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Miranda and the Burger Court: Trends and Countertrends

David Sonenshein*

INTRODUCTION

In the expanse of American legal history there are very few cases which have gained notoriety both within the legal community and the general population. *Miranda v. Arizona* is such a case. Although legal scholars have written much in an effort to interpret and explicate *Miranda* and its progeny, the basic rules prescribed by *Miranda* are recognizable by anyone who consumes a steady diet of police or detective television shows. At the same time, few decisions have been as controversial as *Miranda.* In appearing to place a premium on “fairness” and the rights of the individual at the possible expense of convicting the “factually guilty,” *Miranda* stands as the prototypical Warren Court decision in the criminal procedure area. However, its effect on actual conviction rates is most likely considerably less sweeping than that of *Mapp v. Ohio,* decided two years earlier.

In response to *Miranda,* some prosecutors howled, and “law and
order” politicians railed. It came as no surprise, therefore, when the post-Warren-era Court, composed of first two, and then four, justices appointed by President Richard Nixon, a hardline “law and order” politician, proved to be inhospitable to extending Miranda’s reach or broadening its scope. Few, however, anticipated the liberties that the Court would take with precedent and logic in carrying out its work in the post-Miranda cases.

Much has been written about the Burger Court’s treatment,

New York Times reported:

Police Commissioner Howard R. Leary said yesterday that the Supreme Court’s ruling on Monday that a suspect must be informed of his right to remain silent and to have counsel “will certainly restrict us in our effectiveness.”

“There should be some diminishing of law and order as a result,” he observed. Speaking at a news conference in Police Headquarters, the Commissioner said that in the aftermath of the 5-4 court ruling “it’s quite possible that a great number of persons who are in fact guilty will not be successfully prosecuted.”

“We just won’t be able to offer the district attorneys and the courts as much evidence,” Mr. Leary declared.

N.Y. Times, July 15, 1966, at 1, col. 6. However, other police and prosecution reaction showed a notable lack of concern. Wayne County, Michigan Prosecutor Samuel Olson commented: “So far as we are concerned there is absolutely nothing new in this decision.” N.Y. Times, June 14, 1966, at 25, col. 6. Bronx County (N.Y.) Prosecutor Isidore Dollinger said “that the ruling appeared to him to require ‘exactly what we are doing already.’” N.Y. Times, June 14, 1966, at 25, col. 7.

7. See Chester, Hodgson & Page, An American Melodrama 230-31 (1969). Two of the three major candidates for the presidency in the 1968 election, Richard Nixon and George Wallace, made “law and order” a key theme of their respective campaigns. During their campaigns, both Nixon and Wallace spoke out against recent criminal procedure decisions of the Supreme Court which, according to them, had tipped the criminal justice balance in favor of criminal defendants and against police and prosecutors. See Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 Colum. L. Rev. 436, 438-39 nn. 8-10 (1980).


8. Chief Justice Warren Burger and Associate Justice Harry Blackmun were appointed by President Nixon to the Supreme Court in 1969, replacing Chief Justice Earl Warren and Associate Justice Abe Fortas.

9. Associate Justice Lewis Powell joined the Court in 1971, replacing Associate Justice Hugo Black. Associate Justice William Rehnquist joined the Court in 1972, replacing Associate Justice John Marshall Harlan. These four changes in the Court’s composition replaced two of the five to four Miranda majority.

10. Though history has yet to determine the influence of Chief Justice Burger on his fellow members of the Court, the term “Burger Court” can fairly be used to denote a consistent, if somewhat fluid, majority of the Justices which seems to coalesce on criminal justice and other issues. Although the term “Burger Court” only took on meaning upon the ascension of Chief Justice Burger to the Supreme Court, the Burger Court majority often has included Justice White (a Kennedy appointee) and Justice Stewart (an Eisenhower appointee).
generally, of the Warren Court's criminal procedure decisions,\textsuperscript{11} and some commentators have tried to decipher some decision-making motif or common thread, which might indicate principled and predictable decision-making.\textsuperscript{12} It is difficult, however, to resolve this debate concerning the Burger Court's decisional basis because the differing commentators ground their arguments largely on analyses of mutually exclusive clusters of cases.\textsuperscript{13} Nevertheless, it is clear that from the Burger Court's first confrontation with \textit{Miranda} in 1971 until very recently, the Court resolved to redress the perceived imbalance in favor of criminal defendants over the police by narrowing the scope of the original holding, by refusing to apply \textit{Miranda} to situations clearly within the explicit purview of the \textit{Miranda} rule, and by refusing to extend the \textit{Miranda} protections to suspects finding themselves in situations implicitly addressed by \textit{Miranda}. Whether this decision-making derives from the Court's belief in the actual or factual guilt of confessing defendants, or from the Court's desire to convey a perception that crime is being dealt with and deterred, the result is the same.

Although the Burger Court has not overruled \textit{Miranda}, the Court has consistently undermined the rationales, assumptions, and values which gave \textit{Miranda} life. Indeed, the authority now ex-

\begin{itemize}
  \item[12.] Compare Chase, \textit{The Burger Court, The Individual and the Criminal Process: Directions and Misdirections}, 52 N.Y.U. L. Rev. 518 (1977), with Seidman, supra note 7. Professor Edward Chase has argued that the key to Burger Court treatment of criminal procedure problems is its obsession with "factual guilt." In contrast to the Warren Court, which reversed convictions \textit{irrespective} of the likelihood or even certainty of the defendant's actual guilt if the conviction was obtained unfairly or through the derogation of constitutional rights, the Burger Court takes the position that if reliable evidence establishes the probability that a particular defendant actually committed the crime, constitutional exclusionary rules will be strictly construed, narrowed, or deemed waived. Conversely, constitutional rules that operate to preserve the evidence will be liberally construed or expanded.
  \item[13.] See supra note 12.
\end{itemize}
ists to overrule *Miranda.*

Remarkably, however, three recent cases have breathed new life into *Miranda.* To paraphrase Mark Twain, reports of the demise of *Miranda* may have been exaggerated, or at least premature. In order to determine the current status of *Miranda,* this article will first examine the decision in *Miranda* itself. Next, it will discuss the Burger Court’s reaction to *Miranda* in a number of significant cases. Then, this article will look at the Burger Court’s most recent pronouncements on *Miranda.* Finally, this article will conclude that perhaps *Miranda* retains more vitality today than it has during most of the Burger Court era.

**THE MIRANDA OPINION**

**Antecedents**

When Chief Justice Warren announced the Supreme Court’s decision in *Miranda v. Arizona* and three companion cases on June 13, 1966, there was little doubt that there would be opposition. Perhaps mindful of the criticism levelled against the Court’s allegedly confusing decision in *Escobedo v. Illinois* and anticipating the criticism to come in the wake of *Miranda,* the Chief Justice appears to have taken great pains to write and structure the majority opinion in *Miranda* in a clear and unambiguous manner. The Court did not deem it worthwhile to fuel the critics unnecessarily with confusing messages or an admission that the Court was breaking new ground. Indeed, still smarting from the criticism that it had broken new ground with *Escobedo,* the Court sought to fend off such attacks early in *Miranda,* when it stated: “We start here as we did in Escobedo, with the premise that our holding is not an


17. Prior to oral argument of *Miranda,* thirty state attorneys general supported the attorneys general of California, New York, and Arizona, and the Solicitor General of the United States, by filing an *amicus curiae* brief in support of the proposition that a criminal suspect’s incriminating statement, obtained during custodial interrogation, should be admissible at trial despite the failure of the government to advise such suspect of his right to remain silent and right to counsel prior to commencing questioning. 384 U.S. at 438, 439. See generally, Brief of the State of New York, reprinted in *Kurland & Casper, 63 Landmark Briefs and Arguments of the Supreme Court of the U.S.: Constitutional Law,* 788 (1975).

innovation in our jurisprudence, but it is an application of principles long recognized and applied in other settings." Further, the Court pointed out that *Miranda* is a natural expansion on *Escobedo*, which the Court explicitly reaffirmed.

Given the importance that *Miranda* ascribes to *Escobedo*, examination of *Escobedo* is appropriate here. In *Escobedo*, the Court held that where a police investigation "is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect," and where such suspect has been taken into custody and the police interrogate the suspect in the hopes of obtaining incriminating statements, any such statements are inadmissible against the suspect if he has requested and been denied counsel and has not been informed "effectively" of his fifth amendment right to remain silent.

Where the above cluster of facts are present, the suspect's right to the assistance of counsel, guaranteed by the sixth amendment, is violated, whether or not the suspect has been indicted or otherwise formally charged. As a sixth amendment decision, *Escobedo* is merely the culmination of a long history of right to counsel decisions beginning with *Powell v. Alabama* and continuing through *Massiah v. United States*, which progressively held that the de-

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19. 384 U.S. at 442.
20. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—That no person . . . shall be compelled in any criminal case to be a witness against himself, and that the accused shall . . . have the Assistance of Counsel—rights which were put in jeopardy in that case through official overbearing.

*Id.*

21. U.S. Const. amend. V, provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." This privilege against self-incrimination was made applicable to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964).

22. 378 U.S. at 490-91.
23. U.S. Const. amend. VI, provides in relevant part: "...the accused shall. . . have the assistance of counsel."

24. 378 U.S. at 486.
25. 287 U.S. 45 (1932).
26. 377 U.S. 201 (1963). *Massiah* held that any interrogation that occurs after indictment or formal arraignment is such a critical stage. *Escobedo* held that the critical stage threshold is reached when the law enforcement process focuses on a particular suspect in custody, shifting from the "investigatory" to the "accusatory" stage, 378 U.S. at 486, irrespective of indictment or formal charge. *Id.* at 490-91. It can hardly be gainsaid that the interrogation of a suspect is "critical." The question that opponents of *Escobedo* raised is whether interrogation rises to the dignity of a "stage" in the adversarial process. *Id.* at 493-94 (Stewart, J., dissenting). Such an argument exalts form over substance, since the test of a "critical stage" is whether rights may be lost or compromised, *Hamilton v. Alabama*, 368
defendant’s sixth amendment right to counsel attaches to various proceedings, including pretrial stages in the criminal prosecution, by finding that each such proceeding is a “critical stage” in the criminal justice process.

*Escobedo* was decided on the basis of the sixth amendment right to counsel, while *Miranda* was explicitly a fifth amendment self-incrimination decision. A link between the two holdings is logical, however, because the right to counsel is necessary to preserve inviolate the privilege against self-incrimination during custodial interrogation. Indeed, the Court in *Miranda* noted that Escobedo’s fifth amendment right to silence was jeopardized along with his sixth amendment right to the assistance of counsel, and that *Escobedo* was as much an explication of fifth amendment rights as it was a sixth amendment decision.27

Therefore, the Court in *Miranda* argued that *Escobedo*, although explicitly grounded in the sixth amendment right to counsel, lays an implicit foundation for *Miranda* because the right to counsel is the handmaiden of the fifth amendment right to silence in the custodial setting. In the Court’s words: “the presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [fifth amendment] privilege.”28

**The Holding**

The Court’s holding, in *Miranda*, although lengthy, is straightforward and clear. The prosecution may not introduce any statement, inculpatory or exculpatory, made by a defendant who is undergoing custodial interrogation, unless the state has first demonstrated the use of safeguards effective to secure the privilege against self-incrimination.29

The Court carefully defined and explained the terms of its holding. “Custodial interrogation” was defined as questioning initiated by the police in any setting in which a suspect is not “free to go.”30

Regarding the “safeguards” required to protect a suspect’s right to remain silent, the Court stated that “unless we are shown other procedures which are at least as effective in apprising accused per-

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27. 384 U.S. at 442.
28. *Id.* at 466.
29. *Id.* at 444.
30. *Id.*

sons of their right of silence and in assuring a continuous opportunity to exercise it," the now familiar litany of "warnings" is required. The warnings include informing a suspect: (1) of the right to remain silent; (2) of the fact that any statements may be used against him in court; (3) of his right to the presence of an attorney during questioning; and (4) that an attorney will be appointed free of charge if he cannot afford to retain one. Moreover, the Court clearly held that the giving of each of the warnings is indispensable and a prerequisite to the admission of a confession or other statement by a suspect.

Like the warnings, the suspect's waiver of his rights is indispensable to the admissibility of the suspect's statements. Regarding a suspect's waiver of the rights enunciated in the warnings, the Court incorporated the well-known standard for the waiver of constitutional rights developed in Johnson v. Zerbst. Any waiver of the right to remain silent or the right to counsel must be, in the "totality of the circumstances, knowing, intelligent and voluntary." The Court was careful to add that it is impermissible for a trial court to presume waiver from a "silent record," and that the waiver must be "specifically made" after receipt of the warnings.

Furthermore, the Court held that even if a valid waiver is made and a suspect answers questions, in the event the suspect later changes his mind and requests that he wants the questioning to end, the questioning must cease. Likewise, in the event a suspect decides he would like to consult with an attorney during questioning, all questioning must cease until an attorney is present. Any statement obtained after the police fail to honor such requests to suspend or terminate interrogation is inadmissible.

