THE TWO MIRANDAS*

Michael J. Zydney Mannheimer**

Although the U.S. Supreme Court’s decision in Miranda v. Arizona purported to set forth a clear, bright-line rule, numerous difficult subsidiary issues have developed in the past fifty years. These include: (1) what is custody?; (2) what is interrogation?; (3) when are the Miranda rights successfully waived?; (4) when are the Miranda rights successfully invoked?; (5) should the indirect fruits of unwarned interrogation, such as physical evidence and later warned statements, be admissible?; (6) should the products of unwarned interrogation be admissible for impeachment?; and (7) are there any exceptions to the Miranda rule? The Court’s decisions resolving these issues have often not been a model of clarity. Sometimes, a majority of the Court cannot even agree on a single rationale.

Much of this confusion stems directly from a central ambiguity in the Miranda decision itself, for the Court in that case tried to do two things at once: prescribe concrete guidelines for police during custodial interrogation, and provide similarly clear benchmarks for courts in determining the admissibility of statements taken during those interrogations. Thus, there is a “police conduct model” of Miranda, by which Miranda requires the exclusion of unwarned statements, as with exclusion of evidence in the Fourth Amendment context, as the penalty for police failure to follow the rules of interrogation. But there is also an “admissibility model” of Miranda, by which exclusion of unwarned statements follows from treating those statements as presumptively compelled and therefore inadmissible under the Self-Incrimination Clause. In essence, then, there are really two Mirandas: Miranda as a prescription for police conduct and Miranda as regulator of the admissibility of statements. And these two readings are sometimes in serious tension with one another, leading to the muddled case law that exists on the seven subsidiary issues identified above. Until the Court definitively decides which Miranda is the “real” Miranda, the doctrine will continue to be riddled with confusion.

I. INTRODUCTION

Arnold Loewy once succinctly explained the distinction between evidence that is excluded from criminal trials because it is unconstitutionally obtained and evidence that is so excluded because to use it would be unconstitutional:

* ©2016 Michael J. Zydney Mannheimer.
** Professor of Law and Associate Dean for Faculty Development, Salmon P. Chase College of Law, Northern Kentucky University. Many thanks to Kit Kinports for her helpful comments on an earlier version of this article.
The exclusion of police-obtained evidence at a criminal trial can be justified by one of two theories. Under one theory, evidence is excluded because the police have unconstitutionally obtained the evidence and exclusion is thought desirable to deter such police behavior in the future by precluding a substantial benefit from such misconduct. Under the other theory, the evidence is excluded because the Constitution guarantees the defendant a procedural right to exclude the evidence. The former theory focuses on the constitutional impropriety of obtaining the evidence, while the latter theory’s focus is on the constitutional impropriety of using that evidence at trial.\(^1\)

This important distinction points up an ambiguity that lies at the heart of *Miranda v. Arizona*.\(^2\) Are statements taken outside of the strictures of *Miranda* excluded because they were unconstitutionally obtained, or are they excluded because to use them would violate the Constitution?

Fifty years after the decision, the U.S. Supreme Court has never satisfactorily answered this question.\(^3\) *Miranda* itself could be read as focusing either on police conduct during custodial interrogations or on the admissibility of the resulting statements. Language in subsequent cases similarly points in both directions, sometimes within the same majority opinion, and even within the same paragraph.

Nor is this inquiry purely academic. The way we read *Miranda*, as directed primarily to the police or to the courts, can have an effect on the outcome of marginal cases across a spectrum of subsidiary *Miranda* issues: custody, interrogation, waiver, invocation, fruits, impeachment, and exceptions. Indeed, much of the confusion and inconsistency in *Miranda* jurisprudence can be traced back to this central question: is *Miranda* really about police conduct or is it about admissibility?

This Article argues that much of the lack of clarity in the case law over these subsidiary *Miranda* issues is a result of the Court’s failure to clarify whether *Miranda* is primarily about prescribing police conduct during custodial interrogations or, instead, about providing guidelines to courts for the admissibility of arguably compelled self-incriminating statements. Part I discusses these two very different ways of interpreting *Miranda*, based on the case’s antecedents, its goals, and its language. Part II first discusses some of the


\(^{3}\) See Loewy, *supra* note 1, at 916 (“It is not clear whether the Court disallows confessions obtained in violation of *Miranda* because they were obtained improperly or because their use is improper.”); see also Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 Yale L.J. 447, 454-55 (2002) (“[T]he Court has yet to resolve definitively whether th[e] *Miranda* rules . . . impose obligations on police officers who conduct custodial interrogation or, instead, whether they determine only the admissibility of resulting statements.”).
subsidiary *Miranda* issues mentioned above—fruits, impeachment, invocation, interrogation, and the public safety exception—and demonstrates that the Court has only rarely distinguished between the two models of *Miranda*, and that the Court as a whole has been unable to agree on one or the other model. Part II then discusses how the failure to form a coherent vision of *Miranda* has led to confused results in two recent cases in the areas of custody and waiver.

II. THE TWO MODELS OF *MIRANDA*

In *Miranda*, the Court was attempting to do two things at once. First, after thirty years of messy, fact-based analysis of police methods during interrogations, the Court was attempting to set down bright-line rules for the conduct of custodial interrogations by the police. Second, the Court was attempting to address how the newly-incorporated Self-Incrimination Clause should be operationalized by courts when addressing the admissibility at trial of statements previously compelled inside the police interrogation room. *Miranda* itself recognizes these twin goals early in the opinion when the Court described its mission as “giv[en] concrete constitutional guidelines for law enforcement agencies and courts to follow.” However, the unstated premise is that giving guidance to law enforcement and to courts is, in essence, one and the same. As a result of this conflation of these two goals in *Miranda*, the opinion itself was not fully focused on either of the two and veered back and forth between language addressing one or the other. Thus, some language in the case suggests that unless *Miranda*’s warning-and-waiver protocol is followed, the Constitution is violated right then and there in the interrogation room. Other language suggests, however, that when *Miranda* is not followed, a constitutional violation takes place, if at all, only when the resulting statement is introduced at trial.

---

4. See Chavez v. Martinez, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part) (observing that *Miranda* was designed “to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause”).


6. Later cases repeat this elision of the two main goals of *Miranda*. See Fare v. Michael C., 442 U.S. 707, 709 (1979) (“*Miranda*’s holding has the virtue of informing police and prosecutors . . . as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogations are not admissible.”); see also Oregon v. Bradshaw, 462 U.S. 1039, 1050 n.3 (1983) (Powell, J., concurring in the judgment) (urging the Court to “provide reasonable clarification for law enforcement officials and courts” on the standard for determining when police may interrogate a suspect after he invokes the *Miranda* right to counsel).

7. See Loewy, supra note 1, at 916 (“Language in both *Miranda* and its progeny can be found to support either conclusion.” (footnotes omitted)); see also Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 75-76 (2007) (observing that the Court has been inconsistent in deciding whether to use “the ‘consent model’” which focuses on “a criminal defendant’s right to make a free and unconstrained choice,” or “the ‘coercion model,’” which focuses on “regular[ing] police behavior and . . . deter[ing] the police from using improperly coercive tactics”).
A. The Police-Conduct Model

Miranda cannot be understood divorced from the thirty-year-long attempt by the Court to reign in police misconduct during custodial interrogations. Viewed in this context, Miranda set forth prophylactic rules for police to follow in order to avoid subjecting suspects to coercive interrogation. Thus, as some of the language in Miranda suggests, police act unlawfully—they “violate Miranda”—when they do not follow those guidelines.

The Court’s involvement in regulating police conduct during custodial interrogation began with Brown v. Mississippi in 1936. In that case, three blacks suspected of murdering their white landlord were subjected to severe whippings and other physical mistreatment until they confessed to the crime. At trial, their confessions were admitted into evidence against them and they were found guilty and sentenced to die. The Court, distinguishing the Self-Incrimination Clause of the Fifth Amendment from the Due Process Clause of the Fourteenth Amendment, reaffirmed that the former did not bind the States as it had held almost thirty years earlier. Yet “[c]ompulsion by torture to extort a confession,” to which the Brown defendants were subjected, was “a different matter.” The treatment of Brown and his co-defendants was “revolting to the sense of justice,” and constituted “a wrong so fundamental that [it] made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void.” Under these circumstances, their convictions and sentences violated the Due Process Clause of the Fourteenth Amendment because the judgments “offended [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

In later cases, the Court held that the Due Process Clause was likewise violated if a confession were obtained through psychological as well as physical coercion. As the Court put it: “[C]oercion can be mental as well as physical, and the blood of the accused is not the hallmark of an unconstitutional inquisition. The efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion.” The standard

10. See Brown. 297 U.S. at 279, 283.
11. See id. at 285 (“[T]he question of the right to withdraw the privilege against self-incrimination is not here involved.”).
14. Id. at 286.
15. Id. (quoting Snyder v. Massachusetts 291 U.S. 97, 105 (1905) (alteration added)).
ultimately developed by the Court through the process of case-by-case accretion looked not only to the conduct of the police but also the characteristics and frailties of individual suspects.\textsuperscript{17} Notwithstanding its reliance, to some degree, on those idiosyncratic factors, the Court showed its clear disdain for certain types of police conduct. For example, lengthy and persistent questioning could in and of itself,\textsuperscript{18} or in combination with other factors,\textsuperscript{19} be deemed coercive. The Court also rejected police use of sleep deprivation as an interrogation tactic.\textsuperscript{20} In some cases, the Court pointed to the withholding of nourishment from the suspect as leading to a finding of coercion.\textsuperscript{21} The Court decried certain uses of deception, as in \textit{Spano v. New York}, where a childhood friend of the suspect, now a police officer, pled with him that his refusal to confess was harming the friend's own police career.\textsuperscript{22} The Court also rejected confessions obtained through the use of threats of legal action involving the suspect's family members, such as \textit{Lynumn v. Illinois},\textsuperscript{23} in which the Court found coercion where the confession was obtained only after the police threatened the suspect that her children would be taken away from her if she refused to cooperate, and \textit{Harris v. South Carolina},\textsuperscript{24} where the Court found coercion based in part on a threat to charge the suspect's mother with a crime.

The Court in a number of cases held that the incidents of secret interrogation, in and of themselves, also led to a finding of coercion. For example, the holding

\begin{quote}
17. \textit{See}, e.g., \textit{Stein v. New York}, 346 U.S. 156, 185 (1953) ("The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.").

18. \textit{See Ashcraft v. Tennessee}, 322 U.S. 143, 153-54 (1944) (holding that interrogation for 36 hours straight was "inherently coercive").

19. \textit{See Clewis v. Texas}, 386 U.S. 707, 709, 711-12 (1967) (holding that 38 intermittent hours of interrogation, in combination with other factors, was coercive); \textit{Davis v. North Carolina}, 384 U.S. 737, 739, 746-47, 752 (1966) (interrogation for forty-five minutes to an hour each day for sixteen days, in combination with other factors, was coercive).


21. \textit{See Davis}, 384 U.S. at 746 ("[T]he diet was extremely limited and may well have had a significant effect on Davis’s physical strength and therefore his ability to resist."); \textit{Reck v. Pate}, 367 U.S. 433, 441 (1961) ("During the entire period preceding his confessions, Reck was without adequate food . . . ."); \textit{see also Greenwald}, 390 U.S. at 521 (citing "the lack of food, sleep, and medication," among other factors, as leading to a finding of coercion); \textit{Clewis}, 386 U.S. at 712 (citing "inadequate sleep and food," among other factors, as supporting a finding of coercion); \textit{Payne v. Arkansas}, 356 U.S. 560, 567 (1958) (citing fact that suspect "was denied food for long periods," among other factors, as leading to a finding of coercion).


of the suspect incommunicado was an important factor in finding coercion. This was particularly true where the suspect was taken far from home and placed in foreign surroundings. The Court also focused on whether, during these secret interrogations, the suspect was advised of his rights or taken before a magistrate.

It is reasonably clear from these cases that the constitutional violation takes place within the confines of the interrogation room and not—or at least not only—when the confession is introduced at trial. That is to say, the police violate the Constitution when they subject a suspect to coercive interrogation. Certainly the conclusion that the Constitution was violated in Brown v. Mississippi hinged not only on the fact that the convictions were based on the use of confessions extracted by physical torture, but also on the use of torture itself. After all, the Court wrote that the "methods . . . taken to procure the confessions" were themselves "revolting to the sense of justice." In the cases following Brown, the Court continued to characterize the police conduct using coercion to extract a confession as the constitutional transgression, and the exclusion of the resulting confession as the penalty paid for the constitutional violation. Thus, in Watts v. Indiana, a plurality of the Court wrote that "the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure." In Gallegos v. Colorado, the Court referred to the confession as having been "obtained in violation of due process." In Rogers v. Richmond, the Court wrote that the constitutional proscription against coerced confessions was developed "because the methods used to extract them offend an underlying principle in the enforcement of our criminal law." And in a famous

25. See, e.g., Darwin v. Connecticut, 391 U.S. 346, 349 (1968) (per curiam) (holding suspect incommunicado for thirty to forty-eight hours, despite requests to see attorneys, and despite attorneys' requests to see suspect, rendered confession coerced); Clewis, 386 U.S. at 712 (virtually incommunicado police questioning, in combination with other factors, led to finding of coercion); Davis, 384 U.S. at 744-46 (finding confession coerced where suspect held incommunicado for sixteen days); Haynes v. Washington, 373 U.S. 503, 504 (1963) (finding coercion where suspect held incommunicado for sixteen hours); Gallegos v. Colorado, 370 U.S. at 54-55 (failure to allow fourteen-year-old suspect contact with outside world led to finding of coercion).


