BRIGHT-LINE & PROPHYLACTIC RULES: REFLECTIONS FROM *MIRANDA*

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In recent decades, the United States Supreme Court has frequently chosen to articulate "bright-line" rules in criminal procedure cases. For example, for decades in right to counsel cases, the Court used a case-by-case approach to decide whether an indigent defendant was entitled to state-appointed counsel. Under that approach, the Court would undertake an exhaustive analysis of the totality of the circumstances in each case to determine whether it was fundamentally unfair to require a defendant to proceed pro se.[1] The Court abruptly departed from this model in *Gideon v. Wainwright*[2] when it declared that indigent defendants have the right to counsel.[3] *Gideon* was followed by holdings in *Argersinger v. Hamlin*[4] and *Scott v. Illinois*,[5] which provided a bright-line rule governing *Gideon*'s future application: Indigent defendants are entitled to counsel when they receive the penalty of actual imprisonment for any period of time (even a single day).[6]

There are other examples of bright-line rules.[7] For example, for many years the Court held that when the police arrested someone who was traveling in an automobile, the police were free to search the entire passenger compartment of the automobile.[8] Of course, the Court articulated the ultimate bright-line rule in its landmark decision in *Miranda v. Arizona*.[9]

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1. *See* Betts v. Brady, 316 U.S. 455 (1942).
2. *See* Gideon v. Wainwright, 372 U.S. 355 (1963).
3. *See id.*
4. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972).
5. *See* Scott v. Illinois, 440 U.S. 367 (1979).
6. *See id.*; *Argersinger*, 407 U.S. 25.
7. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 68–69 (1985) (holding that the state must provide a psych-evaluator to criminal defendants when the defendant's sanity is in question); Douglas v. California, 372 U.S. 353, 356–58 (1963) (holding that counsel must be provided to criminal defendants during appeals).
8. *See generally* New York v. Belton, 453 U.S. 454 (1981).
9. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

That decision decreed that, before a suspect could be subjected to custodial interrogation, the suspect must first receive the so-called *Miranda* warning[10] and must have waived the right to remain silent and the right to a lawyer.[11]

This Article examines some of the reasons why bright-line rules are appealing, as well as some of the problems with those rules. However, this Article focuses, in particular, on the *Miranda* rule. This Article notes that *Miranda* is a unique decision because the Court articulated bright-line rules that were divorced from the case before it, and because it is not clear that the rules it created were good ones.

I. THE ADVANTAGES OF BRIGHT-LINE RULES

The Court has found bright-line rules appealing for a variety of reasons. For one thing, such rules allow the Court to more easily control the decisions of the lower federal courts and the state courts. Consider the *Argersinger-Scott* rule mentioned earlier.[12] Prior to the decision in *Gideon*, the Court held in *Betts v. Brady* that indigent defendants are entitled to state-appointed counsel only when the presence of counsel was regarded as fundamental and necessary to due process.[13] Of course, the difficulty presented by that approach is that courts used a "totality of facts" approach to determine whether counsel was fundamental and necessary.[14] In order to use that approach, reviewing courts were required to review the entire record, focusing on such factors as the complexity of the case,[15] the intelligence of the defendant,[16] and the defendant's familiarity with the criminal justice process.[17] The difficulty with this sort of detailed case-by-case review is that it is extremely time-consuming. A reviewing court must examine each case in detail in order to determine whether a particular case is sufficiently complex so that due process demands the presence of counsel. By contrast, under the bright-line rule articulated in *Argersinger* and *Scott*, a reviewing court need not examine the entire record, instead it need only review the record sufficiently to answer two basic questions: Did defendant receive the penalty of imprisonment?[18] If so, was defendant accorded the right to counsel?[19] If the answer to the first question is "yes" and the answer to the

10. *Id.* at 478–79.
11. *Id.*
12. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972).
13. Betts v. Brady, 316 U.S. 455, 472–73 (1942).
14. *See id.* at 462.
15. *See id.* at 472. The *Betts* Court viewed the case as a relatively simple one involving an alibi defense. *Id.*
16. *See id.* In *Betts*, the Court found that defendant had adequate intelligence. *Id.*
17. *See id.* In *Betts*, the Court noted that defendant had been involved in prior criminal proceedings and therefore had some familiarity with the process. *Id.*
18. Scott v. Illinois, 440 U.S. 367 (1979).
19. *See id.*

second question is "no," then defendant's Sixth Amendment right to counsel has been violated.[20] If the answer to the first question is "no," then there is no violation of the right to counsel.[21] As a result, the Court can very quickly determine whether a lower court made a mistake.

