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HAPPY BIRTHDAY MIRANDA
AND HOW OLD ARE YOU, REALLY?

George C. Thomas III*
Amy Jane Agnew**

I. INTRODUCTION

Some folks (not my students) remember that the great comedian Jack Benny celebrated his 39th birthday every year until he died at the age of 80. Miranda v. Arizona,1 not much of a comedian, has pulled off the opposite trick. Though few have noticed, including Chief Justice Earl Warren when he wrote the Miranda opinion, a kind of Miranda warning first surfaced in the late 1700s in England. Miranda warnings appeared in almost modern form in an 1829 New York statute.2 The New York version was quickly copied by Missouri (1835) and Arkansas (1838).3 The mystery here is two-fold: (1) why Miranda warnings developed so early; and (2) why they disappeared only to re-appear in Miranda v. Arizona. In this paper, we will focus on the first mystery.

II. MIRANDA’S EARLY ROOTS

Beginning in 1554, English suspects named in a criminal complaint had to appear before a magistrate and had to answer questions about the crime.4 Those

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* Rutgers University Board of Governors Professor of Law & Judge Alexander P. Waugh, Sr. Distinguished Scholar. I wish to make clear the credit due for the ideas in this paper. As far as I know, Wes Oliver, Duquesne University School of Law, is the modern scholar who “discovered” the 1829 New York “Miranda” statute. See Wesley Oliver, Magistrate’s Examinations, Police Interrogations, and Miranda-Like Rules in the Nineteenth Century, 81 TULANE L. REV. 777 (2007). Richard Leo and I disagree with Wes’s interpretation of the motivation of the New York legislature in enacting the statute. See George C. Thomas III & Richard A. Leo, CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND 78-80 (2012). What makes this paper an original contribution, however, is the proof that Edward Livingston is the probable originator of the notion that suspects examined by magistrates should be given the warning of the right not to answer questions and the right to the assistance of counsel. This idea, and the laborious archival research needed to support it, is exclusively that of my co-author, Amy Jane Agnew. Both authors are extremely grateful to Mike Widener, Rare Book Librarian at The Lilian Goldman Law Library at Yale Law School. Without his assistance and access to the complete volumes of the Reports of the New York Commissioners (Footnote 71), it would have been impossible to attribute the Magistrate’s Warning to Edward Livingston.

** Rutgers Research Fellow in Constitutional Rights.

4. See 1 & 2 Phil. & Mar. c. 13 (1554) (examination prior to bail decision); 2 & 3 Phil. & Mar. c. 10 (1555) (examination prior to committal where bail denied).
answers were taken down by the magistrate or his clerk, who had to certify the answers to the criminal court to be "given in evidence against the offender." As police would not appear for almost another three hundred years, the magistrate’s function was to gather evidence and get the case ready for trial; most criminal cases were prosecuted by the crime victim, rather than the crown’s prosecutor, which made the magistrate and his role critical to securing convictions of guilty defendants.

At least by the early 1700s, however, English judges became aware that accused suspects might make involuntary statements to magistrates. The earliest reference to this risk is found in Hale’s *Pleas of the Crown*, published in 1736. Hale cautions justices of the peace to testify that the prisoner confessed to them “freely and without any menace, or undue terror imposed upon him.” Hale’s *Pleas of the Crown* was not published until fifty years after his death in 1676. The passage about prisoners confessing “freely” might have been added by the editor of the 1736 volume, a well-known lawyer named Sollom Emlyn. But the passage says that Hale saw cases where defendants obtained acquittals by disavowing their confessions, suggesting that he wrote it. Sollom Emlyn claims on the title page that the treatise was “published from his Lordship’s Original Manuscript . . . . To which is added A Table of Principal Matters.” If one takes Emlyn at his word, he added nothing of substance. Although, the earliest case we have found that discussed the voluntariness of a confession was in 1677, a year after Hale died, but that does not mean earlier cases do not exist. Hale was appointed Chief Justice of the King’s Bench in 1671 and could have heard cases in which justices granted acquittals following successful challenges to confessions made to magistrates.