29. See Michael J.Z. Mannheimer, Coerced Confessions and the Fourth Amendment, 30 Hastings Const. L.Q. 57, 91-95 (2002); see also William T. Pizzi and Morris B. Hoffman, Taking Miranda’s Pulse, 58 Vand. L. Rev. 813, 841 (2005) (“[W]e . . . suppress confessions in some of the most extreme cases because we do not want our police acting in these extreme ways.”).

30. 297 U.S. 278 (1936); see supra notes 8-15 and accompanying text.

31. 297 U.S. at 286.

32. 338 U.S. 49, 55 (1949) (plurality opinion).


and telling passage in Spano v. New York, the Court wrote that a key rationale for the rule against coercion in the interrogation room was “the deep-rooted feeling that the police must obey the law while enforcing the law.” The Supreme Court confirmed in Chavez v. Martinez, where arguably coercive tactics were used to extract statements but the statements were never used against the speaker at trial, that a constitutional violation can occur at the point that coercion is used.

In Miranda, the Court initially focused on questionable police tactics, confirming that the Court in that case was concerned with coercive police conduct, or at least conduct that came close to being coercive, in the interrogation room. After briefly mentioning cases involving physical coercion, including a then-recent case involving police who burned a suspect’s back with lighted cigarettes, the Court defined its mission in these terms: “Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future.” The Court acknowledged that interrogation practices had generally transformed from the physically to the psychologically oriented, and then catalogued several types of interrogation tactics used to place psychological pressure on suspects to speak against their interests.Carefully avoiding the conclusion that any particular stratagem constituted coercion, the Court went so far to say that “the very fact of custodial interrogation exacts a heavy toll on individual liberty.” The Court determined that “compulsion” (though not necessarily coercion) was “inherent in custodial surroundings.” And the Court attributed this pressurized atmosphere of custodial interrogation to the police, for the very purpose of extracting statements from those who would otherwise feel free to refuse to speak: “[S]uch an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner.”

Thus, if the Miranda protocol is seen primarily as a surrogate for a fact-intensive determination as to whether coercion was applied in the interrogation room, it stands to reason that a failure to follow that protocol results in a violation

37. See Clymer, supra note 3, at 456 (“[T]he Miranda Court’s objective was to control police overreaching during custodial interrogation.”).
39. Id. at 447.
40. Id. at 448.
41. Id. at 449–55.
42. Id. at 455.
43. Id. at 459.
44. Id. at 458.
of the Constitution, right then and there in the interrogation room.\textsuperscript{45} There is language in \textit{Miranda} that suggests that it is this police-conduct model that is at work: failure to follow the \textit{Miranda} warnings-and-waiver protocol results in a constitutional violation in the interrogation room itself, the penalty for which is exclusion of the resulting statements at trial. For example, near the outset of the opinion, the Court phrased in the imperative its summary of the warning-and-waiver protocol that it was to describe in more detail in the ensuing pages:

\begin{quote}
\textit{The following measures are required. Prior to any questioning, the person \textit{must} be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. \ldots If \ldots he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking \textit{there can be no questioning}. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.\textsuperscript{46}}
\end{quote}

Later in the opinion, when it ran through each of the rights in detail, it phrased them in mandatory terms. Thus, it wrote that the suspect about to be subjected to custodial interrogation \textit{“must first be informed in clear and unequivocal terms that he has the right to remain silent.”}\textsuperscript{47} Further, \textit{“[t]he 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.”}\textsuperscript{48} In creating a Fifth Amendment right to counsel during custodial interrogations, the Court’s language seems even clearer that such a right can be violated in the interrogation room itself. The Court wrote that the suspect \textit{“must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.”}\textsuperscript{49} Such a warning, the Court continued \textit{“is an absolute prerequisite to interrogation.”}\textsuperscript{50}

The same is true of the Court’s language in directing police in what to do if the suspect invokes his or her rights. The Court instructed that if the suspect indicates \textit{“that he wishes to remain silent, the interrogation \textit{must} cease.”}\textsuperscript{51} Similarly, the Court wrote, if the suspect requests an attorney, \textit{“the interrogation \textit{must} cease until an attorney is present.”}\textsuperscript{52} And if the suspects indicates the need to speak to counsel but an attorney is unavailable, the police \textit{“must respect his}

\footnotesize{\textsuperscript{45} See Clymer, supra note 3, at 457 (observing that academic commentary \textit{“often present \textit{Miranda as the culmination of the Court’s struggle to find in the Constitution an effective means of controlling police interrogation practices.””}).
\textsuperscript{46} \textit{Miranda}, 384 U.S. at 444-45 (emphasis added).
\textsuperscript{47} \textit{Id.} at 467-68 (emphasis added).
\textsuperscript{48} \textit{Id.} 469 (emphasis added).
\textsuperscript{49} \textit{Id.} at 471 (emphasis added).
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at 473-74 (emphasis added).
\textsuperscript{52} \textit{Id.} at 474 (emphasis added).}
decision to remain silent.”\textsuperscript{53} The Court went so far as to characterize this aspect of its decision as creating a “right to cut off questioning.”\textsuperscript{54} Such a denomination strongly suggests that the right must be fully exercisable, and capable of being violated, in the interrogation room itself. Finally, the Court instructed that if a suspect requests counsel but counsel is unavailable, the police “may refrain from [providing counsel] without violating the person’s Fifth Amendment privilege so long as they do not question him during that time.”\textsuperscript{55} The obvious implication is that, if the police do question him after such a request, the police do “violat[e] the person’s Fifth Amendment privilege.”

And the Court’s closing thoughts in Part III of the opinion, after laying out the warnings-and-waiver protocol, also suggest that the police conduct model is at work. The question, as the Court put it, is not whether a suspect can make voluntary statements to the police but “whether he can be interrogated.”\textsuperscript{56} It then summarized the protocol in mandatory terms: “Procedural safeguards must be employed to protect the privilege . . . ”\textsuperscript{57} and the measures it outlined “are required.”\textsuperscript{58}

\textbf{B. The Admissibility Model}

Clear as much of this language is that \textit{Miranda} created a fully enforceable right to warnings and to be free of unwanted interrogation, there is another view of what \textit{Miranda} did that is equally supportable by language in the decision. This view recognizes that \textit{Miranda} is an application of the Self-Incrimination Clause to the interrogation room. And the Self-Incrimination Clause primarily governs, not the taking of statements, but their admissibility at a later proceeding. On this view, \textit{Miranda} prescribes a protocol to secure admissible evidence without branding as unlawful, or even wrong, any failure to follow that protocol. On the question whether police must follow its dictates, \textit{Miranda} is simply agnostic. All the decision does is render inadmissible any statements resulting from a deviation from the protocol.

To understand this aspect of \textit{Miranda}, one must go back to \textit{Bram v. United States}.\textsuperscript{59} In that case, Bram, the first officer of a ship, was suspected of murdering the master of the vessel on the high seas.\textsuperscript{60} He was questioned by a detective after the ship put in port at Halifax, and after Brown, another crew member, accused Bram of the murder.\textsuperscript{61} The detective said to Bram: “Your position is rather an awkward one. I have had Brown in this office, and he made

\textsuperscript{53} Id. (emphasis added).
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 478.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 479.
\textsuperscript{59} 168 U.S. 532 (1897).
\textsuperscript{60} See id. at 534.
\textsuperscript{61} See id. at 537.
a statement that he saw you do the murder.”\textsuperscript{62} When Bram asked where Brown had been when he saw him, the detective told Bram that Brown said he had been at the wheel.\textsuperscript{63} Bram stupidly replied: “[H]e could not see me from there.”\textsuperscript{64} At trial, defendant argued for suppression of his statements on the ground that “no statement made by [him] while in custody, and his rights interfered with to the extent described, was a free and voluntary statement.”\textsuperscript{65} The Supreme Court agreed. The Court identified this as a Self-Incrimination Clause issue:

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution of the United States commanding that no person “shall be compelled in any criminal case to be a witness against himself.”\textsuperscript{66} The Court then laid out a broad definition of compulsion, one that covered ordinary “condition[s] of the mind” such as “hope or fear” that might cause a person to speak against his own penal interests.\textsuperscript{67}

The Court supported this broad reading of the Self-Incrimination Clause by adverting to the English practice of requiring a warning prior to pre-trial questioning by a magistrate in order to render admissible any resulting statement by a criminal defendant.\textsuperscript{68} The rationale for this requirement was that “the mere fact of the magistrate’s taking the statement . . . might, unless he was cautioned, operate upon the mind of the prisoner to impel him involuntarily to speak.”\textsuperscript{69} The Court then acknowledged expansion of this rule beyond magistrates to all persons “in a position of authority over the accused,” which would naturally include “a police officer, actually or constructively in charge of one in custody on suspicion of having committed a crime.”\textsuperscript{70} The Court stopped short of declaring that any custodial interrogation by the police must necessarily amount to

\begin{itemize}
\item \textsuperscript{62} Id. at 539 (internal quotation marks omitted).
\item \textsuperscript{63} See id.
\item \textsuperscript{64} Id. (internal quotation marks omitted).
\item \textsuperscript{65} Id. Although Bram was subjected to a strip search either before or during this brief conversation, see id. at 561-62, it does not appear that this fact played a major role in the Court’s decision.
\item \textsuperscript{66} Id. at 543.
\item \textsuperscript{67} See id. at 548 (“[T]he measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind,—that is, hope or fear,—so that, however diverse might be the facts, the test of whether the confession as voluntary . . . would be ascertained by the condition of mind which the causes ordinarily operated to create.”).
\item \textsuperscript{68} See id. at 550 (“[E]ven where the examination was held without oath, it came to be settled by judicial decision in England that, before such an examination could be received in evidence, it must appear that the accused was made to understand that it was optional with him to make a statement.”).
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id. at 551.
\end{itemize}
compulsion. Yet, even so slight an inducement of hope or fear as that engendered by the detective’s repeating of Brown’s accusation of murder was sufficient to render Bram’s response compelled within the meaning of the Fifth Amendment. As the Court concluded:

[T]he situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrow any possible implication that his reply . . . could have been the result of a purely voluntary mental action [and] the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

Notice the stark disjunction between the conduct condemned as a violation of the Due Process Clause of the Fourteenth Amendment in the coerced confession cases and the conduct determined to have triggered the Self-Incrimination Clause in Bram. The detective in Bram never whipped Bram, deprived him of food or sleep, or subjected him to lengthy, persistent questioning. He simply relayed Brown’s accusation that Bram had committed the murder and observed that Bram was thus in an “awkward” position. Moreover, nowhere in Bram did the Court take the detective to task for conducting this interrogation. Instead, the focus of the opinion is not on the detective’s conduct but on Bram’s state of mind: Bram’s admission was inadmissible, not to punish the detective or to deter other law enforcement officers, but because the question must have engendered “hope or fear” in Bram’s mind, rendering it compelled.

The reason for this disjunction, of course, was that Bram and the coerced confessions cases were interpreting two different provisions of the Constitution. Indeed, the very reason the Court had to carve out a separate due process jurisprudence of coerced confessions is that the Court had long held the Self-Incrimination Clause inapplicable to the States. But then, in 1964, in Malloy v. Hogan, the Court reversed course and determined that the Self-Incrimination Clause did apply to the States via the Fourteenth Amendment. But Malloy involved more conventional compelled testimony in a judicial hearing similar to a grand jury proceeding, not in-custody interrogation by police. Thus was the stage set for the Court two years later in Miranda to apply the principles of Bram to the States.