Some bright-line rules are designed not only to guide the lower courts (and to ease the review burden of appellant court), but also to gain control over the police and other parts of the criminal justice system. *Miranda* was such a rule.[22] In that decision, the Court spent a great deal of time and effort discussing police interrogation manuals, and expressing concern regarding the fact that police interrogators—relying on suggestions contained in those manuals—could produce coerced confessions from suspects.[23] In order to control the interrogation process, the Court directed the police to give those subjected to custodial interrogation a *Miranda* warning.[24] In other words, interrogators must inform suspects of four things: (1) that they have the right to remain silent; (2) that, if they give up that right, anything that they say can and will be used against them; (3) that they have the right to an attorney; and (4) if they cannot afford an attorney, one can and will be appointed for them at state expense.[25] If the police fail to give the required warnings, or they fail to obtain a proper waiver of rights, then an incriminating statement or confession should be excluded from the defendant's trial.[26]

II. THE LEGITIMACY OF BRIGHT-LINE AND PROPHYLACTIC RULES

While it may seem sensible for the Court to articulate bright-line rules, there are undoubtedly limits to the scope of the Court's authority. In the United States constitutional system, governmental power is divided between three separate and independent branches of government: the legislative, the executive, and the judicial.[27] While the United States Constitution has been interpreted as giving the courts broad authority to "say what the law is,"[28] Article III of the Constitution requires that courts exercise that authority in the context of actual "cases" and "controversies."[29] Moreover, as a general rule, the establishment of broad legislative policy lies within the jurisdiction of Congress, not the courts.[30]

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20. *See id.*
21. *See id.*
22. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).
23. *Id.* at 471–72.
24. *Id.* at 448–49.
25. *Id.* at 467–69, 471–73.
26. *Id.* at 477.
27. *See* U.S. CONST. arts. I, II & III.
28. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
29. *See* U.S. CONST. art. III. § 2; *see also Marbury*, 5 U.S. (1 Cranch) 137 (delineating the breadth of judicial power).
30. *See* U.S. CONST. art. I.

In some cases, the Court's creation of bright-line rules is illegitimate. Consider, for example, the *Miranda* decision.[31] In that case, the Court was presented with a question regarding the admissibility of confessions against various defendants.[32] In deciding that question, the *Miranda* Court relied heavily on police interrogation manuals that had been referenced by *amicus curiae*, and the Court suggested that the manuals made a convincing argument for imposing prophylactic protections in favor of those subjected to custodial interrogation.[33] The Court began by noting that the manuals contained the most "enlightened and effective means" for obtaining confessions from suspects[34] and offered interrogators specific guidance about how to conduct the interrogation process.[35] In particular, the manuals instructed the interrogators to isolate the suspect in a police interrogation room and to "display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details."[36] In addition, the manuals instructed the interrogator to offer reasons or justifications for a suspect's commission of the offense, to minimize the moral seriousness of the crime that had been committed, and perhaps to "cast blame on the victim or on society."[37] Attempts to deny guilt were to be "dismissed and discouraged."[38] The manuals told the interrogator that, if he finds that "emotional appeals and tricks are employed to no avail," he should "rely on an oppressive atmosphere of dogged persistence" by interrogating steadily and without relent in a dominating manner.[39] The interrogation should continue for hours, and perhaps days, "with no respite from the atmosphere of domination."[40] However, these methods should only be used when the suspect's guilt appears highly probable.[41]

The manuals also offered interrogators tips on how to proceed in various circumstances. For example, the manuals suggested that interrogators should offer the suspect legal excuses for his actions in an effort to obtain an initial admission of guilt.[42] Once an admission was obtained, for example in a self-defense case, the manuals advised the interrogator to try to solicit other evidence that would tend to undercut the self-defense claim.[43] The manuals suggested that this other evidence might lead a suspect to make a fuller confession, or might at least help the prosecution negate the self-defense

