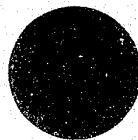


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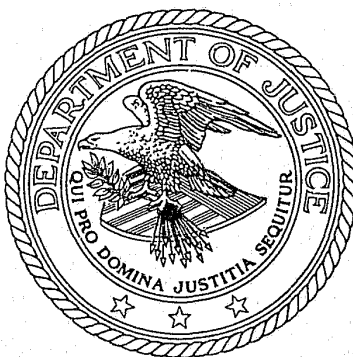
Office of Legal Policy



Report to the Attorney General

The Law of Pre-Trial Interrogation

February 12, 1986



115136

Truth in Criminal Justice Series
Report No. 1

115136

**Report to the Attorney General
on
The Law of Pre-Trial Interrogation**

**Truth in Criminal Justice
Report No. 1**

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Office of the Attorney General
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The function of the criminal justice system might best be summed up as the protection of the innocent. In criminal prosecutions, an extensive system of rights and procedures guards against the conviction of an innocent person. Equally important, enforcement of the criminal law in all its phases -- crime prevention, police investigations, criminal prosecutions and corrections -- also aims at protection of the innocent. By detecting, convicting and punishing those who break our laws, we protect innocent people from the depredations of criminals.

To protect the innocent effectively, the criminal justice system must be devoted to discovering the truth. The truth is the surest protection an innocent defendant can have. Uncovering the truth and presenting it fully and fairly in criminal proceedings is also of critical importance to the effort to restrain and deter those who prey on the innocent.

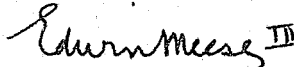
Over the past thirty years, however, a variety of new rules have emerged that impede the discovery of reliable evidence at the investigative stages of the criminal justice process and that require the concealment of relevant facts at trial. This trend has been a cause of grave concern to many Americans, who perceive such rules as being at odds with the goals of the criminal justice system. Within the legal profession and the law enforcement community, debate over these rules has been complicated by disagreements about the extent to which constitutional principles or valid policy concerns require the subordination of the search for truth to other interests.

This report is a contribution to that debate. It was prepared by the Office of Legal Policy, a component of the Department of Justice which acts as a principal policy development body for the Department. At my request, the Office of Legal Policy has undertaken a series of studies on the current status of the truth-seeking function of the criminal justice system.

This volume, "The Law of Pre-Trial Interrogation," is the first in that series. It comprehensively reviews the development of the law of pre-trial interrogation from its medieval origins to the Supreme Court's 1966 decision in Miranda

v. Arizona, 384 U.S. 436. It places the "Miranda rules" in historical and constitutional perspective; rigorously analyzes the Miranda opinion itself; describes the practical effects of Miranda and subsequent legal developments; and compares current American law in this area to the rules and practices of several foreign jurisdictions. It also analyzes the policy considerations relevant to the formulation of rules and procedures for pre-trial questioning, and examines the prospects for reform.

In light of the general importance of the issues raised in this report and its companion volumes, it is fitting that they be available to the public. They will generate considerable thought on topics of great national importance, and merit the attention of anyone interested in a serious examination of these issues.

A handwritten signature in cursive script that reads "Edwin Meese III". The signature is written in dark ink and is positioned above the printed name.

EDWIN MEESE III
Attorney General

Executive Summary

The existing rules in the United States governing the questioning of suspects in custody are based on the Supreme Court's 5-to-4 decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court in *Miranda* promulgated a new, code-like set of rules for custodial questioning, including the creation of a right to counsel in connection with custodial questioning, a requirement of warnings, a prohibition of questioning unless the suspect affirmatively waives the rights set out in the warnings, and a prohibition of questioning if the suspect asks for a lawyer or indicates in any manner that he is unwilling to talk. These admittedly non-constitutional standards impede the search for truth by conditioning inquiry, no matter how brief and restrained, on a suspect's consent to be questioned, and by excluding a suspect's statements at trial, though fully voluntary and reliable, if obtained in violation of *Miranda*'s "prophylactic" procedures. Beyond their costs to the truth-finding process, the *Miranda* rules can also validly be criticized as inept and ineffective means of promoting fair treatment of suspects. Their imposition by judicial fiat has effectively precluded the development of superior alternative procedures.

This Report carries out a comprehensive review of the development of the law of pre-trial interrogation from its medieval origins to the time of the *Miranda* decision; analyzes the *Miranda* decision itself; describes the practical effects of *Miranda*'s standards and subsequent legal developments; and examines the legal rules and practices of several foreign jurisdictions relating to the questioning of suspects and defendants. The Report recommends that the Department of Justice seek to secure a decision by the Supreme Court overruling or abrogating the *Miranda* decision and that the Department develop and implement an administrative policy governing the conduct of custodial questioning by the Department's agencies.

In greater detail, the main findings and recommendations of the Report are as follows:*

*A condensed version of this Report's review of historical issues and its analysis of the *Miranda* decision and subsequent developments appears in Markman, *Miranda v. Arizona: A Historical Perspective*, 24 Am. Crim. L. Rev. 193 (1987).

I. History of the Law of Pre-Trial Interrogation

The right against compelled self-incrimination came into being as part of the reaction to governmental inquisitions in England against political and religious dissidents in the sixteenth and early seventeenth centuries. While the right had emerged in a recognizable form by the mid-seventeenth century, it was understood in connection with pre-trial interrogation as not extending beyond a prohibition against actually forcing a person to incriminate himself. Suspects accordingly could not be tortured or required to answer questions under oath, but were subject to pre-trial interrogation by justices of the peace with no right to warnings or counsel and no right to prevent questioning from taking place. Statements made in response to such questioning -- as well as any refusal to respond to the magistrate's questions -- were admissible in evidence at trial.

The materials associated directly with the formulation of the Constitution and the Bill of Rights do not suggest any purpose of extending the self-incrimination right beyond its common law scope. Rather, they show a primary concern with the most extreme inquisitorial abuses, and particularly with the possibility that the federal government might use torture to obtain confessions in the absence of a constitutional prohibition of compelled self-incrimination.

In the course of the nineteenth century, the common law institution of pre-trial interrogation by judicial officers passed into history, and the focus of the law shifted to the new institution of police interrogation. Between the late nineteenth century and the late 1950's, the Supreme Court reviewed numerous cases which raised questions concerning the procedures that were later imposed by the *Miranda* decision -- such as warnings and a right to counsel -- and held uniformly that such procedures were not required in pre-trial interrogation. Only statements obtained through actual coercion or compulsion ("involuntary" confessions) were held to be constitutionally inadmissible.

The traditional standards began to break down in the early 1960's when the Supreme Court entered a phase in which history and precedent counted for little. In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Court indicated for the first time that a warning to the suspect or the assistance of counsel would in some circumstances be required in police interrogations. The Court also borrowed from extra-judicial sources in its creative efforts, appropriating the warnings that the FBI gave to suspects in 1966

as a matter of administrative policy, and transforming them into nationally applicable requirements in the *Miranda* decision. The same period was characterized by intense interest by law reform bodies and legislatures in defining new standards for police interrogations, but this legal ferment was cut off when the Court imposed its own standards in *Miranda*.

II. The Decision in *Miranda v. Arizona* and Subsequent Developments

In general character, the *Miranda* decision stood somewhere between a code of procedure with commentary and a judicial decision in the conventional sense. Chief Justice Warren, who devised the detailed set of rules announced in the decision, initially drafted the opinion of the Court so as to make these rules constitutional requirements. However, he was forced to accommodate Justice Brennan, who insisted that the federal government and the states should have the option of developing alternative rules counteracting the pressures of custodial interrogation. The final version of the opinion took the position that compelled self-incrimination would necessarily occur if statements were obtained from a suspect without special safeguards, but acknowledged that the specific procedures prescribed by *Miranda* were dispensable if it could be shown that other rules were equally effective.

Empirical findings following the *Miranda* decision indicated that compliance with its rules had a major adverse effect on the willingness of suspects to provide information to the police. For example, District Attorney (now Senator) Arlen Specter reported that an estimated 90% of arrested persons made statements to the police in Philadelphia prior to *Miranda* and *Escobedo v. Illinois*, but that after *Miranda* only 41% did so. A study in Pittsburgh indicated that *Miranda* had roughly cut in half the number of suspected killers and robbers who confessed -- a reduction from about 60% before *Miranda* to about 30% afterward.

Congress quickly repudiated the *Miranda* decision, and somewhat later the Supreme Court rejected its underlying rationale, following a change in the Court's membership. The legislative response was 18 U.S.C. § 3501, a statute enacted in 1968 to overturn the *Miranda* decision and restore the pre-*Miranda* voluntariness standard for the admission of confessions in federal prosecutions. The Department of Justice attempted to establish the validity of this statute in litigation for several years with inconclusive results, but ultimately terminated this

litigative effort after an initial appellate decision -- *United States v. Crocker*, 510 F.2d 1129 (10th Cir. 1975) -- which upheld the statute.

The Supreme Court's rejection of *Miranda's* rationale occurred in *Michigan v. Tucker*, 417 U.S. 433 (1974), which took the position that no violation of the Fifth Amendment occurs if statements are obtained from a suspect without observing *Miranda's* rules or any other safeguards, so long as actual coercion is avoided. This view -- which has been reiterated and relied on in such later decisions as *New York v. Quarles*, 104 S. Ct. 2626 (1984), and *Oregon v. Elstad*, 105 S. Ct. 1285 (1985) -- removed any intelligible doctrinal basis for applying *Miranda's* rules to the states, or for failing to give 18 U.S.C. § 3501 effect in federal proceedings. Nevertheless, the Court continues to apply *Miranda's* standards in its decisions, apparently because no case has yet required the Court to confront the full implications of its rejection of *Miranda's* essential premise.

III. The Questioning of the Accused in Foreign Jurisdictions

The *Miranda* decision attempted to bolster its innovations by pointing to a number of foreign jurisdictions that allegedly had adopted restrictive rules concerning the questioning of suspects without any marked detrimental effect on law enforcement. However, an independent examination of the law in these jurisdictions and others -- England, Scotland, Canada, India, France, and Germany -- shows that the *Miranda* decision's discussion of this issue was superficial and misleading. When all relevant features of these foreign systems are considered, the *Miranda* rules appear to be unique among the jurisdictions surveyed in their restrictiveness and rigidity.

For example, while suspects cannot be forced to answer questions in these other systems, this prohibition is not construed to mean that they can prevent questions from being asked. At trial, the critical question in determining the admissibility of a defendant's pre-trial statements is likely to be whether they are voluntary in some specified sense and not whether the police observed the procedural rules governing interrogations. Warnings may not be required at all prior to police questioning, and any warnings that are required may be quite different from *Miranda's*. For example, England does not require any warning concerning a right to counsel, and Canada does not require a warning concerning any right other than a right to counsel. The countries surveyed also show that a substantive right to counsel may not be recognized at all in

connection with police interrogation, and that any right that is recognized may be much narrower than the counsel right created by *Miranda*.

IV. Recommendations for Reform

In light of the foregoing facts and findings, the Office of Legal Policy recommends that the Department (1) seek to persuade the Supreme Court to abrogate or overrule the decision in *Miranda v. Arizona*, and (2) adopt an administrative policy governing the conduct of custodial interrogations by the Department's agencies, to be put into effect concurrently with the renewal of litigation challenging the validity of the *Miranda* decision.

The considerations supporting the recommendation that the Department seek to have *Miranda* overruled include the *Miranda* system's inconsistency with the constitutional separation of powers and basic principles of federalism, its adverse effect on government's ability to protect the public from crime, and its inadequacy as a means of ensuring fair treatment of suspects in custodial questioning. The Supreme Court's decisions in *Michigan v. Tucker*, *New York v. Quarles*, and *Oregon v. Elstad*, which held that non-compliance with *Miranda* does not entail any violation of the Constitution, imply that the Court would now uphold the statute (18 U.S.C. § 3501) which directs that pre-trial statements be admitted under the traditional voluntariness standard.

In formulating an administrative policy concerning custodial questioning, issues that could appropriately be considered would include the desirability of a regular requirement that interrogations be videotaped or recorded; the desirability of rules relating to the permissible duration and frequency of questioning; and the desirability of other rules concerning behavior and demeanor in questioning suspects. The promulgation of such a policy concurrently with the Department's renewal of a litigative challenge to *Miranda* would ensure that the enhanced freedom to make reforms resulting from *Miranda*'s demise will be exercised responsibly, increase the likelihood of judicial acceptance of an abrogation of *Miranda*, and make the point effectively that the replacement of *Miranda* with superior alternative rules offers major advantages in relation to the legitimate interests of suspects and defendants, as well as major gains in promoting effective law enforcement.

Following an abrogation of *Miranda*, a wide range of fundamental issues that have been foreclosed by the *Miranda* decision would once

again become amenable to study, debate, negotiation and resolution through the democratic process, restoring "the initiative in criminal law reform to those forums where it truly belongs." *Miranda*, 384 U.S. at 524 (Harlan, J., dissenting). Achieving such an abrogation would accordingly be among the most important objectives the Department could pursue in seeking constitutionally to restore the power of self-government to the people of the United States in the suppression of crime.

"The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will Thus the Fifth Amendment does not say that a man shall not be permitted to incriminate himself, or that he shall not be persuaded to do so. It says no more than that a man shall not be 'compelled' to give evidence against himself."

-- *State v. McKnight*, 243 A.2d
240, 250 (N.J. 1968)

"In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative prescriptions, but the impact on those who rely on the public authority for protection There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case."

-- Justice Byron White,
dissenting in *Miranda v. Arizona*

"[C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities. The traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants simply must be restored"

-- Senate Judiciary Committee
Report on 18 U.S.C. § 3501

"In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given"

-- 18 U.S.C. § 3501

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THE LAW OF PRE-TRIAL INTERROGATION

Introduction

At the direction of the Attorney General, the Office of Legal Policy has carried out a comprehensive review of the law of pre-trial interrogation, with particular attention to the rules promulgated by the Supreme Court in the decision of *Miranda v. Arizona*, 384 U.S. 436 (1966), and related legal doctrines. The results of this review are set out in this report.

Part I of the report examines the development of the law relating to self-incrimination and pre-trial interrogation from its origin in the sixteenth century to the time of the *Miranda* decision. The topics covered include the development of self-incrimination law in England and the American colonies; the practice of pre-trial interrogation at the time of the ratification of the Constitution and the Bill of Rights; and subsequent historical developments in this area, including the development of the Supreme Court's caselaw prior to *Miranda*. The general conclusion that may be derived from this review of history is that the *Miranda* rules are inconsistent with the original understanding of the right against self-incrimination and with the Supreme Court's resolution of the same issues in its pre-*Miranda* caselaw.

Part II analyzes the *Miranda* decision and subsequent developments. Two findings in this section stand out: First, Congress enacted a statute in 1968, 18 U.S.C. § 3501, with the specific purpose of overruling the *Miranda* decision and restoring the pre-*Miranda* voluntariness standard as the criterion governing the admissibility of a defendant's pre-trial statements in federal proceedings. Second, the Supreme Court has rejected the underlying rationale of *Miranda v. Arizona* through its decision in *Michigan v. Tucker*, 417 U.S. 433, 443-46 (1974), which characterized *Miranda*'s rules as merely "recommended" procedures, and which made it clear that departures from *Miranda* do not entail any violation of the Constitution. The same position has been reiterated and relied on in more recent decisions, including *New York v. Quarles*, 104 S. Ct. 2626 (1984), and *Oregon v. Elstad*, 105 S. Ct. 1285, 1291-93 (1985).

These decisions imply that there is no longer any doctrinal basis for applying *Miranda*'s admittedly non-constitutional rules to the states,

and that, in connection with federal prosecutions, the Supreme Court would now uphold the validity of 18 U.S.C. § 3501. These implications have been evident to legal writers on the *Miranda* decision,¹ and have been endorsed by the Tenth Circuit Court of Appeals, which held in *United States v. Crocker*, 510 F.2d 1129, 1137 (1975), that “*Michigan v. Tucker* . . . did, in effect, adopt and uphold the constitutionality of the provisions [of 18 U.S.C. § 3501].” As a result of these developments, *Miranda* is now the legal equivalent of the smile of the Cheshire cat, which lingers in the air with nothing to support it.

Part III of the report examines the rules relating to the questioning of suspects and defendants in a number of foreign jurisdictions -- England, Scotland, Canada, India, France, and Germany. These include the countries whose interrogations systems were cited in *Miranda*, see 384 U.S. at 486-89, as evidence that restrictive interrogation rules are not detrimental to law enforcement, as well as others. Our independent review of foreign law indicates that other nations recognize the importance of obtaining information from persons suspected or accused of crime, and provide effective means for doing so. The rules imposed in the United States by *Miranda* and related decisions appear to be unique among the countries surveyed in their restrictiveness and rigidity.

Part IV of the report sets out recommendations for reform. The principal recommendations are that the Department seek to secure a decision by the Supreme Court upholding the validity of 18 U.S.C. § 3501 or otherwise overruling *Miranda v. Arizona*, and that the Department promptly develop and implement a set of rules or guidelines for the conduct of custodial interrogations by the Department's agencies. Part IV also discusses the possibility of more far-reaching reforms that would be opened up by an abrogation of *Miranda*. The recommendations section in Part IV is fairly self-contained, and could be read in advance of the rest of the report.

¹ See Sonenshein, *Miranda and the Burger Court: Trends and Countertrends*, 13 Loyola U. L.J. 405, 407, 425-28 (1982); Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 118-20, 123.

I. History of the Law of Pre-Trial Interrogation

This section of the report reviews the history of the law of pre-trial interrogation from its beginning in the sixteenth century to the time of the *Miranda* decision. Part A covers the period preceding the ratification of the Bill of Rights. Part B covers the post-constitutional development.

A. The Original Understanding of the Right Against Compulsory Self-Incrimination

The right against self-incrimination came into being as part of the reaction to governmental inquisitions in England against political and religious dissidents in the sixteenth and early seventeenth centuries. While the right had emerged in a recognizable form by the mid-seventeenth century, it was understood in connection with pre-trial interrogation as not extending beyond a prohibition of actually forcing a person to incriminate himself. Suspects accordingly could not be tortured or required to answer questions under oath, but were subject to pre-trial interrogation by justices of the peace, without warnings or counsel. Statements made in response to such questioning -- as well as any refusal to respond to the magistrate's questions -- were admissible in evidence at trial.

The materials associated directly with the formulation of the Constitution and the Bill of Rights do not suggest any purpose of extending the right against self-incrimination beyond its common law scope. Rather, they show a primary concern with the most extreme inquisitorial abuses, and particularly with the possibility that the federal government might use torture to obtain confessions in the absence of a constitutional prohibition of compelled self-incrimination.

1. The Common Law Background

a. The Right Prior to the Seventeenth Century

An understanding of the roots of the Fifth Amendment right against compulsory self-incrimination requires some preliminary explanation of English criminal procedure prior to the seventeenth century.

In that period, offenses were adjudicated in the regular criminal courts (the "common law courts") by means of jury trials which

exhibited both significant similarities to and basic differences from the contemporary institution. The government would present evidence in these proceedings through the depositions and oral testimony of witnesses, but the most important element of the trial was the questioning ("examination") of the defendant by the prosecutor and judge. Various features of trial procedure in that period resulted in virtually irresistible pressures on a defendant who hoped to avoid conviction to answer such questions and to respond in his own voice to the charges against him. These included the uniform amenability of defendants to persistent questioning, whether or not they wished to be questioned; the preclusion of counsel in felony cases; and the fact that felony defendants could not call witnesses to give evidence in their behalf. Nevertheless, defendants did not testify under oath, and the common law courts had no power to punish a defendant for refusing to answer questions.²

Quite different methods were employed in the courts that followed the ecclesiastical -- as opposed to the common law -- mode of procedure. These included the Court of High Commission, which was active in the persecution of religious and political dissidents in the late sixteenth and early seventeenth centuries. A person brought before such a tribunal could be required to take an oath -- the *oath ex officio* -- to answer truthfully all questions that might be put to him. Although refusing to take the oath could result in fines, imprisonment, corporal punishment, or even occasionally death, many defendants asserted a right to do so, citing the maxim: "*nemo tenetur prodere seipsum*" -- "no one is bound to accuse himself."³

At this stage of history, the right asserted under this maxim was not a general right to refrain from giving incriminating evidence against oneself, but only a right not to be the source of the initial accusation

²See L. Levy, *The Origins of the Fifth Amendment* 31-32, 37-38, 215-16, 264-65, 282-84, 320-23 (1968); I. J. Stephen, *A History of the Criminal Law of England* 325-26, 440 (1883); G. Williams, *The Proof of Guilt* 5-7, 42-43 (1963); L. Mayers, *Shall We Amend the Fifth Amendment?* 9-12 (1959).

³See L. Levy, *supra* note 2, at 3-4, 23-24, 44-51, 55, 66-67, 77-78, 101-05, 127, 130-33, 141-43, 154-59, 166, 174-79, 250, 266-71, 274-77. The phrase *nemo tenetur prodere seipsum* originated as part of a canon law maxim which stated that a person is not bound to accuse himself, but that a person accused by common repute is bound to show whether he can establish his innocence and purge himself. In the course of the development of the right against self-incrimination, the "nemo tenetur" principle was extracted from this qualifying context and given progressively broader applications. See *id.* at 95-97.

against oneself. In contrast to the common law courts' reliance on grand jury indictment and charges of specific offenses made by identifiable witnesses, these inquisitorial courts could initiate proceedings against a person on the basis of information provided by anonymous accusers, or on the basis of rumor or suspicion that a person may have lapsed in some manner from orthodoxy or loyalty to the crown. Their proceedings were accordingly in many cases open-ended fishing expeditions which could elicit from defendants charges against themselves for which evidence had not previously been provided by any identifiable witness. While the claimed right to refuse the oath was initially predicated on this particular feature of ecclesiastical procedure -- the absence of a limitation on the scope of inquiry to specific charges supported by the evidence of identifiable witnesses -- the resistance of the victims of these inquisitions laid the groundwork for the broader developments that were to follow.⁴

b. The Later Development of the General Right

When the Puritans gained control of Parliament in 1640, they acted against the instruments of their former oppressors, adopting statutes that abolished the Court of High Commission and its ally in the persecution of dissidents, the Court of Star Chamber. The legislation further provided that all trials were thereafter to be determined "in the ordinary Courts of Justice and by the ordinary course of the law," and prohibited use of the *oath ex officio* by any person exercising ecclesiastical authority. These reforms did not directly affect the procedure of the common law courts, which had never questioned defendants under oath. However, a general revulsion against inquisitorial practices persisted, and was fed by new political prosecutions under the Puritan regime.⁵

This ultimately led to a basic transformation in the character of criminal trials. The earlier-asserted right against compulsory self-accusation now became a true right against compulsory self-incrimination. Defendants and witnesses in the middle and late seventeenth century claimed a right to refuse to answer incriminating questions, and these contentions were accepted by the courts. At the same time, the questioning of the defendant at trial took on a less antagonistic character. Around the start of the eighteenth century, this trend reached its

⁴See *id.* at 3-4, 64-67, 130-31, 142-43, 154-59, 177-79, 193-96, 215, 250.

⁵See *id.* at 278-82, 288-313.

culmination, and the practice of examining the accused at trial abated in the English courts.⁶

Concurrent with this development, the traditional exemption of the defendant in the common law courts from testimony under oath acquired a new rationale. In the 1630's judges began to allow felony defendants to call witnesses to give unsworn statements on their behalf, and testimony under oath by defense witnesses in felony cases was authorized by statute in 1701. However, the defendant was not allowed to be sworn as a witness for himself on the ground that he was disqualified to testify as an interested party. The preclusion of the defendant from testifying under oath as a witness, taken together with the cessation of the practice of conducting an examination of the unsworn defendant, meant that there was no longer any regular means of eliciting information from the accused in the course of trial. Defendants retained opportunities to make known their version of the events in the course of presenting a defense and in their closing statements to juries, but these opportunities diminished with the increased availability of counsel and the broadening scope of counsel's role at trial. Overall, these developments had unfortunate consequences both for the protection of the innocent and the conviction of the guilty which were not adequately addressed until the enactment of statutes abrogating the testimonial incapacity of defendants in the late nineteenth century.⁷

While the general tendency of the development in the seventeenth and eighteenth centuries was to silence the defendant at trial -- whether or not he wished to talk -- the defendant nevertheless remained a highly important source of evidence because he was amenable to pre-trial interrogation, and the results of such interrogations were admissible at trial. The practice of pre-trial interrogation in this period provides the proper historical counterpart to the practice of custodial police interroga-

⁶See Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 9-11 (1949); L. Mayers, *supra* note 2, at 14-16; L. Levy, *supra* note 2, at 283-85, 313-20, 323.

⁷See L. Mayers, *supra* note 2, at 16-18; L. Levy, *supra* note 2, at 321, 324; G. Williams, *supra* note 2, at 43, 45-48; I J. Stephen, *supra* note 2, at 440-46.

As the sources cited in this note indicate, the exemption of defendants from testimony under oath originated as a means of maintaining the distinction between jury trials and the older institution of trial by compurgation, under which a person could meet a criminal charge by swearing to his innocence and finding a sufficient number of "compurgators" who were willing to do the same. The disqualification-for-interest rationale was initially applied to this exemption in the seventeenth century.

tion addressed in *Miranda*, and sheds significant light on the historical understanding of the right embodied in the Fifth Amendment.

c. The Right in Pre-Trial Interrogation

The formulation of the Constitution and the Bill of Rights preceded the rise of professional police forces in England and the United States by about half a century. The constables who made arrests in that period were not authorized to question the suspects they took into custody. Rather, that function was carried out in the *preliminary examination* of the accused, which was normally conducted by justices of the peace or other judicial officers.

The legal basis for such examinations was initially provided by statutes enacted in 1554 and 1555 which directed that persons accused of felonies be brought before justices of the peace for questioning. The use of such examinations became the universal practice in both England and the American colonies, and confessions and other statements obtained from defendants in the course of these examinations were important sources of evidence.⁸

The applicability of the right signified by the maxim *nemo tenetur prodere seipsum* at the preliminary examination was clearly recognized. A magistrate was forbidden to question a suspect under oath at his examination, and early strictures also appeared against inducing a suspect to talk by such means as torture or imprisonment.⁹

As a later historical development, a rule or practice emerged in eighteenth century English decisions limiting the admissibility of pre-trial confessions obtained by threats or promises ("involuntary" confessions). This was understood specifically to render inadmissible confessions obtained by threats of punishment or false promises of immunity.¹⁰ Like

⁸See Morgan, *supra* note 6, at 14, 19; G. Williams, *supra* note 2, at 44; J. Goebel & T. Naughton, *Law Enforcement in Colonial New York* 134, 339-41, 565, 633-36, 653-56 (1944); A. Scott, *Criminal Law in Colonial Virginia* 48-49, 55-56, 59-60 (1930); L. Mayers, *supra* note 2, at 16, 175-76, 179-80; L. Levy, *supra* note 2, at 29-30, 35, 325; Kauper, *Judicial Examination of the Accused -- A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224, 1231-33, 1235-36 (1932).

⁹See J. Goebel & T. Naughton, *supra* note 8, at 339-40, 653; A. Scott, *supra* note 8, at 55-56 & n. 29; L. Levy, *supra* note 2, at 33-36, 107, 325-28, 341-42, 345-48, 354-56.

¹⁰See Morgan, *supra* note 6, at 15-18; L. Levy, *supra* note 2, at 325-29. Defendants were granted immunity in the eighteenth century for the same reason as today -- to induce

the prohibition of compelling a person to answer potentially incriminating questions (the *nemo tenetur* right, in its later signification), this evidentiary rule served as an inhibition on coercive interrogations. It was, however, predicated on the distinct rationale that the unreliability of coerced confessions as evidence of guilt barred their use at trial.¹¹

In all of these rules, the occurrence of *actual compulsion or coercion* was an essential requirement.¹² The questioning of suspects at the preliminary examination could have an aggressive character, and a defendant's statements were not rendered inadmissible by the magistrate's failure to observe an elaborate set of prophylactic rules or by the presence of other psychological pressures or incentives that might induce a suspect to talk. There was no right on the part of the suspect to refuse to be questioned, no right to counsel, no requirement that the suspect be advised that he was not required to answer questions, and no insulation of the suspect who had refused to answer questions at the preliminary

them to confess and give evidence against suspected accomplices. See J. Goebel & T. Naughton, *supra* note 8, at 639-41; L. Levy, *supra* note 2, at 384-85, 388-89; see also *id.* at 399-400, 402-04. As the sources cited at the start of this note indicate, English courts became willing in the course of the eighteenth century to entertain challenges to the admissibility of a confession on the ground that it had been obtained in return for a promise of relief from the risk of punishment which had not been kept.

¹¹ See L. Levy, *supra* note 2, at 327-28; Morgan, *supra* note 6, at 17-18. In contrast, rationalizations of the "nemo tenetur" right in common law sources commonly related to the supposed cruelty of forcing a person to act against his own penal interest, regardless of any question of jeopardy to the innocent. In line with the coerced confession doctrine's purpose of safeguarding the reliability of the factfinding process at trial, it was held that evidence discovered or obtained as the result of such a confession was admissible, since the coercion that rendered the confession itself too unreliable to use would not affect the reliability of evidence derived from it. See Morgan, *supra* note 6, at 17.

¹² From a contemporary perspective, this point may appear less evident in connection with the rule barring examination of a suspect under oath than in connection with the rules barring the use or threatened use of torture or criminal punishment as a means of extorting confessions. However, as at present, refusal to take an oath which could lawfully be administered would result in liability for contempt, and exposure to punishment for contempt or perjury would result from a violation of an oath to answer all questions truthfully once such an oath had been taken. Moreover, the oath was regarded as a particularly fearsome form of compulsion by the members of a conventional religious society, who would expect damnation as the price for forswearing God by violating an oath to answer an interrogator's questions truthfully. See L. Levy, *supra* note 2, at 23-24, 63-64, 101-105, 127, 134, 151, 154-55, 166, 176-78, 215, 250, 275-76.

examination from disclosure of that fact at trial.¹³ The author of the most comprehensive historical study of the Fifth Amendment has summarized the general position of the common law on this point as follows:

The fact must be emphasized that the right in question was a right against compulsory self-incrimination, and, excepting rare occasions when judges intervened to protect a witness against incriminating interrogatories, the right had to be claimed by the defendant. Historically it has been a fighting right: unless invoked, it offered no protection. It vested an option to refuse answer but did not bar interrogation nor taint a voluntary confession as improper evidence. Incriminating statements made by a suspect at the preliminary examination or even at arraignment could always be used with devastating effect at his trial. That a man might unwittingly incriminate himself when questioned in no way impaired his legal right to refuse answer. He lacked the right to be warned that he need not answer, for the authorities were under no legal obligation to apprise him of his right. That reform did not come in England until Sir John Jervis's Act in 1848, and in the United States more than a century later the matter was still a subject of acute constitutional controversy. Yet if the authorities in eighteenth-century Britain and in her colonies were not obliged to caution the prisoner, he in turn was not legally obliged to reply. His answers, although given in ignorance of his right, might secure his conviction, but by the mid-eighteenth century the courts, at least at Westminster, were willing to consider the exclusion of confessions that had been made involuntarily or under duress.¹⁴

2. Formulation and Adoption of the Fifth Amendment

With the outbreak of the American Revolution in 1776, the states adopted constitutions, which incorporated to varying degrees enumerations of the rights of defendants in criminal cases. The Virginia constitution contained the prototype on the right against self-incrimina-

¹³ See Morgan, *supra* note 6, at 14, 16-18; L. Mayers, *supra* note 2, at 10, 16, 175, 188, 223-24; L. Levy, *supra* note 2, at 325; *Cox v. Coleridge*, 1 B.&C. 37, 107 Eng. Rep. 15 (1822).