Crucial to the Court's holding was its perception of the nature of "custodial interrogation." The Court pointed out that the third degree has, throughout history, flourished in the setting of custodial interrogation. The Court recognized that, lamentably, physical
brutality still exists in the station house and that it has been abetted by the development of modern techniques of psychological coercion.\textsuperscript{41} In the Court's view, the very fact of obtaining incriminating statements from the accused through the use of official interrogation "exacts a heavy toll on individual liberty and trades on the weakness of individuals,"\textsuperscript{42} correlative raising questions about the reliability of confessions so extracted.\textsuperscript{43}

This concern on the part of the Supreme Court was not new. As far back as 1936, in \textit{Brown v. Mississippi},\textsuperscript{44} the Court had held that a confession obtained by official action which overbore the free will or voluntariness of the suspect violated due process\textsuperscript{45} and was inadmissible at trial.\textsuperscript{46} Where \textit{Miranda} arguably broke new ground\textsuperscript{47} was in the Court's recognition that the traditional due

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\item \textsuperscript{41} Id. at 445-54.
\item \textsuperscript{42} Id. at 455.
\item \textsuperscript{43} Id. at 456 n.24.
\item \textsuperscript{44} 297 U.S. 278 (1936).
\item \textsuperscript{45} U.S. Const. amend. XIV, prohibits the states from depriving a person of, \textit{inter alia}, his liberty without "due process of law."
\item \textsuperscript{46} The \textit{Brown} holding was applied in a series of cases, including: Malinski v. New York, 324 U.S. 401 (1944); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Ward v. Texas, 316 U.S. 547 (1942); Vernon v. Alabama, 313 U.S. 547 (1941); White v. Texas, 310 U.S. 530 (1940); Canty v. Alabama, 309 U.S. 629 (1940); and Chambers v. Florida, 309 U.S. 227 (1940). The question asked under the voluntariness test was whether a suspect's will was overborne at the time of his fifth amendment waiver. See, e.g., Haynes v. Washington, 373 U.S. 503, 513 (1963); Lynum v. Illinois, 372 U.S. 528, 534 (1963). Voluntariness was determined by an analysis of the "totality of the circumstances," and involved a balancing of the pressures exerted by the police against the suspect's power to resist interrogation. See, e.g., Culombe v. Connecticut, 367 U.S. 568, 601-02 (1961); Beck v. Pate, 367 U.S. 433, 442 (1961); Stein v. New York, 346 U.S. 156, 185 (1953).
\item Although the Miranda Court's reliance on the self-incrimination clause of the fifth amendment, as opposed to the due process clause of the fourteenth amendment, seems to break new ground, Chief Justice Warren argued that ample authority has existed for many years in support of the proposition that a compelled confession, obtained during custodial interrogation, violates the self-incrimination clause of the fifth amendment. 384 U.S. at 461-62, \textit{citing} \textit{Wan v. United States}, 266 U.S. 1 (1924), and \textit{Bram v. United States}, 168 U.S. 532, 542 (1897). Since the self-incrimination clause of the fifth amendment was made applicable to the states two years earlier in \textit{Malloy v. Hogan}, 378 U.S. 1 (1964), it could be argued that
process “voluntariness test” had not succeeded in eliminating unsavory police practices. Perhaps more importantly, the Court realized that there is coercion inherent in the setting of custodial interrogation, without more, which can overbear the desire of the suspect to remain silent. It is the *Miranda* warnings that vitiate the inherent coercion of custodial interrogation and establish the environment which permits a suspect, in the absence of other palpable coercion, to choose whether to participate in the interrogation by answering questions.

**Rationales, Policy Choices and Implications**

There are a number of rationales, policy choices, and implications inherent in the *Miranda* holding. First, the Warren Court was clearly dissatisfied with the traditional due process/voluntariness test as a guarantor of fair police interrogation practices and of voluntary, non-coerced, confessions. Since *Brown v. Mississippi*, the record of the state courts, in particular, had been inconsistent in giving serious protection to the rights of suspects in the interrogation setting. The voluntariness test, by its nature, required case by case review. Because each case was determined on its peculiar facts, there was little occasion for appellate courts to control trial courts’ findings on the voluntariness of confessions.

*Miranda’s* reliance on the fifth amendment is clearly consistent with precedent.

49. Id. at 467.
50. Id. at 447. In response to the *Miranda* dissenters’ proclamations of satisfaction with the pre-*Miranda* voluntariness test, Professor Kamisar has trenchantly identified its overwhelming shortcomings. See Kamisar, *supra* note 2, at 94-104.
53. Even *Miranda* critics have attacked the Court’s application of the voluntariness test. For example, Professor Grano has written:

The court’s general unwillingness to articulate the policies underlying volitional terminology explains the ambiguity of voluntariness doctrine even within particular legal contexts. As other commentators have noted, the Court’s failure in this regard accounts for the intolerable uncertainty that characterized the thirty-year reign of the due process voluntariness doctrine in the law of confessions.


Appellate courts were hamstrung because so often the question of coercion raised a "swearing contest" between police officers and suspects. The outcome of such a contest was based on a determination of credibility, a determination peculiarly within the province of trial courts. To make matters worse, the Supreme Court was particularly unable to provide controlling precedents, because criminal procedure cases make up only a small proportion of its variegated caseload. 64

Frustrated by the inability to require the lower courts to exclude coerced confessions, the Court granted certiorari in Miranda expressly to provide "concrete constitutional guidelines for law enforcement agencies and courts to follow." 65 The Court proceeded to establish an objective standard, requiring a showing by the government that the prescribed warnings had been given and affirmatively and knowingly waived as a prerequisite to the admission of a defendant's statements. The Court hoped to provide thereby a "bright line" test of admissibility. If the warnings were given and the rights explicitly waived, the police had discharged their constitutional responsibility. However, if the police failed to provide the warnings or if there was no waiver, the trial judge's duty clearly would be to exclude the statement. Under Miranda, there was not to be any "balancing" of society's need for interrogation against a suspect's rights, 66 nor would "speculative" assessments of a particular suspect's age, intelligence, knowledge, or any other character or personality trait be relevant. 67

In addition, the Court explicitly held that a confession obtained in violation of Miranda was per se the result of coercion because the custodial interrogation process was "inherently coercive." The Court focused on the mental or psychological pressure which flourishes in the isolation of police interrogation and found, specifically,

By such an approach, continued Justice Clark, "we do not shape the conduct of local police one whit; unpredictable reversals or dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecutions." Id. (Clark, J., concurring).

54. According to Kamisar, supra note 2, at 102, the Supreme Court heard an average of one confession case per year in the thirty years following Brown v. Mississippi.

55. 384 U.S. at 441-42.

56. Id. at 479.

57. Id. at 468-69. Although Miranda was designed to remedy the shortcomings of the voluntariness test, there remain areas in the law of confession where Miranda is not controlling and the voluntariness standard still must be applied. See Grano, supra note 53, at 864-85.
that the warnings vitiating such coercion. Thus, absent warnings, the product of custodial interrogation was deemed coerced, despite a lack of any particular physical or mental coercion visited on the suspect.

Furthermore, there is an implicit link between reliability and coercion. A coerced confession, under the common law view and the traditional voluntariness test, had always logically borne the stamp of potential unreliability. Not that every confession extracted as a result of physical brutality is untrue; rather, there will always be a significant doubt as to its truthfulness, even though most confessions so obtained most likely are truthful. So it is with a statement obtained without the *Miranda* protections. If custodial interrogation is by its nature coercive, then statements obtained without the mitigating intervention of *Miranda* are of dubious reliability.

As in many situations where the Court announces a rule which will serve to exclude relevant evidence at a criminal trial, the Court intended by its exclusionary rule to deter illegal police behavior. An implicit purpose of *Miranda* was to encourage and require police to provide suspects the wherewithal to protect the right to silence. The rule of exclusion was designed to deter police officers from dereliction of that duty. Crucial to this deterrent is the Court's ruling that any statements obtained in violation of *Miranda* cannot be used against the defendant for any purpose. Af-

58. See supra note 48 and accompanying text.
59. See supra note 49.
60. See *McCormick*, supra note 52, at 312-15.
61. See supra note 47.
62. See *McCormick* supra note 52, at 313, 316.
63. In the Court's words:

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by the defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual himself in any manner; it does not distinguish degree of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory'. If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as
After *Miranda*, the Warren Court issued four opinions which further delineated the scope of the decision. In *Johnson v. New Jersey,* the Court ruled that *Miranda*’s exclusionary rule would not apply retroactively, but could be applied to confessions offered by the government in trials which commenced after the date of the *Miranda* opinion. In *Jenkins v. Delaware,* the Court added that *Miranda* did not apply to cases in which a retrial commenced after the date of *Miranda*. In *Mathis v. United States,* the Court ruled that *Miranda* applied to the interrogation by federal officers of a prisoner in custody in a state correctional institution, even though the federal crime under investigation was unrelated to the state charges on which the prisoner was held. Finally, in *Orozco v. Texas,* the Court further refined its definition of “custody” for *Miranda* purposes by reiterating that a suspect is in custody whenever “he is deprived of his freedom of action in any way,” irrespective of whether he is deprived of such freedom in the station house or in his own home.

By 1971, however, the personnel on the Court had changed drastically. Though Justice Clark, a *Miranda* dissenter, had been re-
placed by Justice Marshall,\textsuperscript{70} who time would show was sympathetic to \textit{Miranda}'s precepts, Chief Justice Warren and Justice Fortas, both members of the 5-4 \textit{Miranda} majority, were replaced by President Nixon with Chief Justice Burger and Justice Blackmun, respectively. Suddenly, the razor-thin majority for \textit{Miranda} had been transformed into a majority which was profoundly unsympathetic not only to \textit{Miranda}, but also to much of the Warren Court's criminal procedure jurisprudence. The expectation was abroad that wholesale retrenchment was about to begin.

From the time of the Burger and Blackmun appointments until May 18, 1981,\textsuperscript{71} the Court decided ten cases in which the interpretation, application, or scope of \textit{Miranda} was a principal issue.\textsuperscript{72} In every one of those cases, the Court ruled against the defendant seeking reversal of a conviction on the basis of an argued \textit{Miranda} violation. The first such opinion, \textit{Harris v. New York},\textsuperscript{73} was an auspicious beginning.

\textit{Harris v. New York}

The Court granted certiorari in \textit{Harris v. New York}\textsuperscript{74} to determine whether a statement made by the defendant to the police, admittedly inadmissible in the prosecution's case in chief because of police failure to comply with the \textit{Miranda} warning procedure, is admissible for the purpose of impeaching a witness—defendant's credibility.\textsuperscript{75} Harris was charged with the sale of heroin to an undercover police officer.\textsuperscript{76} After his arrest, Harris made incriminat-

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\item \textsuperscript{70} Prior to his appointment to the Supreme Court by President Johnson, Thurgood Marshall had served as Solicitor General of the United States. In this role, he had appeared for the United States in \textit{Westover v. United States}, one of the companion cases to \textit{Miranda}, and argued against \textit{Miranda}'s ultimate holding. 384 U.S. at 438.
\item \textsuperscript{71} On May 18, 1981, the Court decided Edwards v. Arizona, 451 U.S. 477 (1981), and Estelle v. Smith, 451 U.S. 454 (1981), the first occasions on which the Burger Court reversed convictions because of a violation of \textit{Miranda}.
\item \textsuperscript{72} In at least two other cases, Doyle v. Ohio, 426 U.S. 610 (1976) and Brewer v. Williams, 430 U.S. 387 (1977), the Court could have decided the cases on \textit{Miranda} grounds, but ignored \textit{Miranda} and instead chose to reverse the convictions on due process and right to counsel violations, respectively. Further, in Mandujano v. United States, 425 U.S. 564 (1976), United States v. Wong, 431 U.S. 174 (1977), and United States v. Washington, 431 U.S. 181 (1977), the Court failed to reach \textit{Miranda} issues in the context of the grand jury. See Stone, supra note 2, at 154-67, for an extended discussion of Mandujano, Wong, and Washington.
\item \textsuperscript{73} 401 U.S. 222 (1971).
\item \textsuperscript{74} For an in-depth and enlightening discussion of \textit{Harris v. New York}, see Dershowitz & Ely, supra note 2.
\item \textsuperscript{75} 401 U.S. at 222.
\item \textsuperscript{76} Id. at 222-23.
\end{itemize}
ing statements to the police during an interrogation undertaken without benefit of complete Miranda warnings. At trial, the undercover agent and others testified against the defendant without mentioning Harris's admissions. Subsequently, the defendant testified on his own behalf and, though admitting the sale of a substance in glassine envelopes, swore that the substance was baking powder rather than heroin.77

On cross-examination, the prosecutor asked Harris whether he had made the aforementioned incriminating statements to the police immediately after arrest.78 (The admissions partially contradicted the defendant's direct testimony.)79 The defendant testified that he did not remember the interrogators' questions or his answers. The trial judge, over objection, allowed the questions and instructed the jury that the statements, concededly inadmissible in the state's case in chief, could be considered, but only for credibility purposes. The impeaching statements became the subject of prosecution and defense closing arguments, and the defendant was convicted. The conviction was affirmed by the New York Court of Appeals.80

At the outset, Chief Justice Burger, writing for the majority, stated that there had never been any contention that the impeaching statements made to the police were "coerced or involuntary" in traditional fifth amendment, pre-Miranda terms.81 As has been pointed out elsewhere, this is factually untrue. The defendant did indeed raise the issues of coercion and involuntariness both in the trial court and on appeal.82

Then the Chief Justice, anticipating the primary defense argument, noted: "Some comments in the Miranda opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling."83 According to Chief Justice Burger, Miranda merely barred the government from using evidence obtained in violation of Mi-

77. Id. at 223.
78. Id.
79. Id.
80. Id.
81. Id. at 224.
82. See Dershowitz & Ely, supra note 2, at 1201-04.
83. The choice of words is curious here. Miranda does not bar "uncounseled" statements per se.
84. 401 U.S. at 224.
Miranda in its case in chief; a bar to the admissibility of such evidence for any other purpose, including impeachment, simply was not required by Miranda. 85

Although it is true that Miranda involved the use of illegally obtained statements in the prosecution's case in chief, there is nothing in Miranda limiting the bar to admissibility to that situation. To the contrary, the Miranda opinion is replete with language which would bar such statements for any purpose whatsoever. 86

The Burger Court misstated the meaning of Miranda by focusing on an unnecessary and arbitrary factual distinction. Then, the Court transformed this irrelevant factual distinction into a basis for artificially limiting the precedent to its facts. In so doing, the Burger Court provided an omen of the future course of decision-making, not only in the post-Miranda line of cases, but in other criminal procedure decisions as well. 87

Having established to his satisfaction that Miranda does not proscribe the use of the illegally obtained statements for impeachment, the Chief Justice then turned to the other major obstacle to affirmance, Walder v. United States. 88 In Walder, the defendant in a drug prosecution took the stand and testified that he had not possessed or trafficked in narcotics as charged. On cross-examination, the defendant testified he had never sold narcotics to any-

85. Id.

86. The Miranda Court noted that "[t]he privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." Miranda v. Arizona, 384 U.S. 436, 476 (1966). More to the point, the Court stated:

... no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory'... In fact statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.