31. *See generally Miranda*, 384 U.S. 436.
32. *Id.* at 439.
33. *Id.* at 449.
34. *Id.* at 449–50.
35. *Id.*
36. *Id.* at 450.
37. *Id.*
38. *Id.* at 451.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 452.

claim.[44] The manuals also advised interrogators to resort to the "Mutt and Jeff" technique, which involved the interaction of a "good cop" and a "bad cop" in the interrogation.[45] If all else failed, the manuals advised the interrogators to resort to trickery.[46] For example, the police might conduct a fake lineup in which the witness confidently points out the suspect as the perpetrator of the crime, or the police might use witnesses who would identify the suspect as the perpetrator of other crimes.[47] The hope is that the suspect would become desperate and confess to the crime under investigation to avoid the false accusations.[48]

The manuals also offered interrogators advice regarding how to handle individuals who refused to discuss the matter with police or who asked for an attorney.[49] In an effort to unsettle the suspect, the interrogator should concede the suspect's right to remain silent.[50] However, the officer should point out that the suspect's refusal to talk would appear to be incriminating and would suggest that he has something to hide.[51] If the suspect asks to speak to a relative or an attorney, the manuals advised the interrogator to suggest that the suspect tell the truth before involving others, telling the suspect that he could handle the situation on his own if he is telling the truth.[52] If the suspect requested an attorney, the interrogator should suggest that the expense of an attorney would be unnecessary if he was innocent.[53]

In other words, the manuals urged police to create an atmosphere in which the police were able to interrogate the suspect alone, and thereby "to prevent distraction and to deprive him of any outside support."[54] By displaying confidence in the suspect's guilt, the police could undermine the suspect's will to resist, especially if they exercised patience and

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44. *Id.*

45. *Id.* (quoting CHARLES E. O'HARA & GREGORY L. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 104 (1956)).

> In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room.

CHARLES E. O'HARA & GREGORY L. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 104 (1956).

46. *Miranda*, 384 U.S. at 453.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 454.

52. *Id.*

53. *Id.*

54. *Id.* at 455.

perseverance.[55] If normal procedures failed to produce a confession, the manual advised the police to resort to "deceptive stratagems such as giving false legal advice."[56] The ultimate goal was to keep the suspect off balance, "trading on his insecurity about himself or his surroundings," and then "persuade, trick, or cajole him out of exercising his constitutional rights."[57] In *Miranda*, the Court emphasized that these tactics are designed "to subjugate the individual to the will of his examiner" through intimidation, and the Court viewed these tactics as involving a "badge of intimidation" which, while not involving actual physical intimidation, can be "equally destructive of human dignity."[58]

After analyzing these practices, the Court concluded that they are "at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself,"[59] and the Court expressed doubt regarding whether confessions obtained under such circumstances involved "free choice."[60] As a result, the Court perceived "an intimate connection between the privilege against self-incrimination and police custodial questioning."[61]

In discussing the development of the privilege against self-incrimination, the Court analogized to England's Star Chamber and the highly coercive tactics used by that body.[62] The Court went on to suggest that the "informal compulsion" used by police officers during custodial interrogation reveal an impermissible level of compulsion: "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak."[63] The Court concluded that "the compulsion to speak in the isolated setting of the police station may well be greater than in [other contexts]."[64]

In light of the dangers presented by these interrogation techniques, the Court concluded that it was necessary to articulate "safeguards" designed to protect suspects against compelled self-incrimination.[65] "In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 457.
59. *Id.* at 457–58.
60. *Id.* at 458.
61. *Id.*
62. *Id.* at 459–60.
63. *Id.* at 461.
64. *Id.*
65. *Id.* at 467.

honored."[66] Such an appraisal was mandatory absent other procedures that "are at least as effective in apprising accused persons of their right of silence"—the police must give a *Miranda* warning to all suspects subjected to custodial interrogation.[67] The warning must clearly inform a suspect subjected to custodial interrogation that: (1) he has the right to remain silent; (2) if he gives up that right, anything that he says can and will be used against him;[68] (3) he has the right to an attorney;[69] and (4) if he cannot afford an attorney, one will be appointed for him by the state at no cost.[70] The suspect must comprehend that the privilege against self-incrimination contemplates, "not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."[71]

The Court then went on to explain how police interrogators should act once a *Miranda* warning has been given.[72] First, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[73] Any incriminating statement made after that point would be regarded as compelled incrimination.[74] Second, if the suspect requests an attorney, the interrogation must cease until an attorney is present.[75] The individual must then be given the opportunity to confer with the attorney and to have the attorney present during any subsequent questioning.[76] If the individual indicates a desire for an attorney before speaking to the police, but also indicates that he cannot obtain one, the

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66. *Id.*

67. *Id.* at 450–51.