¹⁴ L. Levy, *supra* note 2, at 375.

tion, providing in its Declaration of Rights that "in all capital or criminal prosecutions" a man cannot "be compelled to give evidence against himself." Eight other states incorporated similar provisions in their constitutions, albeit with variations in wording in some instances.¹⁵

Thus, when the time came to formulate a Bill of Rights for the federal Constitution, there was ample precedent for regarding the right against compulsory self-incrimination as a principle of constitutional stature. For the contemporaneous understanding of the nature and scope of this right, one must look primarily to its common law background. No records have been preserved of the debates in the state legislatures relating to the ratification of the Bill of Rights which shed any light on this question. However, some relevant information does appear in the records of the state ratification conventions concerned with the original Constitution, and of the debates in Congress relating to the proposal of the Bill of Rights.

a. The State Ratification Conventions

The federal Constitution as originally proposed did not, of course, contain any extensive enumeration of rights. The adverse reaction to this omission that was evident in the course of the ratification process led to the addition of the Bill of Rights, which became effective in 1791. Four of the state conventions that ratified the original Constitution -- those in Virginia, New York, Rhode Island, and North Carolina -- had called for the addition of an amendment relating to self-incrimination, in each case in substantially the same terms as the corresponding provision in the Virginia Declaration of Rights.¹⁶ Significant discussion of the issue occurred only in the Virginia convention, though it was also briefly mentioned in the Massachusetts convention.

In the Virginia convention, Patrick Henry delivered a fiery speech concerning the need for a bill of rights raising, among other concerns, the objection that in the absence of such restrictions

Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany -- of torturing, to

¹⁵See *id.* at 405-06, 409-10.

¹⁶See III *Elliot's Debates* 658 (Virginia); I *id.* 328 (New York); I *id.* 334 (Rhode Island); IV *id.* 243 (North Carolina).

extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extract confession by torture, in order to punish with still more relentless severity.¹⁷

Another delegate, George Nicholas, responded to this oration by expressing skepticism concerning the utility of paper barriers to governmental abuses, including torture. The author of the Virginia Declaration of Rights, George Mason, misunderstood Nicholas as claiming that there was no prohibition of torture in the state constitution. He pointed to the provisions of the Virginia constitution relating to self-incrimination and cruel and unusual punishment as showing the contrary, noting that evidence was extorted from defendants in countries that used torture. Nicholas responded that Mason was right that confessions were extorted in countries that used torture, but reiterated his belief that a bill of rights would not provide security against such abuses. This concluded the discussion. See III *Elliott's Debates* 451-52.

In the Massachusetts convention, a delegate opposing the Constitution objected that Congress would be free under the proposed document to emulate the Spanish Inquisition. In support of this contention, he pointed out that there was no limitation on the imposition of inhuman punishments on persons convicted of crimes, and that "[t]here is nothing to prevent Congress from passing laws which shall compel a man, who is accused or suspected of a crime, to furnish evidence against himself." II *Elliott's Debates* 111. However, the Massachusetts convention was evidently not persuaded, and did not propose any relevant amendments.

Beyond the discussions in the Virginia and Massachusetts conventions described above, and a passing reference to potential "Star Chamber Court" abuses in the New York convention, II *Elliott's Debates* 400, no other recorded allusion to the right against self-incrimination occurred in the debates at the state conventions.

b. Proceedings in Congress

In 1789, James Madison introduced proposed amendments to the Constitution in the House of Representatives in response to the

¹⁷III *id.* 447-48.

grievances that had been expressed in the ratification process relating to the original Constitution. As originally proposed by Madison, the self-incrimination provision provided that “[n]o person . . . shall be compelled to be a witness against himself.” Following referral to a committee, Madison’s proposals were taken up on the House floor. A representative from New York, John Laurence, objected that the provision relating to self-incrimination should “be confined to criminal cases.” The probable purpose of this change was to make it clear that a person could be compelled to give evidence that would expose him to civil liability. Laurence’s amendment was adopted by the House without recorded debate.¹⁸

In the Senate, the provisions of the proposed Bill of Rights relating to the trial stage of criminal proceedings were grouped into the Sixth Amendment. The placement of the right against self-incrimination in the Fifth Amendment may accordingly have reflected a purpose to make it applicable at pre-trial stages, a point that would be consistent with the common law scope of the right.¹⁹

In sum, the limited direct evidence associated with the formulation of the Constitution and the Bill of Rights shows a concern with the possibility of the grossest inquisitorial abuses, and particularly with the possibility that the federal government might resort to torture to extract confessions in the absence of a constitutional inhibition on doing so. Further illumination of the historical understanding of the Fifth Amendment’s right against compelled self-incrimination must depend on its relationship to the common law right from which it was derived. In relation to pre-trial interrogation, this right, as noted above, was nothing more than a prohibition of actually compelling a person to incriminate himself.

B. Historical Practice and Caselaw under the Fifth Amendment Prior to *Miranda*

In the course of the nineteenth century, the common law institution of preliminary examinations by judicial officers passed into history, and the focus of the law shifted to the new institution of police interrogation. Salient features of the Supreme Court’s caselaw prior to the 1960’s

¹⁸ See L. Levy, *supra* note 2, at 422, 424-26.

¹⁹ See *id.* at 426-27; p. 7 *supra*.

included a consistent position that the Fifth Amendment does not apply to the states, and a preference for resolving questions of the admissibility of pre-trial statements in federal proceedings on the basis of non-constitutional evidentiary doctrines. The Court did, however, consider cases which raised questions concerning the procedures that were later imposed by the *Miranda* decision -- such as warnings and a right to counsel -- and held uniformly that such procedures were not required in pre-trial interrogation.

The traditional standards began to break down in the early 1960's, when the Supreme Court entered an activist phase in which history and precedent counted for little. In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Court indicated for the first time that a warning to the suspect or the assistance of counsel would in some circumstances be required in police interrogations. The Court also borrowed from extra-judicial sources in its creative efforts, appropriating the warnings that the FBI gave to suspects in 1966 as a matter of administrative policy, and conferring quasi-constitutional status on them in the *Miranda* decision. The same period was characterized by intense interest by law reform bodies and legislatures in defining new standards for police interrogations, but this legal ferment was cut off when the Court imposed its own standards in *Miranda*.

1. The General Development

a. The Transition from Judicial Interrogation to Police Interrogation

The termination of pre-trial questioning by magistrates was the decisive post-constitutional event that has determined the contemporary character of pre-trial interrogation and has shaped the legal issues presented in its practice. With the organization of police forces in the nineteenth century, the detective and investigative functions that had previously been discharged by justices of the peace were taken up by the police, and the role of magistrates was confined to adjudicatory functions. By the middle of the nineteenth century, most jurisdictions had terminated pre-trial interrogation by judicial officers, and the remainder followed suit in succeeding decades. The preliminary examination or hearing, which had previously been the essential vehicle for obtaining information from suspects, was transformed into an optional proceeding at which the defendant could avail himself of the opportunity to respond to the charges against him, but was under no pressure to do

so. The locus of interrogation moved from the courtroom to the stationhouse.²⁰

The early consequences of this shift in institutional responsibility were not benign. The use of "third degree" methods by the police to obtain confessions became common, and persisted as a widespread practice until at least the 1930's. These abuses were documented in 1931 in the *Report on Lawlessness in Law Enforcement* of the National Commission on Law Observance and Enforcement (the eleventh report of the "Wickersham Commission"). The consultants' report for the Commission on this issue concluded (*id.* at 153):

"I. Existence

"The third degree -- the inflicting of pain, physical or mental, to extract confessions or statements -- is widespread throughout the country.

"II. Physical Brutality

"Physical brutality is extensively practiced. The methods are various. They range from beating to harsher forms of torture. The commoner forms are beating with the fists or with some implement, especially the rubber hose, that inflicts pain but is not likely to leave permanent visible scars.

"III. Protracted Questioning

"The method most commonly employed is protracted questioning. By this we mean questioning -- at times by relays of questioners -- so protracted that the prisoner's energies are spent and his powers of resistance overcome. At times such questioning is the only method used. At times the questioning is accompanied by blows or by throwing continuous straining light upon the face of the suspect. At times the suspect is kept

²⁰See L. Mayers, *supra* note 2, at 16, 86-87, 100-02, 175-76, 223-24; G. Williams, *supra* note 2, at 44-45; Kauper, *supra* note 8, at 1235-39. While most jurisdictions had terminated pre-trial interrogation by judicial officers by the mid-nineteenth century, it persisted in some for several decades thereafter. In the federal jurisdiction in the United States this practice apparently continued at least until the end of the nineteenth century. See *Wilson v. United States*, 162 U.S. 613 (1896) (interrogation of murder suspect by United States commissioner).

standing for hours, or deprived of food or sleep, or his sleep is periodically interrupted to resume questioning.

"IV. Threats

"Methods of intimidation adjusted to the age or mentality of the victim are frequently used alone or in combination with other practices. The threats are usually of bodily injury. They have gone to the extreme of procuring a confession at the point of a pistol or through fear of a mob.

"V. Illegal Detention

"Prolonged illegal detention is a common practice. The law requires prompt production of a prisoner before a magistrate. In a large majority of the cities we have investigated this rule is constantly violated."

The corrective to these abuses proposed by the Wickersham Commission was a return to a variant of the common law system of pre-trial interrogation by judicial officers (*id.* at 5-6):

Probably the best remedy for [the third degree] would be the enforcement of the rule that every person arrested [and] charged with crime should be forthwith taken before a magistrate, advised of the charge against him, given the right to have counsel and then interrogated by the magistrate. His answers should be recorded and should be admissible in evidence against him in all subsequent proceedings. If he chose not to answer, it should be permissible for counsel for the prosecution and for the defense, as well as for the trial judge, to comment on his refusal. The existing rule in many jurisdictions which forbids counsel or court to comment on the failure of the accused to testify in his own behalf should be abolished.

Neither the Wickersham Commission's proposal nor any other basic institutional changes in pre-trial interrogation took place following the issuance of its report. Nevertheless, the practice of police interrogation ameliorated in the course of time, and the extreme abuses addressed by the Commission had generally disappeared by the time of the *Miranda* decision. In 1967, the President's Commission on Law Enforcement and

Administration of Justice reported that "today the third degree is almost nonexistent" and referred to "its virtual abandonment by the police."²¹

b. The Fifth Amendment and Coerced Confessions

Since the Fifth Amendment right against compelled self-incrimination did not apply to the states until 1964, *see Malloy v. Hogan*, 378 U.S. 1 (1964), the question of its relevance to the admissibility of a defendant's pre-trial statements was limited to federal proceedings throughout most of the nation's history. Even in relation to federal proceedings, however, the Court rarely approached this issue in Fifth Amendment terms prior to the 1960's. In the earliest cases, starting in the late nineteenth century, questions of admissibility were resolved on the basis of the traditional rule of evidence excluding involuntary confessions. In a later line of cases, running from the early 1940's to the late 1950's, questions of this sort were approached in terms of an exclusionary rule that the Supreme Court created to enforce the requirements of federal statutory law that an arrested person be brought promptly before a magistrate.

Sparf v. United States, 156 U.S. 51 (1895), exemplifies the approach of the earliest cases. The case involved the disappearance of the second mate of an American vessel on the high seas. Three members of the crew, who were suspected of killing him and throwing the body overboard, were kept in irons on the way back to the United States. At trial, the captain and two crew members testified concerning admissions made to them by one of the defendants while under restraint during the voyage back. The Court found that this testimony was proper on the ground that the confession was voluntary in the legally relevant sense. The discussion in the decision suggested that the confession would have been considered involuntary, and hence inadmissible, only if it had been obtained by threats of punishment or by violence, or by representations calculated to create hope in the suspect that he would escape punishment if he talked.²²

²¹President's Comm'n on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 93 (Feb. 1967). *See* Fred P. Graham, *The Self-Inflicted Wound* 22 (1970).

²²*See* 156 U.S. at 55-56. The other nineteenth century cases that approached the admissibility of a defendant's pre-trial statements purely as a question of the law of evidence were *Hopt v. Utah Territory*, 110 U.S. 574 (1884); *Wilson v. United States*, 162 U.S. 613 (1896); and *Pierce v. United States*, 160 U.S. 355 (1896).

In 1897, however, the Court rendered a decision that departed sharply from prior and subsequent decisions both in its reliance on a constitutional rationale and in its expansive view of the types of pressures on a suspect that would make a confession inadmissible. *Bram v. United States*, 168 U.S. 532 (1897), involved a triple murder -- of the captain, the captain's wife, and the second mate -- on an American vessel on the high seas. The first mate, Bram, was seized and put in irons after being inculcated by a crew member, Brown, who had also come under suspicion. When the ship reached Halifax, Bram was taken into custody by the police and questioned by a police detective. The detective was later allowed to testify at trial concerning the results of that questioning as follows:

When Mr. Bram came into my office I said to him: "Bram, we are trying to unravel this horrible mystery." I said: "Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder." He said: "He could not have seen me; where was he?" I said: "He states he was at the wheel." "Well," he said, "he could not see me from there." I said: "Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But," I said, "some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." He said: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it." He was rather short in his replies.²³

The Court found the admission of this testimony to be error and reversed Bram's conviction. The Court asserted that "[i]n criminal trials, in the courts of the United States, 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.'" *Id.* at 542. The Court further stated that "the generic language of the [Fifth] Amendment was but a crystallization of the doctrine [excluding involuntary] confessions." *Id.* at 543. The Court found that this doctrine had been violated under

²³ 168 U.S. at 539.

the facts of the case: Bram's remarks were a confession in the relevant sense, since his statement that Brown "could not see me from there," if not just a matter of careless wording, could be understood as an inadvertent admission of guilt. The confession had been improperly obtained by placing Bram in fear since reminding him of Brown's accusation against him, in the context of a custodial interrogation, would "produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person." *Id.* at 562-64.

In reaching these conclusions, the Court made a number of critical errors:

First, the Court's characterization of the Fifth Amendment right against compelled self-incrimination as a codification of the coerced confessions doctrine was simply wrong as a matter of history. The obvious common law antecedent of the Fifth Amendment right was not the evidentiary doctrine excluding involuntary confessions, but the rule against compelling a person to answer potentially incriminating questions ("*nemo tenetur prodere seipsum*"). The latter rule had emerged in a fairly mature form a century and a half before the formulation of the Bill of Rights. The confessions doctrine, in contrast, is only known to have existed in the period preceding the Constitution from a few eighteenth century English sources, and there is no direct evidence of its application by any American court in that period. *See pp. 5, 7-9 supra.*

Second, the interrogation Bram was subjected to would not have been regarded as improperly coercive under any relevant legal doctrine at the time of the ratification of the Fifth Amendment. While the Court found an impermissible threat in the conditions of Bram's interrogation that supposedly created an apprehension on his part that he would be thought guilty and prosecuted if he did not respond to the accusation against him, such a "threat" was implicit in every pre-trial interrogation in the common law period. If a suspect brought before a justice of the peace for examination failed to give answers that were sufficient to rebut the charges of the complaining witnesses and to persuade the justice to discharge him, then he would be committed or bailed and a prosecution against him would proceed. Moreover, any refusal on the part of the suspect to answer the magistrate's questions would be disclosed to the jury when the results of the examination were reported at trial and could

count against him heavily in the final determination of guilt or innocence.²⁴

The anomalies of the *Bram* decision are sufficiently great that no explanation of it in purely legal terms seems possible. Perhaps the most plausible explanation is that a majority of the Justices doubted Bram's guilt and, considering that he was under sentence of death, felt impelled to contrive some rationale for overturning his conviction. In reaching this result the Court did, however, rely on some real doctrinal developments in the law of confessions.

From its meager eighteenth century origins, the rule excluding involuntary confessions had expanded enormously in the first half of the nineteenth century, to the point where "the courts were disposed to take almost any opportunity to exclude evidence of confessions, almost anything being treated as an inducement to confess."²⁵ This trend reversed itself in the mid-nineteenth century, but the expansive notion of involuntariness that emerged in the early nineteenth century decisions continued to exert a selective influence on judicial decisions for some time thereafter.²⁶

In explicating the voluntariness requirement, the Court in *Bram* relied primarily on cases and treatises which reflected the maximalist nineteenth century version of that doctrine -- which it mistakenly believed to be consistent with the corresponding doctrine at the time of the Constitution -- and was also apparently influenced by nineteenth century legislative developments that abolished pre-trial interrogation by judicial officers. See 168 U.S. at 549-61. Thus, the analysis in *Bram* involved a referral back to the time of the Constitution of post-constitutional developments in the involuntary confessions doctrine,

²⁴ See pp. 8-9 *supra*. The Court in *Bram* also discerned an impermissible "promise" in the detective's exhortation to Bram to identify accomplices so as not to bear the blame "on [his] own shoulders." The ground was that Bram might have understood the remark as indicating that he would obtain a mitigation of punishment if he complied. See 168 U.S. at 564-65. However, this remark came after Bram's arguably inculpatory statement that his accuser "could not see me from there." Since Bram's only subsequent statement was his purely exculpatory assertion that he and others considered Brown the guilty party, it could not rationally be believed that the detective's exhortation compelled Bram to be a witness against himself. See *id.* at 570-71 (dissenting opinion).

²⁵ I J. Stephen, *supra* note 2, at 447; see 3 Wigmore, *Evidence* §§ 819, 820 (Chadbourn rev. 1970).

²⁶ See I J. Stephen, *supra* note 2, at 446-47.

taken together with the Court's mistaken belief that the Fifth Amendment was a codification of that doctrine.²⁷

The writings of Wigmore and others subsequently exposed the historically insupportable assumptions of the *Bram* decision, and the Court did not rely on its constitutional rationale or its expansive analysis of the notion of involuntariness in later cases. It did, however, continue to be cited on the general proposition that compulsion or coercion in pre-trial interrogation would affect the admissibility of resulting statements. In *Hardy v. United States*, 186 U.S. 224, 229 (1902), for example, *Bram* was cited for the proposition that objection could be made to the admission of "statements which are obtained by coercion or threat or promise." In *Wan v. United States*, 266 U.S. 1 (1924), the Court actually excluded a defendant's statements on the authority of *Bram*. The case concerned the admissibility of statements obtained from a seriously ill suspect who had been detained and interrogated relentlessly over a period of about two weeks. The Court held that the fact that the defendant's statements were not induced by a promise or threat did not necessarily mean that they were voluntary and stated, citing *Bram*, that "a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise." The extreme facts of the case obviated the need for any more detailed consideration of what types of pressures in pre-trial interrogation would constitute "compulsion."

²⁷The earliest known American decision that alluded to the doctrine excluding involuntary confessions, *Commonwealth v. Dillon*, 4 Dall. 116 (Pa. 1792), is instructive concerning the narrow ambit of that doctrine in the eighteenth century. The case involved a twelve-year-old boy accused of arson, who had confessed in a preliminary examination before the mayor of Philadelphia. On the day of the examination at which he confessed and on the preceding day, he had been visited and interrogated by "several respectable citizens" who urged him to confess and represented that he would "probably" be pardoned if he did so. The report of the case further stated that the "inspectors of the prison endeavored, likewise, to obtain from him a discovery of his offenses, and of his accomplices." The inspectors "carried him into the dungeon; . . . they said that he would be confined in it dark, cold, and hungry, unless he made a full disclosure; but if he did make a disclosure, he should be well accommodated with room, fire, and victuals, and might expect pity and favour."

Despite these appalling circumstances, the court held that the confession "was freely and voluntarily made, was fairly and openly received, before the mayor; and, therefore, it was regularly read in evidence."

Following the *Wan* decision in 1924, the Supreme Court did not decide any coerced confession cases relating to federal proceedings until the 1940's. When the Court turned to this subject again, it did so on the basis of a new doctrine that was expounded in a line of decisions running from *McNabb v. United States*, 318 U.S. 332 (1943), to *Mallory v. United States*, 354 U.S. 449 (1957).

The cases in this line rejected reliance on both the Fifth Amendment and the traditional voluntariness standard, and instead assessed questions of admissibility by reference to provisions of federal statutory law relating to the production of arrested persons before magistrates. In *McNabb*, the Court, as an exercise of its supervisory power to prescribe rules of evidence for the lower federal courts, created a rule excluding confessions obtained by the interrogation of detained persons who were not brought promptly before a magistrate. Following the promulgation of the Federal Rules of Criminal Procedure, the same doctrine was reasserted in relation to Rule 5(a)'s requirement that an arrested person be brought before a magistrate without unnecessary delay. Under the earlier cases in this line it was unclear whether delay in production before a magistrate was in itself a sufficient ground to exclude statements obtained during the period of delay, or whether the exclusion sanction would only apply in the presence of additional unlawful or coercive practices. Later decisions indicated, however, that "unnecessary delay" alone was a sufficient basis for excluding resulting statements.²⁸

These decisions were widely perceived by members of Congress to be excessive constraints on police interrogation.²⁹ They provided no fully secure period of time during which a suspect could be questioned following his arrest, and opportunities for effective questioning were unlikely to arise following the initial appearance before a magistrate, given the likelihood of release on bail and the possibility of obtaining counsel at that stage of the proceedings. Ultimately, the *McNabb-Mallory* rule was

²⁸ See *McNabb v. United States*, 318 U.S. 332 (1943); *Anderson v. United States*, 318 U.S. 350 (1943); *United States v. Mitchell*, 322 U.S. 65 (1944); *Upshaw v. United States*, 335 U.S. 410 (1948); *Mallory v. United States*, 354 U.S. 449 (1957). See generally *Developments in the Law -- Confessions*, 79 Harv. L. Rev. 935, 984-96 (1966); O. Stephen, *The Supreme Court and Confessions of Guilt* 63-67, 73-77 (1973).

²⁹ See generally O. Stephen, *supra* note 28, at 68-72, 74-75, 81-89 (history of legislative proposals directed against *McNabb-Mallory* line); F. Graham, *supra* note 21, at 173-74 (veto by President Johnson in 1965 of legislation overturning *Mallory* in District of Columbia).

limited by a provision of the same legislation that overturned *Miranda*. Section 3501(c) of Title 18, enacted as part of Title II of the Omnibus Crime Control and Safe Streets Act of 1968, provides that a voluntary confession by a person in custody is not inadmissible solely because of delay in bringing the person before a magistrate if the confession is made within six hours of the arrest. *See generally* pp. 64-72 *infra*.

c. The Inapplicability of the Fifth Amendment to the States

The Supreme Court initially made the Fifth Amendment right against compelled self-incrimination applicable to the states in 1964. *See Malloy v. Hogan*, 378 U.S. 1 (1964). In earlier decisions, the Court had repeatedly held that the Fifth Amendment did not apply to the states. Prior to the 1960's, the Court had approached the admissibility of pre-trial statements in state proceedings as a question of general Fourteenth Amendment due process, using standards related to the traditional rule of evidence barring involuntary confessions.³⁰

The Court first considered this question in *Twining v. New Jersey*, 211 U.S. 78 (1908). The case involved a judge's comment at trial on the defendants' failure to take the stand, which was permitted under New Jersey procedure. The Court found it unnecessary to decide whether adverse comment at trial on a defendant's silence would violate the right against self-incrimination, since it concluded that the Fourteenth Amendment did not make the Fifth Amendment right applicable to the states.

The next relevant case was *Palko v. Connecticut*, 302 U.S. 319 (1937), in which the Court considered whether the Fifth Amendment right against double jeopardy applied to the states. In an opinion by Justice Cardozo joined by seven other Justices, including Justice Black (!) and Justice Brandeis, the Court held that it did not, stating that the Fourteenth Amendment only made applicable to the states rights which are "of the very essence of a scheme of ordered liberty." In furnishing

³⁰ While the Supreme Court rejected the "incorporation" of the Self-Incrimination Clause against the states prior to 1964, it bears emphasizing that the *Miranda* decision rested on misinterpretations and misapplications of the Fifth Amendment itself. Its unsoundness is independent of any question of the merits of the incorporation doctrine. *See generally* pp. 43-61 *infra*.

examples of rights that did not so qualify, the Court singled out the right against compelled self-incrimination (*id.* at 325-26):

Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without . . . the immunity from compulsory self-incrimination [citing *Twining v. New Jersey*]. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.

In *Adamson v. California*, 332 U.S. 46 (1947), the Court again addressed the question of adverse inferences from silence at trial. The case involved a prosecutor's adverse comment -- permitted under the law of California -- on the defendant's failure to take the stand and respond to the evidence against him. The Court found it unnecessary to reach the Fifth Amendment question because the Fifth Amendment right was inapplicable to the states, but strongly implied that comment of this type did not involve compulsion in a sense offensive to any constitutional provision (*id.* at 56):

However sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it. The prosecution evidence may be of facts that may be beyond the knowledge of the accused. If so, his failure to testify would have little if any weight. But the facts may be such as are necessarily in the knowledge of the accused. In that case a failure to explain would point to an inability to explain.

Finally, a number of decisions in the years preceding *Malloy v. Hogan* reaffirmed the inapplicability of the Fifth Amendment right against compelled self-incrimination to the states. In *Knapp v. Schweitzer*,

357 U.S. 371, 380 (1958), for example, the Court considered whether the Fifth Amendment banned compulsion of testimony in state grand jury proceedings under a grant of immunity, on the ground that the immunity granted by the state would not bar a federal prosecution based on that testimony. The Court answered this question in the negative, holding again that the Fifth Amendment is only a restraint on compulsion of testimony by the federal government, and stating that "[i]t is plain that the [Fifth] amendment can no more be thought of as restricting action by the States than as restricting the conduct of private citizens." In a still later decision reviewing a state proceeding, *Cohen v. Hurley*, 366 U.S. 117, 118 n.1 (1961), the Court remarked that "[i]t is of course settled that a Fifth Amendment privilege was not available to petitioner in the present case."

The inapplicability of the Fifth Amendment to the states prior to 1964 did not, however, mean that interrogation practices in the states were entirely free of federal judicial oversight. Sufficiently extreme coercive practices were held to render resulting confessions inadmissible as a matter of Fourteenth Amendment due process. The seminal decision was *Brown v. Mississippi*, 297 U.S. 278 (1936), in which the Court overturned a murder conviction based on confessions that had been obtained through torture (hanging and whipping) as a violation of Fourteenth Amendment due process. Between the time of *Brown* and the time of *Miranda*, the due process standard was applied in dozens of cases. The general approach that emerged involved considering the intensity of the pressures to which the suspect had been subjected, and factors relevant to his capacity to resist such pressures, to determine whether he had been deprived of the capacity for choice in making the confession. Factors relating to the method of interrogation that weighed against a finding of voluntariness and admissibility included physical abuse, threats of violence, relentlessly protracted and repeated interrogation, questioning during lengthy periods of unlawful detention, deprivation of food and sleep, and isolation of the suspect. Characteristics of the suspect that weighed in the same direction included youth, lack of education or intelligence, membership in a racial minority, poverty, and psychological disabilities. The fact that a suspect was unaware of or had not been advised of his rights, and denial of access to counsel, were also

noted in a number of cases, but only as two factors among many others bearing on the general determination of voluntariness.³¹

2. Specific Issues

The procedural system for police interrogations created by the *Miranda* decision involved four key elements -- warnings, a right to counsel, a right to have a defendant's pre-trial silence concealed from the trier, and a right to cut off questioning at will. Each of these requirements was inconsistent with the position of the common law and with caselaw preceding *Miranda*.

a. Warnings

At common law, there was no requirement that a suspect be advised in pre-trial interrogation that he could remain silent or that his statements could be used against him. The use of warnings of this type did, however, come into play in connection with the abatement of judicial interrogation. As noted earlier, most jurisdictions had terminated the preliminary examination of suspects by magistrates by the mid-nineteenth century, and the remainder followed suit in succeeding decades. At the conclusion of this development, the only remaining vestige of the once central institution of pre-trial questioning by a magistrate was a general practice of advising a suspect that he could make a statement on his own behalf at a preliminary hearing, but that he was not required to say anything and that anything he did say could be used against him. In this context, the function of the warnings was not to advise a suspect of his rights prior to interrogation, but to make effective a judgment that suspects should not be interrogated at all by judicial officers at preliminary hearings.³²

³¹ See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940); *Ward v. Texas*, 316 U.S. 547 (1942); *Lisenba v. California*, 314 U.S. 219 (1941); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Lyons v. Oklahoma*, 322 U.S. 596 (1944); *Haley v. Ohio*, 332 U.S. 596 (1948); *Watts v. Indiana*, 338 U.S. 49 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Stroble v. California*, 343 U.S. 181 (1952); *Stein v. New York*, 346 U.S. 156 (1953); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Rogers v. Richmond*, 365 U.S. 534 (1961); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haynes v. Washington*, 373 U.S. 503 (1963).

³² See pp. 8-9, 13-14 *supra*; G. Williams, *supra* note 2, at 45; L. Mayers, *supra* note 2, at 100-01, 223-24; Fed. R. Crim. P. 5(c) ("The magistrate . . . shall inform the defendant

In England, the "Judges' Rules" have required since 1912 that similar warnings be given to suspects in *police* interrogation, though courts are not required to exclude statements obtained in violation of the rules. *See generally* pp. 88-89 *infra*. No comparable rules in police interrogation emerged in the United States. Prior to the 1960's, there was no state or federal precedent supporting a requirement of warnings in police interrogation.³³

The Supreme Court had considered the question of whether warnings were required in pre-trial interrogation as a matter of federal law in two early cases, and had held that they were not. *Wilson v. United States*, 162 U.S. 613 (1896), arose from a murder committed in Indian country. The defendant Wilson, in response to questioning by a United States commissioner, gave exculpatory answers, but these answers were used at trial to attack his defense on grounds of inconsistency.

The defendant challenged the admission of these pre-trial statements. In essence, his complaint was that his interrogation had violated most of the rules that were imposed seventy years later in the *Miranda* decision. He had not been advised that he need not answer; he had not been advised that his statements could be used against him; he had not been advised of a right to representation by counsel; and he had not in fact been afforded counsel. The Supreme Court responded that the admissibility of a defendant's statements depended on their voluntariness, and that the absence of warnings and counsel would not warrant their exclusion (162 U.S. at 623-24):

The . . . rule that the confession must be voluntary is applied to cases where the accused has been examined before a magistrate, in the course of which examination the confession is made The fact that he is in custody and manacled does not necessarily render his statement involuntary And it is laid down that it is not essential to the admissibility of a confession that . . . the person was warned that what he said

that he is not required to make a statement and that any statement made by him may be used against him").