Miranda is thus, at least in part, an application of the Self-Incrimination Clause principles first explicated in Bram to the bulk of custodial interrogation,

71. See id. at 558 (“[T]he mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary.”).
72. Id. at 562.
73. See supra text accompanying notes 8-24.
74. See Mannheimer, supra note 29, at 64.
75. See Malloy v. Hogan, 378 U.S. 1, 6 (1964).
76. See id. at 3.
which takes place under the auspices of the States. *Miranda* is, of course, a Self-Incrimination Clause case.\textsuperscript{77} And it relies heavily upon *Bram* in applying the Clause to the interrogation room.\textsuperscript{78} If *Miranda*'s center of gravity is the Self-Incrimination Clause, then a *Miranda* violation cannot take place in the interrogation room. That is because Self-Incrimination Clause violations, the Court later seems to have held in *Chavez v. Martinez*, can take place only in a formal judicial proceeding, such as a trial, when a compelled statement is introduced into evidence.\textsuperscript{79}

Of course, *Chavez* appeared on the scene many years after *Miranda* and much of its progeny. Yet some language in *Miranda* itself points in the direction of the admissibility model. In the second sentence of the opinion, the Court pinpointed the central concern of the decision by writing: “[W]e deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation.”\textsuperscript{80} The Court repeated this theme in the very first sentence of Part I of the opinion: “The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody . . . .”\textsuperscript{81} And in previewing its holding before explicating the *Miranda* requirements in greater detail, the Court articulated that holding in terms of the use of statements, not their extraction: “[T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”\textsuperscript{82} More telling, after describing the warnings-and-waiver protocol, the Court twice summarized its holding in terms of admissibility. It wrote: “The warnings required and the waiver necessary . . . are . . . prerequisites to the admissibility of any statement made by a defendant.”\textsuperscript{83} And it closed Part III of the opinion, just after describing the

\begin{itemize}
\item \textsuperscript{77} The decision mentions the Self-Incrimination Clause or the “privilege against self-incrimination” at least twenty-five times. See *Miranda v. Arizona*, 384 U.S. 436, 439, 444, 457-58, 460-61, 463-64, 473-72, 474, 476-79, 489-91, 494, 498-99 (1966).
\item \textsuperscript{78} See id. at 461-62.
\item \textsuperscript{79} 538 U.S. 760, 767 (2003) (plurality opinion) (“Martinez was never made to be a ‘witness’ against himself in violation of the Fifth Amendment’s Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case.”); id. at 777 (Souter, J., concurring in the judgment) (agreeing with the plurality’s textual analysis that left Martinez’s claim “well outside the core of Fifth Amendment protection”). I say “seems to” because Justice Souter’s opinion leaves open the possibility that the Court might expand the protection of the privilege upon a “powerful showing” that such an expansion is necessary to protect “the core guarantee.” Id. at 778. However, *Chavez* has generally been read as holding that there can be no Fifth Amendment violation if compelled self-incriminating statements are never actually used against their maker in a criminal proceeding. See Carolyn J. Frantz, *Chavez v. Martinez’s Constitutional Division of Labor*, 2003 SUP. CT. REV. 269, 274; Michael J.Z. Mannheimer, Ripeness of Self-Incrimination Clause Disputes, 95 J. CRIM. L. & CRIMINOLOGY 1261, 1279 (2005).
\item \textsuperscript{80} *Miranda*, 384 U.S. at 439.
\item \textsuperscript{81} Id. at 445.
\item \textsuperscript{82} Id. at 444.
\item \textsuperscript{83} Id. at 476; see Loewy, supra note 1, at 916 (“Miranda’s holding . . . focuses on the impropriety of use . . . .”).
\end{itemize}
warnings-and-waiver protocol as “required,” by declaring that “unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant].”

* * *

Thus, the day Miranda was decided, there were, in effect, two Mirandas: one that declared unlawful any police custodial interrogation that was not preceded by the prescribed warnings-and-waiver protocol, and one that declared inadmissible the product of any police custodial interrogation not preceded by the protocol. Admittedly, these sound very similar, and in many cases the result will not hinge on which view of Miranda a court takes. But in a surprisingly large number of cases, it will. Indeed, a survey of the Supreme Court’s treatment of some of the ancillary issues created by Miranda demonstrates that the Court’s choice of which model of Miranda to adopt will often dictate the result. More disturbingly, the Court sometimes does not even recognize that it has set forth two very different visions of what Miranda means so its adoption of one model or the other is often both implicit and contingent.

III. CONFUSION IN THE COURT OVER THE TWO MIRANDAS

In Greek mythology, the Hydra was a water monster with multiple heads; when someone attempted to kill it by cutting off a head, two or more heads grew in its place. In many ways, the law of coerced confessions before Miranda was like the Hydra, its multi-factored analysis as fearsome to courts as the Hydra’s many heads were to ancient mariners. The Miranda Court thought it was killing the monster it had created 30 years earlier with a bright-line rule: give warnings and get a waiver prior to interrogating a suspect in custody or render the resulting statements inadmissible. But when the Miranda Court tried to slay the beast by lopping off a head, multiple heads simply grew in its place. What is “custody?” What is “interrogation?” What is “waiver?” What are the consequences of invocation? What about the fruits of unwarned statements? Can unwarned statements be used for impeachment? And, of course, what are the exceptions to the rule? (For, as every student who has made it into her second week of law school knows, every rule has its exceptions.)

84. Miranda, 384 U.S. at 479. Another clue that the Miranda Court had the admissibility model in mind is that, one week later, it held the decision to be applicable to any “case[] in which the trial began after the date of [that] decision.” Johnson v. New Jersey, 384 U.S. 719, 723 (1966) (emphasis added). Had the Court intended that Miranda be seen as a rule regulating the police, it presumably would have held the decision to be applicable only to those cases in which the interrogation took place after the date of the decision.

85. See David Ogden, Drakon: Dragon Myth and Serpent Cult in the Greek and Roman Worlds 26 (2013).
It is in these sequelae to Miranda where the seeds of confusion over what Miranda said have taken root. In some cases, the Court acts as if Miranda addresses how police must conduct themselves in the interrogation room. In others, the Court proceeds on the premise that Miranda deals only with the admissibility of statements taken in the interrogation room. But in most cases, the choice is implicit, and might even change over the course of an opinion. And even where the Justices explicitly choose one model over the other, there is no majority approach because neither model can find support among five Members of the Court. This confused approach to the question of the essential nature of the Miranda right across five lines of jurisprudence—fruits, impeachment, invocation, interrogation, and the public safety exception—sets the stage for the Court’s recent cases on custody, J.D.B. v. North Carolina,86 and waiver, Berghuis v.Thompkins.87 In J.D.B. and Thompkins, lack of coherence of the doctrine as a whole led to results that were either internally inconsistent or sharply at odds with doctrine in other lines of cases.88

A. The Disjunction Between the Two Models

In a number of cases, the individual Members of the Court implicitly or explicitly adopt one or the other models of Miranda. Such is the case with the Court’s rejection of the “fruit of the poisonous tree” doctrine in the Miranda context, its acceptance of the use of unwarned and post-invocation statements for impeachment, its treatment of a suspect’s invocation of his Miranda rights, its definition of Miranda “interrogation,” and its adoption of a public safety exception to Miranda. However, the Members of the Court cannot always agree on one rationale. Moreover, the cases are in some tension with one another: the admissibility model is robust in the fruits cases, while the police-conduct model appears to be ascendant in the others.

1. Fruits

Start with the “fruits” issue. It is here that the choice between the two models of Miranda most obviously makes a difference. If Miranda is designed as a prescription of police behavior, then the Fourth Amendment model of addressing the fruits of unwarned interrogation should be at work: further fruits of an unwarned interrogation, whether they consist of physical evidence, later

86. 131 S.Ct. 2394 (2011).
87. 130 S.Ct. 2250 (2010).
88. The survey that follows is not meant to be exhaustive of the Court’s Miranda jurisprudence across all seven areas. And it does not address an eighth line of cases addressing the sufficiency of the Miranda warnings, because the choice between the two models does not seem to make a difference in these cases. See generally Florida v.Powell, 130 S.Ct. 1195 (2010); Duckworth v. Eagen, 492 U.S. 195 (1989). Nor should this discussion be understood to make the claim that every case is infected with uncertainty over which version of Miranda is truer to the original decision. Rather, the focus here is on the most contentious of cases.
statements, or the discovery of witnesses to provide trial testimony, should be considered tainted by the initial illegality and presumptively inadmissible, subject only to the recognized exceptions to the “fruit of the poisonous tree” doctrine. If *Miranda* is designed to address the admissibility of unwarned statements, then there is no “initial illegality” in failing to adhere to the warnings-and-waiver protocol; with no poisonous tree, there can be no tainted fruit; and only the statements themselves are inadmissible. But it is here that the Court’s failure to stick with a single vision of *Miranda* is most confounding.

As for physical fruits, the leading case is *United States v. Patane*. There, a police officer upon arresting Patane began reading him the *Miranda* warnings, but Patane interrupted and stated that he knew his rights. The officer did not continue but instead asked about the whereabouts of Patane’s gun. Patane replied that it was in his bedroom. Patane was later charged with possession of a firearm by a convicted felon. In the Supreme Court, the Government conceded that Patane’s statements were suppressible as unwarned responses to interrogation. The question for the Court was whether the gun itself should not be suppressed.

In answering that question in the negative, a plurality of the Court wrote in the clearest of terms that it was rejecting a police-conduct model of *Miranda*: “The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn.” And this is true whether the failure is “negligent or . . . deliberate.” That is to say, *Miranda* does not require that police do anything. Excluding physical fruits of unwarned statements, unlike excluding fruits of unlawful searches and seizures, thus makes no sense. The latter might deter police from committing unlawful conduct in the future, but “there is, with respect to mere failures to warn, nothing to deter.”

Instead, the plurality explicitly adopted the admissibility model: “Potential violations [of *Miranda*] occur, if at all, only upon the admission of unwarned statements into evidence at trial.” That is because *Miranda* was grounded in

---

89. See Loewy, *supra* note 1, at 908 (“[E]vidence obtained from an unconstitutional search and seizure is excluded because of the police misconduct by which it was obtained.”).
91. *Id.* at 635 (plurality).
92. *Id.*
93. *Id.*
94. *Id.* (citing 18 U.S.C. § 922(g)(1)).
95. *Id.* at 635 n.1.
96. *Id.* at 633-34.
97. *Id.* at 637. See also *id.* at 641 (“[A] mere failure to give *Miranda* warnings does not, by itself, violate a suspect’s constitutional rights or even the *Miranda* rule.”) (emphasis added).
99. *Id.* at 635 n.1. See also *id.* at 643 (“[B]ecause police cannot violate the Self-Incrimination Clause by taking unwarned though voluntary statements, an exclusionary rule cannot be justified by reference to a deterrence effect on law enforcement.”).
100. *Patane*, 542 U.S. at 642.
the Self-Incrimination Clause. And, unlike the Fourth Amendment, which required judicial creation of an exclusionary rule for its enforcement, “the Self-Incrimination Clause contains its own exclusionary rule.” Thus, “Miranda itself makes clear that its focus was on the admissibility of statements.”

This view, however, attracted the votes of only three Justices: Justice Thomas, who wrote the opinion, and Chief Justice Rehnquist and Justice Scalia, who joined it. The judgment of the Court rested on the separate opinion by Justice Kennedy, joined by Justice O’Connor, and his reasoning was somewhat murkier, but it suggested that he had in mind the police-conduct model of Miranda. He began by observing that even the important interests served by Miranda must sometimes yield “to other objectives of the criminal justice system.” This suggests something akin to the approach taken in the Fourth Amendment context, where the Court declines to apply the exclusionary rule where the costs of doing so is high and its benefit, in terms of its expected deterrence of police misconduct, is low. Thus, he wrote that, given the “important probative value of reliable physical evidence, it is doubtful that exclusion can be justified by a deterrence rationale.” And he refused to join the reasoning of the plurality that police failures to warn cannot violate Miranda and that exclusion of unwarned statements is all the Self-Incrimination Clause demands in every case. Instead, he concluded that it was “unnecessary to decide whether the detective’s failure to give Patane the full Miranda warnings should be characterized as a violation of the Miranda rule itself, or whether there is ‘[a]nything to deter’ so long as the unwarned statements are not later admitted at trial.”