68. *Id.* at 469.

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

Id.

69. *Id.* at 471–72. "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel." *Id.*

70. *Id.* at 473.

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.

Id.

71. *Id.* at 470–71. "Accordingly, we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today." *Id.*

72. *Id.* at 473–74.

73. *Id.*

74. *Id.* at 474.

75. *Id.*

76. *Id.*

police must respect his decision to remain silent.[77] "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[78] Although "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver," the Court flatly stated 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."[79] In other words, it is impermissible to presume waiver from a suspect's mere silence.[80] A waiver must be "intelligently and understandingly" made.[81] The Court concluded that compliance with the requirement to give the warning, and the procedures outlined in its opinion, were to be regarded as "prerequisites to the admissibility of any statement made by a defendant."[82]

The Court emphasized that the *Miranda* warnings must be given to anyone subject to custodial interrogation.[83] As a result:

> There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.[84]

III. *MIRANDA* AS JUDICIAL LEGISLATION

While the *Miranda* decision involved an extraordinarily detailed analysis of the police interrogation manuals, and the possible effects of the interrogation techniques explained in those manuals, the difficulty is that there was no evidence that the interrogation manuals played *any* role in the interrogations involved in the *Miranda* case.[85] As Justice Clark noted in his dissent:

> The materials [the Court] refers to as "police manuals" are, as I read them, merely writings in this field by professors and some police officers. Not

77. *Id.*
78. *Id.* at 475.
79. *Id.*
80. *Id.*
81. *Id.* (quoting Carnely v. Cochran, 369 U.S. 506, 516 (1962)).
82. *Id.* at 476.
83. *Id.* at 478.
84. *Id.* (footnote omitted).
85. *Id.* at 456–57.

> one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection.[86]

Justice Clark went on to note that these manuals were submitted as part of amicus briefs in the case and "[n]ot one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection."[87] In particular, there was no evidence that the manuals were used to obtain any of the confessions before the Court.[88] As Justice Harlan noted in his dissent: "These confessions were obtained during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion . . . . There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation."[89]

Had the manuals been used to coerce confessions from suspects like Miranda, the Court's analysis would have been quite legitimate and appropriate. However, the Court was completely unconcerned by the fact that there was no evidence that the manuals had played *any* role in the cases before it. Indeed, the Court recognized that the cases before it did "not evince overt physical coercion or patent psychological ploys,"[90] and that none of the manuals had been shown "to be the official manual of any police department, much less in universal use in crime detection."[91]

Thus, the case seemed to involve the Court functioning more like a legislature than like a court.[92] Indeed, the decision regarding Miranda himself reveals the legislative nature of the *Miranda* decision.[93] Miranda was arrested and taken to a special interrogation room where he confessed.[94] In the record, there was no evidence indicating that the police interrogation manuals were used in Miranda's interrogation.[95] Indeed, in its analysis of the facts, the Court noted nothing particularly coercive about Miranda's interrogation.[96] There was no indication that the police had assumed

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86. *Id.* at 499 (Clark, J., dissenting) (footnote omitted).

87. *Id.* (Clark, J., dissenting).

88. *Cf. id.* (Clark, J., dissenting) (implying the Court improperly considered the manuals as evidence).

89. *Id.* at 518–19 (Harlan, J., dissenting).

90. *Id.* at 457.

91. *Id.* at 499 (Clark, J., dissenting).

92. *Id.* (Clark, J., dissenting).

93. *Id.* at 467.

94. *Id.* at 456.

95. *Id.* at 499 (Clark, J., dissenting).