³³ *See McNabb v. United States*, 318 U.S. 332, 345 n.9 (1943); L. Mayers, *supra* note 2, at 84 n.4 ("No American case has been found holding that admissions made by the defendant in response to questions of police or prosecutor must be excluded from evidence at his trial on the ground that he had not been informed that he need not answer questions").

would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appears that he was not so warned

In the case at bar defendant was not put under oath, and made no objection to answering the questions propounded He testified merely that the commissioner examined him "without giving him the benefit of counsel or warning him of his right of being represented by counsel, or in any way informing him of his right to be thus represented." He did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. It is true that, while he was not sworn, he made the statement before a commissioner who was investigating a charge against him, as he was informed; he was in custody but not in irons; there had been threats of mobbing him the night before the examination; he did not have the aid of counsel; and he was not warned that the statement might be used against him or advised that he need not answer. These were matters which went to the weight or credibility of what he said of an incriminating character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as [a] matter of law.

The Supreme Court again discussed the warnings question, this time in explicitly constitutional terms, in *Powers v. United States*, 223 U.S. 303 (1912), a prosecution for illegal distilling. At the preliminary hearing before a United States commissioner, "the defendant, without counsel and not having been instructed by the commissioner, voluntarily, in his own behalf, testified" *Id.* at 311. After the defendant had given his account of the pertinent events, he was asked by a deputy marshal who was present at the hearing whether he had worked at a still on another occasion. The defendant initially refused to answer the question, but answered in the affirmative after being advised that he would be committed to jail if he did not respond. The deputy marshal recounted this admission at trial.

The Supreme Court held that requiring the defendant to answer under threat of contempt at the preliminary hearing was unobjectionable, since he had waived his Fifth Amendment right by voluntarily testifying on his own behalf. The Court, relying on *Wilson v. United States, supra*, also had no problem with the fact that the defendant had not received warnings prior to his testimony and had not had counsel:

The chief objection contended for in argument concerns the admission in the District Court of the testimony of the defendant before the commissioner. The admission of this testimony is claimed to have worked a violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution, which protects him against self-incrimination. It appears from the bill of exceptions that the defendant voluntarily took the stand and testified in his own behalf We are of the opinion that it was not essential to the admissibility of his testimony that he should first have been warned that what he said might be used against him. In *Wilson v. United States*, 162 U.S. 613, Wilson was charged with murder. Before a United States commissioner, upon a preliminary hearing, he made a statement which was admitted at the trial. He had no counsel, was not warned or told of his right to refuse to testify, but there was testimony tending to show that the statement was voluntary

In the present case . . . the record shows that [the defendant's] testimony was entirely voluntarily and understandingly given. Such testimony cannot be excluded when subsequently offered at his trial.³⁴

Following these early decisions, it was taken as settled that warnings were not required in pre-trial interrogation as a condition on the admission of a defendant's statements.³⁵ No contrary suggestion appeared in the Supreme Court's decisions prior to the case of *Escobedo v. Illinois*, 378 U.S. 478 (1964).

³⁴223 U.S. at 313-14. See also *Bilokumsky v. Todd*, 263 U.S. 149, 155-57 (1923) (interrogation by law enforcement officer without admonition that person interrogated is entitled to refuse to answer and to have counsel would not have rendered answers inadmissible in criminal case) (dictum).

³⁵See *Miranda v. Arizona*, 384 U.S. 436, 509 (1966) (Harlan, J., dissenting).

b. The Right to Counsel

In *Miranda v. Arizona*, the Supreme Court created a right to counsel in police interrogations. While this right was ostensibly based on the Fifth Amendment, the Court cited precedents relating to the *Sixth* Amendment right to counsel, and to counsel rights in state proceedings that had been imposed as a matter of Fourteenth Amendment due process. A brief review of developments in these areas is accordingly relevant to an analysis of *Miranda*.

Under early English practice, the procedure in misdemeanor prosecutions was similar to that in civil cases. Defendants were allowed to retain counsel to represent them and to present a full defense at trial. In felony cases, however, where the crown had a stronger interest in conviction, the procedural deck was heavily stacked against the accused. This included a narrowly limited role for defense counsel, whose function in felony cases prior to the mid-eighteenth century did not extend beyond arguing points of law. This approach was not repudiated by a formal enactment until a statute of 1836 authorized the presentation of a defense at felony trials by retained counsel. Practice outstripped theory in this development, however, and defense counsel in England were actually allowed to perform most functions in the presentation of a defense by the end of the eighteenth century.³⁶

Throughout this period, the right to counsel in English procedure was almost exclusively a right to retained counsel. The only English enactment creating a right to appointed counsel prior to the time of the American Constitution was a statute enacted in 1695, which required the appointment of counsel in treason cases. This was essentially a self-protective measure by members of Parliament, who could readily imagine themselves and their associates in the position of treason defendants if the political winds should blow the wrong way.³⁷

The English practice, and its adoption or modification by statutory or constitutional enactments in most of the states, provided the background for the right to counsel that was incorporated in the Sixth Amendment. The original understanding of this right differed from its contemporary interpretation in two basic respects.

³⁶See L. Levy, *supra* note 2, at 320-23; W. Beaney, *The Right to Counsel in American Courts* 8-12, 24 (1955).

³⁷See W. Beaney, *supra* note 36, at 9.

First, the right was a right to retained -- not appointed -- counsel. This point appears, for example, from the original federal statute relating to appointment of counsel. Enacted in 1790 -- seven months after Congress's proposal of the Sixth Amendment and over a year and a half prior to its ratification -- the statute expressly limited its requirement of appointed counsel to capital cases. The same point appears from state enactments preceding the Constitution. Only three states had provisions requiring appointment of counsel -- Pennsylvania, South Carolina, and Delaware -- and all three limited the requirement to capital cases.³⁸

Second, the Sixth Amendment right of the accused "to have the Assistance of Counsel for his defense" was a right to retain counsel for the purpose of assisting in a defense *at trial*. It did not indiscriminately create a right to have counsel at any pre-trial stage in which a defendant might find such assistance useful, and did not, in particular, create a right to counsel at the stage of pre-trial interrogation. There was no right to counsel under the common law procedure of preliminary examinations, and nothing in the history of the Bill of Rights or the colonial enactments that preceded it suggested a purpose to extend such a right to an early investigative stage at which it had not conventionally been recognized.³⁹ Rather, the contrary appears from the placement of the

³⁸ See *id.* at 16-18, 25, 28-29. Connecticut, however, had a unique practice of appointing counsel for any defendant who could not retain counsel, and of advising defendants of their right to counsel. See *id.* at 16, 25.

³⁹ See *Cox v. Coleridge*, 1 B.&C. 37, 107 Eng. Rep. 15 (1822) (no right to counsel at preliminary examination). None of the state provisions preceding the Bill of Rights referred to a right to counsel at that stage, and a number of them definitely characterized the right as a right to counsel at trial. The point is illustrated by the provisions of the states whose ratification conventions had proposed an amendment to the Federal Constitution safeguarding the right to counsel. These were Virginia, North Carolina, and New York. See W. Beaney, *supra* note 36, at 22-23. A Virginia statute of 1786 allowed the accused to retain counsel to assist him at trial. *Id.* at 19. The New York Constitution of 1777 stated that "in every trial . . . for crimes or misdemeanors, the party . . . indicted shall be allowed counsel, as in civil practice." *Id.* at 20. North Carolina, by an act of 1777, provided that "every person accused of any crime or misdemeanor whatsoever, shall be entitled to counsel, in all matters which may be necessary for his defense as well as to facts as to law." *Id.* at 19. The obvious purpose of the statute was to reject the earlier English rule limiting the role of counsel in felony trials to argument of points of law. The provisions of the remaining states are surveyed in *id.* at 18-22.

right to counsel in the Sixth Amendment, which was formulated by the Senate as a compilation of post-indictment and trial rights.⁴⁰

The Supreme Court had little occasion to consider the contours of the Sixth Amendment right to counsel in the first century and a half after the ratification of the Bill of Rights. It became common in this period for federal judges to appoint counsel for indigent defendants, but this was regarded as a matter of custom and discretion, rather than as one of constitutional compulsion.

The historical understanding of the Sixth Amendment right was abruptly abrogated by the Supreme Court in the decision of *Johnson v. Zerbst*, 304 U.S. 458 (1938). The decision, which was authored by Justice Black, created a uniform right to appointed counsel in federal prosecutions, and also created a novel constitutional rule that a defendant must "competently and intelligently" waive his right to counsel if a trial is to proceed without such representation.⁴¹ Judge Friendly, characterizing the decision in *Johnson v. Zerbst* as a "*coup de main*," has attributed its occurrence to the Justice Department's sympathy with the results reached in the case as a matter of policy, and its resulting failure to advocate the contrary historical understanding effectively before the Court.⁴²

In relation to state proceedings, the Supreme Court also proceeded to create federal rights to counsel in a line of decisions running from *Powell v. Alabama*, 287 U.S. 45 (1932), to *Gideon v. Wainwright*, 372 U.S. 335 (1963). The earlier cases in this line, relying on Fourteenth Amendment due process, established rights to counsel in capital cases and other cases presenting "special circumstances." The concluding decision in *Gideon* made the Sixth Amendment right to counsel applicable to the states.

In relation to pre-trial interrogation, however, the Court consistently rejected a right to counsel prior to the 1960's. A claimed right to counsel had initially been rejected in the context of a preliminary examination by a judicial officer in *Wilson v. United States*, 162 U.S. 613

⁴⁰See p. 12 *supra*; L. Mayers, *supra* note 2, at 200 n.42.

⁴¹See W. Beaney, *supra* note 36, at 32-33, 36-44.

⁴²H. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 944-45 (1965). See W. Beaney, *supra* note 36, at 40-42.

(1896), which also rejected a requirement of warnings.⁴³ A number of decisions reviewing state cases in the late 1950's held specifically that there was no right to counsel in connection with pre-trial interrogation by law enforcement officers. Thus, in *In Re Groban*, 352 U.S. 330 (1957), the Court held that counsel could be denied to persons summoned by compulsory process to testify under oath before a fire marshal concerning the circumstances of a possible arson, where the testimony obtained from them could provide the basis for arrest by the marshal and subsequent prosecution. In two murder cases reviewed by the Court in 1958, *Crooker v. California*, 357 U.S. 433, and *Cicenia v. Lagay*, 357 U.S. 504, the Court held that there was no constitutional violation in denying specific requests by suspects in the course of police interrogation that they be allowed to consult with retained counsel.

Despite the recent vintage of these decisions, the Supreme Court proceeded to cast doubt on their continued validity in the early 1960's. Following two decisions that recognized rights to counsel, in narrowly defined circumstances, in pre-trial judicial proceedings at the state level,⁴⁴ the Court took the major step of extending the Sixth Amendment to purely non-judicial pre-trial contexts in *Massiah v. United States*, 377 U.S. 201 (1964), and *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Crooker v. California* and *Cicenia v. Lagay* were finally overruled in *Miranda*, 384 U.S. at 479 n.48.

c. Adverse Inferences from Silence

In addition to creating a requirement of warnings and a right to counsel in pre-trial interrogation, the Supreme Court in *Miranda* prohibited the admission at trial of a defendant's refusal to answer

⁴³ See pp. 25-27 *supra*. Although the Supreme Court subsequently recast the Sixth Amendment right to counsel as a right to appointed counsel in federal proceedings in *Johnson v. Zerbst*, this remained a post-indictment right prior to the 1960's. See the Advisory Committee Note to the original version of Fed. R. Crim. P. 44 ("This rule is a restatement of existing law in regard to the defendant's constitutional right to counsel [It] is intended to indicate that the right of the defendant to have counsel assigned by the court relates only to proceedings in court and, therefore, does not include preliminary proceedings before a committing magistrate"); Beaney, *The Right to Counsel Before Arraignment*, 45 Minn. L. Rev. 771, 776 (1961).

⁴⁴ See *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963). See generally *Developments in the Law -- Confessions*, 79 Harv. L. Rev. 935, 996-97 (1966); Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 Minn. L. Rev. 47 (1964).

questions in pre-trial interrogation. The Court stated (384 U.S. at 468 n.37):

In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

At the time of the Constitution, however, defendants were subject to questioning before justices of the peace, and any failure to respond to the justice's questions could be admitted in evidence.⁴⁵ In later times, courts in the United States approached this issue in terms of the general rule of evidence which holds that a party's pre-trial silence in the face of accusations or statements that he would naturally respond to can be admitted at trial and made the basis for adverse inferences. The majority rule in the states at the time of *Miranda* was that this principle applied to the failure of a suspect in police custody to respond to the evidence against him.⁴⁶

In relation to adverse comment on a defendant's failure to take the stand at trial, the general resolution of this issue in the United States was decidedly in the other direction. In the common law period, this question could not arise, since defendants could not testify even if they wanted to. *See* p. 6 *supra*. With the enactment of statutes abrogating the testimonial incapacity of defendants in the second half of the nineteenth century, most states prohibited adverse comment on a defendant's failure to avail himself of the opportunity to testify. The same approach was followed in the statute of 1878 eliminating testimonial incapacity in federal proceedings -- now 18 U.S.C. § 3481 -- which includes a provision that a defendant's failure to testify "shall not create any presumption against him." The legislative history shows that this provision was meant to preclude prosecutorial comment on a defendant's failure to take the stand, and the Supreme Court later held that a defendant is entitled

⁴⁵See Morgan, *supra* note 6, at 14, 16-18; L. Mayers, *supra* note 2, at 10, 16, 175, 180, 188; *see also* Kauper, *supra* note 8, at 1236 & n.67.

⁴⁶See *Developments in the Law -- Confessions*, *supra* note 44, at 1038; Note, *Adoptive Admissions, Arrest and the Privilege Against Self-Incrimination: A Suggested Constitutional Imperative*, 31 U. Chi. L. Rev. 556, 557-58 & nn.11, 13 (1964).

under the statute to an affirmative instruction to the jury that no adverse inference is to be drawn from his silence at trial.⁴⁷

The prohibition of adverse comment on a defendant's failure to take the stand, though the predominant approach in the United States, was frequently criticized by leading writers and law reform commissions, and was rejected in the formulation of model rules of evidence.⁴⁸ By the 1960's, six states permitted adverse comment on a defendant's silence at trial, and in two others legislation to the same effect had been invalidated by the state courts.⁴⁹

Throughout this period, the Supreme Court had no occasion to rule on the consistency of this approach with the Fifth Amendment. The constitutional issue did not arise in federal proceedings, since the matter had been resolved by statute. In reviewing state cases, the Court held that adverse comment on silence at trial was consistent with general Fourteenth Amendment due process, but did not reach the Fifth Amendment issue on the ground that the Amendment did not apply to the states.⁵⁰

The issue was brought to a head by the Court's "incorporation" of the Fifth Amendment against the states in *Malloy v. Hogan*, 378 U.S. 1 (1964), which made it possible to address the Fifth Amendment issue in reviewing state cases. The Court did so in the following year in *Griffin v. California*, 380 U.S. 609 (1965). In a decision remarkable for its lack of any serious effort at justification,⁵¹ the Court held in *Griffin* that adverse comment on a defendant's refusal to testify violated the Fifth Amendment right against compelled self-incrimination. *Griffin* provided the essential precedential basis for *Miranda*'s announcement in the following year of a corresponding rule barring the use at trial of a defendant's pre-trial silence in custodial interrogation.

⁴⁷ See L. Mayers, *supra* note 2, at 21-23, 225; 7 Cong. Rec. 385 (1878); *Bruno v. United States*, 308 U.S. 287 (1939).

⁴⁸ See pp. 15-16 *supra*; Friendly, *supra* note 42, at 939 & n. 58; L. Mayers, *supra* note 2, at 22.

⁴⁹ See L. Mayers, *supra* note 2, at 23, 225 n.102.

⁵⁰ See *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908); pp. 22-24 *supra*.

⁵¹ See Friendly, *supra* note 42, at 938-40.

d. The Right Not to be Questioned

A final innovation of the *Miranda* decision was the creation of a right on the part of arrested persons to prevent questioning. The Court stated (384 U.S. 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 If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."

The right not to be questioned was an addition to the traditional right to refrain from answering questions on grounds of potential self-incrimination. At the time of the Constitution, suspects had no right to cut off custodial interrogation, *see pp. 8-9 supra*, and no right of this sort was recognized in the Supreme Court's decisions prior to *Miranda*. *Crooker v. California*, 357 U.S. 433 (1958), and *Cicenia v. Lagay*, 357 U.S. 504 (1958), for example, involved suspects who stated in the course of police questioning that they wanted to consult with counsel, but were denied counsel and questioned anyway. The Supreme Court held that their confessions resulting from the questioning could properly be used against them.

3. The Prelude to *Miranda*

Changes in the Supreme Court's composition resulted in a period of rapid innovation in the Court's constitutional caselaw in the 1960's. The results of this development have continued to determine the basic law of criminal investigation and adjudication in the United States until the present. The salient features of the Court's criminal procedure decisions in that period were (i) indifference to history and precedent, (ii) a disposition to impose uniform federal standards, precluding variation among the states on specific procedural issues as well as on broad questions of principle, and (iii) the assumption of a *de facto* supervisory authority over the executive, as well as the judicial, components of the state and federal criminal justice systems, utilizing the exclusion of evidence as the mechanism for enforcing the Court's views concerning desirable procedures.

The law relating to self-incrimination provided fertile ground for the expression of these tendencies. In *Malloy v. Hogan*, 378 U.S. 1 (1964), for example, the Court "incorporated" the Fifth Amendment right against compelled self-incrimination against the states. The practical effect of the decision in *Malloy* was to make the Supreme Court's prior

and subsequent caselaw under the Self-Incrimination Clause of the Fifth Amendment applicable to the states in all of its particulars. *Malloy* overruled the contrary holdings of various earlier decisions, including *Knapp v. Schweitzer*, 357 U.S. 371 (1958), *Adamson v. California*, 332 U.S. 46 (1947), and *Twining v. New Jersey*, 211 U.S. 78 (1908). See pp. 22-24 *supra*.

Another case that departed from precedent in this area was *Jackson v. Denno*, 378 U.S. 368 (1964). In that case the Court held unconstitutional a common state procedure under which the judge would submit the question of a confession's voluntariness to the jury in cases in which the issue presented a fair question of fact, with instructions to disregard the confession if it was found to be involuntary, and otherwise to accord it such probative force as it deserved. The Court held, in effect, that the judge must make an affirmative finding of voluntariness with respect to a challenged confession in a separate proceeding before the jury can hear of it. This overruled the contrary holding of *Stein v. New York*, 346 U.S. 156, 170-79 (1953).

In the area of police procedures two innovative decisions had a particularly close relationship to the *Miranda* decision -- *Massiah v. United States*, 377 U.S. 201 (1964), and *Escobedo v. Illinois*, 378 U.S. 478 (1964).

a. *Massiah* and *Escobedo*

Massiah was a narcotics trafficking case. It turned on the admissibility of incriminating statements made by the defendant *Massiah* to a confederate who, unbeknownst to *Massiah*, was cooperating with the authorities. The relevant conversation took place in the course of a continuing investigation of the narcotics conspiracy in which *Massiah* was believed to be involved. It occurred while *Massiah* was out on bail, having retained counsel and having pleaded not guilty to an indictment.

The Court reversed *Massiah*'s conviction on the ground that eliciting information from him in these circumstances violated his Sixth Amendment right to counsel. The general import of the decision was that statements obtained by a government agent from an indicted defendant who has counsel are automatically inadmissible against him if obtained without counsel present.

The *Massiah* decision was notable both as the initial extension of the right to counsel to the context of police investigation or interrogation, and as an expression of the Court's willingness in this period to impose debatable policy decisions in the guise of constitutional interpretation. The police practice at issue in the case obviously did not interfere with the ability of *Massiah*'s attorney to prepare his case and assist in his defense,⁵² except in the trivial and irrelevant sense that any successful effort to obtain evidence against a suspect reduces the likelihood that he can be successfully defended. The decision also cannot sensibly be understood as resting on a principled objection to investigative methods of the sort employed in the case. Whatever dangers might be thought to inhere in the use of undercover operatives, it is difficult to see how they could be thought any greater in connection with an indicted defendant who has counsel than in connection with other persons suspected of crime. A more plausible explanation of the decision is that it reflected a constitutionalization and extension to a novel context of contemporary conventions regarding dealings among attorneys:

Nothing goes quite as abrasively against the grain of lawyers' thinking than efforts by one side of a controversy to go behind the opposing attorney's back to weaken his case through direct contacts with his client. In civil litigation it can lead to settlements that threaten the wronged attorneys' fees as well as the strength of their cases, and judges, having been lawyers themselves, consider it impropriety of the highest order. In *Massiah*'s case the Supreme Court found it no less than a breach of the Sixth Amendment's declaration that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Potter Stewart, who had once indicated his philosophical leanings by referring to himself as "a lawyer," wrote the majority opinion that overturned the conviction and declared the statements inadmissible under the Sixth Amendment [T]he holding established the precedent that fully voluntary admissions can be ruled out for failure of the police to respect a suspect's right of counsel prior to trial.⁵³

⁵² See generally 377 U.S. at 209 (White, J., dissenting); Enker & Elsen, *supra* note 44, at 54-58.

⁵³ F. Graham, *supra* note 21, at 163-64. See 377 U.S. at 210-11 (White, J., dissenting).

The final milestone on the road to *Miranda* was *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Escobedo* concerned the admissibility of statements obtained from the defendant in police interrogation which played a role in securing his conviction for murder. In the course of questioning, Escobedo's repeated requests to consult with his attorney were denied, in violation of state law.

The Court found the statements to be inadmissible on the ground that, under the facts of the case, Escobedo had been denied the Sixth Amendment right to counsel. This was an extension beyond the rule of *Massiah*, *supra*, both because the interrogation preceded indictment, and because it was a state case. The Court formulated its holding in *Escobedo* as follows (378 U.S. at 490-91):

We hold . . . that where . . . 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" [citing *Gideon v. Wainwright*], and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

The Court did not set out the rationale for the various elements in the holding in a clear way, but some reasonable inferences can be drawn from the general discussion in the case. The reference to the focus of the investigation on a particular suspect and the fact of police custody reflected an effort to be consistent with the Sixth Amendment's characterization of the right to counsel as a right of "the accused" in "criminal prosecutions." The reference to a process of interrogation that lends itself "to eliciting incriminating statements" may have reflected a desire to achieve some relationship to similar language in the *Massiah* decision. The relevance to a Sixth Amendment violation of the absence of an admonition concerning the suspect's "absolute constitutional right to remain silent" is very difficult to figure out. However, the discussion

suggested that it had something to do with the fact that the defendant's lawyer could have advised him of this right if he had been present.

The multiple conditions on the result in *Escobedo* and its enigmatic character prevented any certain predictions as to where it would lead. It did, however, contain the first suggestion that warnings might be a precondition to the admission of statements given to the police, at least in certain circumstances, and the first extension of some type of right to counsel to the earliest stages of custodial police interrogation. The issues that had not been resolved in *Escobedo* immediately became a focus of litigation in the lower courts, and cases raising these issues began to pile up on the Supreme Court's docket. The Court directed its clerk to hold the pending *Escobedo* cases, looking toward a later major decision that would answer the questions that *Escobedo* had raised. This set the stage for *Miranda*.⁵⁴

b. The Interrogation Policy of the FBI

The centerpiece of the *Miranda* decision was its imposition of a nationally uniform requirement that suspects be advised of certain rights prior to interrogation. It specifically required admonitions concerning a right to remain silent; that any statement given might be used against the suspect; that the suspect has a right to counsel; and that free counsel will be provided if a suspect cannot afford to hire an attorney. While some features of the *Miranda* system, as discussed above, were foreshadowed to a limited degree by prior decisions of the Court in the early 1960's, the warnings required by *Miranda* were extra-judicial in origin. Specifically, they were the warnings that Director J. Edgar Hoover had adopted as a matter of administrative policy for use by the FBI in questioning suspects.

While the FBI warnings provided the model for *Miranda*'s central innovation, their interpretation and application were basically different from the *Miranda* system. The FBI policy required an admonition to suspects that they need not make a statement, but there was no requirement that questioning cease at once if a suspect expressed an unwillingness to talk. The only counsel right relevant to interrogation that was recognized under the FBI policy was the right to consult with retained counsel mentioned in the third warning. The fourth warning, relating to appointed counsel, was simply advice to indigent defendants

⁵⁴See F. Graham, *supra* note 21, at 154-55, 172, 189.

that they would be assigned counsel in subsequent judicial proceedings.⁵⁵ The warnings had no bearing on the admissibility of the results of an interrogation, except as evidence that the suspect had not been coerced. Errors and omissions were not punished by the exclusion of voluntary statements. Nevertheless, the Court in *Miranda* characterized the FBI practice as "consistent with" *Miranda*'s procedure, and pointed to it as the principal evidence that *Miranda*'s requirements would not be difficult to comply with or detrimental to law enforcement. See 384 U.S. at 483-86.

c. The ALI Model Code of Pre-Arrest Procedure

The years immediately preceding *Miranda* were characterized by intense interest in the standards governing pre-trial interrogation on the part of public officials and members of the legal profession. This interest had been heightened by the *Escobedo* decision, which raised concerns that the Court in subsequent decisions might prohibit all pre-trial questioning without counsel present, or might impose other restrictions that would effectively end the practice of pre-trial interrogation. Reform efforts in this area had come to focus on the American Law Institute (ALI), which was then at work on a Model Code of Pre-Arrest Procedure, with the cooperation of the American Bar Association's Project on Minimum Standards for Criminal Justice. The Reporters for this effort were James Vorenberg and Paul Bator. The Associate Reporters were Charles Fried and Edward Barrett.⁵⁶

In early 1966, the ALI was presented, with the approval of its Council, with a proposed draft of the Model Code that differed significantly from the system that was imposed shortly thereafter in *Miranda*. It provided for a period of up to four hours in which a suspect in custody could be questioned without counsel present. This was subject to a number of safeguards against abuse, including prohibitions against

⁵⁵ See F. Graham, *supra* note 21, at 181-82; *Miranda*, 384 U.S. at 521 (Harlan, J., dissenting).

⁵⁶ See F. Graham, *supra* note 21, at 173-74; American Law Institute, *A Model Code of Pre-Arrest Procedure* (Tentative Draft No. 1, March 1, 1966). James Vorenberg was head of the Justice Department's Office of Criminal Justice, the earliest predecessor office to the current Office of Legal Policy, and executive director of the President's Commission on Law Enforcement and Administration of Justice. Charles Fried is currently the Solicitor General.

holding a suspect incommunicado during that period, warnings to suspects that they were not required to say anything and could only be detained for a limited time, and a requirement that a sound recording be made of the interrogation if it extended beyond a few brief questions. The ALI had taken no final action on this proposal at the time of the *Miranda* decision. This was in part because the Court's decision in that case was anticipated, and in part a result of direct intervention by Chief Justice Warren, who was presumably concerned that discrepancies between the Model Code and the Court's decision would be embarrassing to the Court.⁵⁷

During oral argument in *Miranda*, it became apparent that a majority of the Justices were unsympathetic to the position of the 30 states that were participating in the case as parties or *amici curiae*. Some hope remained that the legal ferment underway in the area of pre-trial interrogation and the likelihood of legislative action would dissuade the Court from imposing its own standards, but this hope was quashed:

[The] only chance seemed to lie in some thoughts that Brennan had expressed in some speeches he had made, back when the first protests were being heard against the Court's criminal decisions. He had pointed out that the Court had been forced to act because of the default of everyone else. This was no longer true; interest was high across the country on the subject of suspects' rights and police authority, and the state legislatures could be expected to act as soon as the American Law Institute completed its work on the Pre-Arrestment Code. The lawyers urged the Court to wait a while longer. Brennan maintained his silence, but Hugo Black, speaking in soft, Southern tones that carried to the rear of the hushed courtroom, dismissed the subject with two questions: "What is that Model Code? Is it in the Constitution?"⁵⁸

Justice Black and the other members of the *Miranda* majority apparently found it more logical to conclude that the warnings used by the FBI in 1966 were "in the Constitution." The reasoning by which the Court reached this conclusion will be examined in the next section of this report.

⁵⁷See F. Graham, *supra* note 21, at 174-75.

⁵⁸*Id.* at 178.

II. The Decision in *Miranda v. Arizona* and Subsequent Developments

In general character, the *Miranda* decision stood somewhere between a code of procedure with commentary and a judicial decision in the conventional sense. Chief Justice Warren, who devised the detailed set of rules announced in the decision, initially drafted the opinion of the Court so as to make these rules constitutional requirements. However, he was forced to accommodate Justice Brennan, who insisted that some latitude should be left to legislatures to develop alternative rules counteracting the pressures of custodial interrogation. See p. 61 *infra*. The final version of the opinion took the position that compulsion in violation of the Fifth Amendment would necessarily occur if statements were obtained from a suspect without special safeguards, but acknowledged that the specific procedures prescribed by *Miranda* were dispensable if it could be shown that other rules were equally effective.

Congress quickly repudiated the *Miranda* decision, and somewhat later the Supreme Court rejected its underlying rationale, following a change in the Court's membership. The legislative response was 18 U.S.C. § 3501, a statute enacted in 1968 to overturn the *Miranda* decision and restore the pre-*Miranda* voluntariness standard for the admission of confessions. The Department of Justice attempted to establish the validity of this statute in litigation for several years with inconclusive results, but ultimately snatched defeat from the jaws of victory by terminating this litigative effort after an initial appellate decision -- *United States v. Crocker*, 510 F. 2d 1129 (10th Cir. 1975) -- which upheld the statute.

The Supreme Court's rejection of *Miranda* occurred in *Michigan v. Tucker*, 417 U.S. 433 (1974), which took the position that no violation of the Fifth Amendment occurs if statements are obtained from a suspect without observing *Miranda*'s rules or any other safeguards, so long as actual coercion is avoided. This view, which has been reiterated and relied on in later decisions, removed any intelligible doctrinal basis for applying *Miranda*'s rules to the states, or for failing to give 18 U.S.C. § 3501 effect in federal proceedings. Nevertheless, the Supreme Court continues to apply *Miranda*'s standards in its decisions, apparently because no case has yet required the Court to confront the full implications of its rejection of *Miranda*'s essential premise.

A. The Miranda Decision

The title case in *Miranda v. Arizona*, 384 U.S. 436 (1966), arose from Ernesto Miranda's kidnapping and rape of an eighteen-year-old woman in 1963. Miranda confessed to the crime shortly after being taken in custody. He made no request to consult with counsel while being interrogated, but was also not affirmatively advised by the police that he had a right to do so. The confession was admitted in evidence against him at trial.⁵⁹

The Supreme Court overturned Miranda's conviction, based on the failure of the police to comply with a new set of rules that were announced in the *Miranda* decision. The members of the majority in the decision were Chief Justice Warren and Justices Douglas, Brennan, Black, and Fortas. Justices White, Stewart, Harlan, and Clark dissented. The specific rules promulgated by the Court were as follows:

1. *Warnings concerning a right to remain silent and potential adverse use of statements.* A suspect in police custody must be advised prior to questioning that he has a right to remain silent and that anything he says can be used as evidence against him.