Id. at 477.

87. See, e.g., Kirby v. Illinois, 406 U.S. 682 (1972), where the Burger Court held that the Warren Court rule of United States v. Wade, 388 U.S. 218 (1967), which required the presence of counsel to represent defendants at line-ups, would be limited to post-indictment line-ups, only because the line-up in Wade happened to occur post-indictment. After all, Escobedo had established that the right to counsel did not turn on indictment. It is hard to imagine that in resting on this utterly arbitrary distinction, the majority was unaware that the vast majority of line-ups occur prior to indictment. In so limiting Wade, the Burger Court totally ignored the rationale for the provision of counsel at line-ups.

Later on cross-examination, the prosecution sought to impeach this testimony by questioning the defendant regarding his earlier possession of narcotics. This evidence had been suppressed on fourth amendment grounds in a prior prosecution. When the defendant remained steadfast in denial, the government offered the previously suppressed evidence of the arresting officer and state chemist. The defendant was convicted, and the Supreme Court affirmed. The Court reasoned that although the government cannot affirmatively use evidence obtained unlawfully in its case in chief, where the defendant goes "beyond mere denial of complicity in the crimes . . . and makes the surprise claim that he had never dealt in or possessed any narcotics," the government will be permitted to counter this obvious perjury on a collateral matter by the use of the unlawfully obtained evidence. In so holding, the Court contrasted Walder and Agnello v. United States, which held that evidence obtained during an earlier prosecution in violation of the defendant's fourth amendment rights could not be used to impeach the defendant in a later prosecution where the defendant did not testify on direct examination.

Walder painted a bright line regarding the peculiarly limited situation when the prosecutor may use unlawfully obtained evidence to impeach. Such impeachment is permitted only when the defendant takes the stand and goes beyond denial of complicity in the crimes charged and states broadly that he has, in effect, engaged in no such past illegal behavior. In such a case, impeachment by the use of evidence illegally obtained in connection with an earlier prosecution is permitted. Walder, unlike Miranda, explicitly invites a narrow reading of its holding by limiting itself to its narrow factual situation.

Chief Justice Burger, in deciding Harris, totally ignored the explicit holding and rationale of Walder, choosing instead to read that opinion more broadly than reason permits. Even though the defendant in Harris did no more than deny the crime charged, the Chief Justice ruled: "We are not persuaded that there is a dif-

89. Id. at 64.
90. Id.
91. Id. at 65.
92. Id. at 66.
94. Id. at 35.
95. 347 U.S. at 64-65.
96. 401 U.S. at 223.
ference in principle that warrants a result different (in *Harris*) from that reached in *Walder.* In short, *Walder* was read as providing authority for the unrestricted use of illegally obtained evidence for impeachment *under any circumstances.* Suddenly, *Walder*, which should have barred the use of illegally obtained evidence for impeachment in *Harris*, was stood on its head and interpreted to command it.

Turning to whether the purposes of *Miranda*'s exclusionary rule are well served by the *Harris* holding, the Chief Justice focused on the deterrence rationale for exclusion and blithely perceived no incentive for police to violate *Miranda* in permitting *Harris*-type impeachment. He considered the state's inability to use evidence obtained in violation of *Miranda* in its case in chief sufficient to deter *Miranda* violations. In so doing, the Court committed two errors. First, it ignored the "judicial integrity" rationale for the exclusionary rule. Only three years before *Miranda*, the Court had reaffirmed that the exclusionary rule would not only deter illegal police activity but would insulate the courts from participating in illegal behavior. This latter, "judicial integrity" rationale would, of course, bar any use of unlawfully obtained evidence. Second, *Harris*, as its dissenters pointed out, provides a clear incentive to the police to violate *Miranda*. An officer faced with a suspect who will not talk at all if *Miranda* is scrupulously honored will clearly see the advantage, as perhaps one did with *Harris*, of obtaining statements in violation of *Miranda* in order to keep the defendant from taking the stand, or to use the statements against the defendant if he does take the stand.

*Oregon v. Hass,* the Court's next confrontation with the issue of the impeachment use of statements obtained in violation of *Miranda*, is a good example of a situation where *Harris* provides the police with a strong incentive to violate *Miranda*. In *Hass*, the defendant was arrested and interrogated regarding the theft of a number of bicycles. After receiving *Miranda* warnings, the defendant admitted taking some bicycles, but claimed that he had returned one and left another elsewhere. A police officer then placed the defendant in a cruiser and began a drive to the area of the

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97. *Id.* at 225.
98. *Id.*
100. 401 U.S. at 232 (Brennan, J., dissenting)
thefts, presumably to identify the homes from which the bikes were taken and where one was left. While enroute, the defendant stated that he recognized he was in trouble and wished to telephone his attorney before proceeding further. The officer responded by saying he could call his lawyer upon returning to the station and continued on to the neighborhood of the burglaries. There, according to the officer’s testimony, the defendant pointed out the garages from which the bicycles were taken and the place where he left one of the stolen bikes.\(^{102}\)

The trial court ruled that the evidence obtained after Hass asked to call his attorney was obtained in violation of \textit{Miranda} and was inadmissible in the state’s case in chief, but admitted such evidence for impeachment on the authority of \textit{Harris}.\(^{103}\) The Oregon Supreme Court reversed the conviction, ruling four to three that where a warned suspect seeks to terminate questioning, there is an incentive for the police to fail to honor that request if statements obtained in violation of \textit{Miranda} can be used to later impeach the suspect-defendant. Indeed, if a suspect states that he will not talk further without counsel and counsel is located, then the suspect in all likelihood will not talk at all. Therefore, knowing that honoring \textit{Miranda} will effectively preclude further interrogation, an officer would reasonably determine that obtaining information for impeachment is better than getting no information at all.\(^{104}\)

The Supreme Court reversed, reinstating the conviction.\(^{105}\) Justice Blackmun, writing for the majority, noted: “One might concede that when proper \textit{Miranda} warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeaching material.”\(^{106}\) Nevertheless, this “speculative possibility” was not sufficiently important to warrant reconsidering or limiting \textit{Harris}.\(^{107}\)

Therefore, in \textit{Harris}, the Burger Court’s first encounter with \textit{Miranda}, a number of characteristics which will influence later decision-making in the \textit{Miranda} line of cases are evident. These factors include misrepresentation of precedent to give the appearance of

\(^{102}\) Id. at 715-17.
\(^{103}\) Id. at 717.
\(^{104}\) Id. at 717-18.
\(^{105}\) Id. at 724.
\(^{106}\) Id. at 723.
\(^{107}\) Id.
Miranda and the Burger Court

consistency with earlier cases, arbitrary limiting of broad, prophylactic decisions to their particular facts, and a tendency toward eradication of Miranda's bright line standard. In Harris, whether or not the Court was motivated by an obsession with "factual guilt" or "crime control," it clearly recognized its mandate for change.

Perhaps the most fundamental and ominous aspect of the opinion, however, is its distinction between the consequences of a confession which is inadmissible "in traditional terms," that is, coerced irrespective of whether Miranda is violated, and a confession which is inadmissible because the police have failed to honor the prophylactic strictures of Miranda. The Court strongly implied that where the defendant's statements are inadmissible in traditional terms, such statements may not be used by the prosecution for any purpose, including impeachment, but held that evidence inadmissible in the prosecution's case in chief due to a violation of Miranda is admissible for the limited purpose of impeachment. Such a distinction flies in the face of the clear meaning of Miranda, which is based on the recognition of one overriding proposition—that custodial interrogation is inherently coercive. Therefore, to distinguish a "coerced" confession from a confession obtained in violation of Miranda is to raise a distinction where none exists, and to strike at the very heart of Miranda.

Michigan v. Tucker

By 1974, the Court was composed of a six to three majority which would prove unsympathetic to Miranda. In that year, the Court decided Michigan v. Tucker and, for a time, gave life to the worst fears of the pro-Miranda forces. The Tucker majority argued for, but did not actually accomplish, the wholesale overruling of Miranda.

In Tucker, the defendant was given incomplete Miranda warnings prior to an interrogation which chronologically preceded Mi-

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108. A few years later, in Mincey v. Arizona, 437 U.S. 385, 396-402 (1978), the Court would explicitly rule that statements found inadmissible on the basis of the traditional voluntariness test are not admissible for impeachment or any other purpose, whereas statements obtained "in circumstances violating the strictures of Miranda...are admissible for impeachment" if they are otherwise admissible.

109. 401 U.S. at 224.

110. In 1972, Justice Black, a member of the Miranda majority died, and President Nixon filled his seat with the appointment of Justice Rehnquist.

During the interrogation, the defendant made incriminating statements and also mentioned the name of one Henderson, who, after having been located by the police, implicated Tucker in the crime for which Tucker ultimately would be convicted. Prior to trial, which commenced after the date of the *Miranda* opinion, Tucker unsuccessfully moved to suppress Henderson's testimony as the product or fruit of the poisonous tree, i.e., the questioning carried on in violation of *Miranda*. Henderson's testimony was admitted at trial, and Tucker was convicted. Tucker collaterally attacked his conviction and the Sixth Circuit "reluctantly" affirmed the district court's granting of a habeas corpus writ on the theory that Henderson's testimony was the fruit of the poisonous tree. The Supreme Court reversed.

It is axiomatic that hard cases make bad law, and this was a hard case factually. There can be little doubt that Tucker was guilty of a brutal assault and rape. Moreover, the police apparently were particularly solicitous of Tucker's fifth amendment rights. Even though the interrogation, though not the trial, was conducted prior to the issuance of the *Miranda* opinion, the police advised Tucker, prior to interrogation, of his right to remain silent, of the fact that any evidence taken could be used against him, and of his right to counsel. Only a warning regarding Tucker's right to appointed counsel was omitted. Thus, it would appear that the police acted in good faith, offering Tucker, in fact, more protection than the Constitution apparently required at the time the interrogation took place. In addition, there was no allegation that Tucker's statements which led the police to Henderson were in any way coerced or involuntary in traditional terms.

Assuming, as the Court did, that retroactivity posed no problem, this "hard" case was within the ambit of *Miranda's* exclusionary rule. First, the warning regarding appointed counsel was indispensable. Second, even if Henderson's testimony was only

112. *Id.* at 436. The police failed to advise the defendant that counsel would be appointed for him if he could not afford to retain counsel.
113. *Id.* at 436-37.
114. *Id.* at 437.
115. *Id.*
117. In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Court ruled that *Miranda* would not be given retroactive effect. In dicta, however, the Court stated that Miranda would apply to a confession offered in a trial which commences after the date of the *Miranda* decision, even if the interrogation predates Miranda.
the "fruit" of a *Miranda* violation, *Miranda*'s terms would seem flatly to have barred its use.\(^{119}\)

Justice Rehnquist, however, in writing for the majority, began with a frontal assault on the very heart of *Miranda*, eschewing deciding the case on a number of narrow grounds\(^{120}\) that would not have required a confrontation with *Miranda*. First, he denigrated the significance of the *Miranda* warnings. He wrote that these particular warnings are "not themselves rights protected by the Constitution," but merely safeguards to the right against compulsory self-incrimination.\(^{121}\) Recounting that the Court in *Miranda* had designed the warnings as "procedural safeguards" to insure the protection of the self-incrimination clause of the fifth amendment, and relying on the *Miranda* Court's statement that the warnings were required only in the absence of other measures equally effective to protect the right against self-incrimination,\(^{122}\) Justice Rehnquist proceeded to eliminate the explicit constitutional basis for the warnings requirement. Since the warnings were merely one "recommended" means to protect the fifth amendment, they were not in themselves "[c]onstitutional rights."\(^{123}\) Therefore, in failing to give complete *Miranda* warnings, the police did not deprive the defendant of his fifth amendment privilege, but merely failed to provide him one of a number of non-constitutional procedural safeguards.\(^{124}\) Thus, according to the majority, the fifth amendment self-incrimination clause is only violated where the confession is involuntary in traditional terms.\(^{125}\)

Seemingly, the Court utterly destroyed both *Miranda*'s rationale

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417 U.S. at 462, gives the omission of this particular warning heightened significance.

119. 417 U.S. at 464, (Douglas, J., dissenting) (quoting from *Miranda*: "... unless and until such [*Miranda*] warnings and waiver are demonstrated ... no evidence obtained as a result of interrogation can be used against [the defendant].") 384 U.S. at 479.)

120. First, the Court could have simply noted that the language in Johnson v. New Jersey, 384 U.S. 719, 732 (1966), which indicated that *Miranda* would apply to statements obtained prior to *Miranda* but offered at post-*Miranda* trials was merely dicta. Second, the Court might have limited Johnson v. New Jersey so that the fruits of the poisonous tree of illegal pre-*Miranda* interrogation would be admissible at a post-*Miranda* trial. 417 U.S. at 458 (Brennan, J., concurring). Although neither alternative is free of problems, see 417 U.S. at 464-66 (Douglas, J., dissenting), at least such holdings would affect only those relatively few active cases in which interrogation preceded, but trial followed, *Miranda*. Finally, although the Court ostensibly limited its holding to the fruit of pre-*Miranda* interrogations (417 U.S. at 447), nothing in its reasoning turns on that limitation.

121. 417 U.S. at 444.

122. Id. at 443-44.

123. Id. at 444.

124. Id. at 445-46.

125. Id. at 445.
and its holding. The *Miranda* Court had stressed that modern techniques of interrogation are "psychologically rather than physically oriented,"\(^{126}\) and then surveyed various police interrogation manuals whose overriding theme was the creation, even through deception, of an atmosphere of insecurity and fear designed to overbear the suspect's will and to force the suspect to forego his fifth amendment right to remain silent and confess.\(^{127}\) *Miranda* is based on the theory that custodial interrogation compels and coerces confessions.\(^{128}\) It is the giving and honoring of the *Miranda* warnings which remove the compulsion or coercion.\(^{129}\) Therefore, any confession obtained in the absence of *Miranda* warnings is coerced. The Burger Court either failed or refused to grasp this underlying premise of *Miranda*, and this failure or refusal reached full bloom in *Tucker*.