96. *Id.* at 491–92. The Court described the interrogation as follows:

> On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed

Miranda's guilt, offered him excuses for his conduct, attempted to dominate him, or used extreme tactics such as the "Mutt and Jeff" treatment.[97] Nevertheless, in a curious twist of events, the Court reversed Miranda's conviction because the police failed to give him a *Miranda* warning,[98] noting that there was no evidence in any of the cases that the officers undertook "to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice."[99] The Court conveniently ignored the fact that the *Miranda* warning was not in existence at the time of Miranda's interrogation, and therefore the police would have had no way of knowing that they were required to warn Miranda.[100] Indeed, at the time of Miranda's interrogation, even the Court would have been unaware of the need to give the warning.[101]

The same was true of the other cases resolved in the *Miranda* decision. In *Vignera v. New York*, Vignera made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement after being questioned by an assistant district attorney later the same evening.[102] Although Vignera's involvement with police was longer than Miranda's, he seems to have confessed relatively quickly.[103] Again, the Court reversed the

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paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me."

Id. (footnotes omitted).

97. *Id*. at 452, 491–92 (explaining the "Mutt and Jeff" act).

98. *Id.* at 492.

From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible.

Id.

99. *Id.* at 457.

100. *Id.*

101. *Id.*

102. *Id.* at 493.

103. *Id.*

Petitioner, Michael Vignera, was picked up by New York police on October 14, 1960, in connection with the robbery three days earlier of a Brooklyn dress shop. They took him to the 17th Detective Squad headquarters in Manhattan. Sometime thereafter he was taken to the 66th Detective Squad. There a detective questioned Vignera with respect to the robbery. Vignera orally admitted the robbery to the detective. The detective was asked on cross-examination at trial by defense counsel whether Vignera was warned of his right to counsel before being interrogated. The prosecution objected to the question and the trial judge sustained the objection. Thus, the defense was precluded from making any showing that warnings had not been given. While at the 66th Detective Squad, Vignera was identified by the store owner and a saleslady as the man who robbed the dress shop. At about 3 p.m. he was formally arrested. The police then transported him to still another station, the 70th Precinct in Brooklyn, "for detention." At 11 p.m. Vignera was questioned by an assistant district attorney in the presence of a hearing reporter who transcribed the questions and Vignera's answers. This verbatim account of these proceedings contains no statement of any warnings given by the assistant district attorney. At Vignera's trial on a charge of first degree robbery, the

conviction because Vignera was not informed of his rights.[104] In the *Westover* case, also a case consolidated within *Miranda*, the defendant was interrogated over a longer period and made incriminating statements after two hours of interrogation.[105] However, once again, there was no evidence that the interrogation involved any of the tactics suggested in the police manuals, or that the police had employed any psychological ploys to obtain the incriminating statements.[106] Moreover, in that case, there was evidence suggesting that the police had read Westover his rights.[107] The Court reversed because the warnings were not given soon enough.[108] In the final

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detective testified as to the oral confession. The transcription of the statement taken was also introduced in evidence.

Id.

104. *Id.* at 494.

We reverse. The foregoing indicates that Vignera was not warned of any of his rights before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present and his statements are inadmissible.

Id.

105. *Id.* at 456–57.

106. *Id.* at 494–95.

At approximately 9:45 p.m. on March 20, 1963, petitioner, Carl Calvin Westover, was arrested by local police in Kansas City as a suspect in two Kansas City robberies. A report was also received from the FBI that he was wanted on a felony charge in California. The local authorities took him to a police station and placed him in a line-up on the local charges, and at about 11:45 p.m. he was booked. Kansas City police interrogated Westover on the night of his arrest. He denied any knowledge of criminal activities. The next day local officers interrogated him again throughout the morning. Shortly before noon they informed the FBI that they were through interrogating Westover and that the FBI could proceed to interrogate him. There is nothing in the record to indicate that Westover was ever given any warning as to his rights by local police. At noon, three special agents of the FBI continued the interrogation in a private interview room of the Kansas City Police Department, this time with respect to the robbery of a savings and loan association and a bank in Sacramento, California. After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation.

Id.

107. *Id.* at 495.

At trial one of the agents testified, and a paragraph on each of the statements states, that the agents advised Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney.