2. *A right to counsel and related warnings.* A suspect has a right to have counsel present during questioning, and to free counsel for that purpose if he cannot afford to retain counsel. A suspect must also be advised of these rights prior to questioning.

3. *Waiver.* An interrogation cannot proceed unless the suspect makes a voluntary, knowing and intelligent waiver of the rights described in the required warnings. The government has a heavy burden of proof in establishing that such a waiver occurred.

4. *A right not to be questioned.* If a suspect indicates in any manner, at any time, that he does not want to be questioned, then questioning must cease immediately. Likewise, if a suspect indicates in any manner, at any time, that he wants to consult with counsel, questioning must cease immediately and may not resume until counsel is present.

⁵⁹See *Miranda*, 384 U.S. at 491-93; L. Baker, *Miranda: Crime, Law and Politics* 3-14, 17, 22-24, 49, 191-94 (1983).

5. *Enforcement by the exclusion of statements.* Violation of any of the foregoing rules automatically bars the admission of a suspect's statements against him at trial, whether the statements are exculpatory or inculpatory in character.

6. *No adverse use of silence.* The fact that a suspect remained silent or refused to answer questions may not be used by the prosecution at trial.

In supporting these requirements, the Court adduced three broad types of arguments. First, the decision purported to establish the constitutional necessity of a system of rules of this sort, based on the applicability of the Fifth Amendment right against compelled self-incrimination to custodial police interrogations, and the contention that such interrogations invariably involve violations of this right if such rules are not observed. Second, the decision attempted to support the specific rules prescribed by *Miranda* through reasoning from constitutional precedents, most of which related to the Sixth Amendment right to counsel. Third, the Court responded to the objection that it was foreclosing legitimate legislative options by asserting that the specific rules it had prescribed were not necessarily the only acceptable means of complying with the Fifth Amendment. These three lines of argument merit separate analysis.

1. The General Argument

The steps in *Miranda*'s basic argument supporting the need for its system of rules were as follows:

i. The Fifth Amendment's prohibition of compelled self-incrimination governs the admissibility of pre-trial statements obtained in police interrogation at both the state and federal levels. The constraints imposed by the Fifth Amendment's prohibition of compulsion are broader than those imposed by the voluntariness requirement under which such questions have been assessed in prior decisions.

ii. Custodial police interrogation invariably involves compulsion in violation of the Fifth Amendment, unless its coerciveness is negated by the observance of a set of rules like those set out in the decision. The need for such rules is demonstrated by the occurrence of torture in police interrogation and by the abusive methods that "police manuals" recommend for inducing suspects to confess. Exculpatory, as well as

inculpatory, statements obtained in violation of these rules are inadmissible, since inconsistencies between facially exculpatory statements and other statements or evidence may effectively incriminate a suspect.

iii. These rules will not be difficult for the police to follow or unduly harmful to law enforcement. This is shown by the FBI's existing practice of following the same rules, and by the observance of restrictive rules governing police interrogation in England and other foreign jurisdictions.

a. The Fifth Amendment Standard and the Voluntariness Standard

The first step in the Court's general argument in *Miranda* was its invocation of a Fifth Amendment standard in assessing the admissibility of pre-trial statements. The Court's assertion that the Fifth Amendment right against compelled self-incrimination applied to the state cases under review was based on its decision two years earlier in *Malloy v. Hogan*, 378 U.S. 1 (1964), which had overruled numerous contrary precedents on that point. The Court's assertion that the Fifth Amendment right applies in police interrogations, as well as in judicial proceedings, and its assumption that compulsion in violation of the Amendment requires the exclusion of resulting statements at trial, were supported in part on the authority of *Bram v. United States*, 168 U.S. 532 (1897).⁶⁰ The applicability of the Fifth Amendment at this stage is in fact consistent with the historical understanding of the Fifth Amendment right. Police interrogation is the functional equivalent in contemporary criminal justice systems of the common law institution of preliminary examinations before justices of the peace, at which the applicability of the right against compelled self-incrimination was recognized. See pp. 7-9, 13-14 *supra*.

None of these propositions would have been practically important if the Court had taken the notion of "compulsion" under the Fifth Amendment as narrower than, or equivalent to, the notion of "coercion" or "involuntariness" which had provided the touchstone for the admissibility of confessions under the Court's prior decisions. See pp. 24-25 *supra*. However, the Court took the position that the Fifth Amendment requires something more than voluntariness. It stated that in the cases under review it "might not find the defendants' statements to have been

⁶⁰ See 384 U.S. at 461-62. See generally pp. 16-20 *supra*.

involuntary in traditional terms," 384 U.S. at 457, but excluded them anyway on the basis of a new set of rules -- ostensibly required to safeguard the Fifth Amendment right -- none of which had been imposed in prior caselaw under the voluntariness standard.

As a matter of history and precedent, this view of the relationship of the Fifth Amendment standard and the voluntariness standard was wrong. Common law sources bearing on the understanding of the right against compelled self-incrimination in the context of pre-trial interrogation only support a prohibition of eliciting response by such blatant forms of coercion as questioning under oath, torture, or criminal punishment. *See pp. 7-9 supra.*

The Supreme Court's prior Fifth Amendment decisions also did not support the proposition that Fifth Amendment "compulsion" is broader than the notion of "coercion" or "involuntariness" that had traditionally governed the admission of confessions. Indeed, this view was explicitly contradicted by two earlier decisions -- *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Bram v. United States*, 168 U.S. 532 (1897) -- that the Supreme Court cited in *Miranda*, 384 U.S. at 460-62, as authority on the meaning of compulsion under the Fifth Amendment. *Malloy v. Hogan* stated that "the admissibility of a confession in a state criminal prosecution [under the voluntariness standard] is tested by the same standard applied in federal prosecutions since . . . *Bram v. United States* . . . held that . . . the issue is controlled by . . . the Fifth Amendment." 378 U.S. at 7. *Bram v. United States*, in turn, had proceeded under the assumption that the Fifth Amendment is a codification of the evidentiary rule excluding involuntary confessions. *See pp. 17-18 supra.*

Finally, neither these decisions nor any other decision of the Court construing the Fifth Amendment had stated or suggested that any of the rules imposed by *Miranda* were required for conformity with the Amendment. In *Bram*, for example, the Court had assessed the admissibility of a defendant's statements under an expansively defined notion of involuntariness, which it took to be congruent with the Fifth Amendment standard,⁶¹ but did not even mention the interrogator's

⁶¹ As discussed earlier, this approach involved reading into the Fifth Amendment a temporary, post-constitutional development in the evidentiary rules governing the admission of confessions. *See pp. 17-20 supra.*

failure to comply with the *Miranda* rules as a relevant factor in this assessment.⁶²

b. The Fiction of Inherent Coerciveness

The second step in *Miranda*'s general argument was the assertion that custodial police interrogations necessarily involve compulsion in violation of the Fifth Amendment, unless *Miranda*'s rules or equally effective alternative rules negate their "inherently compelling" character. See 384 U.S. at 457-58, 467. The Court cited two types of evidence in support of this conclusion:

First, the Court noted that physical abuse of suspects by the police had been commonplace at the time of the Wickersham Commission's report in 1931, and that incidents of torture had continued to occur up to the time of the *Miranda* decision. The Court recognized that such occurrences were now exceptional, but asserted that, in the absence of rules like those imposed in *Miranda*, "there can be no assurance that practices of this nature will be eradicated in the foreseeable future."⁶³

However, the information presented by the Court on this point did not relate to a problem that could be addressed through *Miranda*'s reforms. Torture already was grounds for the automatic exclusion of a defendant's statements in the pre-*Miranda* caselaw under the due process voluntariness standard,⁶⁴ and none of the new rules announced in *Miranda* had any obvious value in inhibiting an officer who was disposed to resort to physical abuse from doing so.⁶⁵

Second, the Court cited and quoted from a number of works that it characterized as "police manuals." These "manuals" recommended a variety of practices -- some arguably abusive and some plainly so -- that could be used to get suspects to confess. These included isolation of the

⁶²Other cases from the same period as *Bram* had considered directly whether *Miranda*-like rules were required, and had held that they were not. See pp. 26-28 *supra*.

⁶³See 384 U.S. at 445-48. See generally pp. 13-16 *supra*.

⁶⁴See *Stein v. New York*, 346 U.S. 156, 182 (1953); *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936).

⁶⁵See *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) ("The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers.").

suspect in unfamiliar surroundings; projecting an attitude of unshakeable confidence in the suspect's guilt; relentlessly interrogating an apparently guilty suspect, subject only to necessary breaks for food and sleep, for however long may be necessary to break his resistance and secure a confession; making a false show of sympathy for the suspect's circumstances or criminal actions; play-acting by two officers in which one assumes a menacing, belligerent role and the other a sympathetic, ingratiating role; presenting the suspect with fabricated assertions that other have incriminated him or staging scenarios in which "witnesses" make false accusations against the suspect; and a number of other ploys. See 384 U.S. at 448-55.

While the "police manuals" material constituted the essential empirical justification for *Miranda*'s reforms, the Court failed to present and analyze evidence concerning the actual incidence of the recommended practices.⁶⁶ Justice Tom Clark, a former Attorney General, observed in his dissent in *Miranda* (384 U.S. at 499-500):

[I cannot] join in the Court's criticism of the present practices of police and investigatory agencies as to custodial interrogation. The materials it refers to as "police manuals" are, as I read them, merely writings in this field by professors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover, the examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in law reports.

The Court's reliance on this material was undercut in another way by the absence of any reasonable "fit" between the rules announced in the decision and the "police manual" abuses they were supposed to guard against. The point may be illustrated by considering the recommended practice of relentlessly interrogating a suspect until his resistance is worn down and he confesses. The proposed ALI Model Code of Pre-Arrest Procedure had addressed this potential abuse in a straightforward way by setting a limit on the time during which a suspect could be questioned without counsel present, and also stated some additional

⁶⁶See generally *Miranda*, 384 U.S. at 533 (White, J., dissenting).

rules barring unduly prolonged or persistent questioning within this time period.⁶⁷

In comparison, *Miranda's* rules were not tailored in any sensible way to meeting this concern. The right to cut off questioning immediately was overly broad as a response to the risk of marathon interrogations, since it would enable a suspect to insulate himself from all inquiry, however brief and restrained. Conversely, for a suspect who had waived his rights, *Miranda* imposed no limit on the duration of questioning. A suspect could, in theory, thereafter stop questioning whenever he wanted to, but this right was not likely to be of value to a suspect who did not happen to be aware of it from his own knowledge,⁶⁸ or who lacked the presence of mind to assert it at a later time.

The "evidence" presented by the Court in *Miranda* was still more inadequate as support for the Court's broader contention that statements obtained in custodial interrogations, whether exculpatory or inculpatory, are necessarily the product of governmental compulsion unless *Miranda's* rules or an equivalent set of safeguards are observed.⁶⁹ Empirical data alone, even if far more persuasive and extensive than that presented in *Miranda*, could at most establish that existing practices involved coercion or compulsion in a certain proportion of cases. This would not explain why statements should be excluded in cases in which warnings were omitted or other features of *Miranda's* system were not observed, but in which no actual coercion took place.

As a practical matter, suspects in custody may respond to interrogation for a variety of reasons that have nothing to do with being pressured or intimidated. A guilty suspect, for example, may go along with questioning as a means of finding out how much the police know or what evidence they have against him, or to bolster the credibility of a fabricated defense by presenting it on the earliest possible occasion. For an innocent person who has been mistakenly accused, submitting to questioning and giving exculpatory responses reflects the natural impulse to rebut false charges and clear oneself as promptly as possible.

⁶⁷ See American Law Institute, *supra* note 56, at xxiii-xxiv, §§ 4.04(1), 5.01 and Note, 5.04 and Note.

⁶⁸ *Miranda* did not require an admonition stating that the suspect could stop questioning after it had started, most likely for reasons of conformity with the FBI warnings. See generally pp. 52-53 *infra*.

⁶⁹ See 384 U.S. at 457-58, 467, 476-77; *id.* at 532-33, 535 (White, J., dissenting).

Admissions of guilt and other inculpatory responses by a suspect may also reflect a variety of motives, including relief from guilt, a desire to explain mitigating or justifying circumstances, a belief that denial or resistance is futile in light of the suspect's apprehension or the strength of the evidence against him, or a desire to clear relatives or associates who might otherwise also come under suspicion. The absurdity of asserting that statements obtained in custodial interrogation are necessarily compelled is aptly portrayed by an example in the journalist Fred Graham's book on the *Miranda* decision:

One famous incident was the interrogation of Senator Edward M. Kennedy by the Chief of Police of Edgartown, Massachusetts, on the day after the tragic drowning of a young secretary in Kennedy's car in the summer of 1969. Senator Kennedy was a lawyer himself, and a companion was a former United States Attorney. The police chief was so abashed by the necessity of questioning Senator Kennedy that he did not give any of the *Miranda* warnings. It was a vivid refutation of the Supreme Court's view that all statements made in police custody must be presumed to be the product of an intimidating atmosphere. If anyone was rattled it was the chief of police, and any concessions on Senator Kennedy's part were prompted by motives of his own. It would probably have been superfluous to inform the Senator of his right to counsel, but the *Miranda* opinion makes it clear that even lawyers must be told, before they are questioned "in custody," that they may remain silent and that anything they say may be used against them. Later, when Senator Kennedy appeared in court to plead guilty to leaving the scene of the fatal accident, his lawyer mentioned that there were defenses that could have been raised. Privately, the Senator's lawyers expressed the belief that in a case with no public opinion considerations, a successful effort to quash the statement might have been made.⁷⁰

In short, the Court's notion that *all* statements obtained without observance of *Miranda*'s rules are secured through unconstitutional compulsion was simply a fiction. The purpose of this fiction was apparently to justify an inflexible rule excluding statements when *Miranda*'s requirements were not followed, so that their effectiveness

⁷⁰F. Graham, *supra* note 21, at 311.

could not be undercut by case-by-case argumentation over the occurrence of coercion in particular interrogations.⁷¹

The Court might have achieved the same result by acknowledging candidly that *Miranda*'s exclusionary rule required the exclusion of statements in some cases in which admitting them would not violate the Fifth Amendment, and justifying this approach by its value in ensuring the effectiveness of the decision's requirements as a safeguard against abusive interrogations. The Court had in fact approached the issue of coerced confessions in federal proceedings in this manner prior to *Miranda*, exercising its supervisory power in the *McNabb-Mallory* line of decisions to create a rule excluding statements obtained in periods of unnecessary delay prior to the initial appearance before a magistrate, whether or not actual coercion or compulsion had taken place. See pp. 21-22 *supra*.

However, this approach would have appeared unattractive in the context of *Miranda* for two reasons. First, the *McNabb-Mallory* decisions had rested on the Supreme Court's supervisory authority over the lower federal courts. The Court had never claimed any corresponding authority to impose extra-constitutional requirements on the state courts, but without doing so it could not have made *Miranda* applicable in state proceedings as an exercise of supervisory authority. Second, because rules imposed by the Court in the exercise of its supervisory authority are non-constitutional, they can be overturned by legislation. In fact, the *McNabb-Mallory* line of cases had been a frequent target of remedial bills in Congress, which had come close to enactment on a number of occasions. See pp. 21-22 *supra*. *Miranda* would have been vulnerable to legislative repeal in the same manner if cast as an exercise of supervisory power.

In the context of the *Miranda* decision, reliance on the notion of inherent coerciveness served to provide the Court with the best of both worlds -- the breadth and creative freedom of an exercise of supervisory power, accompanied by the immunity from legislative repeal of constitutionally based requirements. However, since the notion was nothing more than a fiction, it provided no secure long-term basis for *Miranda*'s system. This aspect of *Miranda* was overruled once changes in the

⁷¹See generally *Miranda*, 384 U.S. at 468-72; *id.* at 535 (White, J., dissenting).

Court's composition produced a majority that was not committed to the uniform application of the rules that *Miranda* had enacted.⁷²

c. Precedent in Existing Interrogation Systems

The final step in the general argument in *Miranda* was the Court's contention that the rules it had created would be easy to implement and not too harmful to law enforcement, based on the experience with comparable rules in existing interrogation systems. The Court placed primary emphasis on the FBI practice, representing it as being the same as *Miranda's* system. It noted that the FBI had "compiled an exemplary record of effective law enforcement" while giving *Miranda*-like warnings to suspects, and stated that "[t]he practice of the FBI can readily be emulated by state and local enforcement agencies." See 384 U.S. at 483-86. The Court also pointed to the rules of a number of foreign countries, including England, Scotland, and India. See *id.* at 486-90.

The FBI practice was not only cited as an important precedent in the *Miranda* decision, but was also of practical importance in mustering a majority of the Justices behind Chief Justice Warren's proposed interrogation rules:

According to former Justice Fortas, the *Miranda* decision "was entirely his" -- i.e., [Chief Justice] Warren's. At the March 4, 1966, conference, Warren left no doubt where he stood. As at the argument, the Chief stressed that no warning had been given by the police. In such a case, the police must warn someone like *Miranda* of his right to silence, that anything he said could be used against him, that he could have a lawyer, and that he could have counsel appointed if he could not afford one. Warren said that such warnings had been given by his staff when he was district attorney. He placed particular emphasis upon the practice followed by the Federal Bureau of Investigation and explained how it worked. The "standard" F.B.I. warning covered the essential requirements Warren had posited. The F.B.I.'s record of effective law enforcement showed that requiring similar warnings in all police interroga-

⁷²See *New York v. Quarles*, 104 S. Ct. 2626 (1984) (no violation of Fifth Amendment in admitting voluntary statement obtained in custodial police interrogation in the absence of *Miranda* warnings or any other safeguards); *Michigan v. Tucker*, 417 U.S. 433 (1974) (same principle).

tions would not impose too great a burden. Another Justice who was present says, "the statement that the F.B.I. did it . . . was a swing factor. I believe that was a tremendously important factor, perhaps the critical factor in the *Miranda* vote."⁷³

As noted earlier, however, the similarities of the FBI system and the *Miranda* system were largely verbal. FBI agents were not required to obtain an affirmative waiver of the rights recounted in the warnings prior to interrogation and were not required to desist from questioning if a suspect expressed an unwillingness to talk. The only right to counsel in connection with interrogation that was recognized in the FBI system was a right to consult with retained counsel prior to questioning, and questioning could be continued even where counsel was requested if the request was "indecisive" in the judgment of the interviewing agent. Compliance with the requirement of warnings was not a litigable issue, and the omission of warnings did not affect the admissibility of a suspect's statements.⁷⁴

The rules of the foreign jurisdictions cited in *Miranda* are also actually less restrictive than the *Miranda* system.⁷⁵ The rules of these countries and other foreign jurisdictions are described in Section III of this report.

2. Arguments for Particular Rules

The arguments given in the *Miranda* decision for the particular elements in its system can be classified as followed:

a. Application of the Fiction of Inherent Coerciveness

The *Miranda* decision grounded its basic rules on the premise that compulsion in violation of the Fifth Amendment would invariably occur if such rules were not observed. See 384 U.S. at 467. Thus, the Court stated that a warning that a suspect has a right to remain silent "is an

⁷³B. Schwartz, *Super Chief: Earl Warren and his Supreme Court -- A Judicial Biography* 589 (1983).

⁷⁴See pp. 39-40 *supra*; *Miranda*, 384 U.S. at 484-86.

⁷⁵See generally *Miranda*, 384 U.S. at 521-23 (Harlan, J., dissenting); F. Graham, *supra* note 21, at 132, 171, 181-82.

absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere," and that "a warning at the time of the interrogation is indispensable to overcome its pressures." *Id.* at 468-69. In relation to the right to have counsel present, the Court stated that it "is indispensable to the protection of the Fifth Amendment privilege" under the *Miranda* system, since "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will" of the suspect, and because "[w]ith a lawyer present the likelihood that the police will practice coercion is reduced."⁷⁶ As justifications for uniform rights to warnings and counsel based on the Fifth Amendment, these arguments were simply invocations of the fiction that custodial police interrogations are inherently coercive, and stipulations that the rights specified are necessary to negate their coerciveness.

The right of the suspect to prevent questioning and to stop questioning after it has started was similarly justified in *Miranda* on the ground that "any statement taken after the person invokes his privilege cannot be other than the product of compulsion," and that "[w]ithout the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice." 384 U.S. at 474. Although these assertions related to a narrower context -- that of a suspect who indicates at some point that he does not want to be questioned, but is subsequently questioned anyway -- the notion of inherent compulsiveness relied on by the Court in support of this right must also be regarded as a fiction. A suspect who is initially unwilling to talk may change his mind for reasons that have nothing to do with being pressured or compelled, such as the presentation of additional evidence by the police in the course of questioning which affects the suspect's judgment whether it is in his interest to respond. Of course no comparable right under the Fifth Amendment is recognized in other contexts, including those involving overt compulsion to testify or respond. A witness subpoenaed to testify at trial or before a grand jury may refuse to answer potentially incriminating questions, but may not decline to be questioned.⁷⁷ A defendant who decides to testify at trial is deemed to have waived his Fifth Amendment right, and cannot

⁷⁶384 U.S. at 469-70; see *id.* at 466 ("The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process").

⁷⁷See *United States v. Mandujano*, 425 U.S. 564, 572-75, 580-81 (1976) (plurality opinion), and cases cited therein.

selectively answer some questions but later cut off questioning if things are not going his way.

b. The Requirement of a Knowing and Intelligent Waiver

Miranda also attempted to support its system by invoking the doctrine requiring a "knowing and intelligent" waiver of certain constitutional rights. The Court stated a general rule that such a waiver of the rights described in the *Miranda* warnings must be obtained from a suspect before questioning can take place. See 384 U.S. at 444, 475. The Court also relied on this waiver standard in supporting other elements of the *Miranda* system. In relation to the warning concerning the right to remain silent, for example, the Court stated that "[f]or those unaware of the privilege, the warning is needed simply to make them aware of it -- the threshold requirement for an intelligent decision as to its exercise." *Id.* at 468. In relation to the second warning -- "anything you say can be used against you" -- the Court stated that "[i]t is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." *Id.* at 469. In relation to the required admonitions concerning the right to counsel, the Court stated that "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given."

Although *Miranda*'s rules were ostensibly predicated on the Fifth Amendment, the Court relied on precedents relating to the Sixth Amendment right to counsel in supporting *Miranda*'s waiver standard.⁷⁸ In doing so, the Court effectively nullified a portion of the language of the Fifth Amendment, which does not create a right to remain silent, but only a right not to be compelled to talk. As a matter of history, failure to advise a suspect that he could refrain from answering questions, and that his answers could be used against him, was not regarded as a

⁷⁸ See 384 U.S. at 475. Some of the cited cases related to the Fourteenth Amendment due process right to counsel, which had absorbed Sixth Amendment standards, and which was fully assimilated to the Sixth Amendment right by the decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). A waiver requirement for the Sixth Amendment right to counsel was initially created in *Johnson v. Zerbst*, 304 U.S. 458 (1938). See p. 31 *supra*.

circumstance that compelled him to respond.⁷⁹ Moreover, outside the ambit of *Miranda*, the Supreme Court has never held that the absence of warnings or a “knowing and intelligent waiver” amounts to compulsion in the sense of the Fifth Amendment. Rather, both before and after *Miranda*, that proposition has been consistently rejected in the Supreme Court’s Fifth Amendment caselaw.⁸⁰

c. The Argument from Equity

As discussed above, the *Miranda* decision predicated its creation of a uniform right to counsel in pre-trial interrogation and the related warning requirements on the fiction of inherent coerciveness and on a waiver standard abstracted from Sixth Amendment caselaw.⁸¹ The Court also suggested that considerations of equity required that this new counsel right be defined to include a right to appointed counsel and a rule that the police must affirmatively advise suspects of their right to have counsel present. A narrower definition would be objectionable as discriminating against suspects who could not afford to retain counsel, or who did not happen to be aware of their right to counsel at that stage. In support of this conclusion, the Court cited precedents relating to the right to counsel in judicial proceedings under the Sixth and Fourteenth Amendments, which had similarly been defined to include a right to appointed counsel for indigents and affirmative advice to defendants concerning the right. See 384 U.S. at 470-73.

⁷⁹ See pp. 8-9 *supra*. Of course the historical right against self-incrimination had nothing to do with representation by counsel, and did not entail a substantive right to counsel or admonitions concerning a right to counsel. See pp. 8-9, 25-32 *supra*.

⁸⁰ See *Minnesota v. Murphy*, 104 S. Ct. 1136, 1142-46 (1984) (in questioning of probationer by probation officer, as in questioning of witness at trial or before a grand jury, Fifth Amendment right affords no protection unless asserted on the initiative of the person questioned; *Miranda* warnings are not required); *Garner v. United States*, 424 U.S. 648, 654 n.9 (1976) (“an individual may lose the benefit of the [Fifth Amendment] privilege without making a knowing and intelligent waiver”); *Rogers v. United States*, 340 U.S. 367 (1951) (answer to incriminating question constituted waiver of the Fifth Amendment right by grand jury witness who was unaware of the existence of the right); *Powers v. United States*, 223 U.S. 303 (1912) (Fifth Amendment does not require that warnings be given to defendant at preliminary hearing); pp. 27-28 *supra* (description of same case).

⁸¹ A footnote in *Miranda* also declared that preventing an attorney from consulting with his client violates the Sixth Amendment right to the assistance of counsel, independent of any Fifth Amendment issue. See 384 U.S. at 465 n.35.

Concerns over equity of this sort could be met equally well by holding that no one has a right to counsel in custodial police interrogation, as the Court did in *Crooker v. California*, 357 U.S. 433 (1958), and *Cicenia v. Lagay*, 357 U.S. 504 (1958). See p. 32 *supra*. It may also be noted that the considerations of equity that the Court invoked in support of a broad definition of *Miranda*'s Fifth Amendment right to counsel are not given controlling effect in other Fifth Amendment contexts. For example, a witness summoned to testify at trial or before a grand jury has a right to refuse to answer incriminating questions, but he must assert that right on his own initiative. This can result in an advantage for witnesses who happen to know something about the Fifth Amendment, or who can afford to hire counsel to inform them about their rights prior to testifying, but the resulting inequity has not been regarded as constitutionally objectionable.⁸²

In terms of policy, the desirability of a broadly defined right to counsel at trial does not depend on concerns over discrimination against defendants based on knowledge or wealth, but is adequately supported by the consideration that few defendants could be assured of a fair trial without such representation.⁸³ In contrast, a right to counsel defined with the same breadth is not indispensable to the conduct of fair interrogations.⁸⁴

d. The Exclusion of Pre-Trial Silence

One of the innovations of the *Miranda* decision was the creation of a rule barring the use of a defendant's silence in custodial interrogation against him at trial. The majority rule in the states prior to *Miranda* had been to the contrary. See p. 33 *supra*. This new doctrine was announced in a footnote in *Miranda*, 384 U.S. 468 n.37, without supporting

⁸² See generally note 80 *supra*.

⁸³ See *Miranda*, 384 U.S. at 514 (Harlan, J., dissenting). Under existing arrangements, a defendant with superior knowledge or financial resources may use those advantages to get better legal assistance at trial than a defendant who lacks them, but this inequity has not been thought to require a prohibition of retaining defense counsel or otherwise expending a defendant's own funds in preparing a defense. It is considered sufficient if counsel arrangements provide reasonable assurance that defendants generally will have fair trials, though some, through fortunate personal circumstances, can get better assistance than others.

⁸⁴ See generally pp. 40-41 *supra* (regarding pre-*Miranda* ALI proposal); *Miranda*, 384 U.S. at 535 (White, J., dissenting).

argumentation. The only significant authority cited in support of it was *Griffin v. California*, 380 U.S. 609 (1965), which had held in the preceding year that the Fifth Amendment bars adverse comment on a defendant's silence at trial. See generally pp. 33-35 *supra*.

Miranda's rule on this point was inconsistent with the regular practice in criminal cases at the time of the Constitution, under which a defendant's refusal to answer questions at the preliminary examination could be disclosed at trial. Even assuming *Griffin v. California* to be valid on its own terms, the basic differences between the constitutional history relating to the questioning of defendants at trial and suspects prior to trial would suggest that something more than a citation to *Griffin* was called for to justify *Miranda's* conclusory assertion that admitting pre-trial silence unconstitutionally "penalizes" a defendant for remaining silent. See pp. 5-9, 33-34 *supra*.

3. The Expressed Openness to Alternatives

One of the criticisms raised at the time of the *Miranda* decision was that the Court's prescription of a procrustean set of rules for interrogations would stifle the ferment that was then underway in that area of the law, and foreclose the possibility of obtaining experience with alternative systems. This point was developed at some length in Justice Harlan's dissent in *Miranda* (384 U.S. at 523-24 & n.22):

In closing this . . . discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There is now in progress in this country a massive reexamination of criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association, under the chairmanship of Chief Judge Lumbard of the Court of Appeals for the Second Circuit; a distinguished study group of the American Law Institute, headed by Professors Vorenberg and Bator of the Harvard Law School; and the President's Commission on Law Enforcement and Administration of Justice, under the leadership of the Attorney General of the United States. Studies are also being conducted by the District of Columbia Crime Commission, the Georgetown Law Center, and by others equipped to do practical research. There are also signs that

legislatures in some of the States may be preparing to re-examine the problem before us

Of particular relevance is the ALI's drafting of a Model Code of Pre-Arraignment Procedure, now in its first tentative draft

It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past. But the legislative reforms when they come would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.

The *Miranda* majority responded to this objection as follows:

It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making. We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts Where rights secured by the

Constitution are involved, there can be no rule making or legislation which would abrogate them.⁸⁵

This response had two elements. One of them was the assertion that the Court should not be expected to defer to legislatures or advisory groups on matters of constitutional interpretation. This point would have had greater force if the Court's activity in *Miranda* had actually constituted interpretation of the Constitution in some serious sense. However, *Miranda's* system was inconsistent in every particular with the historical understanding of the Fifth Amendment right and repudiated the whole course of the Court's prior caselaw relating to self-incrimination. The *Miranda* majority did not promulgate a code of procedure for interrogations because the Constitution required that, but because it wanted to. It was reasonable to ask the Court to defer in the enactment of legislation to the bodies that exercise that power legitimately.

The second element in the response was the assertion that the Court would not insist on compliance with the particular procedures it had delineated, but would accept equally effective alternatives. Language to the same effect appeared at some other points in the decision. However, this show of openmindedness was illusory for a number of reasons.

First, while the Court stated explicitly that Congress and the state legislatures could depart from *Miranda*, the terms of the invitation suggested that they could not safely stray too far. It would not clearly be enough to adopt an alternative system that was as effective as *Miranda's* in ensuring that suspects were not subjected to coercive interrogations and that the statements obtained from them were voluntary and reliable.

⁸⁵ 384 U.S. at 490-91. Another long statement along the same lines appeared earlier in the decision, *id.* at 467:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we 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. Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, 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 [*Miranda*] safeguards must be observed.

Rather, any acceptable alternative would apparently have to compare favorably with *Miranda*'s system in "informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."

Second, the Court failed to offer any guidance concerning what alternative safeguards it might consider equally effective. Since the price of guessing wrong on this point could be the wholesale reversal of convictions that were obtained through the use of statements secured under an alternative system, there would have been a large element of risk involved in acting on the Court's invitation.