By 1813, William Dickinson, a prominent English treatise writer, identified a “duty of the magistrate to apprise the prisoner that his examination may be produced on his trial, and to give him a reasonable caution, that he is not required to criminate himself.” A more elaborate version of Dickinson’s warning appears in the Sir John Jervis Indictable Offences Act of 1848, which standardized the duties of justices of the peace in serious criminal cases. Section 18 of Chapter 42 of the Act required magistrates to read the depositions

6. Id. at vol. 2, 284.
8. Id. at vol.1, title page.
taken from other witnesses to the suspect and then to say: “Having heard the Evidence, do you wish to say anything in answer to the Charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in Writing, and may be given in Evidence against you upon your Trial . . . .” While it is tempting to suggest a natural development from the 1554 requirement that magistrates question subjects through Hale and the Old Bailey cases to Dickinson and Parliament’s 1848 Act, the appearance of a magistrate’s warning in an 1829 New York Statute calls that natural sweep into question.

III. NEW YORK’S “MIRANDA” STATUTE

Why would the New York legislature be twenty years ahead of Parliament in mandating that magistrates warn suspects that their confessions can be used against them at trial? More fundamentally, the 1829 New York Code also contained a requirement that the suspect be advised of his right to consult with counsel prior to the examination and to have counsel present when the magistrate questioned the suspect. No reference to counsel is made in the English treatises or the act of Parliament of 1848. Even if New York legislators copied the duty to warn from Dickinson, from whence came the notion that the suspect had a robust right to counsel when being questioned by the magistrate? There is a first-rate mystery here.

In Confessions of Guilt: From Torture to Miranda and Beyond, Richard Leo and I speculated that the proximate cause of the New York “Miranda” statute was a remarkably self-aggrandizing lawyer named John Graham. In 1787, seven months before the United States Constitution was created, New York adopted by statute the English requirement that suspects answer questions posed by a magistrate. In an 1823 New York Mayoral Court case, Hiram Maxwell was accused of “stealing a horse and a gig, valued at $225.” Graham represented Maxwell and objected to the admission into evidence of statements

12. Upcoming work by the authors will demonstrate that the source of the New York warnings statute is also the source of the English act.

A gig was a formal cart, usually equipped with two oil lamps. For more on the New York City Mayor’s Court, see Richard B. Morris, “The New York City’s Mayor’s Court” in Courts and Law in Early New York: Selected Essays (Leo Hershkowitz and Milton M. Klein, eds., National University Publications, 1978).
Maxwell made when examined by a magistrate. Graham argued that suppression was required because of the failure of the magistrate to warn Maxwell of his right not to answer and his right to counsel. Graham’s colorful argument goes on for 16 pages. It begins: “There is evil in the city. —Evil did I say? Yes! an evil greatly to be deprecated. I allude to the mode and manner practised in taking the examinations of persons charged with crime . . . .”

To support his position, Graham made a sophisticated constitutional argument based on the New York Constitution of 1821, which became effective a month prior to Maxwell’s case. New York’s 1777 Constitution included a right to counsel “at trials for impeachment or indictment,” but no explicit right against compelled self-incrimination. A state bill of rights, ratified in 1787, also failed to specify a right against compelled self-incrimination. But the Constitution of 1821 included, in Article VII, section 7, a right to counsel at trial and a right not to “be compelled, in any criminal case, to be a wit-ness against himself.” Graham argued that because of the new constitution, “A new era has commenced: the state of New-York, on the first day of January, was regenerated, was born again.”

The new constitution, Graham argued, required “a new system” of examining prisoners. Specifically, by pairing the right to counsel with the right against compelled self-incrimination, in the same sentence, the 1821 constitution created a right not to be questioned by a magistrate without knowing that one had both the right to consult counsel and the right not to answer questions. If one substitutes “police” for “magistrate,” this is precisely the holding in Miranda.

Here is the Graham formulation of what he thought the New York Constitution required when a magistrate was examining a prisoner:

1. Prisoner, you are entitled to counsel.
2. Your confession must be free and voluntary, without fear, threats, or promises.
3. You are not bound to answer any question which may tend to criminate yourself.

18. Maxwell’s case was heard February 3, 1823. The 1821 New York Constitution became effective December 31, 1822. See N.Y. CONST. of 1821, art. IX, §. 1.
19. N.Y. CONST. of 1777, art. XXXIV, http://www.nhinet.org/ccs/docs/ny-1777.htm (last visited April 13, 2016). Thomas Davies thinks that a right against compelled self-incrimination might be implicit in a prohibition of the creation of courts that proceed other than “according to the course of the common law.” Email from Davies to George Thomas, March 5, 2008.
23. Id.
4th. Whatever you confess against yourself, may be made use of on your trial in aid of your conviction. 24