Id.

108. *Id.* at 495–96.

On the facts of this case we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement. At the time the FBI agents began questioning Westover, he had been in custody for over 14 hours and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation. The record simply shows that the defendant did in fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from

case involved in *Miranda*, the *Stewart* case, the police held the defendant for five days at the police station and interrogated him on nine separate occasions before Stewart made an incriminating statement.[109] There was evidence suggesting that Stewart was isolated for all but one of the interrogations.[110] "During the ninth interrogation, Stewart admitted that he robbed the deceased, but claimed that he did not mean to hurt her."[111] The Court reversed Stewart's conviction, noting that Stewart had not been effectively appraised of his rights.[112] The Court emphasized that Stewart had denied guilt in the first eight interrogations.[113]

Thus, in none of the four cases involved in *Miranda* was there any evidence that the police used the interrogation manuals in their interrogation of the suspects.[114] So why, one might ask, were the manuals relevant to the cases before the Court? The Court makes absolutely no attempt to answer that question. Because the manuals had been raised in amicus briefs filed with the Court, the Court simply assumed that the manuals were in widespread use,[115] regardless of whether they had been used to extract the confessions involved in the cases before it.[116] Based on those assumptions, the Court decided that it needed to issue a prophylactic rule (the *Miranda* warning) to protect individuals subjected to custodial interrogation.[117] A critic might be excused for suggesting that the Court had overstepped the bounds of its assigned judicial role and assumed more of a legislative role.

IV. WAS THE *MIRANDA* APPROACH SOUND?

Whether or not the Court was acting legislatively or judicially, legitimate questions might be raised regarding whether the remedy imposed by the Court was a sound one. In other words, does the *Miranda* warning provide the most effective method for protecting the rights of those subjected to custodial interrogation?

Undoubtedly, the Court had a number of other options at its disposal for protecting those subjected to custodial interrogation. For example, Justice White argued in his dissent that "[t]ranscripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other

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Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.

Id.

109. *Id.* at 457.

110. *Id.* at 497.

111. *Id.*

112. *Id*. at 498.

113. *Id.*

114. *Id.* at 456–57.

115. *See, e.g.*, Brief of the American Civil Liberties Union, Amicus Curiae at 15, Miranda v. Arizona, 384 U.S. 436 (1966) (Nos. 759–761, 584).

116. *Miranda*, 384 U.S. at 448–49.

117. *Id.* at 468–72.

devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession."[118] Another possibility that the Court suggested, but rejected, was to require the state to provide attorneys for all station-house interrogations.[119] Other prophylactic measures were available to the Court. For example, the Court might also have required the police to prepare transcripts detailing the questions asked of suspects and the answers given. The difficulty with this approach is that a skillful interrogator can ask questions that will sound perfectly reasonable when viewed in transcript but which do not convey an accurate sense of the interrogator's tone or voice inflection.[120] Although an observer could testify regarding tone and inflection, it would be costly to require that observers be constantly present at the station house.[121] Of course, the Court could have required the police to provide audiotapes, or possibly videotapes, of all custodial interrogations.[122] Having rejected the alternative approaches, the Court decided to focus on requiring the police to give suspects a *Miranda* warning and instructing the police how to act once the warning was given.[123]

Can *Miranda*'s solution (the requirement of a prophylactic warning to those subjected to custodial interrogation) be regarded as a success? In some respects, the answer must be "yes." After all, it is difficult to quarrel with the notion that suspects should be advised of their constitutional rights before being asked to waive those rights. Indeed, it seems improper to allow the police to take advantage of a suspect's ignorance. Moreover, *Miranda* has served an important educational function. Following that decision, television programs and movies began to integrate the *Miranda* warnings into their content (for example, in a television show, when a suspect was arrested, the arrestee would be read his *Miranda* rights).[124] Because American movies and television shows are widely distributed around the world, millions and millions of people learned about *Miranda* rights simply by watching television shows and movies.[125]

Indeed, in *Miranda*'s wake, some worried that the decision might be too effective, thereby making it extremely difficult for the police to obtain confessions.[126] In his dissent, Justice Harlan lamented this fact, noting that "the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward 'voluntariness' in a utopian sense, or to view it from a

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118. *Id.* at 535 (White, J., dissenting).