Third, there were internal inconsistencies in the *Miranda* decision that would have heightened the perceived risk of departing from the system it created. The final version of the opinion of the Court in *Miranda* reflected a compromise between Chief Justice Warren and Justice Brennan. The Chief Justice had not been disposed to tolerate any deviations from the procedural system he had devised. However, Justice Brennan objected to Warren's initial draft of the decision, stating that "I . . . do not think, as your draft seems to suggest, that there is only a single constitutionally required solution to the problems of testimonial compulsion inherent in custodial interrogation [S]hould we not leave Congress and the States latitude to devise other means (if they can) which might also create an interrogation climate which has the similar effect of preventing the fettering of a person's own will?"⁸⁶

Chief Justice Warren accommodated Justice Brennan by inserting language in the decision stating that equally effective alternatives would be acceptable. However, he did not really agree with this point, and the final opinion retained various arguments and characterizations which treated the *Miranda* rules as if they were constitutional requirements, or seemed to be designed to establish them as such.⁸⁷

Given the hedged terms of the invitation to adopt alternative systems, the absence of any discussion of acceptable alternatives, and the discrepancies between the Court's expressed openness to alternatives and specific argumentation in the decision, it is not surprising that no state acted on this invitation. When Congress acted two years later, it did not attempt to enact a substitute system of interrogation rules comparable to *Miranda*'s, but chose instead to overturn the decision.

⁸⁶ B. Schwartz, *supra* note 73, at 590-91.

⁸⁷ See *id.* at 589-93; pp. 53-57 *supra*.

B. The Aftermath of *Miranda*

1. Evidence of Damage to Law Enforcement

Following the *Miranda* decision, before-and-after studies or surveys were carried out in a number of cities which indicated that the implementation of *Miranda*'s system had a major adverse effect on the willingness of suspects to respond to police questioning.

For example, District Attorney (now Senator) Arlen Specter reported that an estimated 90 percent of arrested persons made statements to the police in Philadelphia prior to *Miranda* and *Escobedo v. Illinois*. Following *Escobedo* and a related appellate decision that resulted in the giving of certain warnings to arrestees, the proportion of arrestees making statements declined to 68 percent. Following the implementation of *Miranda*'s full system, the corresponding figure was 41 percent. In reporting these findings to a Senate Subcommittee, District Attorney Specter indicated that his office was looking for a suitable test case to secure a reconsideration of *Miranda* by the Supreme Court, and endorsed the enactment of legislation limiting or overruling *Miranda* as a means of obtaining such a reconsideration.⁸⁸

A second study, conducted by faculty members of the University of Pittsburgh Law School, observed a substantial reduction in the number of confessions.⁸⁹ Police detectives in Pittsburgh had for many years advised suspects of a right to remain silent, and shortly after the *Escobedo* decision they also began to advise suspects of a right to counsel. Notwithstanding this partial compliance with *Miranda*'s requirements prior to the *Miranda* decision, the proportion of suspects confessing in the crime categories studied fell from 48.5 percent prior to *Miranda* to 32.3 percent after *Miranda*.⁹⁰ Particularly great decreases occurred in the

⁸⁸ See *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 90th Cong., 1st. Sess. 200-19 (1967)* [hereafter cited as "Senate Hearings"].

⁸⁹ See Seeburger & Wettick, *Miranda in Pittsburgh -- A Statistical Study*, 29 U. Pittsburgh L. Rev. 1 (1967).

⁹⁰ See *id.* at 8, 12. The pre-*Miranda* interrogation policy had differed from *Miranda*'s system in not including an offer of free counsel and in providing the required information in the course of conversation with the suspect, rather than as a separate set of formal warnings at the start of the interrogation. Also, detectives would attempt to persuade a suspect who indicated that he wanted to remain silent or to be assisted by

categories of homicide and robbery, in each of which the number of confessions was roughly cut in half. Prior to *Miranda*, about 60 percent of suspected killers and robbers had confessed. After *Miranda*, about 30 percent did so.⁹¹

counsel to change his mind and make a statement.

The changes following *Miranda* included the new requirement that suspects be advised clearly of their rights prior to any questioning, and the rule that all questioning must cease if the suspect says that he wishes to remain silent or wants counsel. Once the new policy was in place, suspects in over 40 percent of the cases prevented themselves from being questioned at all by standing on their "right to remain silent." See *id.* at 10, 13.

⁹¹The results of other before-and-after studies and surveys were consistent with the conclusion that compliance with *Miranda*'s rules causes major reductions in the incidence of confessions and other statements. District Attorney Aaron Koota of Kings County, New York, reported that before *Miranda*, approximately 10 percent of suspects in the categories of homicide, robbery, rape, and felonious assault refused to make any statement, but that after *Miranda* the corresponding figure was 41 percent. See Senate Hearings, *supra* note 88, at 223. District Attorney Frank Hogan of New York County reported that in the six months preceding *Miranda*, 49 percent of the cases surveyed in his jurisdiction involved confessions or admissions of guilt, but in the six months following *Miranda* only 15 percent involved such statements. These figures related to almost all nonhomicide felony cases in New York that reached the grand jury stage. See *id.* at 1120.

District Attorney Evelle Younger of Los Angeles County reported that the percentage of felony complaints involving confessions, admissions, or other statements following *Miranda* was greater than the percentage of felony complaints involving confessions or admissions in a pre-*Miranda* survey. However, these findings had no significance because (1) the relevant utterances by suspects were characterized differently in the pre-*Miranda* and post-*Miranda* surveys ("confessions or admissions" versus "confessions, admissions, or other statements"), (2) the pre-*Miranda* survey explicitly cautioned against relying on its results because of its small sample and because of misunderstandings by the officers who filled out the survey forms, (3) the police in Los Angeles County were already advising suspects of a right to counsel and right to remain silent before *Miranda* on account of *Escobedo v. Illinois* and a related state decision, (4) the post-*Miranda* survey was limited to a three week period that almost immediately followed the *Miranda* decision, and (5) the surveys only related to cases that reached the complaint stage, and did not obtain any direct information concerning the incidence of statements in police interrogations. See Senate Hearings, *supra* note 88, at 341-52.

Empirical studies were also carried out in New Haven and the District of Columbia. The New Haven study obtained no comparable figures on the incidence of statements before and after *Miranda*. Both studies found that the police did not comply with *Miranda* in most of the cases in their post-*Miranda* samples, and were of no real value in assessing the effects of *Miranda*'s system. See *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L.J. 1519 (1967); Medalie, Zeitz, & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347 (1968).

Public attention was particularly focused on the *Miranda* decision by its effect on cases in which an interrogation had occurred prior to the decision, but in which the case had not been tried when *Miranda* was decided. *Miranda* was applied retroactively in these cases, *Johnson v. New Jersey*, 384 U.S. 719, 721 (1966), so that confessions and statements obtained in interrogations preceding *Miranda* could not be used in trials occurring after *Miranda*. This affected a large body of pending cases, and resulted in widely publicized instances in which killers, rapists, and other serious offenders were freed.⁹² For example, one case of this sort involved a Brooklyn resident, Jose Suarez, who had slaughtered his wife and five small children with a knife, but had to be let go when his confession became inadmissible. The judge stated as he released Suarez: "This is a very sad thing. It is so repulsive it makes one's blood run cold and any decent human being's stomach turn to let a thing like this out on the street."⁹³

2. The Congressional Reaction -- Enactment of 18 U.S.C. § 3501

a. Proceedings in Congress

In Congress, hearings on the *Miranda* problem were held in 1967 before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee.⁹⁴ Senator McClellan played the leading role in the hearings, and in promoting the legislation that was ultimately enacted as 18 U.S.C. § 3501. The legislation was designed to overrule *Miranda v. Arizona* and certain other decisions that were perceived to be detrimental to law enforcement. It directed the courts, in federal and District of Columbia prosecutions, to admit confessions under the pre-*Miranda* voluntariness standard. Whether a person had been advised of his rights prior to questioning was to be considered by the court as evidence in determining whether coercion had occurred, but would have no significance beyond that. The rationale of this reform was stated as follows in the Senate Committee Report:

⁹² See Senate Hearings, *supra* note 88, at 8-9, 201-02, 207-08, 225-26, 343, 573-74, 620-25, 679-80, 871-72; F. Graham, *supra* note 21, at 184-92.

⁹³ See Senate Hearings, *supra* note 88, at 8-9.

⁹⁴ See Senate Hearings, *supra* note 88.

[C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities. The traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants simply must be restored

The case of *Escobedo v. Illinois* . . . set the stage for another most disastrous blow to the cause of law enforcement This case . . . formed the basis for . . . *Miranda v. Arizona* In *Miranda*, the Supreme Court held that an otherwise voluntary confession . . . could not be used in evidence unless a fourfold warning had been given

The committee is convinced that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement The unsoundness of the majority opinion was forcefully shown by the four dissenting justices, who also predicted the dire consequences of overruling what theretofore had been the law of the land

[The *Miranda*] decision was an abrupt departure from precedent extending back at least to the earliest days of the Republic. Up to the time of the rendition of this 5-to-4 opinion, the "totality of circumstances" had been the test in our State and Federal courts in determining the admissibility of incriminating statements Mr. Justice White's dissent . . . demonstrates beyond question that . . . warnings as to constitutional rights were not required by the Constitution, and that the sole test of admissibility should be "totality of circumstances" as bearing on voluntariness

The committee is of the view that the [proposed] legislation . . . would be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws. By the express provisions of the proposed legislation the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically enumerated factors which historically enter into such a determination.

Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors

The committee is aware that a few have expressed the view that legislation by Congress restoring the voluntariness test to the admissibility of confessions and incriminating statements would be declared unconstitutional, on the ground that the provisions do not measure up to the rigid standards set forth in *Miranda*. The committee, however, . . . is also aware that the opinions of the four dissenting Justices clearly indicate that [none] of them would consider these provisions unconstitutional

The committee feels that it is obvious from the opinion of Justice Harlan and other dissenting Justices . . . that the overwhelming weight of judicial opinion in this country is that the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right. No one can predict with any assurance what the Supreme Court might at some future date decide if these provisions are enacted. The committee has concluded that this approach to the balancing of the rights of society and the rights of the individual served us well over the years, that it is constitutional and that Congress should adopt it. After all, the *Miranda* decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself. The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that this legislation would be upheld.⁹⁵

The Senate Judiciary Committee voted out the anti-*Miranda* legislation as part of Title II of the Omnibus Crime Control and Safe Streets Act, a broad criminal law reform package that included the creation of a system of federal law enforcement assistance for states and localities. The original version of Title II was not limited to overruling *Miranda* in federal prosecutions, but would also have divested the Supreme Court and other federal courts of jurisdiction to review state court decisions admitting confessions, and would have abolished federal

⁹⁵S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2123-38.

habeas corpus review of state judgments.⁹⁶ These proposals were debated on the Senate floor over a period of three weeks.⁹⁷

A compromise was eventually reached under which the portions of the proposal limiting federal jurisdiction were deleted, but the provisions repealing *Miranda* in federal cases were retained. The proponents of the legislation were satisfied that this would be adequate to achieve the essential objective of securing a reconsideration of the *Miranda* decision by the Supreme Court.⁹⁸ Following passage by the Senate, the bill went directly to the floor in the House of Representatives and was passed after relatively brief debate on two successive days.⁹⁹

b. The Statute

Section 3501 of Title 18 reads as follows:

§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time

⁹⁶ See 114 Cong. Rec. 11189 (1968). Title II also contained provisions overruling the *McNabb-Mallory* line of decisions, see pp. 21-22 *supra*, and the decision in *United States v. Wade*, 388 U.S. 218 (1967), which created a right to counsel at police line-ups. These provisions were ultimately enacted as 18 U.S.C. §§ 3501(c) and 3502.

⁹⁷ See 114 Cong. Rec. 11200-07, 11228-30, 11234-35, 11593-97, 11611-13, 11740-47, 11891-907, 12457-75, 12477-81, 12798-822, 12829-36, 13202-03, 13652-56, 13845-67, 13989-14084, 14129-59, 14162-84.

⁹⁸ See F. Graham, *supra* note 21, at 319-20, 327-29; 114 Cong. Rec. 14156-57, 14171-84.

⁹⁹ See 114 Cong. Rec. 16065-78, 16271-300.

elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the abovementioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person

who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

The first sentence of subsection (a) overrules *Miranda* and restores the voluntariness standard for the admission of confessions in federal and District of Columbia prosecutions. The remainder of that subsection provides for an initial determination concerning the voluntariness of a confession by the judge outside the presence of the jury, consistent with the Supreme Court's decision in *Jackson v. Denno*, 378 U.S. 368 (1964).¹⁰⁰

Subsection (b) lists various factors, including the giving of warnings, which are to be considered by the trial judge. The status of these factors under subsection (b) is the same as their status under the pre-*Miranda* voluntariness caselaw. As the last sentence of the subsection indicates, they are not preconditions on the admission of confessions, but simply evidence relevant to the determination of voluntariness.¹⁰¹

Subsection (c) overrules the *McNabb-Mallory* line of decisions, providing that delay of up to six hours in the production of an arrested

¹⁰⁰ See generally p. 36 *supra*; Senate Hearings, *supra* note 88, at 297.

¹⁰¹ See pp. 70-71 & n. 102 *infra*; S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2137 ("By the express provisions of the proposed legislation the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically enumerated factors which historically enter into such a determination. Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors."). As the Senate Committee Report noted, the factors listed in § 3501(b) entered into the determination of voluntariness in the pre-*Miranda* caselaw. See, e.g., *Lyons v. Oklahoma*, 322 U.S. 596, 604 (1944) (admonition that suspect need not make statement and that anything said would be used against him relevant factor); *Gallegos v. Nebraska*, 342 U.S. 55, 65 (1951) (detention without charge, delay in production before magistrate, and lack of counsel relevant factors); *Stein v. New York*, 346 U.S. 156, 185-87 (1953) (delay in arraignment and knowledge of rights relevant factors); *Crooker v. California*, 357 U.S. 433, 438 (1958) (denial of counsel, admonition that suspect need not answer questions, and knowledge of right to be silent relevant factors); *Haynes v. Washington*, 373 U.S. 503, 516-17 (1963) (absence of warnings concerning right to remain silent, potential adverse use of statements, and entitlement to counsel relevant factors).

person before a magistrate does not require the exclusion of a confession obtained in that period. *See generally* pp. 21-22 *supra*. Subsection (d) provides that the statute does not bar the admission of any voluntarily given confession that is not the product of a custodial interrogation. Subsection (e) defines "confession" to include any self-incriminating statement.

There was never any doubt concerning the purpose and meaning of this statute. The enacted version of § 3501 was practically the same as the original anti-*Miranda* bill introduced by Senator McClellan, S. 674.¹⁰² Throughout the Senate hearings on this bill, Senator McClellan and other participants expressed the understanding that the bill would overturn *Miranda* and restore the pre-*Miranda* voluntariness standard.¹⁰³ The Senate Committee Report's statement on proposed § 3501 was essentially a lengthy attack on *Miranda* and related decisions. As noted above, it contained numerous explicit statements that the point of the statute was to restore the law to its pre-*Miranda* state.¹⁰⁴ The Senators who dissented from the Committee Report had the same view of the purpose and effect of the legislation:

The Court emphasized in *Miranda* that the procedural safeguards established in the case are in addition to the traditional voluntariness test [S]ection 3501 specifically dispenses with these safeguards and in lieu thereof establishes voluntariness as the sole test of the admissibility of a confession.¹⁰⁵

¹⁰²See Senate Hearings, *supra* note 88, at 74. The only significant changes that occurred in § 3501 on the way to enactment were the addition of a six hour time limit to subsection (c)'s repeal of the *McNabb-Mallory* rule, *see generally* 114 Cong. Rec. 14184-86 (1968), and the addition of a second sentence to subsection (b) to ensure that the Supreme Court would not be able to defeat the purpose of § 3501 by reading *Miranda*'s requirements into it, *see* Senate Hearings, *supra* note 88, at 925 (statement of Attorney General Thomas C. Lynch of California).

¹⁰³See, e.g., Senate Hearings, *supra* note 88, at 110-11 (Senators Stennis and McClellan), 185 (Senator McClellan), 194 (Senator McClellan), 269-70 (Judge Homer L. Kreider), 579 (Senator McClellan), 619 (National District Attorneys Association), 849 (Senator McClellan), 1173 (American Civil Liberties Union), 1174-75 (Senator McClellan), 1176-77 (American Civil Liberties Union); *accord*, 113 Cong. Rec. 1583-85, 1590-91 (floor statement of Senator McClellan on introducing S. 674).

¹⁰⁴See pp. 64-66 *supra*.

¹⁰⁵S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 22111. The discussion of proposed 18 U.S.C. § 3501(a)-(b) in the

The same understanding of § 3501 was reiterated endlessly throughout the weeks of debate on Title II of the Omnibus Crime Control and Safe Streets Act on the Senate floor.¹⁰⁶ The same understanding was also reflected in numerous editorials, articles, statements and letters relating to Title II that were generated during Congress's consideration of the proposal, many of which were put into the Congressional Record in the course of the floor debates.¹⁰⁷ The same understanding was presented to the House of Representatives in the course of its relatively brief consideration of the legislation.¹⁰⁸

dissenters' statement was entitled "Confessions -- The Repeal of Miranda." The dissenters noted that "[s]ection 3501(a) . . . makes voluntariness the sole criterion of the admissibility of a confession" and that "[s]ection 3501(a) and (b) are squarely in conflict with the Supreme Court's decision in *Miranda v. Arizona*." They went on to defend the *Miranda* decision. See *id.* at 2210-15.

¹⁰⁶ See, e.g., 114 Cong. Rec. 11206-07 (Senator McClellan), 11594 (Senator Morse), 11611-13 (Senator Thurmond), 11740 (Senator Tydings), 11745 (Senators McClellan and Brooke), 11891 (Senator Tydings), 11894 (Senator Tydings), 13202-03 (Senator Scott), 13846-49 (Senator McClellan), 13990-91 (Senator Tydings), 14082 (Senator Tydings), 14136 (Senator Fong), 14158-59 (Senator Hart), 14167 (Senator McIntyre).

¹⁰⁷ See, e.g., 114 Cong. Rec. 12799, 13652-55 (editorials of Richmond News Leader, Washington Daily News, New York Times, Salt Lake Tribune, and Washington Post; articles from Washington Star and Christian Science Monitor); *id.* 13851-66 (letters from law school professors); *id.* 16067-69 (analysis of Title II and memorandum of Legislative Reference Service of Library of Congress).

¹⁰⁸ See, e.g., 114 Cong. Rec. 16066 (remarks of Rep. Celler) ("Title II would turn the clock backward to the day before Mallory and Miranda and make 'voluntariness' the sole test as to the validity of a confession"); *id.* 16074 (remarks of Rep. Corman) ("The language of [title II] attempts to abolish the rights and safeguards established in the famed Miranda case"); *id.* 16278 (remarks of Rep. Poff) ("[T]itle II . . . says that the absence of warnings required by Miranda . . . may be considered as one element in determining the definition of voluntariness but that this need not be the controlling factor"); *id.* 16279 (remarks of Rep. Taylor) ("In Miranda [v.] Arizona, the Supreme Court . . . strengthened the rights of the criminal and restricted the power of the police The passage of the motion before us is a rebuke to the Supreme Court. It reverses decisions which had virtually eliminated confession as a law-enforcement instrument"); *id.* 16296 (remarks of Rep. Randall) ("Title II simply provides that confessions may be voluntarily given, notwithstanding the line of decisions announced by the U.S. Supreme Court"); *id.* 16297-98 (remarks of Rep. Pollock) ("[T]itle II will modify . . . the 1966 Miranda decision, by permitting the use of a 'voluntary' confession even if the suspect had not been specifically warned of his constitutional rights").

Some of the participants in the House debate evidently knew less than their Senate counterparts about the content of the proposed legislation or its relationship to prior law, and made confused statements. See, e.g., *id.* 16276 (remarks of Rep. MacGregor) (stating that § 3501 would return the law to its pre-*Miranda* state but stating

In short, it is clear beyond all question that 18 U.S.C. § 3501, if valid, overrules *Miranda v. Arizona* and restores the pre-*Miranda* voluntariness standard for the admission of incriminating statements obtained in custodial interrogations.

3. The Abortive Implementation of § 3501

Section 3501 was not used immediately after its enactment as a result of the hostility of the incumbent Administration. President Johnson's signing statement on the Omnibus Crime Control and Safe Streets Act indicated that he did not believe that the statute would be constitutional under its intended interpretation, and stated disingenuously¹⁰⁹ that it was ambiguous:

Title II of the legislation deals with certain rules of evidence only in Federal criminal trials -- which account for only 7 percent of the criminal felony prosecutions in this country. The provisions of Title II, vague and ambiguous as they are, can, I am advised by the Attorney General [Ramsey Clark], be interpreted in harmony with the Constitution and Federal practices in this field will continue to conform to the Constitution.

Under long-standing policies, for example, the Federal Bureau of Investigation and other Federal law enforcement agencies have consistently given suspects full and fair warning of their constitutional rights. I have asked the Attorney General and the Director of the Federal Bureau of Investigation to assure that these policies will continue.¹¹⁰

inconsistently that courts would have discretion to apply the *Miranda* rule in particular cases); *id.* 16285 (remarks of Rep. Machen) (assuming that the jurisdiction-limiting provisions had been retained in the Senate-passed version of Title II). However, the House debate as a whole, like the Senate debate, overwhelmingly expressed the understanding that the effect of § 3501 was simply to overrule *Miranda*.

¹⁰⁹The Administration knew as well as everyone else what § 3501 was meant to do. See Senate Hearings, *supra* note 88, at 81-82, 357-58 (letter of Attorney General Ramsey Clark noting conflict between S. 674 and *Miranda*; bill would only be constitutional if *Miranda*'s requirements were "read into" it or added as a "constitutional gloss," but if this were done it would be superfluous).

¹¹⁰4 *Weekly Compilation of Presidential Documents* 983 (June 24, 1968).

Attorney General Clark then instructed the U.S. Attorneys to offer in evidence only confessions that were obtained in conformity with *Miranda*.¹¹¹

This policy was reversed in the following year by Attorney General Mitchell, who issued a directive to federal prosecutors which stated that § 3501 could be invoked in certain circumstances in which *Miranda* was not complied with.¹¹² A number of U.S. Attorneys thereafter attempted to secure decisions upholding § 3501 as an overruling of *Miranda*, and a substantial number of reported decisions resulted. In most instances the courts either found it unnecessary to address the question on the ground that *Miranda*'s requirements had been observed, or side-stepped the issue in some other way.¹¹³

In *United States v. Crocker*, 510 F.2d 1129 (10th Cir. 1975), however, the district judge had not followed *Miranda* in determining the admissibility of a defendant's pre-trial statements, but had applied the standards of § 3501 instead. In the preceding year, the Supreme Court had indicated in *Michigan v. Tucker*, 417 U.S. 433 (1974), that it no longer believed that *Miranda* warnings are constitutional requirements even in the contingent sense specified in the *Miranda* decision.¹¹⁴ Relying

¹¹¹ See 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).

¹¹² See *id.* at 312. The memorandum is reprinted in 115 Cong. Rec. 23236-38 (1969). It took the position that *Miranda* warnings should be given as a matter of standard practice, notwithstanding § 3501, and that proper use of the statute would be confined to cases in which a person was aware of his Fifth Amendment rights but in which there was "a less than perfect warning or a less than conclusive waiver." According to Associate Deputy Attorney General Ronald Gainer, who drafted the Mitchell memorandum, it was formulated in these restrictive terms because it seemed unlikely at that time that the Supreme Court would countenance any greater departure from *Miranda*. However, there was no basis for these restrictions in the statute or its legislative history, and subsequent decisions of the Supreme Court indicate that the Court would now uphold § 3501 under its intended interpretation.

¹¹³ See *United States v. Vigo*, 487 F.2d 295 (2d Cir. 1973); *United States v. Marrero*, 450 F.2d 373, 379 (2d Cir. 1971) (Friendly, J., concurring); *Ailsworth v. United States*, 448 F.2d 439, 441 (9th Cir. 1971); *United States v. Lamia*, 429 F.2d 373, 377 (2d Cir. 1970); see also *United States v. Crook*, 502 F.2d 1378, 1380-81 (3d Cir. 1974). See generally Gandara, *supra* note 111, at 313-16.

¹¹⁴ The *Miranda* decision predicated its system on the fiction that the Fifth Amendment would necessarily be violated if statements were obtained in a custodial interrogation without observance of *Miranda*'s rules or equally effective alternative rules. See pp.

on *Michigan v. Tucker*, the Tenth Circuit in *United States v. Crocker* found rather easily that § 3501 is valid and concluded that the defendant's statements had been properly admitted.¹¹⁵

There has apparently been no effort to secure a judicial determination of the validity of § 3501's overruling of *Miranda* following the initial favorable decision on this point in *United States v. Crocker*.

C. Caselaw Development Subsequent to *Miranda*

Within a few years of the *Miranda* decision, most of the Justices who had subscribed to the opinion of the Court in that case were gone, and a new majority arose in the Court that knew not *Miranda*. Given the status of the *Miranda* decision as an expression of an activist temper that characterized a bare majority of the Court during the 1960's, it is not surprising that the current Court has been disinclined to extend *Miranda*, and has cut back on its potential scope in a number of areas. The persistence of *Miranda*'s general system appears to be based on *stare decisis* and institutional inertia, rather than on any positive commitment of the Court to its particular set of interrogation rules.¹¹⁶ A number of the Court's restrictive decisions relating to *Miranda* can be described briefly.

First, the Court has rebuffed efforts to extend *Miranda* beyond custodial interrogations. *Miranda*'s rules have accordingly been held to be inapplicable in connection with the questioning of a probationer by a probation officer concerning a murder committed by the probationer; the questioning of a targeted witness before a grand jury; the questioning of a suspected burglar by a police officer, where the suspect would have been

47-51, 53-54 *supra*. This fiction was repudiated by the Court in *Michigan v. Tucker*, which characterized *Miranda*'s rules as prophylactic, and found that the defendant in the case, who had not received full *Miranda* warnings, had not been deprived of any constitutional right.

¹¹⁵ See 510 F.2d at 1136-38. The court's finding that § 3501 is valid was an alternative holding. The court also found that *Miranda* had been complied with. See *id.* at 1138.

¹¹⁶ See Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 99-101, 168-69.

free to leave the interview; and the questioning of a suspect at his home by IRS officers concerning a criminal tax fraud.¹¹⁷

Second, the Court has held that a defendant's pre-trial statements obtained in violation of *Miranda* can be used for purposes of impeachment, if the defendant takes the stand and gives an inconsistent story at trial. This rule was established by the decisions in *Harris v. New York*, 401 U.S. 222 (1971), in which the defendant was not given full *Miranda* warnings, and in *Oregon v. Hass*, 420 U.S. 714 (1975), in which statements were obtained from the defendant after he requested counsel. In finding such statements admissible for impeachment in *Harris*, 401 U.S. at 224, the Court rejected contrary dictum in the *Miranda* decision, 384 U.S. at 476-77.

Third, in *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court showed some flexibility about a later renewal of questioning after a suspect says that he does not want to talk. The *Miranda* decision had stated that questioning must cease immediately in such a case, but had said nothing about whether it could be resumed later on. In *Mosley*, the defendant initially refused to be questioned about his involvement in a robbery. About two hours later, however, a different officer presented Mosley with an alleged statement by an accomplice that Mosley had been the trigger man in an unrelated homicide. Mosley then made an inculpatory statement. The Court found this statement to be admissible under the facts of the case.

Several post-*Miranda* developments merit more detailed analysis. The most important is the Supreme Court's rejection of the essential premise of the *Miranda* decision in *Michigan v. Tucker*, 417 U.S. 433 (1974), and later decisions. There have also been significant developments relating to the use of pre-trial silence at trial and to the right to counsel at pre-trial interrogation.

¹¹⁷ See *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984) (questioning by probation officer); *United States v. Mandujano*, 425 U.S. 564 (1976) (plurality opinion) (grand jury witness); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (non-custodial police interrogation of burglary suspect); *Beckwith v. United States*, 425 U.S. 341 (1976) (questioning at suspect's home by IRS investigators).

1. The Non-Constitutional Status of Miranda's System

a. The Decisions in *Michigan v. Tucker*, *New York v. Quarles*, and *Oregon v. Elstad*

The *Miranda* decision did not hold that the rules it promulgated were required by the Fifth Amendment, but did hold that the Fifth Amendment would necessarily be violated if statements were obtained in a custodial interrogation in which *Miranda*'s rules or equally effective alternative safeguards were not observed. The current Court, however, has rejected the view that compliance with *Miranda* is constitutionally required even in this contingent sense.

The first case on this point was *Michigan v. Tucker*,¹¹⁸ which arose from a rape and battery committed by the defendant Tucker. Tucker was questioned without full *Miranda* warnings, and gave exculpatory responses.¹¹⁹ However, his statements led the police to a witness, Henderson, who ultimately gave testimony at trial that was damaging to Tucker. The question was whether Henderson's testimony should have been excluded, since it was obtained indirectly through an interrogation that was not in compliance with *Miranda*.

In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court had held that evidence which is the "fruit" of a Fourth Amendment violation is inadmissible. The Court distinguished this precedent on the ground that despite the violation of *Miranda*, there had been no violation of a constitutional right of the defendant Tucker. The Court explained (417 U.S. at 443-46):

[T]he Court in *Miranda*, for the first time, expressly declared that the Self-Incrimination Clause was applicable to state interrogations at a police station To supplement this new doctrine, and to help police officers conduct interrogations without facing a continued risk that valuable evidence would

¹¹⁸ 417 U.S. 433 (1974) (per Justice Rehnquist, joined by the Chief Justice and Justices Powell, Blackmun, and Stewart, with Justices Brennan, Marshall and White concurring in the judgment). Justice Douglas dissented.

¹¹⁹ The warnings were incomplete because the interrogation occurred before the *Miranda* decision. However, Tucker had not been tried by the time of the decision, and *Miranda* was applied retroactively in such cases. See p. 64 *supra*.

be lost, the Court in *Miranda* established a set of protective guidelines, now commonly known as the *Miranda* rules [These were a] series of recommended "procedural safeguards" The Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected A comparison of the facts in this case with the historical circumstances underlying the privilege against compulsory self-incrimination strongly indicates that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda* Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in *Miranda* This Court has also said . . . that the "fruits" of police conduct which actually infringed a defendant's Fourth Amendment rights must be suppressed. But we have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege. Thus, in deciding whether Henderson's testimony must be excluded, there is no controlling precedent of this Court to guide us.

The Court then went on to determine that, as a matter of policy, the costs of applying *Miranda*'s exclusionary rule in the type of fact situation presented in the case would outweigh any benefit from doing so.