The fallacy of the Court's attempt to open cavernous distance between the fifth amendment and the *Miranda* warnings is shown by the words of *Miranda* itself, which held: "The requirement of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment privilege."\(^{130}\) Indeed, the *Miranda* Court ruled that the evidence obtained in the absence of warnings was obtained "under circumstances that did not meet the constitutional standards for protection of the [fifth amendment] privilege."\(^{131}\) Clearly, if interrogation without warnings is compelled self-incrimination, then the procedural safeguards are required by the fifth amendment. "In sum, the privilege is fulfilled only when the person is guaranteed the right to remain silent. . . ."\(^{132}\) The warnings are the guarantee.

As if frightened by its own audacity in removing the constitutional basis of *Miranda*, the Court in *Tucker* paused to approve *Miranda*'s application to exclude evidence of Tucker's direct, incriminating statements from the government's case in chief.\(^{133}\) The Court did not clarify how *Miranda* could be applied if it is not required by the Constitution. Because this was a state prosecution,
the Court’s supervisory powers failed to come into play. Some-
how, Miranda survived, even though the Court left it no legiti-
mate, articulable legal source or basis.

With respect to Henderson’s testimony and the “fruit of the poi-
sonous tree,” the Court recognized the vitality of Wong Sun v. United
States, conceding that, generally, the fruit of a constitutional
violation is inadmissible. However, since the interrogation
of Tucker was not of the Star Chamber variety, the fifth amend-
ment had not been violated, only the “procedural” or “prophylac-
tic” safeguards to the privilege had been abridged. Since there had
been no constitutional violation, Wong Sun did not apply. The
Court, therefore, was able to write on a clean slate in deciding
whether to exclude the fruit of an interrogation conducted in violation of Miranda.

Having determined that failure to comply with Miranda did not
trigger the “fruit of the poisonous tree” doctrine, the Court ex-
amined the issue of whether to exclude Henderson’s testimony “as
a question of principle.” The Court proceeded to balance the
need for all relevant evidence, on the one hand, against, primarily,
the deterrence rationale of the exclusionary rule on the other.
Noting that the deterrence rationale loses much of its potency
when the police apparently acted in “good faith,” the Court bal-
anced away the exclusion of Henderson’s testimony and ruled that
it was properly admitted at trial.

Justice Rehnquist also deemed it significant that there had been
no showing of potential “untrustworthiness” in the statement pro-

134. See, e.g., McNabb v. United States, 318 U.S. 332, 340 (1943), where the Court exer-
cised its authority under its supervisory powers to affect procedure in federal courts only.
136. 417 U.S. at 445.
137. Even if the Court had found that the failure to provide complete Miranda warnings
amounted to a “constitutional” violation, thus implicating the Wong Sun doctrine, the
Court might still have affirmed Tucker’s conviction. In a later case, United States v. Cec-
colini, 435 U.S. 268, 273-80 (1978), the Court ruled that the exclusionary rule should be
applied with much greater reluctance where the claim is based on the discovery of a live
witness as the fruit of the violation than where the exclusionary rule is invoked to suppress
the inanimate fruit of the constitutional violation. The Court reasoned that a live witness
unlike an inanimate object, has the free will to determine whether or not to testify.
139. Id. at 446.
140. Id.
141. Id. at 447.
142. Id. at 446-52.
cured from Tucker.\footnote{143} A confession obtained through means which would fail to pass muster under the traditional voluntariness test would often carry the possibility that the coerced statement is unreliable.\footnote{144} He argued that a statement obtained in a custodial interrogation setting is not, without more, coerced, and thus, not potentially unreliable.\footnote{145} The Court implicitly, once again, 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.

The Court in Tucker seemed to disregard the apparent import, assumptions, and bases of Miranda, opting for a tortured analysis which serves to undermine Miranda’s very essence. Whereas Harris seemed to artificially limit Miranda, Tucker would deny its legitimacy. In denying the constitutional basis and constitutional indispensability of the warnings, in putting distance between a Miranda violation and a fifth amendment violation, in balancing the failure to provide the warnings against other interests, and in making official “good faith” a factor in the analysis regarding exclusion, the Tucker Court rewrote Miranda from the bottom up. If the Tucker Court is taken at its word, the constitutional bright line of Miranda is blurred beyond recognition, now neither constitutional nor bright. Yet, somehow the Court reaffirmed, despite its shadowy authority, the core of Miranda as modified by Harris. At least one commentator has noted that, “Tucker seems certainly to have laid the groundwork to overrule Miranda.”\footnote{146} Yet, as time would show, the Court would continue to leave the core intact while slicing off the exposed portions of Miranda doctrine by the use of analysis which denigrated or ignored the assumptions which gave Miranda life.

The style of adjudication in Tucker continued a theme begun in Harris. Although granting that Miranda controls the admissibility of a statement offered in the government’s case in chief, the very situation involved in Miranda and its three companion cases, the Court ruled that any other situation in which the statement is offered was a novel situation which did not require adherence to Miranda, despite the expansiveness of Miranda’s clear meaning. On the one hand, the Court was apparently reluctant to overrule Mi-
Miranda, as narrowly interpreted. On the other hand, where it freed itself from Miranda's strictures, the Court opted for a balancing approach diametrically opposed to the spirit of Miranda.

Michigan v. Mosley

Miranda unequivocally requires that 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." A straightforward reading of this requirement would seem to preclude any further interrogation once the suspect asserts his fifth amendment right. Nevertheless, most lower courts had held that Miranda does not forever bar further interrogation once the suspect asserts his right to silence. In Michigan v. Mosley, the Court determined that interrogation may be resumed, in the absence of counsel, within hours of ceasing interrogation in response to the suspect's assertion of his right to silence.

In Mosley, the defendant was arrested on suspicion of a number of robberies, one of which resulted in a murder. Mosley was arrested by a detective attached to the Detroit police robbery section who provided Miranda warnings and then proceeded to question Mosley in the robbery section of a Detroit police station. Mosley told the detective that he did not want to talk about the robberies, at which time the detective ceased the interrogation. Two hours later, the robbery detective moved Mosley to the homicide section on a different floor of the police station. There a homicide detective gave Mosley fresh Miranda warnings and interrogated him about the murder which resulted from one of the robberies. After being told that an accomplice had implicated him, Mosley confessed to the murder. The prosecution, over Mosley's objection, used the confession in its case in chief, and Mosley was convicted of murder.

The Michigan Court of Appeals reversed, holding that the reinterrogation of Mosley had been a per se violation of Miranda. Further state appellate review having been denied by the Michigan

147. 384 U.S. at 473-474.
149. 423 U.S. 96 (1975).
150. Id. at 97.
151. Id. at 97-98.
152. Id. at 99.
Supreme Court, the United States Supreme Court granted certiorari and reversed the Michigan Court of Appeals.

At the outset, the Court rejected a strict or literal reading of Miranda's requirement that interrogation cease upon the suspect's assertion of the right to silence. The Court noted: "Neither this passage nor any other passage in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning." Yet, the Court recognized and reaffirmed Miranda's stricture that the requirement to cease questioning is necessary to avoid the coercion that inheres in custodial interrogation. Observing that Miranda "does not state under what circumstances, if any, a resumption of questioning is permissible," the Court ruled that the police must "scrupulously honor" the suspect's right to "cut off questioning." Therefore, unless the defendant's right to cut off questioning has been scrupulously honored, any statements obtained after interrogation has recommenced would be inadmissible at trial, at least in the prosecution's case in chief. Applying this standard, the Court found that the Detroit Police Department had scrupulously honored Mosley's right to cut off questioning because of the confluence of three factors: (1) the "significant" time lapse of two hours between the two interrogation sessions; (2) the interrogations were conducted by different officers, in a different location (within the same station house), with the intervention of fresh Miranda warnings; and (3) the focus of the second interrogation was a crime (the murder) not specifically queried during the first interrogation.

Apart from whether these seemingly insignificant factors could have served to insulate the defendant from the inherent coercion of renewed custodial interrogation, Mosley raises a larger problem in its shift away from the Miranda bright line approach to a subjective, case by case approach. In effect, on the issue of re-interro-

155. 423 U.S. at 107.
156. Id. at 101-02.
157. Id. at 102.
158. Id. at 100-01.
159. Id. at 101.
160. Id. at 103 (citing Miranda v. Arizona, 384 U.S. 436, 479 (1966)).
161. Id. (citing Miranda v. Arizona, 384 U.S. 436, 474 (1966)).
162. 423 U.S. at 104.
163. Id.
164. Id. at 104-05.
165. Id. at 105.
igation, the Mosley court imposed a “totality of the circumstances,” factual test to determine freedom from coercion, the very sort of indefinite test that Miranda sought to replace. Mosley gives the appearance of “scrupulously honoring” Miranda while striking at its central rationale. It leaves the street police officer unclear as to the legality of his actions, and effectively frees the trial judge of the fetters of judicial review.

Moreover, the Court was not without options consistent with the core of Miranda. Justice Brennan, in dissent, argued for a per se rule that would bar the use of any statement obtained during a second interrogation following the assertion of the right to silence, in the absence of counsel. Even though Miranda may not have explicitly commanded the Brennan approach, there is much greater harmony between Miranda and Brennan’s proposed rule than exists between Miranda and Mosley.

North Carolina v. Butler

Four years later, in North Carolina v. Butler, the Burger Court for the first time addressed the issue of waiver after Miranda warnings have been given. The defendant, after arrest, was given full Miranda warnings. Butler indicated that he understood his rights and agreed to talk to the police in a custodial interrogation setting, but he steadfastly refused to sign a proffered “waiver of rights” form. In addition, the evidence showed that he made no response when he was warned of his right to counsel. Thereafter, Butler made incriminating statements.

The trial court found that Butler had knowingly and voluntarily waived his rights to silence and counsel, and admitted Butler’s statements. Butler was convicted, but, on appeal, the North Carolina Supreme Court reversed on the strength of Miranda. That court read Miranda as requiring “that waiver of right to counsel during interrogation will not be recognized unless such waiver is

166. Id. at 114-18 (Brennan, J., dissenting). Professor Stone has noted: “This approach has the obvious advantages of clarity, is sensitive to Miranda’s concern with the coercive impact of renewed efforts to interrogate, and is consistent with Miranda’s recognition that the presence of counsel is in itself an important safeguard in off-setting the inherent coercion of custodial interrogation.” Stone, supra note 2 at 136.
168. Id. at 370.
169. Id. at 371.
170. Id. at 370.
171. Id. at 371-72.
specifically made after the Miranda warnings have been given."\textsuperscript{172}

Applying this test to Butler's case, the North Carolina court found that since Butler had refused to make either oral or written waiver of the right to counsel, waiver had not been "specifically made."\textsuperscript{173}

The United States Supreme Court reversed, ruling that Miranda did not set forth a per se rule requiring the exclusion of any statement obtained without an explicit waiver.\textsuperscript{174}

In \textit{Miranda}, the Court had stated that the government bears a heavy burden to demonstrate a knowing and voluntary waiver of rights where the government seeks to introduce statements obtained in the absence of counsel.\textsuperscript{175} Moreover, the Court stated unequivocally that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."\textsuperscript{176} On the other hand, the Court did note that an "express statement" of willingness to talk and waiver of the right to counsel, followed proximately by a statement, could amount to a waiver.\textsuperscript{177}

The \textit{Butler} Court reaffirmed all of this prior \textit{Miranda} law,\textsuperscript{178} but then, in characteristic fashion, commenced torturing \textit{Miranda}'s language and spirit, resulting in the validation of the waiver and confession. Justice Stewart, writing for the majority, began the opinion by noting that although "an express waiver can constitute a waiver . . . an express waiver is not indispensable."\textsuperscript{179} Even though "silence is not enough . . . [t]hat does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver may never support a conclusion that the defendant has waived his rights."\textsuperscript{180}

At first blush, Justice Stewart's analysis appears sensible. However, close analysis proves that his view is contrary to \textit{Miranda}'s strictures. \textit{Miranda} held that "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings. . . ."\textsuperscript{181} Moreover, this was not new law;

\begin{itemize}
  \item \textsuperscript{172} \textit{Id.} at 372.
  \item \textsuperscript{173} \textit{Id.}
  \item \textsuperscript{174} \textit{Id.} at 376.
  \item \textsuperscript{175} 384 U.S. at 475.
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{Id.}
  \item \textsuperscript{178} 441 U.S. at 373.
  \item \textsuperscript{179} \textit{Id.}
  \item \textsuperscript{180} \textit{Id.}
  \item \textsuperscript{181} 384 U.S. at 436.
\end{itemize}
as the *Miranda* Court noted approvingly, the Court in *Carnley v. Cochran*\(^{182}\) had held that there can be no waiver of the right to counsel in the absence of an “affirmative waiver” of the right.

On the one hand, the *Miranda* Court had ruled that silence in the face of *Miranda* warnings, ultimately followed by a confession, is per se *insufficient* evidence from which to find waiver. On the other hand, the Court had stated that an explicit statement of waiver followed closely by an incriminating statement *could* establish waiver. The Court apparently established the latter statement as a *minimum* standard. Consequently, even an explicit statement of waiver might not be enough. The *Butler* Court, however, treated absolute silence as the impermissible pole of a waiver continuum with an explicit statement of waiver as the other, permissible pole, and the possibility of valid waiver appearing in between. In fine, something short of explicit waiver, “in the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused,”\(^{183}\) can amount to a valid waiver of the rights to counsel and silence.