119. *Id.* at 474. "This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners." *Id.*

120. *See* Russell L. Weaver, Miranda *at Forty*, 44 SAN DIEGO L. REV. 439, 448 (2007).

121. *Id.*

122. *Id.*

123. *See id.* at 444.

124. *See id.* at 449.

125. *See id.*

126. *See id.* at 448–49.

different angle, voluntariness with a vengeance."[127] Justice Harlan pointedly expressed concern that the *Miranda* warnings would discourage defendants from giving confessions:

> What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it. There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation.[128]

Justice Harlan went on to argue that: "How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy."[129] He ended with a flourish: "We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control, and that the Court is taking a real risk with society's welfare in imposing its new regime on the country,"[130] and he emphasized that the "social costs of crime are too great to call the new rules anything but a hazardous experimentation."[131] A dissenting Justice White agreed with Justice Harlan: "The rule announced today will measurably weaken the ability of the criminal law to perform these tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials."[132]

In point of fact, it is not clear whether *Miranda* has actually turned out to be a pro-defendant decision. *Miranda* potentially helps defendants by giving them fair warning of their right to remain silent and their right to counsel.[133] Nevertheless, it is not clear that the decision, by itself, adequately protects defendants against the possibility of compelled self-incrimination. *Miranda* assumed that the custodial interrogation environment is inherently coercive, but the *Miranda* warning does not eliminate the coercive nature of the environment.[134] Indeed, even after the police administer the *Miranda* warning, the suspect remains in what the Court has characterized as an "inherently coercive"[135] environment—one which *Miranda* recognized can

127. Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).
128. *Id.* at 516–17 (Harlan, J., dissenting) (footnote omitted).
129. *Id.* at 517 (Harlan, J., dissenting).
130. *Id.* (Harlan, J., dissenting) (footnote omitted).
131. *Id.* (Harlan, J., dissenting).
132. *Id.* at 541 (White, J., dissenting) (footnote omitted).
133. *Id.* at 444.
134. *Id.* at 536 (White, J., dissenting).
135. *Id.* at 533 (White, J., dissenting).

"operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators."[136] As Justice White argued in dissent in *Miranda*:

> If the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?[137]

Once the *Miranda* warning is given, the circumstances are stacked in favor of the police.[138] The police are free to isolate a suspect in an interrogation room before attempting to seek a waiver.[139] While *Miranda* provides suspects with some basic information regarding their right to remain silent and their right to counsel, many suspects will understand little else about the criminal law or the rules of evidence. For example, suspects may believe that they can talk themselves out of a potential charge by offering an alibi or other excuse, and may not understand that they may be making incriminating admissions or otherwise prejudicing their future defense. By the time suspects realize that they should have kept quiet, it may be too late. Moreover, if suspects fail to assert their rights, the police are free to utilize many of the interrogation techniques outlined in *Miranda*.[140] Thus, a suspect might make a statement that he regards as exculpatory (for example, I acted in self-defense), but in fact contains incriminating admissions (for example, by claiming self-defense, the suspect has essentially admitted that he was at the scene of the crime and that he committed the prohibited conduct).

In its post-*Miranda* decisions, if a suspect has been given *Miranda* warnings and waived his or her rights, the Court is frequently inclined to find that a waiver is valid.[141] For example, in *Connecticut v. Barrett*,[142] the defendant refused to sign a written waiver of his rights but did agree to speak with the police. Of course, a legitimate question arises regarding whether defendant recognized and understood that both a written statement and an oral statement constitute admissions against interest.[143] Otherwise, why would he agree to give an oral statement, but not a written one? Nevertheless, the Court concluded that Barrett had validly waived his rights: "Barrett's limited requests for counsel . . . were accompanied by affirmative

136. *Id.* at 469.

137. *Id.* at 536 (White, J., dissenting).

138. *See, e.g.*, Connecticut v. Barrett, 479 U.S. 523, 527 (1987) (recognizing the suspect's difficulty understanding *Miranda* rights).

139. *Miranda*, 384 U.S. at 467–68.

140. *Id.* at 471–72.

141. *Barrett*, 479 U.S. at 527.

142. *Id.* at 525.