The essential departure from *Miranda* in *Michigan v. Tucker* was the Court's conclusion that the Fifth Amendment had not been violated, though the police had not fully complied with *Miranda* and had not observed any alternative system of safeguards. As discussed earlier, *Miranda* was predicated on the fiction that compulsion in violation of the

Fifth Amendment necessarily occurs in such cases. *Michigan v. Tucker* accordingly repudiated the doctrinal basis of the *Miranda* decision.¹²⁰

This changed perspective was given an application of greater practical significance in the case of *New York v. Quarles*.¹²¹ In *Quarles*, police officers were approached by a woman who told them that she had been raped by an armed man, and that the man had gone into a nearby supermarket. Quarles was apprehended in the supermarket, and the arresting officers, on finding that he was wearing an empty shoulder holster, asked him where his gun was. In a subsequent prosecution for criminal possession of a weapon, the state courts excluded Quarles' response identifying the location of the gun he had discarded because he had not been given *Miranda* warnings.

The Supreme Court reversed, finding that the danger created by an unlocated firearm justified the creation of a "public safety" exception to *Miranda* under the facts of the case. As in *Michigan v. Tucker*, the Court rejected the contention that the absence of warnings implied that compulsion in violation of the Fifth Amendment had taken place.

¹²⁰ See Sonenshein, *Miranda and the Burger Court: Trends and Countertrends*, 13 Loyola U. L.J. 405, 407-08, 425-28 (1982) ("[T]he authority now exists to overrule *Miranda* Seemingly, the Court [in *Michigan v. Tucker*] utterly destroyed both *Miranda*'s rationale and its holding Somehow, *Miranda* survived, even though the Court left it no legitimate, articulable legal source or basis The Court . . . ignored or rejected the core rationale of *Miranda*, that custodial interrogation is inherently coercive and that only compliance with the *Miranda* warnings procedure or its equivalent can dispel the coercion"); Stone, *supra* note 116, at 118-20, 123 ("Mr. Justice Rehnquist's conclusion that there is a violation of the Self-Incrimination Clause only if a confession is involuntary . . . is an outright rejection of the core premises of *Miranda* The implications of . . . the [*Michigan v. Tucker*] opinion are potentially devastating for *Miranda*. The Court deprived *Miranda* of a constitutional basis but did not explain what other basis for it there might be. Thus, *Tucker* seems certainly to have laid the groundwork to overrule *Miranda*"); see also *United States v. Crocker*, 510 F.2d 1129, 1137 (10th Cir. 1975) ("We believe that *Michigan v. Tucker*, . . . although not involving the provisions of [18 U.S.C.] § 3501 . . . did, in effect, adopt and uphold the constitutionality of the provisions thereof").

¹²¹ 104 S. Ct. 2626 (1984) (per Justice Rehnquist, joined by the Chief Justice and Justices White, Powell, and Blackmun). Justices Marshall, Brennan, and Stevens dissented. Justice O'Connor dissented in part, but her dissent was based on the concern that a "public safety" exception would not provide sufficiently definite guidance to the police and would foster litigation. She subsequently authored the opinion in *Oregon v. Elstad*, 105 S. Ct. 1285 (1985), which was emphatic about the non-constitutional status of *Miranda*'s rules. See *id.* at 1291-93.

Finally, in *Oregon v. Elstad*,¹²² the Court held that a confession obtained after proper *Miranda* warnings is not rendered inadmissible on the ground that it is derived from or motivated by an earlier inculpatory statement that was obtained without *Miranda* warnings. In reaching this conclusion, the Court again expressly rejected the notion that a violation of *Miranda* necessarily entails a violation of the Fifth Amendment. As in *Michigan v. Tucker*, the Court distinguished earlier decisions holding the “fruits” of constitutional violations to be inadmissible on the ground that the defendant had not been subjected to compulsion in violation of the Fifth Amendment despite the non-compliance with *Miranda*.

b. The Anomaly of *Miranda*’s Survival

These decisions evidence the Supreme Court’s willingness to accept incremental restrictions of *Miranda*, and may portend a receptivity to further limitations in the future. In *New York v. Quarles*, for example, the Court found that the hazard created by an unlocated firearm in a public place outweighs the value of applying *Miranda*’s exclusionary rule. Leaving a criminal’s gun at large creates a danger to the public, but leaving the criminal who wields the gun at large creates an even greater danger. Considerations of this sort might be sufficient in the future to persuade the Court to recognize other limitations on *Miranda* in light of countervailing concerns for protection of the public.

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 caselaw, no violation of the Fifth Amendment occurs at the interrogation in such a case, and the trial judge would not violate the Fifth Amendment in admitting the resulting statements. Nevertheless, *Miranda* requires that they be excluded.

In connection with state proceedings, this result is incomprehensible in relation to the Supreme Court’s traditional view of its relationship to the state courts. The Court has always rejected the idea that it has the authority to impose extra-constitutional requirements on the state courts. Yet applying *Miranda* in such a case requires a state court to refrain from

¹²² 105 S. Ct. 1285 (1985) (per Justice O’Connor, joined by the Chief Justice and Justices White, Blackmun, Powell, and Rehnquist). Justices Brennan, Marshall, and Stevens dissented.

an action -- the admission of the suspect's voluntary statements -- that the Constitution permits.

Superficially, this problem is less acute in relation to federal proceedings, since the Supreme Court has asserted a supervisory authority to prescribe non-constitutional rules of evidence for the lower federal courts. However, the Court's supervisory authority only operates in areas in which Congress has left the Court with discretion, and is subordinate to Congress's exercise of the legislative power. In 18 U.S.C. § 3501, Congress has mandated that voluntary statements be admitted despite non-compliance with *Miranda*'s rules. Applying *Miranda* in such a case accordingly requires a federal court to violate an Act of Congress, though complying with the Act would involve no violation of a constitutional right of the defendant.

There is no real explanation for the persistence of *Miranda* in light of these considerations, aside from the fact that the Supreme court has not yet faced up to them. If the Court were to address these issues, it could preserve *Miranda* only by avowing a supervisory power over the state courts, and by avowing an authority superior to that of Congress to exclude evidence in federal proceedings in which its admission is required by statute and consistent with the Constitution.

2. The Use of Pre-Trial Silence

In *Harris v. New York* and *Oregon v. Hass*, discussed at p. 75 *supra*, the Supreme Court held that pre-trial statements obtained in violation of *Miranda* can be used at trial for impeachment, despite contrary dictum in the *Miranda* decision. This naturally raised the question whether a defendant's silence in custodial interrogation can be used for impeachment, notwithstanding the dictum in *Miranda*, 384 U.S. at 479 n.48, which asserted that the prosecution cannot use such silence at trial. See generally pp. 32-34, 57-58 *supra*.

The Supreme Court had been presented with an analogous question, forty years before *Miranda*, in the case of *Raffel v. United States*, 271 U.S. 494 (1926). *Raffel* involved a defendant who failed to take the stand at trial. On re-trial for the same offense, *Raffel* did take the stand, and the prosecutor used his silence at the earlier trial to impeach him in the course of cross-examination. Although adverse comment by the prosecutor at the initial trial on the defendant's failure to take the stand would

clearly have been improper,¹²³ the Court held that it was consistent with the Fifth Amendment and federal statutory law to use Raffel's earlier silence for impeachment at the later trial.

Nevertheless, the Court held in *Doyle v. Ohio*¹²⁴ that a defendant's silence following the receipt of *Miranda* warnings cannot be used even for purposes of impeachment. The Court did not base this decision on *Miranda*'s theory that the admission of pre-trial silence unconstitutionally "penalizes" a person for remaining silent. Rather, the Court took the position that the *Miranda* warnings implicitly represent to a suspect that he will suffer no adverse consequences of any sort for remaining silent. Violating this representation by later using a defendant's silence for impeachment would amount to a denial of due process:

The State pleads necessity as justification for the prosecutor's action in these cases. It argues that the discrepancy between an exculpatory story at trial and silence at time of arrest gives rise to an inference that the story was fabricated somewhere along the way, perhaps to fit within the seams of the State's case as it was developed at pretrial hearings. Noting that the prosecutor usually has little else with which to counter such an exculpatory story, the State seeks only the right to cross-examine a defendant as to post-arrest silence for the limited purpose of impeachment

[W]e have concluded that the *Miranda* decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights . . . require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested

¹²³ Such comment is barred by statute in federal proceedings. See pp. 33-34 *supra*.

¹²⁴ 426 U.S. 610 (1976) (per Justice Powell, joined by the Chief Justice and by Justices Brennan, Stewart, White, and Marshall). Justices Stevens, Blackmun, and Rehnquist dissented.

Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.¹²⁵

Justice Stevens, in dissent, noted sensibly that a defendant who remains silent in reliance on a representation he discerns in the *Miranda* warnings is free to offer that explanation at trial, but the majority was not persuaded.

Consistent with the rationale of the decisions in *Doyle v. Ohio* and *Raffel v. United States*, the Court has subsequently held that there is no problem with admitting pre-trial silence for impeachment where the defendant has not been given *Miranda* warnings. Thus, in *Jenkins v. Anderson*,¹²⁶ the Court held that the defendant's failure to come forward to the police with his story during a two week period between the commission of the crime and his arrest could be used to attack the credibility of his trial testimony. Similarly, in *Fletcher v. Weir*,¹²⁷ the Court held that the silence of a suspect in custody prior to his receipt of *Miranda* warnings can be admitted for impeachment (455 U.S. at 605-07):

The significant difference between the present case and *Doyle* is that the record does not indicate that respondent Weir received any *Miranda* warnings during the period in which he remained silent immediately after his arrest In *Jenkins*, as in other post-*Doyle* cases, we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him

¹²⁵ 426 U.S. at 616-18.

¹²⁶ 447 U.S. 231 (1980) (per Justice Powell, joined by the Chief Justice and Justices White, Blackmun, and Rehnquist). Justice Stewart concurred in part and concurred in the judgment. Justice Stevens concurred in the judgment. Justices Marshall and Brennan dissented.

¹²⁷ 455 U.S. 603 (1982). The decision was per curiam. Justices Brennan and Marshall objected to the disposition of the case without argument.

In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand.

In sum, use of a defendant's pre-trial silence is currently barred in most cases in which it might be useful by the Supreme Court's decision in *Doyle v. Ohio*. However, since *Doyle* depends on an implicit representation that the Court has discerned in the *Miranda* warnings, it could be made inapplicable by reformulating the warnings so that they could not reasonably be understood as carrying such a representation, or by advising suspects explicitly that refusals to answer can be admitted in evidence or used against them.¹²⁸

In light of *Jenkins v. Anderson* and *Fletcher v. Weir*, there should then be no constitutional problem with using a defendant's silence while in police custody to impeach his testimony at trial.¹²⁹ The question would remain whether pre-trial silence can be admitted if the defendant fails to take the stand. However, since the only contrary authority on this point is gratuitous dictum in the *Miranda* decision, announced in a footnote without supporting argumentation, there would be no direct precedential impediment to finding that a defendant's pre-trial silence can be disclosed in such cases as well.¹³⁰

¹²⁸For example, an additional admonition along the following lines might be given: "Whether or not you choose to talk, the occurrences at this interrogation may be disclosed at trial," or: "If you choose to remain silent, that fact may cast doubt on any story or explanation you offer later on."

¹²⁹In *United States v. Hale*, 422 U.S. 171 (1975), the Court excluded use of a federal defendant's pre-trial silence following the receipt of *Miranda* warnings as an evidentiary matter. This was a non-constitutional case decided under the Court's supervisory power. See *Doyle v. Ohio*, 426 U.S. at 617-18 n.8. A change in the warnings to avoid the constitutional problem under *Doyle v. Ohio* would accordingly not necessarily change the rule applied in federal proceedings. However, since the court in *United States v. Hale* attached some weight to the fact that the defendant might have remained silent in reliance on the *Miranda* warnings, the Court might be willing to reconsider or distinguish *Hale* if the warnings were formulated differently.

¹³⁰The Supreme Court has not endorsed *Miranda*'s dictum on this point in any subsequent decision. In *Wainwright v. Greenfield*, No. 84-1480 (Jan. 14, 1986), the Court held that pre-trial silence following *Miranda* warnings cannot be admitted as evidence in chief -- in that case, as evidence of the defendant's sanity -- but the decision was based on the *Doyle v. Ohio* due process rationale.

3. The Right to Counsel

The period following *Miranda* has also produced significant developments in the right to counsel prior to trial. Cases have been decided relating to *Miranda*'s Fifth Amendment right to counsel -- which the Court now regards as a non-constitutional, "prophylactic" right -- and to the right to counsel under the Sixth Amendment. The upshot of this development is that the Supreme Court no longer recognizes any constitutional right to counsel in connection with police interrogations, except when an interrogation takes place after the commencement of adversarial judicial proceedings.

The principal right-to-counsel case drawing on *Miranda* was *Edwards v. Arizona*, 451 U.S. 477 (1981), which addressed the circumstances in which questioning can be resumed after a suspect invokes his right to counsel. The *Miranda* decision had stated that questioning cannot resume in such a case "until an attorney is present," but had not considered the effect of an intervening waiver of *Miranda* rights by a suspect. The Court in *Edwards v. Arizona* held, in effect, that a repetition of *Miranda* warnings and a normal waiver of rights following a request for counsel is not enough, and that questioning can resume prior to the appearance of counsel in such a case only if the suspect himself "initiates further communication, exchanges or conversations with the police." 451 U.S. at 484-85. While this case was unusual for the current Court, in that statements were actually suppressed on the authority of *Miranda*, it did not signal any renewed commitment to *Miranda*'s principles. Rather, the Court simply applied the *Miranda* decision, and resolved one issue in the operation of its system that *Miranda* itself had not decided.¹³¹

A second line of decisions has involved applications and extensions of the rule of *Massiah v. United States*, 377 U.S. 201 (1964), which recognized a pre-trial right to counsel under the Sixth Amendment, and took an expansive view of what police practices would constitute a violation of that right. See pp. 36-37 *supra*. Thus, in *United States v. Henry*, 447 U.S. 264 (1980), and *Maine v. Moulton*, 106 S. Ct. 477 (1985), the Court held inadmissible statements obtained by informants from indicted defendants who were not aware that they were dealing with government operatives.

¹³¹ The Court has subsequently taken a generous view of the actions by a suspect that can be regarded as an "initiation" which justifies a renewal of interrogation under the rule of *Edwards v. Arizona*. See *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

Another application of *Massiah* occurred in the case of *Brewer v. Williams*, 430 U.S. 387 (1977), which arose from the defendant Williams' rape and murder of a ten-year-old girl in 1968. Williams was arrested and arraigned before a judge on an arrest warrant that had been issued against him. In the course of Williams' subsequent transportation to another city by police officers, one of the officers urged him to disclose the location of his victim's body, and he ultimately did so. Williams' conviction was later reversed in federal habeas corpus proceedings because of the admission of his statements and derivative evidence at trial, and the Supreme Court affirmed the reversal. The Sixth Amendment right had attached, in the Court's view, because of Williams' arraignment in court on the arrest warrant. This brought the rule of *Massiah v. United States* into play and required the exclusion of Williams' statements, since he made them without counsel present and had not made an adequate waiver of his right to counsel.

However, in *United States v. Gouveia*,¹³² the Supreme Court held squarely that the Sixth Amendment right to counsel can attach no earlier than the filing of an indictment or information, or the initial appearance of the defendant in court to answer charges. *Gouveia* involved prisoners, suspected of murdering another inmate, who had been held in administrative detention units for a period of nineteen months, without counsel, prior to the return of an indictment against them. In responding to the prisoners' contention that this violated their right to counsel under the Sixth Amendment, the Court held that "the Sixth Amendment right to counsel attaches only when formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing."¹³³

In reaching this conclusion, the Court noted that earlier decisions consistently supported the proposition that the Sixth Amendment right does not attach until the initiation of adversarial judicial proceedings, the only possible exceptions being *Miranda v. Arizona* and *Escobedo v. Illinois*.¹³⁴ However, *Miranda* and *Escobedo* were held to be irrelevant to

¹³² 104 S. Ct. 2292 (1984) (per Justice Rehnquist, joined by the Chief Justice and Justices O'Connor, White, Powell, and Blackmun). Justices Stevens and Brennan concurred in the judgment. Justice Marshall dissented.

¹³³ *Gouveia*, 104 S. Ct. at 2296, citing *Kirby v. Illinois*, 406 U.S. 682 (1972) (plurality opinion).

¹³⁴ The rule of *United States v. Wade*, 388 U.S. 218 (1967), which created a right to counsel at police line-ups, might also have appeared to be inconsistent with *Gouveia's*

the Sixth Amendment issue on the ground that they involved counsel rights created to protect the Fifth Amendment right against self-incrimination.¹³⁵

In sum, the decision in *Edwards v. Arizona* has no significance independent of the *Miranda* decision because it simply involved an application of *Miranda's* right to counsel. Like the other features of *Miranda's* system, the Supreme Court now regards this as a non-constitutional prophylactic rule. The Court has continued to engage in muscular applications of the rule of *Massiah v. United States*, relating to the Sixth Amendment right to counsel, but all of these applications have involved defendants who had been indicted or brought into court to answer charges. The only case which provided significant support for a Sixth Amendment right to counsel in police interrogations at an earlier stage was *Escobedo v. Illinois*. In *Gouveia v. United States*, however, the Court characterized *Escobedo's* right to counsel, like *Miranda's*, as a prophylactic measure designed to protect the Fifth Amendment right against self-incrimination. The Court further held in *Gouveia* that the Sixth Amendment right does not attach prior to the commencement of adversarial judicial proceedings. Because police interrogations usually

holding that the Sixth Amendment right does not attach prior to the commencement of adversarial judicial proceedings. However, *Wade* and its companion case, *Gilbert v. California*, 388 U.S. 263 (1967), involved post-indictment line-ups. The opinion of the Court in *Kirby v. Illinois*, 406 U.S. 682 (1972), whose view of the Sixth Amendment was endorsed by a majority of the Court in *Gouveia*, limited the application of *Wade* and *Gilbert* to identification procedures taking place after the commencement of adversarial judicial proceedings.

¹³⁵ *Gouveia's* characterization of *Miranda* as irrelevant to Sixth Amendment questions was clearly accurate. *Miranda's* rules were justified as necessary to protect the Fifth Amendment right against self-incrimination. *Gouveia's* characterization of *Escobedo v. Illinois* as establishing a prophylactic right related to the Fifth Amendment was inconsistent with the language of the holding in *Escobedo*, but consistent with its substance. *Escobedo* premised its result on a finding that the Sixth Amendment had been violated, but only held that such a violation would occur if a suspect's request to consult with counsel is denied and he is not advised by the police of his right to remain silent. See p. 38 *supra*. The only right to the assistance of counsel that can be derived from *Escobedo* is accordingly a right to have counsel for the purpose of advising a suspect of his right to remain silent. This understanding would explain the conjoint condition on the holding in *Escobedo*: If the police have already told a suspect that he need not talk, it would be superfluous to give him a lawyer for the purpose of telling him the same thing. Viewed in these terms, *Escobedo's* right to counsel was a prophylactic measure designed to safeguard the right against self-incrimination, as the Court in *Gouveia* stated.

occur prior to that point, it would be accurate to say that the Supreme Court's current caselaw generally rejects the existence of any constitutional right to counsel in custodial police interrogations.

III. The Questioning of the Accused in Foreign Jurisdictions

The opinion of the Court in the *Miranda* decision pointed to the laws of several foreign countries as evidence that *Miranda's* rules would not be seriously detrimental to law enforcement. Following a description of the most restrictive features of the interrogation systems in these jurisdictions, the Court stated that: "There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules." (384 U.S. at 489.)

However, the Court's review of foreign law was both superficial and misleading. As Justice Harlan observed in his *Miranda* dissent (384 U.S. at 521-22): "The law of the foreign countries described by the Court . . . reflects a more moderate conception of the rights of the accused as against those of society when other data are considered." This "more moderate conception" is evident when consideration is given to foreign rules and practices regarding such matters as: (1) the timing and content of required warnings; (2) the scope and definition of the right to counsel; (3) the existence of other opportunities, beside police interrogation, for compulsory questioning of defendants; (4) the consequences of failures by the police to observe the rules; (5) the admissibility of evidence derived from improperly elicited confessions, and the effect of the evidence on the admissibility of the confessions themselves; and (6) the use against a person of his refusal to answer questions.

The discussion in this part examines these issues and other pertinent aspects of law in England, Scotland, Canada, India, France, and West Germany.¹³⁶

¹³⁶ England, Scotland, and India are three of the countries that were cited as supporting precedent in the *Miranda* decision. See 384 U.S. 486-89. The Court also pointed to the law of Ceylon (now Sri Lanka), but we have not attempted to obtain information on interrogation practices in that country, since it was merely mentioned in passing as having the same evidentiary provisions as India. Canada, France and Germany have been included in our survey on account of their political and cultural similarities to the United States, and the availability of adequate descriptive materials concerning their legal systems.

A. England

In England, standards for police questioning are set by the "Judges' Rules." The Rules provide that when there are reasonable grounds for suspecting that a person has committed an offense, he is to be given the following caution prior to questioning: "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence." Once an officer has enough evidence to prefer a charge against a person, he should "without delay cause that person to be charged or informed that he may be prosecuted." At that point a similar admonition is required, and further questioning thereafter is limited to "exceptional cases."¹³⁷

The Rules do not require an admonition concerning a right to counsel at any point. They do provide that "every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor." However, this principle is qualified by a provision that a person in custody need not be allowed access to counsel if that would cause "unreasonable delay or hindrance . . . to the processes of investigation or the administration of justice." As a practical matter, the police are free to deny access to counsel, and to hold suspects incommunicado for questioning. There is also no offer of, or right to, free counsel for suspects who cannot retain counsel.¹³⁸

Superficially, the Rules might appear to establish a restrictive standard for custodial police interrogations through the provisions that a suspect is to be charged or advised that he may be prosecuted without delay once there is sufficient evidence to do so, and that thereafter he is not to be questioned outside of "exceptional cases." However, this Rule does not significantly limit such interrogations in practice, since the police are free to make arrests on reasonable suspicion without formally charging a person or advising him of an intent to prosecute. As a practical matter, suspects are routinely interrogated by the police at the stationhouse following arrest. Few suspects remain silent in the face of

¹³⁷The Judges' Rules are reproduced in Kaci, *Confessions: A Comparison of Exclusion Under Miranda in the United States and Under the Judges' Rules in England*, 6 Am. J. Crim. L. 87, 109-12 (1982).

¹³⁸See *id.* at 88; Caplan, *Questioning Miranda*, 38 Vand. L. Rev. 1417, 1441 n.118 (1985); Zander, *Access to a Solicitor in the Police Station*, 1972 Crim. L. Rev. 342.

such questioning, and most confess or make incriminating statements as a result.¹³⁹

The admissibility of pre-trial statements at trial generally depends on their voluntariness. The voluntariness standard is understood as excluding statements made as a result of a fear of prejudice or hope of advantage held out by a person in authority, or as a result of "oppression." In theory, judges also have a discretionary authority to exclude voluntary statements obtained through violations of the Judges' Rule, but rarely do so as a practical matter.¹⁴⁰

At trial, both the judge and the prosecutor may comment on the defendant's pre-trial silence. The judge, but not the prosecutor, may comment on the defendant's failure to testify at trial.¹⁴¹

B. Scotland

At the time of the *Miranda* decision, Scotland followed a highly restrictive approach to interrogation, effectively barring police questioning of a person in custody.¹⁴² However, a statutory interrogation procedure has subsequently been created by the Criminal Justice Act (Scotland) 1980.

The Act authorizes the police to detain a person on reasonable suspicion for up to six hours for purposes of interrogation and other investigation. The police are required to advise a person detained pursuant to this authority of the reason for the detention, and to inform him that he is not obligated to answer questions. The suspect must also

¹³⁹ See Lidstone, *Investigative Powers and the Rights of the Citizen*, 1981 *Crim. L. Rev.* 454, 463-65; Mitchell, *Confessions and Police Interrogation of Suspects*, 1983 *Crim. L. Rev.* 596; Zander, *The Investigation of Crime: A Study of Cases Tried at the Old Bailey*, 1979 *Crim. L. Rev.* 203, 211-16; Kaci, *supra* note 137, at 99.

¹⁴⁰ See Schrager, *Recent Developments in the Law Relating to Confessions: England, Canada and Australia*, 26 *McGill L.J.* 435, 435-36, 452-53, 481-82 (1981); Gerstein, *The Self-Incrimination Debate in Great Britain*, 27 *Am. J. Comp. L.* 81, 88 & n.42 (1979).

¹⁴¹ See Greenawalt, *Perspectives on the Right to Silence* in Hood, ed., *Crime, Criminology and Public Policy* 235, 240, 243 (1974).

¹⁴² See Hardin, *Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland*, 113 *U. Pa. L. Rev.* 165, 171-74 (1964). *But cf. Miranda*, 384 U.S. at 522 & n.21 (Harlan, J., dissenting) (noting countervailing advantages of prosecution under Scottish procedure).

be advised of the right to have a solicitor and "one other person reasonably named by him" informed of the fact that he is being detained and of the place of detention. However, he has no right to speak to those persons during the period of detention; they have no right of access to him; and notice to outside parties may be delayed by the police as long as necessary "in the interest of the investigation." This restrictive approach reflects the fact that an avowed purpose of the detention is the isolation of the suspect.

During the authorized period of detention, the police may search the suspect, take fingerprints and the like, and interrogate him concerning the suspected offense. At the end of six hours, the suspect must be released or formally arrested.¹⁴³

C. Canada

In Canada, the police are required to inform an arrestee of the charge against him; to advise him of his right to "retain and instruct counsel"; and to bring him before a justice, if one is available, within twenty-four hours of his arrest. Aside from these general requirements, which apply to all persons who are taken into custody, there are no procedural constraints on custodial interrogation. The police are not required to tell a suspect that he may refrain from answering questions, or that his statements may be used against him. There is no offer of, or right to, appointed counsel for suspects who cannot retain counsel. There is no right to refuse to be questioned.¹⁴⁴

The admissibility of statements made to the police generally depends on their voluntariness. The voluntariness requirement is interpreted as barring the admission of statements obtained through a fear of prejudice or hope of advantage ("threat or promise") held out by a person in authority. However, if real evidence is discovered as the result

¹⁴³ *Police Powers Falling Short of Arrest*, 1981 Scots Law Times 173, 174-77.

¹⁴⁴ See Pye, *The Rights of Persons Accused of Crime Under the Canadian Constitution: A Comparative Perspective*, 45 L. & Cont. Prob. 221, 227, 231-33 (1982); Caswell, *The Law Reform Commission of Canada, the Proposed Canada Evidence Act and Statements by an Accused*, 63 Can. B. Rev. 322, 324-25 (1985); Ratushny, *Self-Incrimination: Nailing the Coffin Shut*, 20 Crim. L. Q. 312, 321-22 (1978).

of an involuntary statement, the evidence is admissible along with the portion of the statement that it confirms.¹⁴⁵

The Canadian constitution provides a right to trial by jury in connection with offenses punishable by imprisonment for five or more years. There is a statutory prohibition of comment on a defendant's failure to testify, but this rule is taken loosely. Oblique references to a defendant's silence are allowed -- e.g., characterizing the government's evidence as "uncontradicted" -- and both triers and reviewing courts are free to draw adverse inferences from such silence.¹⁴⁶

D. India

Indian law regulates police interrogations in an indirect way through a general rule that limits the admissibility of confessions to cases in which the confession was voluntarily given before a magistrate, and that excludes the use of confessions given to the police.¹⁴⁷ However, the rule barring confessions made to the police is subject to an exception in cases in which other evidence is discovered as a result of a suspect's statement. In such cases the portion of the statement that "relates distinctly to the fact thereby discovered" may be admitted at trial, along with the evidence derived from it.

Trials in India are usually conducted by a judge alone, but juries are used in some restricted geographic areas.¹⁴⁸ The defendant is free to refrain from taking the stand and testifying under oath, and comment is not allowed on his failure to do so. However, the judge is allowed to question the unsworn defendant at any time during the trial, and is required to do so -- at least if the defendant is not represented by counsel -- at the end of the presentation of the prosecution's case. This procedure

¹⁴⁵ See Ratushny, *supra* note 144, at 318-21, 326-28; Schrager, *supra* note 140, at 495-96. But see Caswell, *supra* note 144, at 330-36 (arguing that voluntariness standard may require exclusion of statements outside of "threat or promise" situations, such as in those involving "oppression").

¹⁴⁶ See Pye, *supra* note 144, at 237; Ratushny, *supra* note 144, at 342-46; Ratushny, *Is There a Right Against Self-Incrimination in Canada?*, 19 McGill L.J. 1, 33-41 (1973).

¹⁴⁷ The account of Indian law in this section is generally based on *Developments in the Law -- Confessions*, 79 Harv. L. Rev. 935, 1106-14 (1966).

¹⁴⁸ See Sharma, "Law and Order" and Protection of the Rights of the Accused in the United States and in India: A General Framework for Comparison, 21 Buffalo L. Rev. 361, 398 (1972).

serves to enable the accused "to explain any circumstances appearing in the evidence against him," and the judge, to this end, is required to question the defendant "separately about each material circumstance which is intended to be used against him." Questioning by the judge operates to the detriment of the guilty -- as well as serving as a shield to the innocent -- since the code of criminal procedure specifies that the court or jury may infer guilt from a refusal to answer or from a false answer.

E. France

Under French law, the police may detain suspects for a period of 24 or 48 hours for purposes of investigation. Suspects may be held incommunicado and interrogated during that period. There is no right to warnings or counsel in such interrogations. The French system also provides multiple opportunities for compulsory judicial interrogation of defendants, and freely allows adverse inferences to be drawn from a defendant's silence.

In greater detail, investigative detentions by the police of suspects and other witnesses are permitted. The period of detention is limited to twenty-four hours, but may be extended to forty-eight hours with the permission of a prosecutor. The police are required to include in the case report information showing the duration and frequency of interrogations in this period, but are otherwise generally free of formal constraints. A suspect is not legally obligated to answer questions, but the police are not required to advise him of this fact and defense counsel do not participate at this stage of the process. Confessions obtained through physical abuse are inadmissible, but such abuse rarely occurs. Lesser forms of pressure by the police do not affect the admissibility of a suspect's statements.¹⁴⁹

If police investigation fails to clear a suspect, he may be charged and brought before a magistrate for further development of the case. The magistrate is required to advise the defendant of the charge against him and to inform him that he is not required to talk. The magistrate also advises the defendant that he may choose counsel or have counsel designated by the court. If the defendant waives counsel, the interrogation may proceed immediately. If the defendant requests counsel, further

¹⁴⁹Tomlinson, *Nonadversarial Justice: The French Experience*, 42 Maryland L. Rev. 131, 156-57, 158-59, 161, 167-68, 177-78 (1983); *Developments in the Law -- Confessions*, *supra* note 147, at 1115-16.

proceedings are deferred so as to provide counsel with an opportunity to review the prosecution's evidence prior to the examination.