The rub, again, is in the words of *Miranda*, which require a “specific” and “affirmative” waiver, not a waiver by implication. If these words mean anything, they mean “explicit.” *Miranda* sought to avoid swearing contests and to provide a bright line which the police know they cannot cross. As Justices Brennan, Marshall, and Stevens note in their *Butler* dissent, the majority allowance of implicit waivers shrouds in half-light the question of waiver, allowing courts to construct inferences from ambiguous words and gestures.”\(^{184}\)

Indeed, the facts of *Butler* provide all the proof required to illustrate the weakness of its holding. First, assuming that Butler was appropriately warned, his response regarding his right to counsel was silence regarding waiver, followed by a statement.\(^{185}\) This is the very scenario which *Miranda* held could not, under any circumstances, constitute waiver.\(^{186}\) Moreover, since Butler steadfastly refused to sign a card that would have indicated an explicit

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183. 441 U.S. at 376 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
184. 441 U.S. at 377 (Brennan, J., dissenting). Although it is true that *Miranda* generally left the question of waiver to case by case analysis in the “totality of the circumstances,” the *Miranda* Court did establish a bright line, objective, *minimum* standard for waiver. That minimum standard was an “affirmative waiver.”
185. 441 U.S. at 370-71.
186. 384 U.S. at 475.
waiver,\textsuperscript{187} there seems no room left, within the confines of \textit{Miranda}, to find waiver. Once \textit{Miranda}'s per se fetters regarding the effect of a “silent record” are broken, however, \textit{Butler} demonstrates that waiver is up for grabs.\textsuperscript{188}

In \textit{Butler}, then, the Court forsook the clarity of the bright line approach to police interrogation, so important to \textit{Miranda}. Admittedly, \textit{Miranda} had, of necessity, left many determinations of waiver to a case by case approach. However, the \textit{Miranda} Court found certain ambiguous behavior to be per se insufficient as proof of waiver, and therefore excised it from the field of case by case analysis. The Burger Court, in \textit{Butler}, chose to create uncertainty where none had existed before.

\textit{Miranda} AND THE BURGER COURT'S SECOND DECADE

At the close of the Burger Court's first decade, \textit{Miranda} had not been overruled, but in every case which the Court chose to hear, it rebuffed any challenge to a conviction based on a claimed violation of \textit{Miranda}.\textsuperscript{189} Moreover, the Court had on numerous occasions

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\textsuperscript{187} 441 U.S. at 371.
\textsuperscript{188} The dissent further noted:

Faced with 'actions and words' of uncertain meaning, some judges may find waivers where none occurred. Others may fail to find them where they did . . . Had Agent Martinez simply elicited a clear answer from Willie Butler to the question, 'Do you waive your right to a lawyer?' this journey through three courts would not have been necessary.

\textit{Id.} at 378-79 (Brennan, J., dissenting).

\textsuperscript{189} Prior to 1980, the Burger Court dealt with \textit{Miranda} issues in four other instances. In Baxter v. Palmigiano, 425 U.S. 308, 315 (1975), the Court held that statements elicited without benefit of \textit{Miranda} warnings may be admitted in a prison disciplinary hearing, or any type of proceeding, other than a criminal trial. In Beckwith v. United States, 425 U.S. 341 (1975), the Court ruled that \textit{Miranda} was inapplicable to a situation where the defendant was interviewed by IRS agents in a private home and was apparently free to go. In such case, the defendant, who concededly was not "in custody" or deprived of his freedom of action, was not subjected to "inherently coercive," "custodial interrogation." \textit{Id.} at 345-48. In Oregon v. Mathiason, 429 U.S. 592 (1977), the Court ruled in a \textit{per curiam} opinion that where a parolee came to the police station voluntarily and submitted to questioning after being told he was not under arrest, and then after confessing, left the police station "without hindrance," he was not subjected to custodial interrogation and \textit{Miranda} warnings were not required. Because the case was decided in a brief, \textit{per curiam} opinion, without benefit of briefs or arguments, and gave no explicit indication of the precise standard applied, it is difficult to assess its impact on \textit{Miranda}.

Finally, in Fare v. Michael C., 422 U.S. 707 (1979), a juvenile was arrested on suspicion of murder and fully apprised of his \textit{Miranda} rights prior to the commencement of interrogation. The defendant stated that he understood his rights, but he failed to respond directly to a police query as to whether he chose to waive his right to remain silent. \textit{Id.} at 710. In response to whether he would waive his rights to have an attorney present during questioning, the defendant, who had a prison record, requested that his probation officer be present.

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limited or tortured the meaning of *Miranda* and, at the same time, seemingly denied the very assumptions on which *Miranda* was based. Further, the Court truly appeared to be attempting to revitalize the traditional, voluntariness due process test, favored by the *Miranda* dissenters, at the expense of *Miranda*'s bright line.

With this background, we turn to the Court's latest pronouncements in the *Miranda* area. Although the Court had dealt with the meaning of "custody" for purposes of defining "custodial interrogation" on at least four occasions, the Court had not determined, before *Rhode Island v. Innis*, the boundaries of "interrogation." More precisely, the Court had never decided whether any conversation apart from direct questioning of a suspect could amount to "interrogation" for *Miranda* purposes. Because of this omission, the lower federal and state courts were without substantial guidance for dealing with police tactics which amounted to the equivalent of direct police interrogation. Predictably, these lower courts, in wrestling with the problem, developed various and contradictory approaches and tests to determine whether particular conduct, short of direct questioning, constituted interrogation in the *Miranda* setting.

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Rhode Island v. Innis

Thomas J. Innis was arrested in connection with the murder of a Providence, Rhode Island cabdriver. Although the murder had been committed with a shotgun, the suspect did not have a shotgun in his possession when arrested. Innis was advised of his Miranda rights by the arresting officer and by two other officers who later arrived at the scene. After receiving Miranda warnings, Innis asked to speak to an attorney. He was placed in a police car in the company of several police officers for transportation to the police station. Prior to leaving the scene, a superior officer instructed the officers in the cruiser not to question or intimidate Innis in any way.\(^1\)

While enroute to the station house, however, two of the officers in the cruiser engaged in a conversation regarding the missing murder weapon. It was undisputed that the conversation was within Innis' hearing.\(^2\) One of the officers stated that he was familiar with the area where Innis had been arrested and that there were a large number of handicapped children in the area because of its proximity to a school for handicapped youngsters. "God forbid," he said, "one of them might find a weapon with shells and might hurt themselves."\(^3\) Another officer agreed that the gun posed a hazard, and the first officer added that "... it would be too bad if the little ... girl ... would pick up the gun, maybe kill herself."\(^4\)

At this point, Innis interrupted the conversation and asked the police officers to turn the car around so that he could lead them to the murder weapon. The officers returned the cruiser to the arrest scene. The suspect was again given Miranda warnings. He replied that he understood his rights but that he "wanted to get the gun out of the way because of the kids in the area of the school."\(^5\) Innis thereafter led the police to the shotgun, secreted a short distance away.\(^6\)

Innis was indicted for murder and related offenses.\(^7\) He sought to suppress evidence of both the shotgun and his statements in
connection with its discovery at a pretrial hearing. Both the shotgun and Innis’s statements regarding its location and discovery were admitted at trial. Innis was convicted on all charges. On appeal, the Rhode Island Supreme Court reversed. The court held that once Innis had requested counsel, the police officers were obligated by Miranda to cease interrogation. The police officers had, by their conversation with each other in Innis’s presence subtly “interrogated” the defendant. Even though questions had not been directed at Innis, the conversation in his hearing was “subtle compulsion” which amounted to the indirect, functional equivalent of interrogation. The court, at least in part relying on an earlier Supreme Court decision, ruled that any evidence derived from the conversation in the cruiser was obtained contrary to the requirements of Miranda and should have been excluded at trial.

The United States Supreme Court granted certiorari “to address for the first time, the meaning of ‘interrogation’ under Miranda. . . .” In formulating its definition, the Court initially focused on the language of the Miranda opinion. Although the Court in Miranda had stated that “by custodial interrogation, we mean questioning initiated by law enforcement officers after a person had been taken into custody. . . .”, the Burger Court refused to “construe Miranda so narrowly.” The Court found that Miranda did not limit “interrogation” to express questioning, but that the term also could encompass other police behavior in the “interro-

200. Id. at 295-96. After the pretrial hearing, the trial judge found that Innis had been adequately warned under Miranda, that the police officers’ voicing of concern for the handicapped children was “entirely understandable,” and that the suspect’s leading the police to the shotgun was an intelligent and voluntary waiver of the right to silence. Id. at 296. Without determining whether Innis had been “interrogated” within the meaning of Miranda, the trial judge overruled the motion to suppress. Id.

201. Id. at 296.
203. Id. at 1162.
204. Id. at 1164. The Supreme Court case partially relied on was Brewer v. Williams, 430 U.S. 387 (1977). In Brewer, discussed at length below, the Court determined that a police officer’s intentional elicitation of information from a suspect is “tantamount to interrogation,” whether or not the officer directly questions the suspect. Brewer, however, was a sixth amendment decision which determined whether or not the suspect was interrogated for purposes of implicating the right to counsel pursuant to Massiah v. United States, 378 U.S. 478 (1964). See supra note 26.
205. 446 U.S. at 297.
206. 384 U.S. at 444.
207. 446 U.S. at 299.
208. Such police behavior includes the variety of psychological ploys surveyed in Miranda, 384 U.S. at 450, 453. See generally, Comment, Police Use of Trickery as an Interro-
The Innis Court noted, however, that not all statements obtained from a person in custody can be considered the product of interrogation. At the very least, interrogation means that a suspect is subjected to a measure of compulsion above and beyond that which is inherent in custody itself. The Court concluded that Miranda is implicated "whenever a person in custody is subjected to either express questioning or its functional equivalent," i.e., any words or actions on the part of the police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Although this test appears to focus on the perception, knowledge, or intent of the police officer as determinative of whether words or actions are likely to elicit a response, the Court explicitly noted that its "definition focuses primarily upon the perceptions of the suspect rather than the intent of the police." This focus, according to the Court, is consistent with the general contours of Miranda, which protect suspects' rights without requiring proof of police intent. In short, the Court marketed its test as an objective, bright line standard.

The Court then confused matters considerably by emphasizing that the term "interrogation" can only extend to conversations or acts which the police should know would reasonably lead to incrimination. After all, the Court noted that the police cannot be responsible for the "unforeseeable results" of their actions. Further, in a footnote, the Court explained that "intent to elicit" is relevant, since in most cases an officer who intends to elicit an incriminating statement should know that his intentional action is likely to elicit a response from the suspect. Therefore, although the Court at one point squarely stated that the focus is on the perception of the suspect, and not the expectations, knowledge, or intent of the police, the Court later defined away the relevance of the suspect's perception and focused virtually exclusively on the perception.

gation Technique, 32 VAND. L. REV. 1167 (1979), for further discussion of techniques and ploys short of direct questioning used to elicit confessions.

209. 446 U.S. at 299.
210. Id. at 300.
211. Id. at 300-01.
212. Id. at 301.
213. Id.
214. Id. at 302.
215. Id. at 301-02 n.7.
ception of the reasonable police officer regarding the effect of his efforts on the perception of the particular suspect. In fact, the Court, on a number of occasions, referred to the relevance of the state of the officer's knowledge regarding the psychological makeup, experience, and susceptibility of the particular suspect under interrogation.\textsuperscript{216}

In short, it is wholly unclear whether the Court's interrogation standard was actually based upon the perceptions of the suspect or of a reasonable person in the suspect's position, or upon the perceptions of a reasonable police officer or of the particular officer involved. This lack of clarity will undoubtedly engender a great deal of litigation, which will contribute to the further overburdening of the federal judiciary. This lack of clarity may also provide an incentive for police to misapply the \textit{Innis} standard.\textsuperscript{217}

Applying its newly articulated interrogation standard to the \textit{Innis} facts, the Court concluded that the officers' conversation did not constitute interrogation.\textsuperscript{218} The Court found that express questioning had not taken place, because the officers' conversation was regarded as nothing more than conversation without reference to the suspect.\textsuperscript{219} Further, the conversation was not found to be the "functional equivalent" of express questioning, the second part of the \textit{Innis} test, because there was no showing that the officers should have known that their statements would elicit an incriminating response from Innis.\textsuperscript{220} The Court arrived at this conclusion by characterizing the officers' conversation as merely off-hand remarks, and not the type of statements that would be reasonably anticipated to provoke a suspect to confess. In addition, because the officers were not aware that the defendant would be susceptible to the pressures inherent in an appeal to conscience, the Court regarded the incriminating statements of Innis as no more than the unforeseeable result of the officers' conversation.\textsuperscript{221} Therefore, under the newly announced interrogation standard, the officers were not responsible for the incriminating statements made by the suspect because the statements were not elicited during

\textsuperscript{216} \textit{Id.} at 302 n.8.
\textsuperscript{217} As Justice Jackson recognized, in a fourth amendment context the police will interpret and push to the limit any ambiguities in constitutional doctrines promulgated by the Court. \textit{Brinegar v. United States}, 338 U.S. 160, 182 (1948) (Jackson, J., dissenting).
\textsuperscript{218} 446 U.S. at 302.
\textsuperscript{219} \textit{Id.}
\textsuperscript{220} \textit{Id.} at 302-03.
\textsuperscript{221} \textit{Id.} at 303.
“interrogation.”

In ruling that the officers could not have known that Innis would be susceptible to the pressures inherent in an appeal to conscience, the Court found that such an appeal is not reasonably likely to elicit an incriminating response. This conclusion is not well founded. Criminologists familiar with the psychological state of suspects in custody have concluded that, in the inherently coercive atmosphere of confinement, an appeal to conscience takes on added authority. In fact, challenging a suspect's social decency is a recommended interrogation technique. It is difficult to comprehend how the Court could characterize an appeal to conscience as non-interrogational, when such an appeal is widely accepted as a standard police interrogation technique.

Quite apart from the Court's misapplication of its own standard, Chief Justice Burger, in a concurring opinion, pointed out a glaring weakness of the majority's test, stating: "It may introduce new elements of uncertainty; under the Court's test a police officer in the brief time available, apparently must evaluate the suggestibility and susceptibility of an accused. . . . Few, if any, police officers are competent to make the kind of evaluation seemingly contemplated. . . ." In placing this nettlesome burden on police officers, Innis appears to embody a major departure from Miranda. If Miranda sought to establish a constitutional bright line, free from ambiguity, subjectivity, and swearing contests, Innis adds obscurity and uncertainty. Effectively, the Court's standard focuses on the state of the police officer's knowledge, intent, and familiarity with the suspect, as well as the officer's perception of the effect of his actions on the suspect in the totality of the circumstances. In short, the focus is on whether the police knowingly erred, rather than on whether a confession was actually procured after the suspect invoked his right to silence. The test apparently is not whether a reasonable person in the position of a suspect would respond to particular words or actions, but whether most police officers would know that he would.