143. *See id.* at 523 (deciding whether the defendant legally confessed when he refused to provide a written statement without an attorney present but admitted orally to sexual assault).

announcements of his willingness to speak with the authorities . . . . Barrett made clear his intentions, and they were honored by police."[144] The Court refused to place much emphasis on the fact that the defendant distinguished a written statement from an oral statement:

> We . . . reject the contention that the distinction drawn by Barrett between oral and written statements indicates an understanding of the consequences so incomplete that we should deem his limited invocation of the right to counsel effective for all purposes . . . . These warnings . . . made clear to Barrett that "if you talk to any police officers, anything you say can and will be used against you in court"[145] . . . . [W]e have never "embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness"[146] . . . .
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> . . . .
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> . . . *Miranda* gives the defendant a right to choose between speech and silence, and Barrett chose to speak.[147]

The Court also rejected the argument that Barrett's distinction between oral and written statements indicated "an understanding of the consequences so incomplete that we should deem his limited invocation of the right to counsel effective for all purposes."[148] Justice Stevens, joined by Justice Marshall, dissented, arguing that Barrett had effectively requested counsel.[149]

Likewise, in *Moran v. Burbine*, the Court upheld the admission of the defendant's confession when he was given a valid *Miranda* warning and chose to waive his rights.[150] The Court found it irrelevant that the suspect's sister had retained a lawyer for him, and that the police had told the lawyer that the defendant would not be interrogated that evening.[151] Despite their representations to the lawyer, the police did interrogate the suspect and obtained a confession.[152] The Court held that the waiver was valid because Burbine made a "voluntary decision to speak" with "full awareness and comprehension" of his rights.[153] The Court emphasized that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."[154]

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144. *Id.* at 529 (footnote omitted).
145. *Id.* at 530.
146. *Id.* (alteration in original) (quoting Oregon v. Elstad, 470 U.S. 298, 316 (1985)).
147. *Id.* at 529.
148. *Id.* at 530.
149. *Id.* at 536–37 (Stevens, J., dissenting).
150. *See* Moran v. Burbine, 475 U.S. 412 (1986).
151. *Id.* at 423.
152. *Id.* at 417–18.
153. *Id.* at 424.
154. *Id.* at 422.

V. CONCLUSION

Miranda was a remarkable decision because of the way the decision was rendered. Rather than simply deciding the cases before it, based on the facts presented in those cases, the Court extensively examined police interrogation manuals even though there was no evidence that those manuals played any role in any of the cases before it.[155] Then, responding to the potential abuses that could have been perpetrated had the manuals been used, the Court articulated the *Miranda* warning, and the procedures to be used in conjunction with that warning, to be applied in future cases.[156] In the cases before it, the Court reversed the defendants' convictions on the basis that they had not been sufficiently advised of their rights prior to being interrogated.[157] The Court took that unusual step, even though the police would have had no way of knowing at the time of the interrogations, that they were required to advise suspects of their Fifth Amendment right not to incriminate themselves.

Even though the Court seemed to invest considerable time analyzing the police interrogation manuals and the effects of the techniques outlined in those manuals on the interrogation process, the Court did not engage in extensive analysis or research regarding the remedies that could or should be used to counteract the coercive techniques suggested by the manuals.[158] Somehow, the Court simply decided that the *Miranda* warnings would provide sufficient protection against the tactics described in the manuals.[159]

Although *Miranda* might have been initially regarded as a pro-defendant decision, in the sense that the decision required the police to inform suspects of their rights and perhaps making them less willing to make coerced, incriminating statements, it is not clear that the decision has turned out to be pro-defendant. The *Miranda* warning is often administered in a perfunctory manner. Moreover, once the warning is given, the suspect remains in the same coercive, police-dominated environment. And if a suspect waives his or her rights in that situation, a court is much more likely (absent very extenuating circumstances) to find that the waiver was knowingly and intelligently made. Even if a suspect appeared to be unclear or uncertain about his or her rights, a court is likely to uphold the waiver.

155. Miranda v. Arizona, 384 U.S. 436, 441–42 (1966).
156. *Id.* at 444–45.
157. *Id.* at 445, 449.
158. *Id.*
159. *Id.* at 478–79.