While the defendant has a right to have counsel present when questioning by the magistrate takes place, his attorney may not question the defendant or other witnesses without the permission of the magistrate, and the defendant may not confer with his attorney prior to answering particular questions. A refusal by the defendant to answer questions would result in adverse inferences being drawn by the magistrate, and later by the court at trial.¹⁵⁰

French criminal cases are tried before judges alone, or before mixed tribunals including both judges and laypersons in the case of more serious offenses. The judges have at their disposal a dossier containing the results of earlier investigative efforts, including the pre-trial interrogations of the defendant. The trial normally opens with the questioning of the defendant by the presiding judge. The defendant may refuse to answer, but rarely does so, since this would involve remaining silent in the face of direct questioning in the presence of the trier, and since such silence "exposes the defendant to whatever inferences the court chooses to draw."¹⁵¹

F. Germany

German procedure has historically been influenced by the French system. However, its rules relating to the interrogation of suspects and defendants have taken on a more restrictive character as a result of reaction to the practices of the Nazi regime and other developments.

The German police are authorized to arrest a suspect for purposes of interrogation and other investigation. Detention pursuant to this authority cannot extend beyond the end of the day following the arrest, after which the suspect must be released or brought before a judge. Various forms of overreaching are prohibited by the Code of Criminal Procedure, including eliciting statements by "ill-treatment," fatigue, physical abuse, or deception. Statements obtained by these proscribed

¹⁵⁰ See Tomlinson, *supra* note 149, at 171; *Developments in the Law -- Confessions*, *supra* note 147, at 1116-18; Hrones, *Interrogation Abuses by the Police in France -- A Comparative Solution*, 12 Crim. L.Q. 68, 78 (1969).

¹⁵¹ Tomlinson, *supra* note 149, at 173-74; *Developments in the Law -- Confessions*, *supra* note 147, at 1118-19.

means are automatically inadmissible at trial. However, the courts have given a narrow reading to these provisions, and there is no "fruit of the poisonous tree" doctrine. Thus, evidence derived from an unlawfully obtained confession can be used at trial.¹⁵²

The police are also supposed to advise a suspect that he has a right to respond to the accusation against him, or to refrain from answering the charge, and that he has a right to consult with defense counsel. However, violations of the warnings rule do not make resulting statements inadmissible at trial. As a practical matter, the police usually engage in informal conversation with a suspect, without warnings, "to get his side of the story," and are likely to defer giving the statutory warning until a later point in the interrogation.¹⁵³

Trials in Germany are conducted by judges or by mixed tribunals including both judges and laypersons. Questioning is primarily carried out by judges. The defendant is initially questioned concerning his personal history and general circumstances, and then is advised that he has the option of remaining silent prior to the second phase of questioning, which relates to the charge against him. This option is rarely elected, however, since it would require an overt refusal in open court to submit to questioning. Moreover, since there is no separate hearing regarding the sentence, total silence by the defendant would deprive him of the opportunity to testify concerning facts relating to the offense in mitigation of punishment. If the defendant does answer some questions, but refuses to answer others, adverse inferences may be drawn from the refusal.¹⁵⁴

¹⁵² See Bradley, *The Exclusionary Rule in Germany*, 96 Harv. L. Rev. 1032, 1049-51 (1983); Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 Va. L. Rev. 239, 245-46 (1970); Clemens, *Police Interrogation Privileges and Limitations under Foreign Law: Germany*, 52 J. Crim. L., Crimin., & Pol. Sci. 59, 59-63 (1961).

¹⁵³ See Bradley, *supra* note 152, at 1051-52 & n.110; Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 Buffalo L. Rev. 361, 377 & n.74 (1977).

¹⁵⁴ See Schlesinger, *supra* note 153, at 379-83; Bradley, *supra* note 152, at 1052 & nn.105-06; Jescheck, *supra* note 152, at 243-49.

G. Conclusion

The foregoing review of foreign jurisdictions suggests some common principles concerning the role of the police and the rights of individuals in the investigative phase of criminal cases. All agree that suspects should not be coerced into making incriminating statements, and more or less extensive procedural rules are prescribed in most instances as safeguards against overreaching. However, the critical question in determining the admissibility of statements is likely to be whether they are voluntary or uncoerced in some specified sense, and not whether the police observed the prescribed procedures. Moreover, most of the jurisdictions surveyed clearly share the perception that society's choice not to compel a person to answer incriminating questions does not require that it also permit him to remain silent at no risk to himself, thereby -- in effect -- obstructing the investigation. Rather, the common view is that the trier should be allowed to draw adverse inferences from a defendant's failure to tell what he knows at some stage in the process.

Beyond these common themes, the specifics of interrogation law and practice differ from country to country. More to the point of this report, however, they differ from the rules that have been imposed in the United States by the *Miranda* decision. Warnings may not be required at all at the initial stage of police interrogation, and any warnings that are required may be quite different from *Miranda's*. England, for example, does not require a warning concerning a right to counsel, and Canada does not require a warning concerning any right other than a right to counsel. Even where warnings are required, their omission need not result in the exclusion of subsequent statements. The countries surveyed also show that a substantive right to counsel may not be recognized at all in connection with police interrogation, and that any right which is recognized may be drastically narrower than the counsel right created by *Miranda*.

In sum, an examination of the law of other countries does not support the view that any of the features of *Miranda's* system are essential to fairness to suspects and defendants. The prevalence of practices prohibited by *Miranda* in other civilized nations tends to substantiate the desirability of reconsidering the system employed in this country.

IV. Recommendations for Reform

Having reviewed the development of the law of pre-trial interrogation from its medieval origins to the present, and having considered the corresponding legal doctrines of several foreign nations whose political and cultural values are similar to our own, we have a number of recommendations concerning the future development of this law in the United States. In brief, our advice is as follow:

First, the Department of Justice should seek to persuade the Supreme Court to abrogate or overrule the decision in *Miranda v. Arizona*. The most promising line of attack involves reliance on the statute enacted in 1968 to achieve that end, 18 U.S.C. § 3501. The Supreme Court's decisions in *Michigan v. Tucker*, *New York v. Quarles*, and *Oregon v. Elstad*, which held that non-compliance with *Miranda* does not entail any violation of the Constitution, imply that the Court would now uphold the validity of this statute.

Second, we recommend that an administrative policy setting standards for the conduct of custodial interrogations by the Department's law enforcement agencies be formulated promptly and put into effect concurrently with our renewal of litigation challenging the validity of the *Miranda* decision. Promulgating such a policy would increase the likelihood of judicial acceptance of the abrogation of *Miranda*, ensure that the enlarged freedom of action resulting from *Miranda's* demise will be exercised responsibly, and demonstrate that implementing alternative procedures would promote fair treatment of suspects as well as furthering effective law enforcement.

Third, we have a number of specific suggestions concerning the directions our interrogation policy might take if and when the Supreme Court confirms that *Miranda* is no longer binding.

A. Reasons for Abrogating *Miranda*

There are several considerations supporting the recommendation that we should seek to have *Miranda* overruled:

First, the continued application of *Miranda* violates the constitutional separation of powers and basic principles of federalism. *Miranda's* promulgation of a code of procedure for interrogations constituted a usurpation of legislative and administrative powers, thinly disguised as

an exercise in constitutional exegesis, which rested on fictions and specious arguments. 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 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. Fidelity to the Constitution's plan of government requires that this situation be corrected. *See pp. 79-80 supra.*

Second, *Miranda*, by impeding the prosecution of crime, impairs the ability of government to protect the public. Compliance with *Miranda* markedly reduces the willingness of suspects to respond to questioning by the police. *See pp. 62-63 supra.* In a substantial proportion of criminal cases, confessions and other statements from the defendant are indispensable to a successful prosecution.¹⁵⁵ When statements are not obtained in such cases through the operation of *Miranda*'s system, criminals go free. Other damage to the operation of the criminal justice system includes the need to expend limited investigative resources in developing cases that might easily have been made had the suspect cooperated; the need to accept pleas that are not commensurate with the seriousness of the actual offense, where a case has been weakened through the unavailability of the defendant's statements; and the need to expend prosecutorial and judicial resources in litigating questions of compliance with *Miranda*'s formalities.¹⁵⁶

Third, *Miranda*'s system is a poorly conceived means of protecting suspects from coercion and overreaching in police interrogations. Its consequences are to divide suspects into two classes: those who "stand on their rights," and those who waive their rights and submit to questioning. The effect of *Miranda* on suspects in the former class is not to protect them from abusive questioning, but to enable them to insulate themselves from any sort of questioning.¹⁵⁷ In cases in which suspects do waive their

¹⁵⁵ *See* Seeburger & Wettick, *supra* note 89, at 15-16 (judgment that confession is probably necessary to secure conviction in 20 percent of all cases); Caplan, *Questioning Miranda*, 38 Vand. L. Rev. 1417, 1464-65 (1985).

¹⁵⁶ *See* F. Graham, *supra* note 21, at 289-96, 298-99; William Tucker, *True Confessions: The Long Road Back from Miranda*, National Review 28, 31 (Oct. 18, 1985).

¹⁵⁷ *See generally* Seeburger & Wettick, *supra* note 89, at 13 (over 40 percent of suspects rely on *Miranda* to prevent all questioning in Pittsburgh study); *id.* at 13-14 n.37 (data on waiver of rights in Chicago, including information that majority of homicide

rights, interrogations can be carried out much as they were before *Miranda*. In such instances *Miranda* is, in particular, virtually worthless as a safeguard against the specific interrogation practices that were characterized as abusive in the *Miranda* decision and cited as the empirical justification for *Miranda*'s reforms:

The last laugh in the *Miranda* episode was not had by its author, Earl Warren . . . but by Fred E. Inbau and John E. Reid, the authors of the interrogation manual that he quoted frequently and with disapproval in the *Miranda* decision. To show that secret interrogation was inherently coercive, even without the rubber hose or third degree, Warren exposed the techniques taught in that manual and others, which enable the police to bring psychological pressures to bear on the suspect to "persuade, trick, or cajole him out of exercising his constitutional rights." With this to recommend it, the manual became a best seller among police and a second edition had to be printed. "All but a few of the interrogation tactics and techniques presented in our earlier publication are still valid," the authors purred in their post-*Miranda* edition, adding that all that is required is to give the warnings, get a waiver, and proceed.¹⁵⁸

The judgment concerning *Miranda*'s inadequacies on this score is not limited to critics of any particular ideological stripe. Rather, there has been general agreement among writers on the subject that *Miranda* is an inept means of protecting the rights of suspects, and a failure in relation to its own premises and objectives.¹⁵⁹

Fourth, *Miranda* is damaging to public confidence in the law, and can result in gross injustices to crime victims. *Miranda*'s rules are

suspects claim right to remain silent or to counsel); p. 62 *supra* (59 percent of arrestees in Philadelphia make no statement to police following *Miranda*, up from estimated 10 percent prior to *Miranda* and *Escobedo*); Caplan, *supra* note 155, at 1466 (additional data).

¹⁵⁸F. Graham, *supra* note 21, at 315-16; see Note, *Police Use of Trickery as an Interrogation Technique*, 32 Vand. L. Rev. 1167, 1167-68 (1979).

¹⁵⁹See Caplan, *supra* note 155, at 1425-26 n.47 (compilation of citations to writers characterizing *Miranda* as inadequate or ineffective in protecting rights of suspects); Note, *Police Use of Trickery*, *supra* note 158, at 1167-68, 1213; F. Graham, *supra* note 21, at 182-83; Steven R. Schlesinger, *Witness Against Himself: The Self-Incrimination Privilege as Public Policy*, 3 Claremont J. 55, 78-80 (Spring 1975).

completely rigid and formal, in the sense that no showing, however strong, that a suspect's statements were freely given and truthful is deemed sufficient to excuse non-compliance. Cases accordingly arise in which perpetrators of the most serious crimes secure the exclusion of their admissions or the reversal of their convictions on the basis of technical violations of *Miranda* or related decisions that do not cast the slightest doubt on their guilt. This can result in the freeing of known criminals or the prolongation of the anguish of crime victims through years of additional litigation. The perception of such cases by members of the public must be that the system has become deranged, treating their lives, their security and their deepest sensibilities as pawns in an inscrutable game.¹⁶⁰

Fifth, the *Miranda* decision has petrified the law of pre-trial interrogation for the past twenty years, foreclosing the possibility of developing and implementing alternatives that would be of greater effectiveness both in protecting the public from crime and in ensuring fair treatment of persons suspected of crime. The decision immediately stifled the active ferment in the law of pre-trial interrogation that was underway at the time it was handed down, *see generally* pp. 40-41, 58-61 *supra*, and nothing much as changed since then. Nothing is likely to change in the future as long as *Miranda* remains in effect and perpetuates a perceived risk of invalidation for any alternative system that departs from it.

On the other side, we see no substantial reasons for retaining *Miranda's* system. The argument that it is necessary to guard against abusive interrogations requires no lengthy discussion. *Miranda* is not rationally designed to further that end, *see* pp. 47-49, 97-98 *supra*, and it has precluded the development of other approaches that would avoid its shortcomings in that regard.

¹⁶⁰ *See, e.g., Edwards v. Arizona*, 451 U.S. 477 (1981) (overturning murder conviction, despite compliance with warnings-and-waiver requirement, because questioning occurred after suspect had requested counsel); *People v. Braeseke*, 602 P.2d 384 (Cal. 1979) (reversing conviction for triple murder because waiver of *Miranda* rights found inadequate on review); Letter of James K. Stewart, Director, National Institute of Justice, to Attorney General Edwin Meese (Dec. 6, 1985) (materials documenting Ronnie Gaspard case, in which contract murderer of government witness in narcotics case was freed because officers questioned him after he had been assigned counsel); Memorandum of Assistant Attorney General Lois Haight Herrington to Attorney General Edwin Meese regarding *Miranda* (Oct. 18, 1985) (various cases, and impact on victims). *See generally* Tucker, *supra* note 156, at 31-32.

A second argument advanced in support of *Miranda* is that it serves to promote equity among defendants who might otherwise have disparate chances of avoiding conviction on account of differences in their personal circumstances. The *Miranda* decision itself invoked this consideration in support of a broad definition of the right to counsel it created. See pp. 56-57 *supra*. In the controversy that followed the *Miranda* decision, apologists for *Miranda* also frequently relied on this point in supporting its warning rules. In the absence of such warnings, the argument ran, suspects who happened to know of the rights covered by the warnings would enjoy an unfair advantage in comparison with those who did not.

However, so long as interrogations are conducted so as to ensure that innocent suspects are not coerced into making false admissions, this argument is without force. It is not unfair to obtain and use a suspect's statements to convict him for a crime that he has in fact committed, just because more knowledgeable criminals are better able to exploit the rules of law to defeat justice.¹⁶¹ As Attorney General Nicholas Katzenbach observed: "I have never understood why the gangster should be made the model and all other raised, in the name of equality, to his level of success in suppressing evidence. This is simply the proposition that if some can beat the rap, all must beat the rap."¹⁶² If disparities among defendants are to be addressed, the sensible way to do so is by devising rules of pre-trial interrogation that minimize the potential for obstruction and manipulation by all defendants.

A third argument offered in support of *Miranda* is that it provides "bright line" rules which were not provided by the due process voluntariness standard. This argument may be taken in two ways.

First, it may amount to the contention that there is an unacceptable risk that unlawful coercion will take place if the relatively diffuse strictures of the voluntariness standard are not supplemented by rules providing more definite guidance concerning permissible interrogation practices. It may also involve the contention that the voluntariness standard is too permissive, and leaves room for practices that are inhumane or unworthy, even if not literally unlawful.

¹⁶¹ See Caplan, *supra* note 155, at 1456-58; Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 711 (1968); *State v. McKnight*, 243 A.2d 240, 250-51 (N.J. 1968).

¹⁶² Quoted in William F. Buckley, Jr., *Four Reforms -- A Guide for the Seventies* 103 (1973).

We agree that law enforcement officers should be provided with interrogation rules that are more definite than "thou shalt not engage in coercion." However, we do not see any merit in the particular rules that *Miranda* promulgated for this purpose, and do not believe that the courts are the appropriate agencies for developing and enacting such rules.

Second, the "bright line" argument may refer to the concern that the absence of more definite prophylactic rules would lead to increased litigation over the occurrence of actual coercion. The force of this point is limited to some degree by the fact that *Miranda* did not supplant the traditional voluntariness standard, but supplemented it. Defendants who have received the full *Miranda* treatment remain free to claim that they were coerced anyway, and do so frequently. This point also affords no reason for preferring *Miranda*'s rules over various other possible systems of prophylactic rules whose observance would make it difficult for a defendant to make a credible claim of coercion.

Moreover, *Miranda*'s requirements have given rise to an enormous volume of litigation of a wholly novel character. This includes litigation relating to the delivery and formulation of the warnings; the existence of a "custodial" situation requiring warnings prior to questioning; the adequacy of a defendant's waiver; compliance with the rules against questioning a defendant who has expressed an unwillingness to talk or requested counsel; compliance with the rule that a defendant's silence following the receipt of *Miranda* warnings must be concealed from the jury at trial; and various other matters. Given *Miranda*'s status as a major source of litigable issues in its own right, there is no reason to believe that it has had any effect of reducing the volume of litigation relating to the admission of pre-trial statements by defendants.

A fourth argument is that the *Miranda* decision has become institutionalized in police practice to the point where it no longer exacts any unacceptable costs in terms of lost statements or evidence. Police training in *Miranda*'s rules and the use of such props as *Miranda* cards and printed waiver forms reduce the likelihood of errors by the police that would jeopardize the admissibility of a defendant's statements in subsequent proceedings.

This argument, however, basically misapprehends the nature of the costs associated with *Miranda*. While cases continue to occur in which police officers are tripped up by *Miranda*'s technicalities and statements are later excluded as a result, the main cost is the loss of statements

which are never obtained to begin with because compliance with *Miranda* has enabled suspects to insulate themselves from inquiry, or has inhibited them from responding. Since the purpose and effect of *Miranda*'s rules are to enlarge the opportunities for suspects to remain silent, perfection in the machinery of compliance can only increase this cost.

Some final points that have been offered in support of *Miranda* are that it is somehow questionable or undesirable to use a person's own statements to convict him; that a system which relies frequently on such statements is likely to be less reliable and effective overall than one that does not; and that restrictive interrogation rules improve the quality of police work by requiring the development of greater facility in obtaining other sorts of evidence.

We see no merit in these arguments. There is nothing wrong with using a defendant's own statements to convict him, so long as the Constitution's prohibition of compulsion is not transgressed:

The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will Thus the Fifth Amendment does not say that a man shall not be permitted to incriminate himself, or that he shall not be persuaded to do so. It says no more than that a man shall not be "compelled" to give evidence against himself.¹⁶³

The points relating to the overall effectiveness or reliability of the criminal justice system are also unpersuasive. So long as coercion is avoided, a suspect's incriminating statements are highly probative evidence, since innocent people are not prone to make false admissions that will send them to prison.¹⁶⁴ While restrictions on obtaining evidence from suspects obviously will result in increased emphasis on obtaining evidence from other sources, it is difficult to see how this could be regarded as supporting the adoption of such restrictions. If any other important type of evidence were excluded or arbitrarily restricted -- for example, fingerprint evidence, or documentary evidence, or eyewitness

¹⁶³ *State v. McKnight*, 243 A.2d 240, 250 (N.J. 1968).

¹⁶⁴ Admissions are also frequently self-validating, in the sense that they often disclose knowledge of facts relating to the offense which only the offender would possess, or lead to other evidence that confirms their veracity. See Caplan, *supra* note 155, at 1422-23 & n.28.

testimony -- that would also result in an increased need to develop other types of evidence for use in criminal cases. No one regards this as an affirmative reason for adopting rules which would exclude evidence of these types in cases in which it is reliable and probative. A system that aims at justice will obtain and use every type of reliable evidence that can be secured by means that are legally and morally acceptable.¹⁶⁵

In sum, we see compelling reasons for attempting to secure an abrogation of *Miranda*, and no substantial arguments to the contrary. The interesting question is not whether *Miranda* should go, but how we should facilitate its demise, and what we should replace it with.

B. Challenging *Miranda* in Litigation

Under the Supreme Court's current caselaw, *Miranda* is vulnerable to attack on at least four theories.

First, *Miranda* should no longer be regarded as controlling because a statute was enacted in 1968, 18 U.S.C. § 3501, which overrules *Miranda* and restores the pre-*Miranda* voluntariness standard for the admission of confessions. Since the Supreme Court now holds that *Miranda*'s rules are merely prophylactic, and that the Fifth Amendment is not violated by the admission of a defendant's voluntary statements despite non-compliance with *Miranda*, a decision by the Court invalidating this statute would require some extraordinarily imaginative legal theorizing of an unpredictable nature. The one court of appeals that has addressed this issue found quite easily that 18 U.S.C. § 3501 is valid under the Supreme Court's current view of *Miranda*. See pp. 73-74 *supra*.

Second, we can urge the Supreme Court to overrule *Miranda*, independent of whether 18 U.S.C. § 3501 is effective as a direct overruling of that decision. The essential points in an argument supporting this result are not difficult to make out: *Miranda*'s rules are wrong in relation to the original understanding of the Fifth Amendment. Virtually every important issue decided by *Miranda* had been raised in the Court's pre-*Miranda* precedents, and had been resolved in a manner inconsistent with *Miranda*. *Miranda*'s rules and its doctrinal assumptions are inconsistent with those recognized in the Court's decisions in every other Fifth Amendment context, both before and after *Miranda*. See pp. 7-9, 25-35, 53-58 *supra*.

¹⁶⁵ See Friendly, *supra* note 161, at 691; L. Mayers, *supra* note 2, at 67-69.

Miranda has also been seriously eroded by subsequent decisions. Its essential doctrinal premise -- that the Fifth Amendment is necessarily violated if *Miranda*'s rules or their equivalent are not observed -- has been squarely rejected in later decisions. Its specific strictures have been eroded in decisions recognizing the admissibility of statements obtained in violation of *Miranda* for impeachment, in the recognition of a "public safety" exception to *Miranda*, and in recognizing that evidence derived from statements obtained in violation of *Miranda* can be admitted. See pp. 75-79 *supra*. Whether or not 18 U.S.C. § 3501 is directly effective as a repeal of *Miranda*, it is a relevant factor in deciding whether to overrule that decision. In the past, the Supreme Court has been willing to reconsider and overturn constitutional decisions in light of later Congressional enactments which expressed disagreement with them.¹⁶⁶ The Congressional findings embodied in 18 U.S.C. § 3501 should also be accorded weight in deciding whether the time has come to overrule *Miranda*.

Third, *Miranda*'s continued application in state proceedings has a decidedly mysterious character, since the Supreme Court now holds that a state court would not violate the Fifth Amendment by admitting a voluntary statement obtained in violation of *Miranda*. If confronted squarely with this issue, the Court could perpetuate *Miranda* only by holding that it has supervisory authority over the state courts. See pp. 79-80 *supra*.

Finally, at least one state has a statute on the books that is substantially the same as 18 U.S.C. § 3501.¹⁶⁷ In cases coming up from this state, the no-supervisory-authority argument would be reinforced by the fact that *Miranda* involves the application of admittedly non-constitutional rules in the face of a contrary legislative enactment.

Of these four approaches, the approach based on 18 U.S.C. § 3501 should be our lead argument, since it relates directly to federal proceedings and the courts could reject it only by holding an Act of Congress unconstitutional. However, the contention that *Miranda*

¹⁶⁶ See *Glidden v. Zdanok*, 370 U.S. 530 (1962) (reconsidering and overruling decisions which held that the Court of Claims and the Court of Customs and Patent Appeals are Article I courts in light of later Congressional enactment declaring them to be Article III courts).

¹⁶⁷ See *Ariz. Rev. Stat. Ann.* §13-3988 (1978). Indiana also enacted provisions modeled on 18 U.S.C. § 3501, but they were repealed in 1982.

should be overruled, independent of the direct effectiveness of 18 U.S.C. § 3501, would also be worth offering when the issue reaches the Supreme Court, since it would provide an opportunity for setting out a more broadly formulated argument against *Miranda*. If the Court upheld § 3501 this would dispose of *Miranda* at the state level as a practical matter, even though the statute only directly affects federal and District of Columbia proceedings: States could enact statutes like § 3501, and the validation of the federal statute would make it clear that any possible doctrinal grounds for applying *Miranda* in contravention of such statutes have been rejected by the Supreme Court.

C. Administrative Rules for Interrogations by the Department's Agencies

Our second general recommendation is that the Department promptly develop a set of rules or guidelines for the components that carry out interrogations, and implement these rules concurrently with our renewal of a litigative challenge to *Miranda*. Issues that could appropriately be considered in the development of an interrogation policy for the Department would include the desirability of requiring that interrogations, where feasible, be videotaped or recorded;¹⁶⁸ the desirability of rules providing additional guidance concerning the permissible duration and frequency of interrogations;¹⁶⁹ and the desirability of rules restricting or prohibiting specific deceptive or manipulative practices that were characterized as abusive in the *Miranda* decision. See generally p. 48 *supra*. The principal reasons for this recommendation are as follows:

First, we consider such standards to be desirable as a matter of institutional responsibility. Currently, the basic rules for custodial interrogations are set by the *Miranda* decision, and enforced by the courts through the exclusion of evidence. If this form of oversight is to be

¹⁶⁸ See generally *Mallot v. State*, 608 P.2d 737, 743 n.5 (Alas. 1980) (announcement by Supreme Court of Alaska of rule that police, where feasible, must record any interrogation occurring in a place of detention); *Stephan v. State*, 38 Crim. L. Rep. 2243-45 (Alas. Dec. 6, 1985) (digest of more extensive opinion relating to same requirement); American Law Institute, *A Model Code of Pre-Arrest Procedure* § 130.4 (1975) (recording requirement); *id.* at 345-50 (commentary discussing recording requirement, with citations to literature).

¹⁶⁹ Partial time constraints on interrogations are already provided, in an oblique way, by the requirement of Fed. R. Crim. P. 5(a) that an arrested person be brought before a magistrate without unnecessary delay and by the six-hour rule of 18 U.S.C. § 3501(c).

removed, we should adopt other measures which ensure that interrogations are carried out in a manner that is fair to suspects, and that does not jeopardize the admissibility or credibility of confessions or other statements in subsequent judicial proceedings. While the circumstances of the various agencies will obviously require somewhat different practices in carrying out interrogations, we see no presumption in favor of leaving the individual agencies entirely to their own devices in this matter. A general policy can set out standards that leave room for variations reflecting legitimate differences in the needs and operations of different components. By way of comparison, we now have Department-wide rules or guidelines relating to the exercise of prosecutorial discretion, and guidelines have been issued by the Attorney General relating to the activities of particular agencies in such areas as undercover operations and the use of informants.¹⁷⁰

Second, the existence of an administrative policy of this sort should be of substantial value in persuading the courts to abandon *Miranda*. The courts are now accustomed to setting the rules for custodial interrogations, and to enforcing the rules that they have created in particular cases. It should be easier for them to relinquish this role if they know that in doing so they are acceding to a responsible alternative system, rather than writing a blank check for individual officers or agencies.

Third, the adoption of such rules would provide us with two additional arguments for abrogating *Miranda*. The first of these arguments would be based on the *Miranda* decision's assertion that its rules are not the only acceptable means of ensuring compliance with the Fifth Amendment, and its invitation to develop "equally effective" alternatives.¹⁷¹ In light of this invitation, a reasonably designed administrative policy would provide an argument for dispensing with *Miranda*'s system even under the terms of the decision that created it. A second argument

¹⁷⁰ See *Principles of Federal Prosecution* (Dept. of Justice 1980); Attorney General's Guidelines on FBI Undercover Operations (Dec. 31, 1980); Attorney General's Guidelines on FBI Use of Informants and Confidential Sources (Dec. 2, 1980).

¹⁷¹ *Miranda* formulated this invitation restrictively, stating that an acceptable alternative must be "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it," 384 U.S. at 467, 490-91. However, given the Court's prophylactic conception of *Miranda*'s rules in its contemporary caselaw, see pp. 76-79 *supra*, it should be satisfied with any alternative rules that are equally effective in guarding against actual compulsion in violation of the Fifth Amendment.

to the same effect could be based on the Supreme Court's decision in *INS v. Lopez-Mendoza*, 104 S. Ct. 3479 (1984), which held that the Fourth Amendment exclusionary rule does not apply in deportation proceedings. In reaching this conclusion, the Court regarded it as significant that the INS has an administrative system for preventing and punishing Fourth Amendment violations. *Id.* at 3487-88. We could argue similarly that our system of administrative rules and sanctions provides adequate safeguards against Fifth Amendment violations, and justifies dispensing with *Miranda*'s prophylactic system.

A final point in support of an administrative policy is that it would enable us to show that replacing the *Miranda* system with superior alternative rules offers major advantages in relation to the legitimate interests of suspects and defendants, as well as major gains in promoting effective law enforcement. Adopting publicly articulated standards which avoid the *Miranda* rules' manifest shortcomings as a means of ensuring fair treatment of suspects, *see pp.* 48-49, 97-98 *supra*, would be the most effective way of making this point.

D. After *Miranda*

The abrogation of *Miranda* would open the way for a comprehensive reconsideration of pre-trial interrogation and related areas of self-incrimination law. The issues that would merit examination in this connection include (i) the desirability of dispensing with warnings, or including material in warnings which provides an affirmative incentive to suspects to respond to inquiry, (ii) whether any right to counsel should be recognized in connection with police interrogation, prior to the suspect's initial appearance in court, (iii) the propriety of continuing to question a suspect after he has expressed an unwillingness to talk, and (iv) the general admissibility of a defendant's pre-trial silence at trial, both for purposes of impeachment and as evidence in chief.

1. Warnings

A first question that would be open to general reconsideration following an abrogation of *Miranda* is whether "warnings" should be given at all to suspects prior to questioning, and if so, what their content should be. The most basic point against continuing the specific warnings now mandated by *Miranda* is that they reduce the likelihood that a suspect will talk. Since the willingness of suspects to respond to official

inquiry is conducive to the discovery of truth, a practice which has this inhibiting effect is, *prima facie*, undesirable.

The affirmative grounds supporting a warning policy are not particularly persuasive. We have already addressed the argument that warnings are desirable as a means of affording less knowledgeable suspects the same opportunities for stonewalling that are available to those who know more. *See* pp. 56-57, 100 *supra*. While a suspect might believe that he is under a legal obligation to respond to incriminating questions if not told otherwise, it is not apparent why the government should go out of its way to disabuse him of that notion. A failure to do so does not constitute compulsion under the Fifth Amendment, *see* pp. 55-56 *supra*, and doing so may entail the loss of statements which would be helpful in clearing an innocent person¹⁷² or bringing a criminal to justice.¹⁷³

The giving of warnings does, however, at least have some pragmatic value in rebutting claims of coercion by defendants. If a suspect is told at the start of an interview that he does not have to say anything, it becomes more difficult for him to argue later on that he was forced to confess.¹⁷⁴ The utility of warnings on this ground -- and the potential detriment from omitting them -- is enhanced by the formulation of the statute that would govern the admission of pre-trial statements after *Miranda*. Section 3501(b) of Title 18 enumerates several specific factors which the trial judge is to consider on a regular basis in determining the question of voluntariness. Because a number of these factors relate to the giving of *Miranda*-like warnings, or to the suspect's knowledge of information that is conveyed in such warnings, a policy of giving no warnings at all could be a distinct disadvantage in litigating questions of voluntariness under this statute.