The dissenters, meanwhile, took a decidedly police-conduct-centered approach to the question. The principal dissent, authored by Justice Souter and joined by Justices Stevens and Ginsburg, articulated the issue as “whether courts should apply the fruit of the poisonous tree doctrine lest we create an incentive for the police to omit Miranda warnings.” Justice Souter characterized the

101. Id. at 636 (“[T]he Miranda rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause.”).
102. Id. at 640.
103. Id. at 642 n.3.
104. See Pizzi & Hoffman, supra note 29, at 839 (observing that Justice Kennedy’s opinion in Patane is “difficult to gauge”).
105. Patane, 542 U.S. at 644 (Kennedy, J., concurring in the judgment).
106. See, e.g., Davis v. United States, 131 S.Ct. 2419, 2427-28 (2011) (“[W]hen the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way.”) (internal quotation marks omitted)); Herring v. United States, 555 U.S. 135, 145 (2009) (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”).
107. Patane, 542 U.S. at 644 (Kennedy, J., concurring in the judgment).
108. Id. at 645 (alteration in original).
109. Id. (Souter, J., dissenting).
failure to warn here as “[un]justified” and “[un]mitigated” by any overriding interest.\textsuperscript{110} He expressed concern that the Court’s decision would act as “an . . . inducement for interrogators to ignore the [Miranda] rules,”\textsuperscript{111} and encourage them “to flout Miranda when there may be physical evidence to be gained.”\textsuperscript{112} Thus, Justice Souter saw Miranda as a Fourth-Amendment-type rule: a guide for police conduct backed up by the penalty of exclusion for misdeeds. And Justice Breyer, writing only for himself, was even clearer in this regard when he, too, advocated a “‘fruit of the poisonous tree’ approach,”\textsuperscript{113} by which courts should “exclude physical evidence derived from unwarned questioning unless the failure to provide Miranda . . . warnings was in good faith.”\textsuperscript{114}

The same day that the Court decided in Patane that physical fruits stemming from failures to warn should not inevitably be excluded from evidence, it decided that later statements stemming from initial failures to warn sometimes should be excluded. Here, too, the Court was split, and its fractures represent deep divisions over how to characterize the Miranda rights. In Missouri v. Seibert, a suspect in an arson and murder had been subject to a two-step interrogation method: the officer questioning her deliberately withheld Miranda warnings, aware that any ensuing statements the suspect made would be inadmissible; the officer would then administer Miranda warnings and obtain a waiver in the hopes that the pre-warning statements would lead more easily to post-warning statements.\textsuperscript{115} The tactic worked: after about thirty to forty minutes of pre-warning questioning, Seibert made incriminating statements.\textsuperscript{116} After a twenty-minute break, the officer administered Miranda warnings, obtained a waiver, and the suspect repeated her incriminating statements, which were then admitted against her at trial.\textsuperscript{117} While the defendant’s initial statements were inarguably inadmissible pursuant to Miranda, the question was whether the later statements were properly admitted.\textsuperscript{118}

A plurality, consisting of the Patane dissenters, held that they were not. However, Justice Souter, who wrote the plurality opinion, veered back and forth between the admissibility and police-conduct models of Miranda without ever appearing to come to rest on one or the other,\textsuperscript{119} in contrast to his dissent in Patane. At the outset, the Seibert plurality appeared to adopt the admissibility model. Justice Souter wrote that “Miranda conditioned the admissibility at trial

\textsuperscript{110} Id. at 647.
\textsuperscript{111} Id. at 645.
\textsuperscript{112} Id. at 647.
\textsuperscript{113} Id. (Breyer, J., dissenting).
\textsuperscript{114} Id. at 648.
\textsuperscript{115} 542 U.S. 600, 605-06 (2004) (plurality opinion).
\textsuperscript{116} See id. at 604-05.
\textsuperscript{117} See id. at 605-06.
\textsuperscript{118} See id. at 604.
\textsuperscript{119} See Kinports, supra note 7, at 101 (discussing the “ambivalence” that characterized the plurality opinion in Seibert).
of any custodial confession on warning a suspect of his rights.”

He proceeded to focus, not on the mindset of the interrogating officer, but on that of the suspect, asking whether the question-first technique would be “‘likely . . . to disable [an individual] from making a free and rational choice’ about speaking.”

He concluded that mid-stream Miranda warnings under some circumstances would be ineffective in fully apprising the suspect of her right not to speak.

Where those circumstances exist can be identified only by looking to specific objective characteristics of the interrogation:

"The completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second, the continuity of police personnel, and the degree to which the interrogator’s questions treated the second round as continuous with the first.

Notably absent from this list is the good or bad faith of the interrogator. Indeed, the plurality disclaimed any reliance on the questioner’s intent.

The plurality also rejected the defendant’s suggestion that the later statements were “fruit of the poisonous tree” of the earlier, unwarned interrogation, an approach that would make sense only on the theory that the police conduct in performing the two-step interrogation was a wrong that called for punishment and deterrence.

Instead, the Court wrote that “clarity is served” by asking whether midstream warnings “could reasonably be found effective,” not on whether the later statements are “tainted” by the first.

And, for what it is worth, Justice O’Connor in dissent lauded the plurality for not relying on questions of subjective intent of the interrogator.

Yet there is also some language in the Seibert plurality pointing toward the police-conduct model of Miranda.

First, at various points in the opinion, Justice Souter characterized the question-first protocol as a “strategy,”

---

120. See Seibert, 542 U.S. at 608 (plurality opinion).
121. Id. at 611 (quoting Miranda v. Arizona, 384 U.S. 436, 464-65 (1966) (alterations in original)).
122. See id. at 613 (“[I]t is likely that if interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect or successive interrogation, close in time and similar in content.”).
123. Id. at 615.
124. See id. at 616 n.6 (“[T]he focus is on facts apart from intent . . . .”). See also Pizzi & Hoffman, supra note 29, at 833 (“[T]he plurality . . . specifically resisted the temptation to create a classic bad faith test focused on the subjective intent of police.”).
125. See Seibert, 542 U.S. at 612 n.4 (plurality opinion).
126. See id.
127. See id. at 623 (O’Connor, J., dissenting) (“[T]he plurality correctly declines to focus its analysis on the subjective intent of the interrogating officer.”). See also id. at 624 (“The plurality’s rejection of an intent-based test is . . . in my view, correct.”).
128. See Kinports, supra note 7, at 102 (“[P]assages in the plurality opinion also focus on the subjective intent of the police.”).
129. See Seibert, 542 U.S. at 609, 616 (plurality); see also Pizzi & Hoffman, supra note 29, at 833 n.82 (“A strange kind of bad faith seems to have crept into the plurality’s opinion when it
“tactic,” 130 and a “technique,” 131 a practice having a particular “object.” 132 This
language reeks of intentionality. Moreover, the plurality distinguished the
Court’s earlier decision in Oregon v. Elstad 133 by arguing that the initial,
unwarned statement in that case was the result of “innocent neglect of Miranda”
and a “good-faith Miranda mistake.” 134 And Justice Souter’s rejection of an
approach that focused on the interrogator’s intent was based not on doctrinal
reasons but administrative concerns: “Because the intent of the officer will rarely
be as candidly admitted as it was here . . . the focus is on facts apart from intent
that show the question-first tactic at work.” 135

Justice Kennedy cast the deciding vote so, as in Patane, his separate opinion
is critical. And that opinion leaves little doubt that he had in mind a police-conduct
view of Miranda. It is replete with language denigrating the question-
first protocol: Justice Kennedy variously characterized it as “designed to
circumvent Miranda,” 136 “undermin[ing] the Miranda warning,” 137 an
“intentional misrepresentation,” 138 a “distort[ion] [of] the meaning of
Miranda,” 139 and an “abuse.” 140 Justice Kennedy also repeatedly characterized
this police conduct as a “violation” of Miranda, 141 and a “deliberate” one at
that. 142 He characterized the suppression of unwarned statements as a
“remedy” 143 for such a violation. And he rejected the plurality’s approach that
shunted to the side the good or bad faith of the interrogator. 144 Instead, Justice
Kennedy would give the questioner’s intent center stage and suppress later
warned statements only where “the two-step interrogation technique was used in
a calculated way to undermine the Miranda warnings.” 145

concluded the Missouri police engaged in ‘a police strategy adapted to undermine the Miranda
warnings.’” (quoting Seibert, 542 U.S. at 616 (plurality)).
130. See Seibert, 542 U.S. at 610 n.2, 616 n.6 (plurality opinion).
131. See id. at 613.
132. See id. at 611.
133. 470 U.S. 298 (1985) (holding later, warned statement resulting from lengthy interrogation
at police precinct admissible when earlier, unwarned statement was result of stray question by
officer in suspect’s living room prior to transportation to police station).
134. Seibert, 542 U.S. at 615 (plurality). See Kit Kinports, supra note 7, at 102 (making the
same point). But see Seibert, 542 U.S. at 615-16 (plurality opinion) (explaining result in Elstad
with reference to whether later warnings would have been effective in communicating to suspect
that he had a real choice between speech and silence).
135. Seibert, 542 U.S. at 616 n.6 (plurality opinion).
136. Id. at 618 (Kennedy, J., concurring in the judgment).
137. Id.
138. Id. at 620.
139. Id. at 621.
140. Id.
141. Id. at 618, 620-21.
142. Id. at 620.
143. Id. at 619.
144. See id. at 621 (criticizing the plurality’s approach for “appl[yng] to both intentional an
unintentional two-stage interrogations”).
145. Id. at 622. He allowed that further “curative measures” could save the later statements
from suppression even in such a case. Id.
Justice Breyer, too, wrote separately to advocate an approach nearly identical to that of Justice Kennedy. In his view, the “fruit of the poisonous tree” approach should be carried over root and branch from the Fourth Amendment, complete with a “good faith” exception. Accordingly, he would adopt the “simple rule” that “[c]ourts should exclude the ‘fruits’ of the initial unwarned questioning unless the failure to warn was in good faith.” Thus, like Justice Kennedy, he clearly had in mind a police-conduct model of Miranda. Curiously, however, he joined the plurality opinion in full based on the belief that its “approach in practice will function as a ‘fruits’ test.”

By contrast, writing for herself and three of her colleagues in dissent, Justice O’Connor viewed Miranda as a rule of admissibility and roundly rejected the police-conduct model of Miranda. She expressed agreement with the plurality in rejecting a “fruit of the poisonous tree” approach, because “a robust deterrence doctrine” has no place in Miranda jurisprudence. She observed that at the heart of the Miranda rule is freedom from compulsion to speak, which exists in the mind of the suspect. Whatever is in the mind of the interrogator is irrelevant.

Accordingly, as with the physical fruits issue, the law on subsequent warned statements following initial, unwarned interrogation is unsettled. The plurality’s approach appears to reject the police-misconduct model, but Justice Kennedy, who supplied the crucial fifth vote for affirmance, clearly embraces just that model. And under the Court’s Marks rule, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” Justice Kennedy’s opinion can be viewed as representing “the narrowest grounds,” in the sense that it eschewed the multi-factored analysis favored by the plurality, applicable to both intentional and unintentional failures to warn, in favor of a bright-line test excluding only later statements stemming from

---

146. See id. at 617 (Breyer, J., concurring) (“Prosecutors and judges have long understood how to apply the ‘fruits’ approach, which they use in other areas of law” (citing Wong Sun v. United States, 371 U.S. 471 (1963))).
147. See id. at 618.
148. Id. at 617.
149. Id. at 618.
150. See id. at 623-24 (O’Connor, J., dissenting).
151. See id. at 624 (“Because voluntariness is a matter of the suspect’s state of mind, we focus our analysis on the way in which suspects experience interrogation.”).
152. See id. (“Thoughts kept inside a police officer’s head cannot affect [the suspect’s] experience.”).
153. See Kinports, supra note 7, at 103 (noting the “conflicting signals given by the even the Justices in the plurality”).
intentional failures to warn.\textsuperscript{155} Yet, it appears that as many as seven Justices—all but Justices Kennedy and Breyer—rejected the police-conduct approach to \textit{Miranda}. Thus, we arrive at the confounding result that a position rejected by a majority of the Court might be the controlling law.\textsuperscript{156}

2. Impeachment

One area where the Members of the Court seem to be in agreement over the correct model of \textit{Miranda} is when it comes to impeachment. In these cases, the question is whether a defendant who testifies at trial can be impeached with prior inconsistent statements made by him during custodial interrogation after either a failure to warn or he has invoked his right to silence or to counsel. Though the Justices disagreed amongst themselves over the ultimate outcome, all used the police-conduct model in getting to their preferred result.

In \textit{Harris v. New York}, the defendant made statements during custodial interrogation without benefit of the \textit{Miranda} warnings.\textsuperscript{157} Though the prosecution conceded that these were inadmissible in its case-in-chief against the defendant at trial, the statement were used to impeach his testimony.\textsuperscript{158} In \textit{Oregon v. Hass}, the suspect was given \textit{Miranda} warnings prior to custodial interrogation and he invoked his \textit{Miranda} right to counsel.\textsuperscript{159} He was interrogated further and made damning admissions.\textsuperscript{160} Again, the statements were used not in the prosecution’s case-in-chief but only to impeach the defendant’s trial testimony.\textsuperscript{161}

In both cases, the Court ruled that using statements such as these for impeachment purposes was permitted. The Court relied in large part on a prior Fourth Amendment exclusionary rule decision, \textit{Walder v. United States}, which


\textsuperscript{156} See Charles D. Weisselberg, \textit{Mourning Miranda}, 96 Cal. L. Rev. 1519, 1551 (2008) (“[T]here is doubt whether Justice Kennedy’s concurrence could be characterized as ‘narrower’ since it is premised upon the officer’s intent, a position expressly rejected by seven or more justices.”).

\textsuperscript{157} 401 U.S. 222, 223-24 (1971).

\textsuperscript{158} Id. at 223-24.

\textsuperscript{159} 420 U.S. 714, 715 (1975).

\textsuperscript{160} See id. at 716.