The Court's refusal to label the police conversation "interrogation" in Innis is all the more remarkable in light of the Court's

222. Id. at 302.
225. 446 U.S. at 304 (Burger, C.J., concurring).
recent decisions in *Brewer v. Williams*\(^{226}\) and *Henry v. United States*.\(^{227}\) The Supreme Court disagreed with the Rhode Island Supreme Court's partial reliance on *Brewer* in formulating a definition of interrogation for *Miranda* purposes, because *Brewer* was decided on sixth amendment right to counsel grounds under *Massiah*.\(^{228}\)

In *Brewer*, a suspect had been formally arraigned for the murder of a little girl, thus implicating his right to counsel under *Massiah*.\(^{229}\) After counsel had been retained and had informed the police that the suspect chose to forego interrogation,\(^{230}\) a police officer, while enroute with the suspect to the jail from the place of arrest addressed the suspect, in the absence of counsel, as follows:

> I want to give you something to think about while we're traveling down the road . . . Number one, I want you to observe the weather conditions, it's raining, it's sleet, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas (E)ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.\(^{231}\)

The officer also stated that he knew the body was hidden on the way to Des Moines and added: "I do not want you to answer me. I don't want to discuss it further. Just think about it as we ride down the road."\(^{232}\) Williams apparently thought about it, and when the car reached a town called Mitchelville, he directed the officer to the body of the victim.\(^{233}\)

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228. 446 U.S. at 300 n.4.
229. 430 U.S. at 391.
230. Id. at 391-92.
231. Id. at 392-93.
232. Id. at 393.
233. Id.
In reviewing the propriety of the so-called “Christian burial speech,” the Brewer Court eschewed the fifth amendment analysis applied by the lower courts. Noting the fact of formal arraignment, the Court applied a sixth amendment analysis to determine whether an “interrogation” of Williams had taken place.\textsuperscript{234} The Court decided that the “Christian burial speech” was “tantamount to interrogation,” because the police, who were aware of the suspect’s state of agitation and his strong religious bent, had intentionally sought to elicit a statement from the suspect in the absence of counsel. By so doing, the officers violated Williams’s sixth amendment rights under \textit{Massiah}.\textsuperscript{235}

This sixth amendment “deliberate elicitation” definition of interrogation, derived from \textit{Massiah} and applied in \textit{Brewer}, was applied again in \textit{Henry v. United States},\textsuperscript{236} which was decided in the same term as \textit{Innis}. In \textit{Henry}, the FBI told the defendant’s cell-block mate to listen for any incriminating statements Henry might make, but warned the informant not to “initiate conversation with or question Henry.”\textsuperscript{237} Although it was not clear who initiated the conversation, Henry and the informant engaged in general conversation. Thereafter, Henry made certain admissions which were offered against him at trial.\textsuperscript{238} The Court concluded on this record that the FBI had “deliberately elicited” statements from Henry when it “intentionally created a situation likely to induce Henry to make incriminating statements without the assistance of counsel.”\textsuperscript{239}

There can be little doubt that if \textit{Innis} had been able to show that the police had deliberately elicited a statement from him, the Court would have found that he had been “interrogated” within the meaning of \textit{Miranda}. The facts of \textit{Henry} and \textit{Brewer} amounted to “deliberate elicitation,” but amounted to much less clear elicitation than the conversation in \textit{Innis}. Even though in \textit{Brewer} and \textit{Henry} the police or their agents spoke to the suspects, whereas in \textit{Innis} they spoke \textit{in his presence}, on the whole, the police statements in \textit{Innis} were much more likely to elicit a response than those in \textit{Brewer} and \textit{Henry}. After all, in \textit{Brewer} the appeal was for the proper burial of one already dead. In \textit{Innis} the appeal

\begin{itemize}
\item \textsuperscript{234} \textit{Id.} at 397-98.
\item \textsuperscript{235} \textit{Id.} at 399-400.
\item \textsuperscript{236} 447 U.S. 264 (1980).
\item \textsuperscript{237} \textit{Id.} at 266.
\item \textsuperscript{238} \textit{Id.} at 266-67.
\item \textsuperscript{239} \textit{Id.} at 274.
\end{itemize}
was to save the living. In Henry the informant did no more than place himself in a position to hear incriminating words, whereas in Innis the police made a powerful, though somewhat indirect, appeal to conscience. Therefore, it appears that on a continuum of reasonable likelihood of eliciting a statement, the situation presented in Innis was the most likely of the three to evoke a suspect’s response. Thus, if the police activity in Brewer and Henry amounted to deliberate attempts to elicit statements, then the police conversation in Innis was, at least, police action which a reasonable officer should have known would evoke a response from the suspect.

The problem, however, is the Court’s steadfast insistence on distinguishing between “deliberate elicitation” or interrogation for sixth amendment purposes, as represented in Massiah, Brewer, and Henry, and “interrogation” for fifth amendment purposes. Without explaining why such a distinction is meaningful, the Court simply stated that the test for interrogation found in the sixth amendment cases is inapposite to any discussion of fifth amendment interrogation. Even if the distinction were legally meaningful, the sixth amendment test is narrower than the fifth amendment test. Any police activity which would be deemed interrogation under the Massiah-Brewer-Henry standard, a fortiori must constitute “interrogation” under the Innis standard.

Therefore, the Innis majority’s approach provides the police with an incentive to continue to probe indirectly at the suspect after he has invoked the rights to silence and counsel, thereby denigrating his right to cut off questioning. The police officer knows that if challenged, he simply can respond that his words or actions were either not directed explicitly at the suspect, were “long shots” not “likely” to produce an incriminating statement, or that his knowledge of the suspect was limited. Most arresting officers do not know their arrestees intimately. After all, if an appeal to conscience based on saving the life of retarded children would not be considered likely to elicit a statement, many other illegitimate ploys remain available.

The Innis interrogation test necessitates the use of case by case
analysis, which previously had rarely furnished a reliable or clear guide for the courts or police. Because the Innis standard requires the courts to ascertain in every case whether a reasonable police officer should have known the probable effect of his conduct on a particular suspect, the courts will be unable to delineate concrete rules regarding what constitutes interrogation. The Innis test will be reduced to an illusory and unworkable standard, its determination too often depending on judicial resolution of a swearing contest between the police and a suspect, few of which will be won by the latter.

The facts of Innis itself demonstrate the unworkability of its test. It is nearly impossible to ascertain, either at the time of trial or on appeal, whether the police officers intended or hoped to obtain a statement from Innis. There can be no doubt that such conversation might evoke an incriminating response. Beyond that, we enter the worlds of epistemology and psychology, hardly appropriate areas of expertise for police officers or judges. Furthermore, there can be no doubt that if the police officers had addressed Innis directly, saying, “if you don’t tell us where the gun is located, a little handicapped child might find it and shoot herself,” all would agree that this is interrogation. However, according to Innis, if the officer merely averts his gaze from the suspect’s face and says to an officer seated next to the suspect, “if he doesn’t tell us where the gun is located, a little handicapped child might find it and shoot herself,” this does not constitute interrogation.

By way of rationalizing Innis, Professor Welsh White has argued recently that the case should be read to turn on “the objective purpose manifested by the police.” That is, “if an objective observer [with the same knowledge of the suspect as the police officer] would, on the sole basis of hearing the officer’s remarks, infer that the remarks were designed to elicit an incriminating response, then the remarks should constitute ‘interrogation’.”

Professor White’s suggested reading of Innis appears to remedy the subjective nature of the majority approach, by removing the inquiry from the intent of the officer who actually performed the putative interrogation. Nevertheless, his approach fails to eliminate the major problems of the majority’s test—the almost impossible after the fact analysis of the “objective” intent and import of the officer’s words, as well as the analysis of what the officer knew

242. White, supra note 192, at 1231-32.
about the particular suspect's mental makeup on a case by case basis. The premium is on ignorance, or at least to testifying under oath to ignorance. On the street, every police officer becomes an amateur psychiatrist, required to make judgments which often are dubious when made by professionals. Moreover, Professor White's reading of Innis would elevate intent or "design" to an essential element of every application of the Innis rule. The Innis Court, quite correctly, noted that "the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." Supra note 192, at 1234.

Furthermore, Professor White himself, though marking it as a strength, points out perhaps the greatest weakness of his suggested reading of the Innis standard. He argues that his reading differentiates between indirect police tactics which all agree are within Miranda's meaning of "interrogation"—"tactics such as reading a ballistics report to the suspect, showing him incriminating evidence, and stating in his presence that another individual accused him of the crime,"—and the officers' conversation in Innis. Supra note 192, at 1235.

The critical distinction, according to Professor White: Supra note 192, at 1235.

. . . is that in Innis there is a basis for concluding that the officer's remarks were made for some purpose other than that of obtaining evidence from the suspect. An objective listener could plausibly conclude that the policemen's remarks in Innis were made solely to express their genuine concern about the danger posed by the hidden shotgun. This distinction is legally significant because when an impartial observer perceives the officer's purpose to be something other than eliciting information from the suspect, the suspect is likely to view the officer's purpose in the same way. If the suspect takes such a view, he would differentiate the speech or conduct from a "direct question" because he would not see it as a demand for information. Accordingly, the officer's speech or conduct would not be the "functional equivalent" of "direct questioning" because the "measure of compulsion above and beyond that inherent in custody itself" would be lacking.

According to Professor White, this reading "reinvigorates" Miranda, providing a standard "fully responsive to the concerns of
the Miranda decision.\textsuperscript{246}

However, a close reading of \textit{Innis} and this favorable commentary reveals that \textit{Innis} actually creates a potentially gaping hole in \textit{Miranda}. If it is sufficient, to avoid \textit{Miranda}'s requirements, to show that there is some basis for concluding that the tactics employed may have had some purpose other than eliciting information, then it would not require much ingenuity for police officers to frame Hydra-headed tactics which serve a dual or multiple purpose, only one of which amounts to seeking incrimination. Therefore, in focusing on intent instead of effect, the trial court is left to speculation. The street officer receives no guidance, on the one hand, and an incentive to continue indirect questioning, on the other.

Therefore, after having seemingly broadened \textit{Miranda}'s scope by including the "functional equivalent" of questioning within the meaning of interrogation, the Court proceeded to define "functional equivalent" in such a way as to further erode the fundamental or core values of \textit{Miranda}. Where \textit{Miranda} sought to establish a bright line standard and avoid the dangers of case by case analysis, \textit{Innis} creates a difficult case by case analysis requirement. In each post-\textit{Innis} case, the trial court will have to determine the state of the officer's knowledge and, perhaps intent, regarding the peculiar susceptibilities of the suspect.\textsuperscript{247}

Alternatively, the Court could have adopted a simple and clear-cut rule consistent with the bright line approach of \textit{Miranda} itself. The Court could have announced a rule as follows: once the suspect invokes the right to silence and/or counsel, the police are barred from any conversation in the defendant's presence which relates to the criminal activity with which the suspect is charged. Such a rule would put police, prosecutors, and trial judges unequivocally on notice regarding the latitude of permissible police power. Moreover, this test is truly objective, requiring no after the

\textsuperscript{246} Id.

\textsuperscript{247} Justice Stevens, in his dissent, argued that the Court's reasonable officer standard restricted the broad protections of \textit{Miranda}. He preferred to base his standard on the perceptions of the reasonable suspect. According to his conception, any police action or statements that appear to a reasonable person in the suspect's position to call for a response must be termed "interrogation." Stevens' standard, though preferable to the majority's, is not lacking in its own difficulties. First, it retains a case by case approach. Second, it would be extremely difficult, if not impossible, for the courts and police to determine the way in which a reasonable suspect should perceive certain acts or statements. Even under the Stevens approach, there remains a premium on interrogation by indirection and the possibility of indirect and suggestive probing of the suspect, despite his invocation of the right to cease interrogation. 446 U.S. at 311.
fact reconstruction of feelings, attitudes, motives, or perceptions, and no determination of the relative credibility of sorely interested witnesses.

In *Innis*, the officers’ conversation revolved around the school children and the murder weapon, a shotgun. The shotgun clearly related to the criminal activity. Under the proposed standard, the officers’ conversation about the shotgun would properly constitute interrogation and would cause any disclosures arising from it to be excluded. Suspects would be protected from interrogation under the proposed standard because the police would be prevented from using interrogation methods which in any way relate to the crime in question. A firm line of precedent for the lower courts to follow could be developed under the alternative test, because the standard is objective and does not change with what the police or courts perceive as reasonable in each case. Unlike *Innis*, the suggested alternative formulation is consistent with the values and expectations of *Miranda*.

*Edwards v. Arizona*

Whereas *Innis* provided a mixed blessing for proponents of *Miranda*, *Edwards v. Arizona* provided the Burger Court’s first clear-cut victory for *Miranda*. Robert Edwards was arrested on charges of robbery, burglary, and murder on January 19, 1976. He was taken to the station house and given *Miranda* warnings. Edwards stated that he understood his rights and would submit to interrogation. During questioning, police officers informed Edwards that another person in custody had already implicated Edwards in the crimes. Edwards denied complicity and claimed an alibi. He later sought to negotiate a “deal” with the police. The interrogating officer claimed that he was not authorized to make a deal, but gave Edwards the telephone number of the local county attorney. Edwards began dialing, but did not complete the call. He hung up and requested an attorney before making any deals; the interrogation then ceased, and Edwards was transported to the county jail for the night.

At 9:15 the next morning, a guard told Edwards that two detectives were in the jail and wished to talk to him. These detectives were colleagues of the officer who had conducted the interrogation the night before. Edwards told the guard that he did not want to

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249. *Id.* at 479.
talk to "anyone." The guard then informed Edwards that "he had" to talk to the detectives and took him to see them. After the detectives gave Edwards fresh Miranda warnings, Edwards indicated that he would be willing to talk if permitted to hear a tape recording, which the detectives had in their possession, of the putative accomplice's statement which implicated him. After hearing the recording, Edwards implicated himself in the commission of the crimes charged.\textsuperscript{250} His statement was admitted against him at trial, and he was convicted.\textsuperscript{251} On appeal, the Arizona Supreme Court affirmed the conviction.\textsuperscript{252}

The United States Supreme Court reversed.\textsuperscript{253} Justice White, writing for the Court, stated that certiorari had been granted to determine "whether the Fifth, Sixth and Fourteenth Amendments require suppression of a post-arrest confession which was obtained after Edwards had invoked his right to counsel before interrogation. . . ."\textsuperscript{254} The Court answered the question affirmatively on the strength of Miranda.