An intermediate possibility would be to give warnings which, in substantive content, overlap the *Miranda* warnings and the factors enumerated in 18 U.S.C. § 3501(b), but which contain additional material that offsets their inhibiting effect. For example, it could appropriately be pointed out to a suspect that, in remaining silent, he is

¹⁷² A suspect's silence may deny the authorities information that would clear others who have also come under suspicion. *See* Friendly, *supra* note 161, at 680-81, 686-87.

¹⁷³ *See* Caplan, *supra* note 155, at 1450-54.

¹⁷⁴ *See, e.g., Lyons v. Oklahoma*, 322 U.S. 596, 604 (1944); *see also Berkemer v. McCarty*, 104 S. Ct. 3138, 3147 & n.20 (1984).

foregoing an opportunity to present any information he may have that would clear himself. Advice to a suspect that his silence would reflect poorly on the credibility of any exculpatory story he might offer later on would also provide a rational incentive for cooperation.¹⁷⁵ As discussed earlier, p. 83 *supra*, an admonition along these lines may be independently desirable as a means of avoiding *Doyle v. Ohio*'s prohibition of the use of a suspect's pre-trial silence. With the addition of this type of material, a revised set of warnings might run along the following lines:

(1) You are charged with the commission of [name or description of offense]. The purpose of this interview is to obtain information concerning this offense. Anything you say here may be used as evidence in a court of law.

(2) You are not required to make a statement or to answer questions. However, this interview does give you an opportunity to provide any information that would show your innocence or explain your actions. If you choose to remain silent, that fact may be disclosed in court and may cast doubt on any story or explanation you give later on.

Or:

(1) You are under arrest on suspicion of [name or description of offense]. The purpose of this interview is to obtain information concerning this offense. Anything you say here may be used as evidence in a court of law.

(2) You do not have to make a statement or answer questions. However, if you have anything to say in your defense, we advise you to tell us now. Your failure to talk at this interview could make it harder for a judge or jury to believe any story you give later on.

It is not apparent that warnings formulated in these terms would be less effective than a no-warnings policy in eliciting response. They would, however, cover most of the points of information that are explicitly identified as relevant to the determination of voluntariness in the

¹⁷⁵ See Caplan, *supra* note 155, at 1452 & nn.177-78 (support for similar admonitions).

confessions statute.¹⁷⁶ The desirability of an admonition relating to a right to counsel is a more complicated question that merits separate discussion.

2. The Assistance of Counsel

An antecedent question to whether a suspect should be told that he has a right to counsel in custodial interrogation is whether such a right should in fact be recognized in custodial interrogation. Under Fed. R. Crim. P. 5(a), an arrested person must be brought before a magistrate without unnecessary delay, and this principle is reinforced by the six-hour rule of 18 U.S.C. § 3501(c). A defendant is, of course, entitled to counsel when he is brought into court.¹⁷⁷ The question remaining is accordingly whether a right to counsel should be recognized in the limited period of time prior to the initial appearance before a judicial officer, although there is no legal right to counsel during that period (pp. 84-87 *supra*).

The factors identified in § 3501(b) as relevant to the determination of voluntariness include the presence or absence of advice to a defendant concerning his right to the assistance of counsel and whether the defendant was actually without the assistance of counsel. Recognizing a right to counsel and advising suspects of such a right would accordingly have some value in establishing that any ensuing statements were voluntarily given. However, this point should not be overestimated. The inclusion of these factors in § 3501(b) was not meant to create or recognize a substantive right to counsel at interrogations, or to create a presumption in favor of allowing counsel at that stage. Rather, the statute simply restores the law to its pre-*Miranda* state, in which the absence of counsel or a related admonition are factors of some relevance, along with many others. See pp. 67-72 *supra*. In the absence of other

¹⁷⁶Section 3501(b) provides in part: "The trial judge in determining the issue of voluntariness shall take into consideration . . . whether such defendant knew the nature of the offense with which he was charged or of which he was suspected [and] whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him."

¹⁷⁷ See Fed. R. Crim. P. 44(a) & Note to 1966 Amendment; pp. 84-87 *supra* (current Sixth Amendment doctrine).

indicia of coercion, denial of counsel alone should not weigh heavily in favor of a finding of involuntariness.¹⁷⁸

Moreover, any value of a right to counsel in establishing voluntariness must be weighed against the costs of recognizing such a right. These costs are substantial and obvious. If a lawyer appears, he will usually tell his client to say nothing to law enforcement officers, and there will be little point in attempting further questioning.¹⁷⁹ Even if questioning does subsequently take place, prior consultation with counsel and the delay associated with it eliminates the possibility of obtaining an untainted story, and increases the likelihood of successful fabrication:

If anything has happened and it is important to discover who is the author of it, the first impulse of the human mind is to inquire of the person suspected, whether he did it, and to cross-examine him as to the circumstances Why is it unjust? If he is not guilty will he not have the strongest motive for saying so, and, if he is guilty and seeks to escape liability, will he not use every effort to make his conduct consistent with his innocence? Why, then, does it expose the defendant to improper treatment if an officer of the law at once begins to interrogate him concerning his guilt. But the answer is, he has the right to consult counsel. He should not be hurried into statements which he may subsequently desire to retract. In other words, he should be given an opportunity after he has

¹⁷⁸ See, e.g., *Crooker v. California*, 357 U.S. 433, 438 (1958) (voluntariness clear, despite denial of counsel, where defendant was advised of right not to talk and was aware of that right); *Cicenia v. Lagay*, 357 U.S. 504, 508 (1958) (no coercion despite denial of counsel); *Gallegos v. Nebraska*, 342 U.S. 55, 60, 62-68 (1951) (confession obtained during lengthy detention without counsel voluntary and admissible).

¹⁷⁹ See Note, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L.J. 1519, 1600-02 (1967); Caplan, *supra* note 155, at 1438-41.

Permitting adverse inferences from a suspect's silence in police custody would reduce the costs of a right to counsel, since counsel would then have to figure in the risk of such inferences in deciding whether to advise the suspect to talk or remain silent. However, cases would remain in which the balance of strategic advantage would favor silence and counsel would, in effect, obstruct the investigation by advising the suspect to withhold his knowledge of the offense from the police. Moreover, adverse inferences from silence would do nothing to meet the problem of delay and the increased risk of false denials and fabrications that result from prior consultation with counsel. See Kauper, *supra* note 8, at 1241, 1247.

committed the crime to frame in his mind some method by which he can escape conviction and punishment.¹⁸⁰

In the *Miranda* decision itself, the Court predicated its right to counsel primarily on the fiction of inherent coerciveness. However, the Court also suggested a number of subsidiary purposes that would be served by introducing defense counsel into interrogations (384 U.S. at 470):

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

The suggestion that a defense attorney will assist his client in telling a truthful story may be discounted, in light of the much greater probability that he will prevent him from telling any story. The other functions identified for defense counsel at this stage were deterring the police from resorting to coercion, ensuring that the occurrence of coercion could be established in later judicial proceedings if it did take place, and ensuring that the government would not misrepresent a defendant's statements in subsequent proceedings. These objectives are legitimate, though how much weight they carry as support for a right to counsel depends in part on one's assessment of how likely it is that they would not be realized in the absence of such a right. In any event, *Miranda's* right to counsel, like the other features of *Miranda's* system, does not have any reasonable "fit" in relation to its stated purposes. If special arrangements are thought necessary to deter coercion and to guard against perjury by the government, it would, for example, seem evident that a regular practice of videotaping or recording interrogations would be more effective than a waivable -- and frequently waived -- right to have counsel present.

¹⁸⁰ William Howard Taft, *The Administration of Criminal Law*, 15 Yale L.J. 1, 8-9 (1909); see Kauper, *supra* note 8, at 1241, 1247.

In terms of specific policies, we would see no problem with advising a suspect that he will be brought promptly before a magistrate, and that counsel will be made available to him when he is brought into court. Advice of this sort would have affirmative value in rebutting claims that a suspect was intimidated into confessing by the prospect of indefinitely prolonged interrogation or detention.¹⁸¹ It would not be advisable, however, to tell a suspect that he has a right to consult with counsel prior to custodial questioning, or to have counsel present during questioning. A policy of this sort could be implemented by giving suspects an admonition along the following lines:

We are required by law to bring you before a judge without unnecessary delay. [Insert more definite information here concerning the expected time when the suspect will be brought before a magistrate]. You have a right to be represented by counsel when you appear in court. If you cannot afford a lawyer, the judge will appoint one for you without charge.¹⁸²

3. Questioning Uncooperative Suspects

A third issue that would be open to consideration after *Miranda* is the propriety of questioning a suspect who indicates that he does not want to be questioned. *Miranda* itself established nearly absolute rules that a suspect can cut off custodial interrogation, immediately and permanently, by expressing a reluctance to talk or by asking for counsel. As discussed above, pp. 8-9, 35, 54-55 *supra*, these rules are wrong as a matter of history, and more extreme than those that are presently recognized in any other Fifth Amendment context. As a matter of policy, we see no reason why a reasonable effort should not be made to persuade an uncooperative suspect to make a statement or answer questions. It should at least be permissible to present such a suspect with an account

¹⁸¹ Cf. *Haynes v. Washington*, 373 U.S. 503 (1963) (confession excluded based on police threat that defendant would be held incommunicado until he confessed).

¹⁸² In conjunction with the revised warnings suggested earlier, see p. 109 *supra*, an admonition of this sort would, subject to the suggested policy constraints, round out the relationship to the factors enumerated in 18 U.S.C. § 3501(b). These include "the time elapsing between arrest and arraignment . . . if [the confession] was made after arrest and before arraignment . . . [and] . . . whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel"

of accusations or other evidence against him, and to ask him whether he can offer any response or explanation in light of that information.¹⁸³

4. The Admission of Pre-Trial Silence

Miranda's rule prohibiting the admission at trial of a defendant's silence in custodial interrogation was unknown to the common law, and contrary to the weight of state authority at the time of the *Miranda* decision. In historical critiques of self-incrimination law, rules barring adverse inferences from silence have been among the most frequent targets of criticism. See pp. 8-9, 33-34 *supra*. In other social contexts, questioning a person who is reasonably suspected of wrongdoing is considered a natural and appropriate response, and the refusal of a person in that situation to explain or respond to the evidence against him is rationally regarded as grounds for heightened suspicion.¹⁸⁴ Legal doctrines which establish a contrary rule for criminal cases are basically of benefit to the guilty, since an innocent person is likely to be eager to clear himself. As the law reformer Jeremy Bentham observed in relation to a nineteenth century rule barring any "legal presumption" against a defendant based on silence in the face of incriminating questions:

Let us now consider the case of persons who are innocently accused. Can it be supposed that the rule in question has been established with the intention of protecting them? They are the only persons to whom it can never be useful. Take an individual of this class; by the supposition, he is innocent, but, by the same supposition, he is suspected. What is his highest interest, and his most ardent wish? To dissipate the cloud which surrounds his conduct, and give every explanation which may set it in its true light; to provoke questions, to answer them, and to defy his accusers. This is his object; this is the desire which animates him. Every detail in the examination is a link in the chain of evidence which establishes his innocence.

If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first

¹⁸³ Cf. American Law Institute, *supra* note 56, § 5.04 & Note (police may confront suspect with new evidence and ask whether he wishes to answer questions, even after he has indicated unwillingness to talk).

¹⁸⁴ See Caplan, *supra* note 155, at 1451-52.

which they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence.¹⁸⁵

The volubility of the critics of rules barring adverse inferences from silence has frequently been matched by the taciturnity of their proponents. The Supreme Court's decision in *Griffin v. California*, barring adverse comment on silence at trial, and *Miranda's* footnote which announced a corresponding rule concerning pre-trial silence, involved no serious effort at justification, and did not deign to address the historical and policy arguments on the other side of the issue. See pp. 57-58 *supra*. Recent Supreme Court decisions in such cases as *United States v. Hale*, 422 U.S. 171 (1975), and *Doyle v. Ohio*, 426 U.S. 610 (1976), have given this issue more serious attention, but fall considerably short of providing a convincing rationale for any broad preclusion of the use of pre-trial silence at trial.

The case for restricting the use of such evidence has been based in part on the contention that jurors are likely to overestimate the value of a defendant's silence in police custody as evidence of guilt. See *United States v. Hale*, 422 U.S. at 180. In assessing this contention, any resulting jeopardy to defendants who are in fact guilty may be discounted, since the guilty should be convicted. The argument accordingly must be that the admission of pre-trial silence would create a substantial risk of conviction for innocent defendants, and that this risk is great enough to outweigh the value it would have in securing the conviction of the guilty.

No evidence has ever been offered in support of this proposition, and it would not appear to have any intrinsic plausibility to persons who are not already disposed to believe that a defendant's silence under questioning should be concealed from the trier of fact. To the extent that it relates to a supposed propensity of *jurors* to error, it apparently reflects the common conceit of lawyers and judges that jurors, lacking the sagacity of lawyers and judges, are likely to go wrong if allowed to know what has actually happened in a case, and that the way to improve their thinking is to let them know less.

In concrete terms, the following occurrences would generally be required for the conviction of an innocent person to result from the admission of pre-trial silence under questioning: (1) The defendant,

¹⁸⁵ *A Treatise on Judicial Evidence* 241 (1825).

though innocent, fails to deny the false charges or accusation against him when confronted with them by the police, or otherwise refuses to respond to the evidence against him; (2) the defendant, though innocent, does not subsequently present an exculpatory story to the prosecutor before trial, or if he does, the jury finds his later willingness to talk inadequate to mitigate the inference arising from his silence in police custody; (3) the defendant, though innocent, fails to take the stand at trial and offer some alternative explanation for his earlier silence, or offers an explanation that is sufficiently implausible that the jury discounts it, and (4) the jury finds the defendant's silence sufficiently probative in the context of all the evidence in the case that it convicts the defendant, though he is innocent, where it would have acquitted him had his silence been concealed. Proponents of the view that this confluence of improbabilities amounts to an undue risk to the innocent would at least appear to have the burden of proof on this point.

A somewhat different notion supporting the exclusion of pre-trial silence that has surfaced in the Supreme Court's decisions is that such silence is inherently ambiguous. See *United States v. Hale*, 422 U.S. at 176-77; *Doyle v. Ohio*, 426 U.S. at 617 & n.8. To the extent that this refers to the idea that a suspect may have understood the *Miranda* warnings as representing that his silence could not be used against him, the problem could easily be dispelled by not giving suspects any warnings, or by giving variant warnings that could not be so understood. To the extent that it merely refers to the fact that suspects in police custody may remain silent for various reasons, and that a jury would be required to engage in inferences and make a judgment concerning the actual reason under the facts of a case, it fails to distinguish a defendant's silence from many other sorts of evidence. For example, a suspect's flight following the occurrence of an offense is properly admitted as evidence of guilt, even though there are any number of reasons, aside from consciousness of guilt, which may motivate a person to leave one place and go to another.

Finally, any "ambiguity" in a suspect's silence could be minimized by suitably framed admonitions. For example, a suspect might be advised, as suggested earlier, that the interview provides him with an opportunity to present any information that would establish his innocence, and that his failure to present such information will reflect poorly on the credibility of any exculpatory story he might offer later on. A suspect's failure to say anything in his defense following such advice

would suggest that he had nothing to say. In such circumstances, "a failure to explain would point to an inability to explain."¹⁸⁶

As discussed earlier (pp. 83, 109 *supra*), some simple changes in the warnings policy should be sufficient to get around the problem with using pre-trial silence for impeachment under the rule of *Doyle v. Ohio*. A problem might remain in federal proceedings under the Supreme Court's decision in *United States v. Hale*, which barred the admission of a defendant's silence following the receipt of *Miranda* warnings as an evidentiary matter. However, that decision was partially based on the same considerations as *Doyle v. Ohio*, and the Court might be willing to reconsider or distinguish it under a revised warnings policy.¹⁸⁷

A final issue that would be ripe for reconsideration following a general abrogation of *Miranda* would be the use of pre-trial silence as evidence in chief. If the removal of *Doyle v. Ohio* did make pre-trial silence freely admissible to impeach a defendant's trial testimony, there would be strong policy arguments for admitting such silence in cases in which the defendant does not take the stand as well: First, a rule admitting pre-trial silence when the defendant takes the stand but not otherwise would create a perverse incentive to refrain from testifying. Since the defendant -- whether innocent or guilty -- is normally the person who knows the most about the truth of the charges against him, it is desirable to have him available for examination at trial, and detrimental to the discovery of truth if evidentiary rules are so devised as to discourage him from taking the stand. Second, admitting a defendant's pre-trial silence "for impeachment" but not as "evidence in chief" would make the admissibility of such silence depend on an artificial distinction that has no relationship to its probative value, since a defendant's silence before trial may cast doubt on the credibility of a defense presented through the testimony of other witnesses to the same degree as a defense presented through his own testimony.¹⁸⁸

¹⁸⁶ *Adamson v. California*, 332 U.S. 46, 56 (1947). See generally pp. 23, 33-34 *supra*.

¹⁸⁷ See note 129 *supra*.

¹⁸⁸ See, e.g., *Wainwright v. Greenfield*, No. 84-1480 (U.S. Jan. 14, 1986) (prosecutor's use of defendant's silence to impeach insanity defense presented through the testimony of expert witnesses).

Conclusion

Miranda v. Arizona was a decision without a past. Its rules had no basis in history or precedent but reflected, rather, a willful disregard of the authoritative sources of law. In frank terms, it stood on nothing more substantial than Chief Justice Warren's belief that general use of the FBI warnings and other rules he had devised would be socially beneficial, and on his ability to persuade four other Justices to go along with him.

Miranda v. Arizona is a decision without a future. The current majority of the Supreme Court has rejected the doctrinal basis of *Miranda*, and has no personal stake in perpetuating its particular system of rules. The persistence of *Miranda* appears to rest on nothing more than the current Court's reluctance to unsettle the law, and the fact that it has not yet encountered a case that has forced the issue of *Miranda*'s validity. While a reluctance to rock the boat is, up to a point, understandable, it cannot be accorded controlling weight in supporting a decision that not only flies in the face of the principles of constitutional government but also impairs the ability of government to safeguard "the first right of the individual, the right to be protected from criminal attack in his home, in his work, and in the streets."¹⁸⁹ The tragedy of *Miranda* is compounded by its shortcomings in relation to its own objective of ensuring fair treatment of persons suspected of crime. It is difficult to conceive of a legislature enacting so peculiar a set of rules, or keeping them in effect after their deficiencies had been discerned and their rationale discredited. Yet despite the repudiation of its underlying premises by the Supreme Court, *Miranda* drifts on twenty years later, a derelict on the waters of the law.

There is every reason to believe that an effort to correct this situation would be successful. We have at our disposal a uniquely favorable set of circumstances -- several recent decisions by the Supreme Court holding, in effect, that *Miranda* is unsound in principle, and a statute, 18 U.S.C. § 3501, that is specifically designed to overrule it. It is difficult to see how we could fail in making our case.

The potential benefits from success in this effort are very great. A wide range of fundamental issues that have been foreclosed by *Miranda* would once again become amenable to study, debate, negotiation and

¹⁸⁹ *State v. McKnight*, 243 A.2d 240, 250 (N.J. 1968).

resolution through the democratic process, restoring "the initiative in criminal law reform to those forums where it truly belongs." *Miranda*, 384 U.S. at 524 (Harlan, J., dissenting). Beyond the correction of the specific evils that have resulted from *Miranda*'s system, an abrogation of *Miranda* would be of broader import because of its symbolic status as the epitome of Warren Court activism in the criminal law area. We accordingly regard a challenge to *Miranda* as essential, not only in overcoming the detrimental impact caused directly by this decision, but also as a critical step in moving to repudiate a discredited criminal jurisprudence. Overturning *Miranda* would, accordingly, be among the most important achievements of this administration -- indeed, of any administration -- in restoring the power of self-government to the people of the United States in the suppression of crime.

Addendum of January 20, 1987, to the Report to the Attorney General on the Law of Pre-Trial Interrogation (Feb. 12, 1986)

Subsequent Cases

Since the submission of the Office of Legal Policy's *Report to the Attorney General on the Law of Pre-Trial Interrogation* (the "*Miranda Report*"), the Supreme Court has decided two cases -- *Moran v. Burbine* and *Colorado v. Connelly* -- that provide additional support for a number of the Report's legal conclusions. The relevant features of these cases are as follows:

In *Moran v. Burbine*, 106 S. Ct. 1135 (1986), the Court considered the effect of a failure by the police to give an attorney access to a suspect in custody. The suspect -- unaware that an attorney had attempted to contact him -- waived his *Miranda* rights and confessed to the murder of a young woman. The admission of the confession was challenged on both Fifth Amendment and Sixth Amendment grounds.

On the Fifth Amendment issue, the Court reiterated the familiar proposition that the *Miranda* rules are not constitutional rights, but only prophylactic measures designed to reduce the likelihood of coercion taking place in custodial questioning. *See Miranda Report* at 76-79. The Court rejected the argument that a new rule should be created requiring that the police inform suspects of efforts by attorneys to reach them. The Court reasoned that a further prophylactic restriction of this sort would upset the balance that *Miranda* had struck between society's interest in law enforcement and the interest of defendants in being protected from Fifth Amendment violations. It would carry a "substantial cost to society's legitimate and substantial interest in securing admissions of guilt" without significantly enhancing the protection of suspects from coercion. *See* 106 S. Ct. at 1142-45.

On the Sixth Amendment issue, the Court found the constitutional right to counsel to be inapplicable, on the ground that the right does not attach prior to the commencement of adversarial judicial proceedings (the "first formal charging proceeding"). *See* 106 S. Ct. at 1145-47. This confirms the analysis of that issue in the *Miranda Report* (*id.* at 84-87).

In *Colorado v. Connelly*, 107 S. Ct. 515 (1986), the Court considered the admissibility of a confession given by a mentally disordered defendant to the police. The defendant admitted to the murder of a girl, believing that God had ordered him to confess or commit suicide. The

Court rejected the view that the defendant's confession on the basis of internal psychological pressures would affect his statements' admissibility, holding that the due process standard of voluntariness is only a prohibition of coercive practices by the government, and does not require free will or rational choice in any broader sense. *See* 107 S. Ct. at 519-22. The Court observed similarly that "[t]he sole concern of the Fifth Amendment . . . is governmental coercion." *Id.* at 523.

Appendix: Miscarriages of Justice Resulting from *Miranda* and Related Decisions

The principal cost of *Miranda* is the loss of statements that are never obtained to begin with because suspects invoke *Miranda*'s rules to prevent all questioning by the police or are inhibited from responding to such questioning. However, substantial costs are also exacted when police officers are tripped up by the technicalities of *Miranda* or related decisions, with the result that voluntary statements whose truthfulness is not in doubt are excluded from trial. Confessed criminals may go free in such cases, and even if re-trial is possible, the anguish of crime victims and their families may be prolonged through years of additional litigation. This appendix describes a number of cases illustrating the damage to the criminal justice system that can result from application of *Miranda*'s exclusionary rule.

1. *The Jose Suarez case.* The *Miranda* decision was applied retroactively to exclude statements obtained from suspects in interrogations that preceded *Miranda*, where the cases had not yet been tried when the *Miranda* decision was handed down. This application affected a large body of pending cases, and resulted in egregious and widely publicized incidents in which killers, rapists and other serious offenders were set free.

One of the most notorious incidents of this sort involved a Brooklyn resident, Jose Suarez, who confessed to butchering his wife and five children with a knife. Because his interrogation preceded *Miranda*, he was not, of course, given warnings satisfying its requirements, and his statements became inadmissible. District Attorney Aaron Koota and the police attempted unsuccessfully for seven months to obtain independent evidence of Suarez's guilt, but were unable to do so. On releasing Suarez, the judge stated: "This is a very sad thing. It is so repulsive it makes one's blood run cold and any decent human being's stomach turn to let a thing like this out on the street."¹

¹ See *Controlling Crime Through More Effective Law Enforcement: Hearings before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 8-9, 225-26, 573-74 (1967).

2. *The Braeseke case.* Barry Braeseke was convicted in the Superior Court of Alameda County, California, for the first-degree murder of his father, mother and grandfather. Braeseke had confessed to murdering his family with a .22 caliber rifle, and had led the police to the spot where he had hidden the weapon. He later confessed again to a deputy district attorney. Both confessions were tape recorded. There was no suggestion of any coercion or overreaching in obtaining these statements, and the record of Braeseke's conversations with the police and prosecutor were permeated with repetitive explanations of his rights, and with his repeated assertions that he understood his rights and was freely waiving them.

The Supreme Court of California nevertheless suppressed the confessions and reversed the conviction on the ground that Braeseke had asked for counsel at one point prior to his first confession, and that his later initiation of further conversation by asking to speak to a police officer "off the record" did not constitute a knowing and intelligent waiver of his rights. The court discounted Braeseke's numerous subsequent assertions that he understood his rights and was willing to talk, and suppressed his second confession as well as the first, on the ground that the former was derived from the latter. The dissenting justices in the case observed:

How did the constable blunder? What did the officers do that they should not have done? What should have been done that was left undone? . . . As soon as the officers had reason to suspect defendant of the murders they fully advised him of his *Miranda* rights. He responded that he understood his rights and was willing to speak to the officers. When defendant subsequently invoked his rights and stated he did not wish to talk further without an attorney present, the officers immediately terminated the interview, told defendant they could not question him further, and advised he would have to reinitiate communication if he later wished to speak to them.

Defendant was then arrested. While being booked he asked to speak with Officer Cervi alone and "off the record." This request was granted and when alone, defendant asked Cervi certain hypothetical questions regarding what would happen if he were in fact responsible for the murders. Cervi told defendant he would have to go to jail, but that it would be better for him if he gave Cervi a statement. Cervi then asked

defendant if he was willing to give a tape recorded statement, and defendant agreed to do so. At commencement of the statement defendant was reminded he had previously refused to talk further without an attorney. Defendant acknowledged this was the case and also admitted he had subsequently asked to talk further with Cervi. Defendant also stated he was acting voluntarily and was still aware of his right to have an attorney present

A few hours later defendant gave a taped statement to a deputy district attorney. Defendant was again given the *Miranda* admonition and again stated he understood it and was willing to waive its protection. He acknowledged he had previously been advised of these rights, had understood them at that time, had stated he did not wish to talk without an attorney present and had then been advised that if he wanted to talk further, he would have to reinitiate discussion with the officers. Defendant affirmed he had later told Officer Cervi he wished to speak to him, that he had acted voluntarily in reinitiating communication with the officer, and he had done so with his *Miranda* rights in mind. Defendant was again asked whether he was willing to waive his *Miranda* rights, stated he was and again gave a full description of his crimes.

It would be difficult to imagine more compelling evidence of waiver of one's privilege to sit silent. Conversely, defendant's desire to describe his conduct to those charged with its solution is clear and should not be frustrated by our court.

Defendant's conviction for these grave crimes -- cold-blooded murder of his father, mother and grandfather to secure his inheritance -- should be affirmed.²

3. *Edwards v. Arizona*. Edwards was arrested for participating in a robbery of a bar which resulted in the death of the proprietor. He was given *Miranda* warnings, waived his rights, and made exculpatory statements in response to questioning. However, he then expressed an interest in making a deal. Following an unproductive discussion of this possibility with the county attorney, he stated that he wanted an attorney before making a deal. He did not indicate that he wanted an attorney

²See *People v. Braeseke*, 602 P. 2d 384 (Cal. 1979).

prior to further interrogation; nevertheless, questioning was not resumed at that point and Edwards was taken to the county jail.

On the following day, Edwards was visited by two police detectives who were not aware that he had made a statement about an attorney. They explained his *Miranda* rights to him and he said that he was willing to talk if he could first hear an accomplice's tape recorded statement that he had been told about the preceding day. After hearing the accomplice's statement, Edwards made a statement inculcating himself in the fatal robbery. Edwards was subsequently convicted of robbery, burglary, and first degree murder, and the conviction was affirmed by the Supreme Court of Arizona on appeal.

The Supreme Court granted certiorari and reversed, holding that a normal waiver of *Miranda* rights following a suspect's request for counsel is inadequate. In such cases, said the Court, further questioning is permitted only if the suspect himself initiates further communication with the police.³

4. *The Ronnie Gaspard case.* Ronnie Gaspard was a member of the Bandidos motorcycle gang who admitted to carrying out a contract murder of a woman who had served as a government witness in a narcotics prosecution of gang members. Following his arrest in 1984, Gaspard was informed of his *Miranda* rights, waived his rights, and made a full confession to the crime. However, his confession and evidence derived from it were suppressed on the ground that he had routinely been assigned counsel on his initial entry into jail. The district judge apparently believed that suppression of his statements under these circumstances was required by *Edwards v. Arizona*, notwithstanding compliance with the warnings requirement and despite Gaspard's waiver of his rights, including the right to counsel. Without this evidence there was no case, and Gaspard was set free. A newspaper account described this ostensible vindication of Gaspard's rights as follow:

Two years ago, a Fort Worth woman was shot to death execution-style after she agreed to testify in a drug trial against members of a motorcycle gang.

Soon afterward, Bandidos gang member Ronnie Dale Gaspard was charged with killing Diane Hubbard Sanders, 23, after he

³See *State v. Edwards*, 594 P.2d 72 (Ariz. 1979); *Edwards v. Arizona*, 451 U.S. 477 (1981).

led officers to the crime scene and signed a statement admitting the crime.

But Tuesday . . . a judge in Fort Worth threw out his statement on a legal technicality. Without the statement, Tarrant County prosecutors said they had no case. The charges were dismissed and Gaspard was set free.

Gaspard, 37, . . . walked out of the courtroom grinning.

Another article reported:

Gordon and Geraldine Hubbard had urged their 23-year-old daughter to testify against members of a Fort Worth motorcycle gang because "it was the right thing to do."

Now they aren't so sure.

Denise Hubbard Sanders was killed for cooperating with authorities nearly two years ago. And Tuesday, the man who said he shot her in the head was freed on a legal technicality

What hurt most, the Hubbards said, was seeing Ronnie Dale Gaspard, a 37-year-old member of the Bandidos motorcycle gang, walk out of a Fort Worth courtroom with a "big smirky grin" on his face.

"That stinks," Gordon Hubbard said. "The guy sits there and admits it and then just walks out."

State District Court Judge Charles Dickens ruled that even though Gaspard had been read his rights, his statement to police was inadmissible as evidence because of a 1981 U.S. Supreme Court ruling.

That ruling states that defendants who have lawyers can confess to crimes only when they offer to talk and not when police question them, said Gaspard's attorney, William O. Wuester. To the Hubbards, it is the kind of quirk in the law that protects only the criminals.

"Look, we are the kind of people that stop for red lights at four in the morning when no one else is around," said

Geraldine Hubbard as she sat in her kitchen. "We believe in law and order. But when something like this happens, you lose faith."

Geraldine Hubbard described her daughter as a naive and easygoing woman who was a good mother to her now 4-year-old daughter.⁴

⁴See Letter of James K. Stewart, Director, National Institute of Justice, to Attorney General Edwin Meese (Dec. 6, 1985) (with attachments documenting Gaspard case).