\textsuperscript{161} See id. at 716-17.
had held that items seized in violation of the Fourth Amendment, and thus inadmissible in the prosecutor’s case in chief at trial, were nonetheless admissible for impeachment.\footnote{162} The Court in \textit{Harris} and \textit{Hass} assumed for the sake of argument that the \textit{Miranda} “exclusionary rule has a deterrent effect on proscribed police conduct.”\footnote{163} But it rejected the notion that “impermissible police conduct will be encouraged” by permitting impeachment use of unwarned or post-invocation statements.\footnote{164} It reasoned that police will be deterred from conducting custodial interrogation under these circumstances, if at all, by the fact that the resulting testimonial evidence will be inadmissible in the prosecution’s case in chief.\footnote{165} That is to say, the marginal utility in deterring \textit{Miranda} “violations” of excluding unwarned or post-invocation statements for impeachment purposes is low. This low marginal benefit is outweighed by the cost in terms of the loss of evidence that can “provide[] valuable aid to the jury in assessing [the defendant’s] credibility.”\footnote{166} Thus, applying the \textit{Miranda} exclusionary rule fails a cost/benefit analysis.

Justice Brennan, in dissent in each case, joined by Justice Marshall (and by Justice Douglas in \textit{Harris}), also premised his argument on the need to “deter[] improper police conduct.”\footnote{167} He also relied on \textit{Walder} but viewed that case more narrowly.\footnote{168} In his view, the Court’s rulings in \textit{Harris} and \textit{Hass} would encourage police to engage in “practices in disregard of the Constitution,” in order to secure valuable impeachment evidence for trial.\footnote{169} He objected to the result in \textit{Hass} in particular, pointing out that, while a police officer might be encouraged to issue the warnings even after \textit{Harris}, in the hope that the suspect will waive, thereby securing his statements for use for all purposes, an officer faced with an invocation has “almost no incentive for following \textit{Miranda}’s requirement that” interrogation cease.\footnote{170} And, beyond deterrence, he cited other

\footnote{162. 347 U.S. 62, 65 (1954). \textit{See Harris}, 401 U.S. at 224-25; see also \textit{Hass}, 420 U.S. at 721-22 (discussing \textit{Harris}’s treatment of \textit{Walder} and concluding that there was “no valid distinction to be made in the application of the principles of \textit{Harris} to that case and to \textit{Hass}’ case”).}

\footnote{163. \textit{Harris}, 401 U.S. at 225; see also \textit{Hass}, 420 U.S. at 723 (“The deterrence of the exclusionary rule . . . lies in the necessity to give the warnings.”).}

\footnote{164. \textit{Harris}, 401 U.S. at 225; see also \textit{Hass}, 420 U.S. at 723 (“That [the] warnings, in a given case, may prove to be incomplete, and therefore defective . . . does not mean that they have not served as a deterrent to the officer who is not then aware of their defect; and to the officer who is aware of the defect the full deterrence remains.”).}

\footnote{165. \textit{See Harris}, 401 U.S. at 225 (“Sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.”); see also \textit{Hass}, 420 U.S. at 722 (“[T]here is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief.”).}

\footnote{166. \textit{Harris}, 401 U.S. at 225; see also \textit{Hass}, 420 U.S. at 722 (“[T]he impeaching material would provide valuable aid to the jury in assessing the defendant’s credibility [and] the benefits of this process should not be lost.” (internal quotations marks omitted)).}

\footnote{167. \textit{Harris}, 401 U.S. at 231 (Brennan, J., dissenting).}

\footnote{168. \textit{See id.} at 227-28.}

\footnote{169. \textit{Id.} at 232.}

\footnote{170. \textit{Hass}, 420 U.S. at 725 (Brennan, J., dissenting).}
Fourth Amendment exclusionary rule cases as standing for the proposition that the courts must not “aid or abet the law-breaking police officer,” observing that “[n]othing can destroy a government more quickly than its failure to observe its own laws.”

Thus, in Harris and Hass, both the majority and the dissent premised their respective analyses on the police-conduct model of Miranda. The key question for both was whether there was any marginal deterrent value to exclusion of the statements for impeachment purposes. Both relied in large part on Fourth Amendment doctrine which uses the exclusionary rule as a remedy for violations of the Constitution by the police. For his part, Justice Brennan referred to the statements in Harris as “illegally obtained” and, three separate times, as “tainted.” Clearly, both sides adopted the police-conduct model of Miranda: the decision prescribes police behavior and excludes evidence that stems from a violation of its prescriptions in order to deter future misconduct.

None of the Justices explored the impeachment question through the lens of the admissibility model. Had any of them done so, the analysis would have looked quite different. Instead of asking whether there is any marginal value, in terms of deterring the police, from excluding the evidence for impeachment purposes, one would have instead considered whether using the evidence in that manner makes the suspect “a witness against himself” at trial. There is not necessarily one correct answer to this question. On the one hand, one could argue that the prosecution’s use of the suspect’s unwarned or post-invocation statements in any way at trial makes him “a witness against himself.” A more nuanced approach might be that use of statements solely for impeachment purposes is not a testimonial use of the statements—that is to say, they are not being offered for their truth—and therefore there is no “witnessing” going on. Adoption of one view of Miranda or the other does not necessarily dictate the result in any given case. It merely provides the framework for analysis.

3. Invocation

The Court’s cases on invocation of the Miranda rights have been less clear. Yet by articulating the right invoked as the “right to cut off questioning,” by placing blame on an officer in one case for lacking diligence in determining whether such an invocation had been made, and by deferring to reasonable police

171. Harris, 401 U.S. at 232 (Brennan, J., dissenting).
173. Harris, 401 U.S. at 230 (Brennan, J., dissenting).
174. Id. at 230, 232.
175. See Mannheimer, supra note 29, at 127-28.
interpretations of suspects’ use of language, the Court, in effect, has viewed
invocation through the lens of the police-conduct model of Miranda.

As noted,177 Miranda itself seems to command that interrogation must
“cease” when either the right to silence or to counsel is invoked by the suspect.178
Subsequent cases have reiterated this command.179 Indeed, in Miranda and in
subsequent cases, the Court wrote that a suspect in custody has a “right to cut off
questioning” that can be exercised by invoking either right.180 The less robust
form of the rule comes from Michigan v. Mosley, where the Court held that
interrogation must cease upon an invocation of the right to silence, but that “a
resumption of questioning is permissible” under some circumstances.181 The
more robust form of this rule, articulated in Edwards v. Arizona, is that if the
suspect invokes the right to counsel, interrogation must not only cease but may
not again be initiated by law enforcement unless counsel is present.182 This has
been viewed as a right to avoid interrogation altogether.183 By generally
articulating the rule in terms of what police may or may not do following
invocation, and not the evidentiary significance of their actions, the Court has
signaled that it views invocation through the lens of the police-conduct model of
Miranda.

This inference is greatly strengthened by the Court’s analysis in Arizona v.
Roberson.184 Roberson, a suspect in custody, invoked his right to counsel.185
Three days later, a second officer, unaware of the prior invocation, interrogated

177. See supra notes 51-56 and accompanying text.
immediately cease questioning a suspect who has clearly asserted his right to have counsel present
counsel is requested, interrogation must cease . . . ."); Connecticut v. Barrett, 479 U.S. 523, 529
(1987) (describing the "prohibition on further questioning" after invocation); Edwards v. Arizona,
451 U.S. 477, 482 (1981) ("[I]f the suspect requests counsel, "the interrogation must cease until an
attorney is present.""
180. See Miranda, 384 U.S. at 474; see also Mosley, 423 U.S. at 103.
181. 423 U.S. 96, 101 (1975). The factors considered in Mosley were the interval of time that
passed between the invocation and the subsequent attempt to interrogate, and that the subsequent
interrogation was by a different officer, at a different location, and about a different crime. See id.
at 104.
182. 451 U.S. 477, 482 (1981); see also Davis, 512 U.S. at 458 ("[A] suspect who has invoked
the right to counsel cannot be questioned regarding any offense unless an attorney is actually
present."); Minnick, 498 U.S. at 152 ("Our cases following Edwards have interpreted the decision
to mean that the authorities may not initiate questioning of the accused in counsel’s absence.");
a prisoner after he has asked for the assistance of a lawyer.").
185. See id. at 678.
him about a different crime and obtained incriminating statements.\textsuperscript{186} Such a scenario highlights the disjunction between the police-conduct model and the admissibility model. If the Court had the admissibility model in mind, the resolution would be straightforward. Whether the second officer was at fault would be entirely irrelevant. All that mattered is that the suspect expressed an inability to deal with the police without counsel, an incapacity that Edwards deemed all but indelible. Having once expressed that inability, any further attempt to interrogate him is deemed compelled via Edwards’s strict but clear rule. In fact, the Court did hold that the statements taken by the second officer were inadmissible and, in doing so, seemed to give a nod to the admissibility model, by observing that “Edwards focuses on the state of mind of the suspect and not of the police.”\textsuperscript{187}

Yet the Court did not stop there. It went on to place the blame for the result squarely at the feet of the second officer for his lack of diligence in failing to determine that Roberson had already invoked his right to counsel. As the Court put it, “custodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel.”\textsuperscript{188} The Court noted that Roberson’s request for counsel had been “memorialized in a written report but the officer who conducted the interrogation simply failed to examine that report.”\textsuperscript{189} The Court concluded that the “failure” of the police to abide by Roberson’s “request cannot be justified by the lack of diligence of a particular officer.”\textsuperscript{190} These words—“failure,” “justified,” “diligence”—represent normative conclusions about the police conduct in this case, not descriptions of the evidentiary consequences of interrogation following invocation.\textsuperscript{191} Thus, notwithstanding its initial observation about Edwards’s lack of focus “on the state of mind . . . of the police,” the Court went on to justify suppression in terms of the negligence—a “state of mind”—of the police. Unsurprisingly, Roberson has been distinguished.

\textsuperscript{186} See id.\textsuperscript{187} Id. at 687.\textsuperscript{188} Id.\textsuperscript{189} Id.\textsuperscript{190} Id. at 688.\textsuperscript{191} It is perhaps unsurprising that Justice Stevens, the author of the opinion in Roberson, also previously used the most strident of language in criticizing police officers who “violate” the Edwards rule. He declared continued interrogation in the face of an invocation to be “unlawful,” wrote that “the police conduct in this case violated respondent’s rights under the Fifth Amendment,” and decried the Court’s lack of concern for “the conduct of . . . lawbreakers” such as the police. Solem v. Stumes, 465 U.S. 638, 655 & n.1 (1984) (Stevens, J., dissenting). He also invoked Justice Brandeis’s dissent in Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), a Fourth Amendment case, in observing “the overriding importance of requiring strict obedience to the law by those official who are entrusted with its enforcement.” Stumes, 465 U.S. at 667 (Stevens, J., dissenting).
by at least one state court where the interrogating officer had no reason to know of an earlier invocation.192

Another clue that the Court has treated invocation as a police-conduct issue is the way in which the Court has addressed ambiguous statements by suspects. This issue arises in two different contexts. First, a suspect might make a statement that is ambiguous as to whether it is an invocation of the right to silence or counsel.193 Second, even after an unambiguous invocation of the right to counsel, a suspect might make an ambiguous statement that could be interpreted as re-initiating a discussion of the crime with the police, permitting them to re-interrogate with a valid Miranda waiver.194

From an admissibility standpoint, the focus would be on the suspect’s state of mind, specifically what he believed he was doing by making the statement. A suspect who believed he was invoking the right to counsel and was met with further interrogation might feel as if he was being badgered to abandon the right he had already invoked, which is what the Edwards rule was designed to guard against.195 Likewise, a suspect who has invoked that right and made further statements without the intention to re-initiate discussions with the police about the crime might also feel badgered when the police attempt to re-interrogate him in the face of his prior invocation.

Nevertheless, even from an admissibility standpoint, the Court would likely want to impose an objective standard. Although the ultimate test of compulsion might be thought to hinge on the content of the suspect’s mind, sole reliance on the suspect’s subjective impressions would leave courts with little to go on other than the defendant’s self-interested testimony as to whether he believed he was invoking his rights or re-initiating a conversation. Such reliance would virtually make the suspect the judge of his own case, in defiance of a fundamental precept of justice that is centuries old.196 It would also reward perjury. And, for good measure, it would throw us back into the morass of unpredictability wrought by three decades of coerced confessions jurisprudence. A suspect’s subjective mindset might be relevant but an objective standard is required, even under an admissibility model, to temper this unpredictability, to curb the temptations of

---

192. See People v. Young, 558 N.E.2d 1287, (Ill. App. 1990) (refusing to impute to Illinois police knowledge of invocation of right to counsel made to Wisconsin police because such an imputation “would impose an additional duty upon law enforcement authorities to investigate to whether the right had been asserted and to whom”).
195. As Justice Souter put it:
   When a suspect understands his (expressed) wishes to have been ignored (and by hypothesis, he has said something that an objective listener could “reasonably,” although not necessarily, take to be a request), in contravention of the “rights” just read to him by his interrogator, he may well see further objection as futile and confession . . . as the only way to end his interrogation.
   Davis, 512 U.S. at 472–73 (Souter, J., concurring in the judgment).
perjury, and to ensure more even-handed judicial decision-making,\footnote{Cf. Kinports, supra note 7, at 131-32 (noting that in "tort and criminal law ... the concept of objective reasonableness is utilized both to reflect community values and to enforce uniform standards of behavior," but adding that "[i]t is not obvious ... that these principles carry the same weight in criminal procedure jurisprudence" (footnote omitted)).} by holding the suspect’s subjective impressions to an objective measure of reasonableness.\footnote{Cf. Davis, 512 U.S. at 458-59 (using objective standard in part "[t]o avoid difficulties of proof")} Thus, the Court might ask whether a reasonable person would have understood the statement as an invocation or as re-initiation, as the case may be.