The Court agreed with the Arizona Supreme Court's finding that Edwards had asserted both his right to silence and counsel on the night of January 19.\textsuperscript{255} However, according to the Supreme Court, the Arizona court erred in finding a waiver of these rights on the morning of January 20. First, the Court found that the Arizona court had applied the wrong standard to measure the effectiveness, for constitutional purposes, of the waiver. Instead of applying the Johnson v. Zerbst\textsuperscript{256} standard authorized by Miranda, the state court looked only at whether the waiver was voluntary in the total-

\textsuperscript{250} Id.
\textsuperscript{251} Id. at 480. Prior to trial, Edwards had moved to suppress his inculpatory statement on the ground that his rights under Miranda had been violated when the detectives interrogated him in the absence of counsel after he had invoked his right to counsel the night before. The trial court denied the motion, finding that Edwards's statement was "voluntary."
\textsuperscript{252} 122 Ariz. 206, 594 P.2d 72 (1979). The Arizona Supreme Court ruled that even though Edwards had asserted both his rights to silence and to counsel on the evening of January 19, he had waived both rights on the morning of January 20, when, after receiving fresh Miranda warnings, he voluntarily spoke to the detectives in the county jail. The court agreed with the trial court's finding that the waiver and confession had been "voluntarily and knowingly made." Id. at 83.
\textsuperscript{253} 451 U.S. at 487.
\textsuperscript{254} Id. at 478.
\textsuperscript{255} Id. at 480.
\textsuperscript{256} 304 U.S. 458, 464 (1938). This standard requires a voluntary and intentional relinquishment or abandonment of a known right or privilege.
ity of the circumstances. The latter test, derived from \textit{Schneckloth v. Bustamonte}, was inapposite. \textit{Schneckloth} was a fourth amendment waiver case dealing with the voluntariness of a consent to a search. Therefore, the Arizona court had reviewed Edwards's alleged waiver for voluntariness, without focusing on "whether Edwards understood his right to counsel and intelligently and knowingly relinquished it."

Although the Court, acceding to \textit{North Carolina v. Butler}, acknowledged that a suspect can waive his rights after warning, it nevertheless held that "additional safeguards are necessary when the accused asks for counsel." According to the Court, once a suspect asks for counsel and interrogation ceases, the waiver of the right to counsel will not be established simply because the suspect is given fresh warnings and then responds to questioning. This holding, like the earlier part of the opinion regarding the standard for waiver, is merely a restatement of the law clearly delineated in \textit{Miranda}: if the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

The Court appeared to make new law, however, by further holding that once a suspect requests counsel, he is not subject to any further interrogation, in the absence of counsel, unless the suspect is the initiator of the communication. Justices Powell and Rehnquist concurred in the result; but in this further holding, they saw the "constitutionalizing not [of] the generalized \textit{Zerbst} standard [of] a single element of fact," i.e., who initiated the second contact, as the threshold of the waiver inquiry. Although Justices Powell and Rehnquist hoped that they were misreading the major-

\footnotesize{257. 451 U.S. at 482-83.  
259. 451 U.S. at 484.  
261. 451 U.S. at 484. A comparison of \textit{Edwards} with \textit{Michigan v. Mosley}, 423 U.S. 96 (1975), further buttresses the notion that the Court has shown greater solicitude for the right to counsel than the right to silence. In \textit{Mosley}, the Court ruled that where a suspect invokes the right to silence during interrogation, the police may continue or recommence questioning once the right has been "scrupulously honored." \textit{See supra} text accompanying notes 147-66. The \textit{Edwards} holding, triggered by the invocation of the right to counsel, sets out a per se rule barring any police-initiated reinterrogation until counsel is present. If the distinction between the two rights is meaningful, then \textit{Edwards} and \textit{Mosley} co-exist; if not, then it could be argued that \textit{Edwards} overrules \textit{Mosley} sub silentio.  
262. 451 U.S. at 484.  
263. 384 U.S. at 474.  
264. 451 U.S. at 484.  
265. \textit{Id.} at 492. (Powell, J., concurring).}
ity opinion, the majority responded: “[w]e . . . emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.”

*Edwards* not only is the first Burger Court opinion to reverse a conviction on *Miranda* grounds; it marks the first time that the Court not only has gone beyond the narrow meaning of *Miranda*’s words but also has announced a rule harmonious with *Miranda*’s implicit commands. Holding that no waiver of the invoked right to counsel can be established when the police initiate reinterrogation is in the nature of the bright line or per se rule that police and trial judges can easily follow.

This “further holding” is all the more remarkable since a narrower ground for reversal was available. As the Chief Justice pointed out in concurrence, the Arizona courts had found that “When the detention officer told Edwards the detectives were there to see him, he told the officer he did not wish to speak to anyone. The officer told him *that he had to*.”

“This is enough for me,” the Chief Justice wrote. Admittedly, it is difficult to imagine a greater derogation of the fifth amendment by a police officer than telling a prisoner, effectively, that he has no right to silence. This point, however, is ignored by the majority opinion.

The Court concluded its opinion by responding to whether Edwards was subjected to any custodial interrogation on January 20, since *Miranda* is only relevant if there is interrogation. According to the majority opinion, the detectives informed Edwards on January 20 that they wanted to talk to him and then informed him, again, of his rights. Next, “Edwards stated he would talk, but what prompted this action does not appear. He listened at his own request to part of the taped statement made by one of his alleged accomplices and then made an incriminating statement, which was used against him at trial.” From these facts, the Court found it was “clear” that Edwards had been “subjected to custodial interrogation” on the morning of January 20 “within the meaning of *Rhode Island v. Innis*.” Therefore, according to *Edwards*, where police officers inform a suspect in custody that they would like to

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266. *Id.* at 485.
268. 451 U.S. at 488. (Burger, C.J., concurring).
269. *Id.* at 487.
270. *Id.* at 479.
271. *Id.* at 487.
talk to him, but ask him no questions, and the suspect asks to hear a tape which may implicate him, and then confesses, interrogation has taken place. This is so presumably because the police should have known that by saying they wanted to talk to the suspect, and by granting his request to hear a tape which implicated him, an inculpatory response would be elicited.

The Edwards finding of "interrogation" under the Innis test, and the holding in Innis itself, present fertile ground for confusion. Even though the police in Edwards clearly had the intent to question the suspect, they apparently never got the opportunity to ask him any questions. Contrarily, the police in Innis may not have intended to seek statements from the suspect, but got them anyway by "off-hand" conversation. Two conclusions are possible. First, it might be assumed that police intent is the key to defining the "functional equivalent to interrogation" under Innis. Second, it might now be argued that the Court is implicitly moving in the direction of harmonizing the Henry "deliberate elicitation" standard and the Innis standard. In Edwards as in Henry, the police merely placed themselves and their agents in a position to hear statements from the suspect, without actually subjecting such suspect to questioning.

Estelle v. Smith

On the same day the Court issued its opinion in Edwards v. Arizona, the Court gave Miranda another clear-cut victory in announcing its decision in Estelle v. Smith. In Smith, the Court ruled that the fifth amendment bars the government from offering psychiatric testimony at a penalty phase hearing in a bifurcated capital trial, where the defendant was not given Miranda-type warnings prior to a pretrial psychiatric examination from which the expert testimony is derived.

Ernest Benjamin Smith was indicted for a murder growing out of his part in an armed robbery which resulted in the fatal shooting of a store clerk. Smith's accomplice had fired the fatal shots. Prior to trial, the State of Texas announced that it would seek the death penalty for Smith. The trial judge, sua sponte, ordered that Smith be examined by a court-appointed psychiatrist for the purpose of assessing Smith's competency to stand trial. After the court-appointed counsel for Smith, the psychiatrist, a Dr. Grigson,
examined Smith in custody at the county jail, without seeking the permission of his attorneys.\textsuperscript{274} He also failed to advise Smith, prior to the examination, that Smith possessed the right to remain silent and that anything Smith said to the psychiatrist could be used against him in court.\textsuperscript{275} After the examination, the psychiatrist reported to the court his conclusion that Smith was competent to stand trial.\textsuperscript{276}

Prior to trial, the defense secured an order requiring the state to list the names of the witnesses it planned to call at both the guilt and penalty stages of the prosecution. Later, the court granted a defense motion to disallow the testimony of any witness offered by the state in its case in chief whose name had not been disclosed pursuant to the earlier order. The examining psychiatrist's name was not on the list.\textsuperscript{277}

At Smith's penalty hearing,\textsuperscript{278} the state called Dr. Grigson as a witness. The trial judge allowed Dr. Grigson to testify over defense objection that Dr. Grigson's name had not been disclosed on the pretrial witness list. After establishing his expert qualifications, Dr. Grigson, testifying on the basis on his ninety minute pretrial mental competency examination of Smith, stated that Smith was a "very severe sociopath" who could be expected to continue his "previous behavior," and that Smith's condition would only worsen over time.\textsuperscript{279} Furthermore, Dr. Grigson testified that Smith had exhibited no remorse or sorrow for his acts, that he was without regard for other human life or property, that he was untreatable, and finally, that "if given the opportunity to do so," Smith would per-

\textsuperscript{274} \textit{Id.} at 459.
\textsuperscript{275} \textit{Id.} at 461.
\textsuperscript{276} \textit{Id.} at 457. The report also characterized Smith as "a severe sociopath," \textit{id.} at 458-59, but made no other reference to Smith's future dangerousness. The psychiatrist discussed his findings with the prosecutor in the case, who told the psychiatrist that he should be prepared to testify, apparently at the sentencing hearing, if Smith were found guilty. \textit{Id.} at 459.
\textsuperscript{277} 451 U.S. at 459.
\textsuperscript{278} Under Texas law, a capital trial is bifurcated, with the same jury first determining guilt or innocence and later, in a separate "penalty" or "sentencing" phase of trial, determining whether the defendant will be sentenced to death or receive a sentence of life imprisonment. TEX. CODE OF CRIM. PROC., art. 37.071(a) (Vernon Supp. 1980). At the sentencing phase, the trial judge is required to impose the death penalty if the jury answers three questions in the affirmative. \textit{Id.} art. 37.071 (b)(1)-(3). One of the questions is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." \textit{Id.} art. 37.071 (b)(1). As the Court noted, "[i]n other words, the jury must assess the defendant's future dangerousness." 451 U.S. at 458.
\textsuperscript{279} \textit{Id.}
petrate similar criminal acts again. The jury found beyond a reasonable doubt that Smith presented a probability of future dangerousness and answered the other two statutory questions affirmatively as well. The court then sentenced Smith to death. The Texas Court of Criminal Appeals affirmed Smith's conviction and sentence. The United States Supreme Court denied Smith's petition for certiorari. Smith then sought relief by means of habeas corpus, and the district court issued the writ. The Fifth Circuit affirmed.

The Supreme Court granted certiorari "to consider whether the prosecution's use of psychiatric testimony at the sentencing phase of respondent's capital murder trial to establish future dangerousness violated his constitutional rights." Chief Justice Burger, writing for the Court, held that Smith's constitutional rights were indeed violated. In so holding, the Court extended Miranda in ways that must have happily surprised Miranda's strongest proponents.

The Court could have easily chosen to ignore any self-incrimination Miranda analysis at all. Justices Stewart, Powell, and Rehnquist, all concurring in the judgment, argued that since the mental status examination took place after indictment and appointment of counsel, but without any notice to defense counsel, the sixth and

280. Id. at 459-60.
281. Id. at 460.
282. Id.
283. 540 S.W.2d 693 (1976).
285. Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977). The district court vacated the death sentence on the grounds that the admission of Dr. Grigson's testimony violated Smith's right to due process and to be free from self-incrimination under the fifth and fourteenth amendments. The basis for this finding was Dr. Grigson's failure to advise Smith of his right to remain silent at the competency examination, and the state's failure to notify the defense in advance of the sentencing hearing that it intended to call Dr. Grigson as a witness. Id. at 657, 664. Moreover, the district court found that Smith's sixth amendment right to the effective assistance of counsel had been violated, as well his eighth amendment right to show evidence in mitigation regarding the imposition of the death penalty. Id. at 658, 661.

286. Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979). The Fifth Circuit found two constitutional violations. It held first that the "surprise" use of Dr. Grigson violated due process. Id. at 699. Then, the court found that Smith's fifth and sixth amendment rights had been violated by the state's use of psychiatric testimony derived from an examination of the defendant in the absence of defendant having been advised prior to the examination of his rights to remain silent, to terminate the examination at will, and to consult with counsel in making the decision whether to participate in the examination. Id. at 709.

287. 451 U.S. at 456.
fourteenth amendment right to counsel, as applied in Massiah and Brewer, "made impermissible the introduction of Dr. Grigson's testimony against the respondent at any stage of his trial."288

After all, the Court could have decided Brewer v. Williams289 on either fifth or sixth amendment grounds. The Court eschewed fifth amendment Miranda analysis and relied exclusively on the sixth amendment right to counsel. This refusal to dignify Miranda was seen as a further derogation, in the period following Michigan v. Tucker,290 of the constitutional significance of Miranda. As one commentator noted: "the Court's refusal to ground its decision on Miranda, despite the fact that both lower courts had done so, raised doubts as to the continued scope, and perhaps even the continued vitality, of Miranda."291 In light of the fact that the case for the application of Miranda in the setting presented by Estelle v. Smith is much less apparent, as we shall see, than the application of Miranda to the facts of Brewer, and given that the sixth amendment analysis is clearly called for in Smith, it must be concluded that the Court in Smith went out of its way to apply Miranda to the pretrial psychiatric examination.