Yet, in the invocation context at least, the Court has adopted, not a “reasonable suspect” standard, but a “reasonable police officer” standard.\footnote{See id. at 459 ("[A] suspect ... must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."); see also Kinports, supra note 7, at 106-08.} Moreover, in both contexts, the Court has gone even further and imposed an unequivocality requirement in an effort to achieve utmost clarity for the police.\footnote{In a telling passage in Davis, 512 U.S. at 461, the Court justified this focus on the police: “Although the courts ensure compliance with the Miranda requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect.”} Thus, in Davis v. United States, the Court held that invocation must be unequivocal to be operative.\footnote{512 U.S. 452, 459 (1994) ("[T]he suspect must unambiguously request counsel."); see also Berghuis v. Thompkins, 130 S.Ct. 2250, 2260 (2010) (extending unequivocality requirement to invocations of the right to silence).} The Davis Court went beyond requiring “‘some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney,’”\footnote{512 U.S. at 458-59 (partly using objective standard “to avoid difficulties of proof”).} and required, in essence, a statement that can reasonably be construed only as such an expression.\footnote{See id. at 472 (Souter, J., concurring in the judgment) (characterizing majority as holding that, in order to invoke the right to counsel, the suspect must say “something that an objective listener [would] necessarily take to be a request”).} The Court justified this rule in terms of guidance for the police, observing that if it “were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, the clarity and ease of application [of Miranda] would be lost.”\footnote{Id. at 461 (plurality).} Likewise, in Oregon v. Bradshaw, a plurality of the Court wrote that an “ambiguous” statement by a suspect post-invocation will be deemed to constitute re-initiation if “[i]t could reasonably ... be[] interpreted by the officer as relating generally to the investigation.”\footnote{462 U.S. 1039, 1045-46 (1983) (plurality).} Or, to put it another way, the burden is on the suspect to be unequivocal that his statement does not relate to the case, or else he will be deemed to have re-initiated. Thus, law enforcement interpretation of statements as non-invocation and as re-initiation will be countermanded only if
unreasonable. In effect, we have a *Chevron* rule\(^{206}\) for the police.\(^{207}\) This great deference for reasonable police interpretations of suspect’s statements can be explained only if we view *Miranda* as governing police conduct, not as regulating admissibility.

In sum, it appears that our current jurisprudence on invocation is premised on a police-conduct model of *Miranda*. Of course, had the Court examined invocation through the lens of admissibility, we might still have something close to the *Edwards* rule. After all, *Edwards* and its progeny have a point that police re-initiation of interrogation following an invocation of the right to counsel might cause the suspect to eventually give in and waive his rights despite his earlier expression of a need to employ counsel in his dealings with the police.\(^{208}\)

One might imagine an equally robust *Edwards* rule that is phrased in terms of admissibility: a right to exclusion of post-invocation statements rather than a right to cut off questioning.\(^{209}\) But instead, the invocation cases generally show the police-conduct model at work.

4. Interrogation

Similar confusion was created by the Supreme Court in its pathmarking case on interrogation, *Rhode Island v. Innis*.\(^{210}\) There, the unarmed Innis was arrested on suspicion of having murdered a cab driver with a shotgun.\(^{211}\) He was given his *Miranda* warnings and he invoked his right to counsel.\(^{212}\) In the police car en route to the police station, two of the three officers present engaged in a


\(^{207}\) For an examination of judicial delegation to law enforcement, see generally Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407 (2013).

\(^{208}\) See, e.g., Minnick v. Mississippi, 498 U.S. 146, 150 (1990) (“*Edwards* is ‘designed to prevent police from badgering a defendant into waiving his previously asserted rights *Miranda* rights.’” (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990))); Smith v. Illinois, 469 U.S. 91, 98 (1984) (per curiam) (“In the absence of . . . a bright-line prohibition, the authorities through ‘badger[ing]’ or ‘overreaching’—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel’s assistance.”).

\(^{209}\) Indeed, on one occasion, the Court did frame the issue in terms of admissibility: the Court began its opinion in *Shea v. Louisiana*, 470 U.S. 51, 52 (1985), by declaring that the *Edwards* Court had “ruled that a criminal defendant’s rights under the Fifth and Fourteenth Amendments were violated by the use of his confessions obtained by police-instigated interrogation—without counsel present—after he requested an attorney” (emphasis added); see also Oregon v. Bradshaw, 462 U.S. 1039, 1054 n.2 (1983) (Marshall, J., dissenting) (“[U]nless the accused himself initiates further communication with the police, a valid waiver of the right to counsel cannot be established.”).

\(^{210}\) 446 U.S. 291 (1980). See Kinports, supra note 7, at 98 (observing the Court’s lack of clarity in determining whose perspective controls in defining interrogation).

\(^{211}\) See *Innis*, 446 U.S. at 293-94.

\(^{212}\) See id. at 294.
conversation regarding the missing murder weapon, commenting upon the danger created by the fact that a loaded shotgun might be lying around somewhere near a school for handicapped children.\textsuperscript{213} Innis interrupted and told them that he would lead them to the gun, which he then did.\textsuperscript{214} The gun and Innis’s statements leading the police to it were introduced against him at trial.\textsuperscript{215} Their admissibility hinged on whether the conversation between the two officers in front of Innis amounted to “interrogation” for purposes of \textit{Miranda}.\textsuperscript{216}

The Court held that no interrogation had occurred.\textsuperscript{217} The Court acknowledged that statements and actions, not just questions, could amount to the “functional equivalent” of “express questioning.”\textsuperscript{218} Interrogation, the court held, generally included “words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.”\textsuperscript{219}

Some language in \textit{Innis} suggests that the Court had the admissibility model of \textit{Miranda} in mind when it crafted this definition of interrogation. For one thing, immediately after it articulated this standard, it all but adopted the admissibility view by recognizing that \textit{Miranda} was primarily about how individual suspects subjectively experience custodial interrogation. It wrote that the

\begin{quote}
the definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the \textit{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.\textsuperscript{220}
\end{quote}

From this language one can surmise what the Court had in mind. The focus is on whether the suspect subjectively understood the police words or actions as exerting a pull on him for incriminating testimonial evidence. But, as with invocation, the standard cannot be entirely subjective. If it were, self-interested defendants would have every reason to testify falsely at suppression hearings that they felt this pull. An objective benchmark is therefore necessary to minimize the benefits of perjury. By testing the professed perceptions of the suspect against those of a reasonable person, a court can better determine whether the defendant’s suppression hearing testimony is true. And if a reasonable person in the suspect’s situation would have experienced the officer’s words or actions as

\begin{flushright}
\textsuperscript{213} See \textit{id.} at 294-95.  \\
\textsuperscript{214} See \textit{id.} at 295.  \\
\textsuperscript{215} See \textit{id.} at 295-96.  \\
\textsuperscript{216} See \textit{id.} at 298 (“The issue . . . is whether [Innis] was ‘interrogated’ by the police officers . . . .”). But see Kit Kinports, \textit{What does Edwards Ban?: Interrogating, Badgering, or Initiating Contact?}, 43 N. Ky. L. Rev. 361 (2016).  \\
\textsuperscript{217} See \textit{Innis}, 446 U.S. at 302.  \\
\textsuperscript{218} \textit{Id.} at 300-01.  \\
\textsuperscript{219} \textit{Id.} at 301 (footnote omitted).  \\
\textsuperscript{220} \textit{Id.}
\end{flushright}
exerting this pull, the police should know that as well, irrespective of whether they actually do. Thus, the good or bad faith of the police is irrelevant, except insofar as it sheds light “on whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response.”\footnote{Id. at 301 n.7.}

But the Court did not stop there. Immediately after the quote above, the Court continued with language that suggests it was viewing the interrogation issue through the lens of the police-conduct model. It wrote that “since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they \emph{should have known} were reasonably likely to elicit an incriminating response.”\footnote{Id. at 301-02.} Moreover, the Court continued, the actual mindset of the police is relevant in some cases: where the police have “knowledge . . . concerning the unusual susceptibility of a defendant to a particular form of persuasion.”\footnote{Id. at 302 n.8.}

This language evokes the police-conduct model of \textit{Miranda}. First, the Court expressed concern about police officers being “held accountable” for circumstances beyond their knowledge or control, a concern that makes sense only if we view \textit{Miranda}’s set of constraints primarily as a dictate for police officers, backed up by an exclusionary penalty. If the primary focus is on excluding as presumptively compelled statements taken under circumstances highly likely to have been viewed by the suspect as compelling, then holding police officers “accountable” is a non-issue.

Additionally, the Court’s caveat about police knowledge of the idiosyncrasies of individual suspects is a dead giveaway that the Court had the police-conduct model in mind. For the negative implication, of course, is that where a suspect has an “unusual susceptibility . . . to a particular form of persuasion” but the police know nothing about it, that idiosyncrasy is irrelevant to whether the police “should have known” their words or actions “were reasonably likely to elicit an incriminating response.” Based on this language, the reasonableness standard serves the purpose of ensuring that the police act reasonably, not of providing courts with an objective benchmark when determining questions of admissibility.

A simple hypothetical illustrates the point. Suppose the police arrest a murder suspect who, unbeknownst to them, is extraordinarily religious. Prior to rendition of \textit{Miranda} warnings, an officer comments that “God only knows” what happened to the victim. Assume that a person of ordinary religiosity would understand the comment for the offhand remark that it was intended to be. But the suspect experiences the remark, as would reasonable people with his level of religiosity, as a reminder that an omniscient God is already aware of his guilt,
that he will pay dearly unless he makes full absolution, and that it is in his interest to make a clean breast of things. He confesses.

On an admissibility view of Miranda, there is interrogation: the officer’s good faith—his “underlying intent”—is quite beside the point; “focus[ing] primarily upon the perceptions of the suspect,” this suspect experienced the comment as a “pull” for information; and judging this suspect’s experience based on that expected of his equally religious cohort, the comment was “reasonably likely to evoke an incriminating response.” By contrast, on a police-conduct view of Miranda, there is no interrogation: because the officer cannot be “held accountable” for the unseen idiosyncrasies of each suspect, excluding the unwarned confession in order to punish the officer and deter future misconduct makes little sense.

Innis, with language pointing in both directions, is arguably unclear on how such a case should be resolved. Yet its focus on what the officer “should have known” seems to dictate that there was no interrogation in our hypothetical. Indeed, only Justice Stevens in dissent seems to have advocated something along the lines of an admissibility approach by urging that the standard be whether the “police conduct or statements . . . would appear to a reasonable person in the suspect’s position to call for a response.” This standard would adopt “[t]he suspect’s point of view,” but subject it to a reasonableness standard in order “both to avoid the difficulties of proof inherent in a subjective standard and to give police adequate guidance.” That the Court rejected this standard strongly suggests that it was viewing interrogation through the police-conduct lens.

5. The Public Safety Exception

Another area where we might expect a sharp disjunction between application of the police-conduct model and the admissibility model of Miranda is the “public safety” exception to the Miranda rule. Pursuant to this exception, questions reasonably related to safety concerns can produce admissible evidence even if not preceded by warnings and waiver. If the Miranda rule is about police misconduct, the public safety exception, which hinge on the reason the police failed to give warnings, makes some sense: before branding such a failure

---

224. See Kinports, supra note 7, at 99 (observing that the Innis Court’s language about “‘focus[ing] primarily upon the perceptions of the suspect’ . . . is difficult to square with the literal language of the definition” (alteration added)).

225. See id. (observing that the way the Court applied its own standard in Innis suggests “a very literal construction, focusing on what the police knew or should have known”).

226. Innis, 446 U.S. at 311 (Stevens, J., dissenting); see also Kinports, supra note 7, at 98 (observing that Justice Stevens’s dissent advocated an approach to interrogation that focused on the suspect’s perceptions).

227. Innis, 446 U.S. at 311 & n.10 (Stevens, J., dissenting).

as misconduct, we would want to know what the reason for the failure was. But this reasoning has little place if we adopt an admissibility model. If the *Miranda* rule renders inadmissible the results of any interrogation not preceded by warnings and waiver because it treats those results as the product of pressures that compel the suspect to speak, it ought not matter that the police had good reason for creating those pressures.\footnote{229} In fact, we see these two models of *Miranda* at war in *New York v. Quarles*,\footnote{230} in which the Court carved out the public safety exception. There, police responding to a report of a rapist with a gun, confronted and arrested Quarles, wearing an empty shoulder holster, in a supermarket late at night.\footnote{231} Rather than administer *Miranda* warnings immediately, one officer asked him where the gun was and Quarles gave an incriminating response, leading police to the gun.\footnote{232} The Court, in an opinion by then-Justice Rehnquist, held that the statements and the gun were admissible.\footnote{233}

It is fairly clear that, in so doing, a majority of the Court adopted the police-misconduct model of *Miranda*. The Court characterized the *Miranda* rule as “[r]equiring *Miranda* warnings before custodial interrogation”\footnote{234} and as “requir[ing] police to give to suspects in custody” the warnings.\footnote{235} It reasoned that the *Miranda* majority weighed the cost of such a rule (lost convictions) against its benefits (enhanced protection for the Fifth Amendment privilege).\footnote{236} The *Miranda* Court “was willing to bear that cost.”\footnote{237} But when one adds to the cost of lost convictions the potential for public danger from a suspect unwilling to answer questions relating to that danger, the costs outweigh the benefits of giving the warnings. Treating *Miranda* as having demanded that police administer the warnings in most circumstances, the Court wrote that, in cases such as this one, “overriding considerations of public safety justify the officer’s failure to provide *Miranda* warnings.”\footnote{238}

The *Quarles* Court’s weighing of costs and benefits in determining whether to suppress statements was straight out of Fourth Amendment jurisprudence. The Court also drew an explicit parallel between this newly-created exception and the “exigency” exception to the general Fourth Amendment rule requiring a warrant for some searches and seizures,\footnote{239} which is not a rule of admissibility but instead renders otherwise unreasonable police conduct reasonable. And, to hammer the

\begin{itemize}
  \item \footnote{229} But see Mannheimer, *supra* note 177, at 1162-68 (advancing a different rationale for the “public safety” exception).
  \item \footnote{230} 467 U.S. 649 (1984).
  \item \footnote{231} See id. at 651-52.
  \item \footnote{232} See id. at 652.
  \item \footnote{233} See id. at 657-58.
  \item \footnote{234} Id. at 654.
  \item \footnote{235} Id. at 656.
  \item \footnote{236} Id. at 656-57.
  \item \footnote{237} Id. at 657.
  \item \footnote{238} Id. at 651 (emphasis added).
  \item \footnote{239} See id. at 653 n.3 (emphasis added).
\end{itemize}
point home, the Court expressly equated suppressing unwarned statements under these circumstances with “penalizing officers for asking the very questions” they need to ask to allay any safety concerns.\textsuperscript{240} This unmistakably calls to mind the Fourth Amendment paradigm whereby exclusion is the penalty for officer misdeeds.

It is true that the Court purported to refuse to look at the particular officer’s subjective motivations in a public-safety situation, instead focusing on whether “the questions . . . relate to an objectively reasonable need to protect the police or the public from an immediate danger.”\textsuperscript{241} Yet, the Court did so apparently out of administrative and evidentiary concerns, not doctrinal ones. The Court wrote that officers often “act out of a host of different, instinctive, and largely unverifiable motives.”\textsuperscript{242} This suggests a rule of deference to the officer’s judgment, not a rule strictly ignoring officer motivation. Moreover, the language the Court chose actually belies the notion that it was totally shunting police motivation off to the side. The Court wrote that \textit{Miranda} need not apply “to a situation in which police officers ask questions \textit{reasonably prompted} by concern for the public safety.”\textsuperscript{243} The best reading of the italicized language is that the questions must \textit{actually} be “prompted by” public-safety concerns, as well as being reasonably related to those concerns.\textsuperscript{244} Finally, the Court expressed confidence in officers’ ability to “distinguish . . . between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.”\textsuperscript{245} This passage is telling. First, it drops the word “reasonably” from the formulation. Second, it uses the word “designed,” suggesting that officer intent can matter.\textsuperscript{246} And, finally, the word “solely” indicates perhaps what was on the Court’s mind in purporting to refuse to look at officer motivation: as long as the questions were prompted, at least in part, by public safety concerns, the \textit{Quarles} exception would apply.

The dissenters in \textit{Quarles}, predictably, adopted the admissibility approach to \textit{Miranda}. Justice Marshall, joined by Justices Brennan and Stevens, argued that if the public safety is truly at risk, “the police are free to interrogate suspects without advising them of their constitutional rights,” noting that “nothing in the Fifth Amendment or . . . \textit{Miranda} . . . proscribes this sort if emergency questioning.”\textsuperscript{247} Rather, “[a]ll the Fifth Amendment forbids is the introduction of

\begin{footnotesize}
\textsuperscript{240}. See id. at 658 n.7; accord Loewy, \textit{supra} note 1, at 924 (pointing to this language in concluding that “[t]he Court analyzed [\textit{Quarles}] as a police practices case”).

\textsuperscript{241}. See \textit{Quarles}, 467 U.S. at 659 n.8.

\textsuperscript{242}. Id. at 656.

\textsuperscript{243}. Id.


\textsuperscript{245}. \textit{Quarles}, 467 U.S. at 658-59.

\textsuperscript{246}. See Kinports, \textit{supra} note 7, at 108-09.

\textsuperscript{247}. \textit{Quarles}, 467 U.S. at 686 (Marshall, J., dissenting).
\end{footnotesize}
coerced confessions at trial.”

Similarly, Justice O’Connor in her partial dissent wrote that “Miranda has never been read to prohibit the police from asking questions to secure the public safety.” The only question is whether the defendant or the prosecutor should “bear the cost of securing the public safety when such questions are asked and answered” and the defendant goes to trial: the defendant, through admission of the evidence or the prosecutor, through its exclusion. For Justice O’Connor, as for Justice Marshall, it was not a question of police conduct but of admissibility. Indeed, because Miranda governed admissibility only of testimonial evidence, she would have permitted admission of the gun.

**B. Confusion in Recent Cases**

In two recent cases, the Court split 5-4 over two important questions, one involving Miranda custody and the other involving Miranda waiver. Unfortunately, the majority in each case failed to set forth a coherent vision of Miranda, cultivating the confusion over which model of Miranda is the operative one.

1. Custody

We can also see a distinction between a police-conduct approach to Miranda and an admissibility approach when it comes to questions of custody. The Court has held that Miranda warnings are necessary only if the person being interrogated is also in custody. And a person is in custody only where there is “a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.” In determining whether there is custody, courts “apply an objective test.” The question is thus whether “a reasonable [person] in the suspect’s position would have understood his situation” as being under arrest or under arrest-like constraints.

Adoption of a “reasonable person” standard makes some sense from the standpoint of either model. Certainly, an objective standard is better if the goal is to guide police conduct, for the more objective the standard, the easier it will be...
for police to apply. And if the goal of *Miranda* is to guide police conduct, we are unjustified in blaming police and punishing them with exclusion of valuable evidence where the difference between custody and non-custody turns on the idiosyncratic, and perhaps hidden, characteristics of the suspect. But the admissibility model should favor an objective standard as well. As with invocation and interrogation, exclusive reliance on a subjective standard from the point of view of the suspect vis-à-vis the custody question would put too much weight on a defendant’s self-serving, possibly perjurious, testimony in determining admissibility of statements resulting from arguable custody. Holding the suspect’s subjective impressions as to custody to an objective measure of reasonableness furthers predictability and even-handed decision-making. Accordingly, an objective standard furthers both of *Miranda*’s twin goals of “giv[ing] concrete constitutional guidelines for law enforcement agencies and courts to follow.”

However, as often occurs in the law, courts must confront the degree to which the objective standard should be subjectivized. That is to say, granted that the relevant perspective is that of a “a reasonable [person] in the suspect’s position,” courts must determine which characteristics of the defendant to take into account when considering “the suspect’s position,” including race, age, gender, prior experiences, and so forth. A judge adopting a police-conduct view of *Miranda* presumably would want to strictly limit the characteristics to take into account, in order to keep *Miranda*’s guidance to the police as clear as possible. Certainly, such a judge would be extremely reluctant to take into account factors unknown and unknowable by police. By contrast, a judge who reads *Miranda* as a decision about admissibility should be more open to taking such characteristics into account. If the primary goals of the reasonableness standard are to reduce the benefit of perjury by the suspect and reduce the impact of subjective views of custody that could lead to unpredictability by comparing those views with some objective measure, those goals will be served if the suspect can point to some non-negligible subgroup that shares those views. Moreover, if the focus is on admissibility, and thus on whether the environment

256. See J.D.B. v. North Carolina, 131 S.Ct. 2394, 2402 (2011) (“The benefit of the objective custody analysis is that it is `designed to give clear guidance for the police.’” (quoting Yarborough v. Alvarado, 541 U.S. 652, 668 (2004))); see also Kinports, supra note 7, at 98 (observing that Court justified use of objective standard “by citing the importance of articulating a standard that could easily be administered by the police”).

257. See Berkemer, 468 U.S. at 442 n.35 (expressing preference for an objective test in part because “it is not solely dependent either on the self-serving declarations of the police officers or the defendant.” (quoting People v. P., 233 N.E.2d 255, 260 (N.Y. 1967))).


rose to a level that created compulsion within the meaning of *Miranda*, it should not matter even if the pivotal characteristic—say, intellectual disability—was unknown and unknowable by the police.

These views came into direct conflict, with frustrating results, in the recent case of *J.D.B. v. North Carolina*. In that case, thirteen year-old J.D.B. was questioned by a police officer in a conference room at his middle school for thirty minutes without benefit of *Miranda* warnings. J.D.B. confessed to several break-ins and his statements were later used against him in juvenile court. The North Carolina courts, using an objective standard that did not take into account J.D.B.’s age, held that he had not been in custody.

The Supreme Court reversed on the ground that where the suspect is a child, his age must be taken into account in determining whether he was in custody. The court, taking a common-sense approach to the question, reasoned that child is generally more likely to feel the pressure to submit to police authority than an adult would be in the same situation. In response to the objection that age can affect only the perception, not the reality, of custody because its operation “is internal” and “psychological,” the Court wrote that “the whole point of the custody analysis is to determine” the effect of such objective factors on a reasonable suspect’s psyche, and so the fact that age operates in this way as well is no objection at all. Moreover, these observations are generalizable to children as a class.

Given this reasoning, one would think that the Court was adopting an admissibility model of *Miranda*, which plays down the importance of what the police did or did not do or know. To the contrary, the Court seemed to approach the question from a police-conduct standpoint. It began its analysis by characterizing *Miranda* as having decreed that “[p]rior to questioning, a suspect `must be warned,’” and wrote that the warnings “are required” when a person is in custody. Moreover, the Court rationalized the objective custody analysis wholly in terms of its beneficial effects on police conduct. Its main selling point “is that it is `designed to give clear guidance to the police.’” This is important because “[p]olice must make in-the-moment judgments as to when to administer

---

261. See id. at 2399.
262. See id. at 2399-2400.
263. See id. at 2400.
264. See id. at 2399 (“[A] child’s age properly informs the *Miranda* custody analysis.”).
265. See id. at 2403 (“[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.”).
266. Id. at 2407 (quoting Br. For Resp at 20; Br. For United States as Amicus Curiae at 21).
267. See id. at 2404 (“[T]he differentiating characteristics of youth are universal.”).
268. Id. at 2401 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).
269. Id. at 2402.
270. Id. (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004)).
An objective analysis thus “avoids burdening the police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those traits affect each person’s subjective state of mind.” Thus, the J.D.B. Court focused on Miranda’s goal of “giv[ing] concrete constitutional guidelines for” the police, not its goal of providing such guidelines for courts. After all, the slow, deliberative process of determining custody after the fact—which courts, but not police, have the luxury of undertaking—is entirely consistent with taking into account numerous traits of the suspects, at least if they are widely shared with others. And if there were any doubt that the Court was taking a police-conduct view of Miranda, such doubt would be dissipated by the Court’s holding, in which it expressly limited the relevance of the suspect’s age to those situations where it is known, or at least knowable, by the police: “[W]e hold that, so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.”

The Court’s opinion thus seems equivocal. The rationale for taking age into account is that youths, generally speaking and as a class, subjectively experience encounters with law enforcement differently than do adults. Specifically, youth are more likely to believe they must submit to authority and less likely to believe they are free to go about their business. Moreover, given that the custody issue concerns not just whether the suspect feels free to go but the apparent degree of constraint on his freedom—it must arise to an arrest-like constraint to constitute custody—it might be said that youth are more likely to view an interaction with the police as being more serious as compared with similarly situated adults, thus implicating a greater degree of constraint. In addition, judges making the post hoc custody analysis can compare a particular youthful suspect’s experience against the expected reactions of a typical youth. Such a comparison acts as a hedge against both dissembling by the suspect on the stand and an honest and

271. Id.
272. Id.
274. Cf. J.D.B., 131 S.Ct. at 2416 (Alito, J., dissenting) (distinguishing questions of negligence for purposes of tort liability, which can import case-specific factors into the “reasonable person” analysis, because these “involve[] a post hoc determination, in the reflective atmosphere of a deliberation room”).
275. Id. at 2406 (majority opinion); see also id. at 2404 (“So long as the child’s age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances ‘unknowable’ to them, nor to ‘anticipat[e] the frailties or idiosyncrasies’ of the particular suspect whom they question” (quoting Berkemer v. McCarty, 468 U.S. 420, 430 (1984), and Yarborough v. Alvarado, 541 U.S. 652, 662 (2004) (citation and internal quotation marks omitted) (alteration in original))).
accurate, but atypical, assessment by the suspect of how he experienced his encounter.