Although Smith did not have to be a Miranda case, the Court implicitly made it primarily a Miranda case by turning first to the fifth amendment self-incrimination issue. Taking note of the root question, the Court began by determining whether the fifth amendment applied at all. According to the state, the fifth amendment was inapposite to Smith's situation because Dr. Grigson's testimony was not offered to establish guilt but merely to fix the

288. Id. at 474. (Stewart, J., concurring). In addition to the sixth amendment, the Court might have taken advantage of another option to vacate Smith's death sentence. The Court could have followed the lead of the Fifth Circuit, which had relied on the due process clause of the fifth amendment as interpreted in Gardner v. Florida, 430 U.S. 349 (1977). Gardner mandated the vacation of a death sentence where defense counsel was denied the opportunity to effectively answer or challenge the evidence on which the death sentence was predicated, thereby "impairing the interest in reliability." 430 U.S. at 359. Gardner seemed a likely authority in light of the district court's finding that the prosecution had intentionally omitted Dr. Grigson's name from the witness list in the hope of surprising the defendant at the penalty phase. Smith v. Estelle, 445 F. Supp. 647, 658 (N.D. Tex. 1977). Interestingly, according to an article in The American Lawyer, August 2, 1981 at 41, counsel for Smith apparently saw little hope for persuading the Court to apply Miranda in the Estelle v. Smith context and, therefore, gave the Miranda argument a "low profile" in both briefs and oral argument, emphasizing instead the due process argument relied on in part by the Court of Appeals.

291. White, supra note 192, at 1214.
appropriate sentence. The self-incrimination clause, argued the state, protects against incrimination and "incrimination is complete once guilt is adjudicated." In fine, the state said, there can be no self-incrimination where there is no incrimination.

The Court disagreed with the state's purported distinction between the guilt and penalty phases, noting that in Culombe v. Connecticut the Court had said that the "essence" of the fifth amendment self-incrimination clause is "[t]he requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from its own lips." It can hardly be gainsaid that the Culombe Court's use of the words "and punish" amount to dictum. Culombe did not involve a bifurcated trial with a sentencing phase. There is no real doubt that the words "and punish" were included merely to show the ultimate effect, after conviction, of self-incrimination. This is hardly authority for the proposition that self-incrimination is relevant to punishment. It is remarkable to see the Court, so quick in Harris to confine Miranda's precepts to the particular facts involved, and so quick to characterize as dictum Miranda's repeated emphasis on the rule that statements obtained in violation of Miranda are barred for any purpose, now take pure dictum as a basis for expanding Miranda.

The Court went on to cite another Warren-era decision, In re Gault, for the proposition that the nature of the proceeding, whether civil or criminal, does not determine whether the fifth amendment applies. Rather, the Court said, it is "the nature of the statement or admission and the exposure which it invites" which

292. 451 U.S. at 462 (quoting Brief for Petitioner 33-34).
293. Id.
294. Cf., Bullington v. Missouri, 451 U.S. 430 (1981), decided two weeks before Smith, in which the Court had stated that for double jeopardy purposes, the capital penalty hearing "resembled, and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt and innocence." Id. The Court held that where a jury imposes a life sentence in the first trial, the double jeopardy clause precludes the jury from sentencing the defendant to death after a retrial occasioned by the reversal of the defendant's earlier conviction. Id. at 446.
298. 451 U.S. at 462-63.
determines the availability of the privilege. Although this may be a correct statement of the law, the Court begs the question of whether the use of a defendant's statements in the penalty phase amounts to self-incrimination. To say that one is exposed to self-incrimination when one's statement invites prosecution for a crime in no way answers the question whether the determination of punishment is indistinguishable for fifth amendment purposes from the determination of guilt.

Prior to the decision in Estelle v. Smith, few cases had decided whether a convicted, but unsentenced, defendant could assert the self-incrimination privilege. It had generally been held in lower courts that conviction terminates the privilege. Most of the cases which had so held, however, had dealt with persons seeking to assert the privilege after conviction and sentencing were complete. No cases appear which determined the precise issue as to whether one who has been convicted at the guilt phase of a bifurcated capital trial can raise the privilege at the sentencing phase. However, at least one federal court of appeals had held that where a convicted, but not yet sentenced, defendant is called to testify at another's trial, he is permitted to claim the privilege where his testimony could bear on his subsequent sentence. At least one state court had decided that the privilege against self-incrimination can be asserted by one who has an appeal pending because of the danger of the use of his testimony at a possible new trial.

The strongest argument in support of the Court's position may be the simplest. The words of the self-incrimination clause are: "No person . . . shall be compelled in any criminal case to be a witness against himself." The penalty phase of a bifurcated capital trial is arguably part of the criminal case. The Court, however, satisfies itself by saying that if it is true, as the state conceded in Smith, that any effort to compel the defendant to testify against his will at the sentencing hearing would contravene the fifth


300. See cases collected at annot. 9 A.L.R. 3d 990-1004.

301. Id.


304. U.S. Const. amend. V.
amendment, then any attempt to establish the defendant’s future dangerousness, and thus his sentence, by reliance on unwarned statements made to a psychiatrist would likewise infringe fifth amendment values. It is noteworthy that this statement comes perilously close to saying that the failure to provide Miranda-type warnings amounts to a violation of the fifth amendment, a position specifically rejected six years earlier in Michigan v. Tucker.

Having decided that incrimination is not complete once guilt has been adjudicated, the Court next turned to the state’s alternative argument in support of the inapplicability of the fifth amendment, that Smith’s “communications to Dr. Grigson were non-testimonial in nature.” The state argued that, as in the situation of blood tests, voice exemplars, handwriting exemplars, and the like, the self-incrimination clause is not violated “where the evidence given by a defendant is neither related to some communicative act nor used for the testimonial content of what was said.” Rather, in offering the psychiatric testimony, the state offered scientific evidence based on expert interpretation of Smith’s words. Although a subject of scholarly debate, the question of whether the compelled psychiatric examination of a criminal defendant implicates the self-incrimination clause had, prior to Smith, never been decided by the Supreme Court. The Court had recently noted how-

305. 451 U.S. at 440.
307. 451 U.S. at 463.
308. Id.
310. Note, however, that FED. R. CRIM. P. 12.2(c) specifically provides that where a trial court orders a pretrial psychiatric examination of a criminal defendant, “no statement made by the accused in the course of any examination provided for by this rule . . . shall be admitted in evidence on the issue of guilt in any criminal proceeding.” The Federal Rules of Criminal Procedure are proposed by the Supreme Court and promulgated after congressional approval. The language barring the admissibility of the defendant’s statements made during the psychiatric examination at trial was not proposed by the Supreme Court, but was added by the Congress for the purpose of securing the accused’s privilege against self-incrimination. Thus, Congress clearly saw the self-incrimination potential of the pretrial examination. However, rule 12.2(c) is limited to “use on the issue of guilt” and the Historical Note following the rule states that the rule specifically does not forbid the use of such evi-
ever, that it "has never applied the fifth amendment to prevent the otherwise proper acquisition or use of evidence, which in the Court's view, did not involve compelled testimonial self-incrimination of some sort," and "that the fifth amendment applies only when the accused is compelled to make a testimonial communication that is incriminating."

In an earlier line of cases, the Court had consistently distinguished the requiring of non-testimonial acts by the defendant, such as modelling clothing, voice or handwriting exemplars, blood samples, lineups, or the exhibition of physical characteristics, from the requirement that the defendant testimonially provide evidence against himself. Only testimonial self-incrimination garners the protection of the fifth amendment. According to Justice Brennan, writing for the majority in *Schmerber v. California*, "the distinction which has emerged often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimonial', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

The determination of whether the psychiatrist's testimony as to the defendant's future dangerousness implicates the fifth amendment, therefore, can turn on whether such testimony is "real" evidence, merely the observations, analysis, and conclusions of an expert who has seen and listened to the defendant, or whether the expert's testimony is, in actuality, a report of the defendant's own words or testimonial disclosures. The lower courts have divided on this issue. The majority of the few courts which have addressed the issue have treated the evidence as essentially non-communicative, while others have held such evidence "testimonial" because

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312. *Id.* at 408.
315. *Id.* at 764.
"the words of the accused are critically important in determining his mental condition."\textsuperscript{317}

The Court in \textit{Smith} resolved this troublesome issue by stating:

Dr. Grigson's diagnosis, as detailed in his testimony, was not based simply on his observation of respondent. Rather, Dr. Grigson drew his conclusions largely from respondent's account of the crime during their interview, and he placed particular emphasis on what he considered to be respondent's lack of remorse. (citations omitted.) Dr. Grigson's prognosis as to future dangerousness rested on statements respondent made, and remarks he omitted, in reciting the details of the crime. The Fifth Amendment privilege, therefore, is directly involved here because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination.\textsuperscript{318}

Having determined that the fifth amendment applied to Smith's pretrial examination when evidence derived therefrom was offered at the penalty phase, the Court then considered whether \textit{Miranda} was implicated in this setting. Particularly, the Court was compelled to decide whether the pretrial psychiatric examination was "custodial interrogation," since it is the fact of custodial interrogation that triggers the \textit{Miranda} warnings and other protections.\textsuperscript{319}


\textsuperscript{318} 451 U.S. at 464.

The Court's argument echoed the opinion of the district judge who had issued Smith the writ of habeas corpus:

All of these cases (which raise the testimonial limitation of the privilege against self-incrimination) reach only those situations where identifiable physical characteristics or properties of the Defendant are compelled. See People v. Evans, 90 Misc. 2d 195, 393 N.Y.S.2d 674 (1977). It does not matter what the Defendant speaks or what he writes when a voice or handwriting exemplar is produced. The Defendant is only being compelled to divulge the way he speaks or the manner in which he writes both of which are non-testimonial acts to which the privilege does not apply.

The compelled psychiatric examination on the issue of "dangerousness" clearly rests on different ground. Here it is not only the way the Defendant communicates to the psychiatrist, but also the content of what he says that forms the basis of the expert opinion.

I, therefore, do not believe that the Holt line of cases inevitably leads to the conclusion urged by the State. Each of these cases has been careful to distinguish between the "content" of the communication and the "fact" of the communication. No such distinction is possible where the psychiatrist, as here, relies, at least in part, on the content of the communication elicited from the Defendant.

\textsuperscript{319} 451 U.S. at 467.
Despite the Burger Court's historical reluctance to extend *Miranda* beyond its precise circumstances, the Court concluded that "the considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here."\(^{320}\) The Court noted that Smith was in jail when he underwent the examination and the doctor, though designated by the Court as a neutral examiner,\(^{321}\) became, once he testified for the State, a police agent.

The latter point is a particularly thin reed on which to rely. It is unlikely that the Court means to imply that if a non-police operative or other "neutral" person visits a prisoner in jail and obtains admissions from the defendant, such person can never be called by the prosecution to relate such admissions unless he first advises the defendant of his fifth amendment rights and obtained the appropriate waiver. Yet, the Court certainly provides no basis to distinguish such cases from the pretrial psychiatric examination. Furthermore, the Court imposed no requirement that the psychiatrist or other person intend to obtain incriminating information or intend to testify at trial. There clearly was no showing that Dr. Grigson intended to testify.

In any event, the Court formulated its fifth amendment holding by stating:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness. If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. . . . Volunteered statements . . . are not barred by the Fifth Amendment, but under *Miranda* v. *Arizona*, supra, we

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320. *Id.*

321. Dr. Grigson's actual impartiality may be subject to some question. Dr. Grigson, sometimes referred to as the "Dallas Doctor of Doom," Nat'l L.J., Nov. 24, 1980 at 1, col. 2, has testified for the state in twelve of the twenty cases in which the state of Texas offered psychiatric testimony at capital sentencing hearings. See Dix, *Participation by Mental Health Professionals in Capital Murder Sentencing*, 19 AM. CRIM. L. REV. 1 (1981).
must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. . . . These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand.  

As noted earlier, Justice Rehnquist concurred in the result, resting solely on sixth amendment grounds. He would not have decided the fifth amendment issues, but if required to do so, would have rejected the defendant's claim because, in his view, the fifth amendment simply was not implicated by the psychiatric examination.  

Quoting from a recent Second Circuit opinion, Justice Rehnquist said: "The psychiatrist's interrogation of [defendant] on subjects presenting no threat of disclosure of prosecutable crimes . . . involved no 'compelled testimonial self-incrimination' even though the consequence might be more severe punishment."  

However, even if the fifth amendment did apply here, Justice Rehnquist argued that Miranda would not be implicated because no inherently coercive custodial interrogation took place. He concluded in a statement that is undoubtedly correct that "the Miranda requirements were certainly not designed by this Court with psychiatric examinations in mind." It is this last fact which makes Estelle v. Smith so remarkable a Burger Court decision.  

CONCLUSION  

On the heels of Harris, Hass, Tucker and Mosley, a dire prediction for the future of Miranda could hardly be gainsaid. In its pre-1980 decision-making, the Burger Court had shown its disdain for the assumptions which underlie Miranda and had limited, misread, or ignored its holding at every apparent opportunity. In Tucker, the Court even appeared to deny Miranda's jurisprudential legitimacy, inexplicably failing to overrule the Warren Court holding, perhaps because protestations of awed respect for precedent bound the majority's hands.

322. 451 U.S. at 468-69.  
323. Id. at 475 (Rehnquist, J., concurring).  
325. 451 U.S. at 475 (quoting Hollis v. Smith, 571 F.2d 685, 690-91 (2d Cir. 1978)).  
326. Id. at 475.
In 1980, however, the Court in *Innis* seemed to reconcile itself to the fact that *Miranda* has survived the *Tucker* assault and, not content to rest there, appeared to go out of its way in *Edwards* and *Smith* to not only decide the cases on a *Miranda* theory, despite the availability of other grounds, but also for the first time to reverse convictions because of *Miranda* violations.

Although reversal of convictions is surely a significant means to give *Miranda* vitality, the greatest service to *Miranda* performed by the Court in both *Edwards* and *Smith* was the Court’s announcement of per se, bright line rules. If there is a *Miranda* theme, it is that abuse of authority thrives on discretion. If there is a legacy in *Miranda*, it is that the privilege against self-incrimination will only be honored in the official interrogation setting where police and judges operate within clearly delineated guidelines. The Burger Court resisted this notion for many years, often yearning for the flexibility of the traditional, voluntariness standard. Now, the Burger Court has shown that, perhaps, it too has finally accepted the *Miranda* legacy.