But if the focus is on how suspects experience interactions with law enforcement, the limitation to traits known or knowable by the police makes little sense. For example, imagine a situation where a police officer confronts a person with an intellectual disability in a context where a person with no intellectual deficits would realize that no arrest-like constraints are in the offering. Yet the suspect might very well believe that his interaction with a police officer means that he is not only not free to leave, but that he is in serious trouble, and the typical intellectually disabled person might believe the same. Assume further, however, that the officer neither knows nor has reason to know of the suspect’s intellectual disability. Based on J.D.B., there would be no custody. Yet if the point of Miranda is to provide safeguards against compelled self-incrimination, and the intellectually disabled suspect feels the pressure of custody, and other similarly situated intellectually disabled suspects would as well, then the warnings should be required to dispel this compulsion and render his statements admissible. Whether the officer did the “right” thing by questioning without the warnings is quite beside the point. Thus, the J.D.B. Court attempted to ride both the police-conduct and the admissibility horse at once, with predictable results: a clear holding but a confused rationale.

2. Waiver

The dispute in another recent case, on Miranda waiver, also tells us much about how differences in whether one views Miranda as a rule of police conduct or as a rule of admissibility can dictate results in individual cases. Like J.D.B. and some of the Court’s earlier cases, it also shows that when a majority of the Court fails to articulate a coherent view of Miranda, the results are muddled and unsatisfying.

Berghuis v. Thompkins involved a conviction for murder in Michigan. Thompkins had been interrogated while in custody after the shooting. Police read him the Miranda warnings at the outset, and had Thompkins read aloud one warning, informing him that at any time during the interrogation, he could exercise his right to remain silent or to have an attorney present. However, Thompkins neither expressly invoked his rights nor expressly waived them. Nonetheless, police interrogated him for about three hours, during which time

276. This hypothetical is taken from Justice Alito’s dissent, except that the officer neither knows nor has reason to know of the disability. Cf. id. at 2414 (Alito, J., dissenting).
277. See also Jackson, supra note 274, at 9 (asserting that J.D.B. “managed only to compound the confusion”).
278. 130 S.Ct. 2250, 2257-58 (2010).
279. See id. at 2256.
280. See id.
281. See id.
Thompkins was largely unresponsive, but gave a few brief answers, such as “yeah,” “no,” and “I don’t know,” and by nodding his head. Two hours and forty-five minutes into this interrogation, one officer asked whether Thompkins “pray[ed] to God to forgive [him] for shooting that boy down.” Thompkins said that he did, a damning admission that was later used against him.

One question for the Supreme Court on habeas review was whether, by effectively remaining silent for so long before providing this answer, Thompkins had invoked his right to silence. Thompkins’s claim was that he had “‘invoke[d] his privilege’ to remain silent by not saying anything for a sufficient period of time, so that interrogation should have ‘cease[d].’” The Court acknowledged that Miranda and its progeny seem to command that interrogation must “cease” when either the right to silence or to counsel is invoked by the suspect and that a suspect in custody has a “right to cut off questioning” that can be exercised by invoking either right. Here, however, the Court held that invocation of the right to silence, just like invocation of the right to counsel, must be “unambiguous” to be operable. Thompkins’s silence thus did not amount to invocation.

The Court next turned to the second issue: whether Thompkins validly waived his Miranda rights. The crux of this issue was whether the waiver had to be obtained before police could even interrogate Thompkins or whether waiver could come about during the interrogation, in the answers to police questioning, as occurred here. The unusual temporal element at work in Thompkins—an arguable waiver coming mid-interrogation—starkly frames the disjunction between the two models of Miranda. If Miranda instructs police what they must do in order to conduct custodial interrogation, then both warnings and waiver must precede the interrogation. Thus, a police-conduct model would forbid police from interrogating a suspect in custody without following the

282. Id. at 2256-57 (internal quotation marks omitted).
283. Id. at 2257 (internal quotation marks omitted) (alteration added).
284. See id.
285. See id. at 2259-60.
286. Id. at 2259 (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966) (alteration in original)).
287. Id. at 2260. See Edwards v. Arizona, 451 U.S. 477, 482 (1981) (“If [the suspect] requests counsel, ‘the interrogation must cease until an attorney is present.’” (quoting Miranda, 384 U.S. at 474)); Fare v. Michael C., 442 U.S. 707, 709 (1979) (“[I]f the accused indicates in any manner that he wishes to remain silent or to consult an attorney, interrogation must cease . . . .”); Michigan v. Mosley, 423 U.S. 96, 101 (1975) (“[T]he interrogation must cease’ when the person in custody indicates that ‘he wishes to remain silent.’” (quoting Miranda, 384 U.S. at 473-74 (alteration added))).
288. See Miranda, 384 U.S. at 474; see also Mosley, 423 U.S. at 103.
290. Thompkins, 130 S.Ct. at 2260.
291. Id.
292. See id.
293. See id. at 2263 (“Thompkins . . . argues that . . . the police were not allowed to question him until they obtained a waiver first.”).
warnings-and-waiver protocol. By contrast, an admissibility model would look instead to whether waiver occurred at some point, irrespective of whether that point was before or during the interrogation, rendering statements made after that point admissible. If all 
Miranda dictates is the steps that must be taken to secure the admissibility of statements, then even a mid-stream waiver is valid, so long as it precedes—or even occurs simultaneously with—the statements.

The Court held that Thompkins’s mid-interrogation waiver was valid.294 Unsurprisingly, the Court twice framed the Miranda requirement of waiver as a rule of admissibility. At the outset of its analysis of whether Thompkins’s answer to a question could constitute a waiver, it wrote: “[T]he accused’s statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused ‘in fact knowingly and voluntarily waived [Miranda] rights.’”295 And in the course of rejecting Thompkins’s claim that waiver had to occur before interrogation, the Court wrote: “In order for an accused’s statement to be admissible at trial, police must have given the accused a Miranda warning.”296

But there is considerable tension between how the Court has addressed invocation and how it addressed waiver in Thompkins. And the tension stems again from confusion over whether Miranda’s primary focus is police conduct or admissibility. The premise of the invocation cases, up to and including Thompkins, is that a suspect in custody has an enforceable right, which need only be invoked by him, to avoid interrogation.297 This is the police conduct model of Miranda at work: police may not interrogate in the face of an invocation.298 Yet Thompkins held that a valid waiver of the right to silence and the right to counsel can come at any time during the interrogation. Again, this is a result of the adoption of the admissibility model of Miranda.

Notice the tension. The invocation cases say that the suspect has a Miranda right to avoid interrogation. All a suspect need do to avoid questioning before

294. See Thompkins, 130 S.Ct. at 2264 (“[T]he police were not required to obtain a waiver of Thompkins’s Miranda rights before commencing the interrogation.”).
295. Id. at 2260 (quoting Butler v. North Carolina, 441 U.S. 369, 373 (1979) (alteration in original)).
296. Id. at 2264.
297. See Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) (“[B]efore a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the suspect himself initiates dialogue with the authorities.” (internal quotation marks omitted)); Wyrick v. Fields, 459 U.S. 42, 45-46 (1982) (per curiam) (“[O]nce a suspect invokes his right to counsel, he may not be subjected to further interrogation until counsel is provided . . . .”); Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (“[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him . . . .”); see also id. at 488 (Burger, C.J., concurring in the judgment) (characterizing Miranda as having established a “right to be free from interrogation”); Rhode Island v. Innis, 446 U.S. 291, 309 n.5 (1980) (Stevens, J., dissenting) (“[M]iranda protects a suspect [who has invoked the right to counsel] from any interrogation at all.”).
298. See Wyrick, 459 U.S. at 49 (describing rule propounded by court below as “an unjustified restriction on reasonable police questioning”).
any interrogation begins is invoke that right. But if that is true, and if adhering to 
_Miranda_ depends on obtaining a waiver, as _Miranda_ itself said, then the _Miranda_ 
right to avoid interrogation can logically be waived _only before interrogation 
begins_. Otherwise, the right has been violated.

The _Thompkins_ Court attempted to resolve this tension by splitting the 
warnings from the waiver. In essence, the warnings must be given prior to 
interrogation but the waiver need not be obtained until later. It wrote that 
“_Miranda_ . . . prevents [the police] from interrogating suspects without first 
providing them with a _Miranda_ warning,” because the “main protection” of that 
decision “lies in advising defendants of their rights.”299 Later in the opinion, the 
Court wrote that “[i]n making its ruling on the admissibility of a statement made 
during custodial interrogation, the trial court . . . considers whether . . . waiver 
has been established.”300 The Court appears to have implicitly adopted the 
position of the United States as amicus curiae that _Miranda_ governs police 
conduct insofar as it requires warnings but it governs admissibility insofar as it is 
requires waiver: “Only the warnings are ‘an absolute prerequisite to 
interrogation’; the warnings plus waiver are ‘prerequisites to the admissibility of 
any statement made by a defendant.’”301

Clever as this argument is, it does not resolve the inconsistency between 
_Thompkins_ and the invocation cases. Waiver and invocation are simply two sides 
of the same coin.302 Either a suspect in custody has a right to avoid interrogation 
or he does not. If he does, that right can be invoked before interrogation but, by 
like token, it must be waived before interrogation can begin. Conversely, if he 
does not have that right, he must be prepared to sit through an unwanted 
interrogation, irrespective of whether he has invoked, waived, or done nothing. 
If he has invoked, anything he says cannot be admitted into evidence against him. 
If he has waived, of course, anything he says can be used against him. And if he 
does nothing, anything he says will be deemed a waiver of his right to silence and 
to an attorney. But he either has the right to avoid questioning or he does not, for 
purposes of both invocation and waiver.303 Either the invocation cases are right 
or _Thompkins_ is. But they cannot both be right.

IV. CONCLUSION

Fifty years after it was decided, the Court still has not determined whether 
_Miranda_ set forth a rule of police conduct or a rule of admissibility. Instead, it

299. _Thompkins_, 130 S.Ct. at 2262.
300. _Id._ at 2264 (emphasis added).
301. Br. for United States as Amicus Curiae, Berghuis v. _Thompkins_, No. 08-1470 (OT 2009), 
at 20-21 (quoting _Miranda_ v. _Arizona_, 384 U.S. 436, 471, 476 (1966)).
302. See _Kinports_, _supra_ note 7, at 110 (characterizing invocation as “the flip side of waiver in 
some sense”).
303. See _Sacharoff_, _supra_ note 184, at 580 (observing that “to require that the [right] not to be 
questioned be waived before the police may interrogate[,] would bring theoretical order to the 
conflict of waiver and invocation requirements”).
generates fractured decisions premised on both models, it shifts back and forth from one model to the other depending on the issue involved, and it uses language pointing to both models in the same majority opinion, and even—as in *Innis* and *Roberson*—within the same paragraph. A choice of one or the other models could be justified based on the language of *Miranda*. On the other hand, it is difficult to justify the erratic and unprincipled path the Court has taken.304

Notice that the choice between the police-conduct model and the admissibility model is not the choice between a pro-prosecution and a pro-defense reading of *Miranda*. In *Quarles*, the police-centered view of *Miranda* advanced in the majority opinion resulted in a pro-prosecution result: because the police were blameless for asking questions related to an exigency, the questioning was constitutionally acceptable and the resulting evidence was admissible. But in *Patane*, the plurality opinion adopted the admissibility model of *Miranda*, by which police blame for not reading the warnings was quite beside the point, because violations of the Self-Incrimination Clause or even *Miranda* by the police was deemed a legal impossibility. But again, the plurality reached a pro-prosecution result, permitting physical evidence to be admitted. Likewise, sometimes the admissibility model tends toward a pro-prosecution result, as with the waiver issue raised in *Thompkins*, and sometimes it tends toward a pro-defense result, as with the custody question raised in *J.D.B*. And adoption of one or the other does not necessarily give one the correct answer in a particular case. Recall that in the impeachment cases, *Harris* and *Hass*, the police-conduct model was pressed into service by both the pro-prosecution majority and the pro-defense dissent.

Though the reasoning in some of these cases might have changed drastically had the Court adopted a single, coherent approach to *Miranda*, the results need not have. But clarifying whether *Miranda* is really about police conduct or instead about admissibility would set the Court on the path of asking the right questions. And unless one asks the right questions, one has little hope of getting to the right answers.305

---

304. See Kinports, *supra* note 7, at 110 ("The Court[*s] habit of inexplicably shifting perspective from case to case—or of hiding the perspective it views as controlling—cannot be justified." (footnote omitted)).

305. See Felix Frankfurter, Book Review, *A Symposium on Unraveling Juvenile Delinquency*, 64 Harv. L. Rev. 1022, 1023 (1951) ("The likelihood of getting on the road to right answers . . . is very slim unless the right questions are asked."); see also Loewy, *supra* note 1, at 939 ("Perhaps of greatest importance, the Court ought to understand what it is doing.").