Two accounts exist of the Maxwell case. One is contained in the monograph Graham published himself that also included the letters Graham received in praise of his argument. In that account, Graham claims that the judge stated that he “agrees with Doctor Graham, in most of the points which he has taken on the subject of examinations and confessions taken in the police office; but as the examination now before the court appears to have been voluntarily made by the prisoner . . . the court will permit it to be read to the jury.” 25 However, this rendition does not synch with that of Jacob Wheeler, the nominative reporter who included the case in his Criminal Recorder. Wheeler reported that Graham indeed gave the fiery speech and suggested the Magistrate’s Warning, but that the judge “knew of no law to compel the magistrate to caution the prisoner that his examination ought to be free, or that it would be read in evidence against him, or that it ought to appear on the face of the depositions.” 26 Nowhere in Wheeler’s Reporter do the judges agree with John Graham that a principle of law demands the Magistrate’s Warning. In any event, Maxwell’s statements were read to the jury, which “found the prisoner guilty, without leaving the box.” 27 suggesting why Graham worked so hard to keep the answers from the jury.

After losing the Maxwell case, it was important to Graham to convince the public that other imminent legal thinkers did agree with him. Affixed to his published version of the Maxwell case, including his argument for a Magistrate’s Warning, Graham presented twenty-three letters he had received from venerable lawyers, statesmen and philosophers. 28 From the text of the letters, it seems that

24. Id. at 13.
25. Id. at 23-24. The Court was presided over by one Judge, called the “Recorder,” and two aldermen.
27. Id. at 166, People v. Maxwell.
28. The letters of support were from: John Adams (former President); Thomas Jefferson (former President); John Jay (former Governor of NY); Morgan Lewis (former Governor of NY and Chief Justice of State); DeWitt Clinton (former Governor of NY); Major General Andrew Jackson; John Marshall (Chief Justice of the Supreme Court); James Kent (Chancellor to State of New York); Cadwallader D. Colden (former Mayor of New-York City, Congressman); Thomas Addis Emmet (former AG of New York); Josiah Ogden Hoffman (former Recorder City of New-York; former AG of New York); Pierre C. Van Wych (former Recorder City of New York; former DA for City and County of NY; partner of John Graham’s brother in practice); David B. Ogden (Lawyer); John Anthon (Lawyer); William Sampson (Lawyer); David Graham (Lawyer and John Graham’s Brother); Maturin Livingston (Judge of Common Pleas in Dutchess County; former Recorder of City of New York); Samuel L. Mitchell (former U.S. Congressman and Senator); David Hosack; Ambrose Spencer (former Chief Justice of NY Supreme Court); Reverend John M. Mason (President Dickinson College); Reverend John Knox; and Reverend Chauncy Lee. Ironically, DeWitt Clinton had opposed the Constitutional convention and James Kent and
Graham sent out copies of his oral argument with requests for feedback on February 22-23, 1823, just two weeks after having lost Maxwell’s case.29

John Adams, who had defended clients against British persecution, was perhaps the strongest in his support of Graham’s argument.30 In Adams’s view, the only justification for a “personal examination” of an accused “before a magistrate” was to provide “an opportunity of being witness for himself in his own favour.” But “no insidious questioning ought to be put to him, by which he may be betrayed into any confession of any fact that may discover his guilt, if he is guilty. His examination ought to be public, and he ought to be allowed counsel, if he can have it.” John Marshall noted that Virginia did not follow New York in requiring the English form of magistrate examination, but Marshall said, “[W]here the contrary practice prevails, it would seem proper that it be regulated by principles you lay down.” 31

However, most of the responses to Graham’s self-published monograph on the Magistrate’s Warning were nothing more than perfunctory thanks to Graham for his letter. While Graham had a colorful past as a criminal defense attorney, nothing suggests he was a great legal thinker or legal reformer. We now believe the Thomas-Leo book was incorrect in concluding that it was John Graham who came up with the idea of Magistrate Warnings. His published works suggest a man continually striving for public recognition and, perhaps, reaching for fame beyond his abilities. He started a law practice in Rutland, Vermont in 1785 and practiced there until 1794.32 In 1794, Governor Chittendon sent him to England to try and arrange the consecration of Vermont’s bishop elect in England, but some sources suggest his trip was also to flee lawsuits and debt to an ex-wife.33 The Vermont Episcopal community wanted their new bishop consecrated by the Bishop of Canterbury or the Bishop of York in England, rather than by a collection of three American bishops in the United States.34 While their plea was ostensibly based on convenience because their bishop-elect was in England, it

Ambrose Spencer were delegates to the Convention, but refused to sign the new Constitution of 1821.


30. Id. at 25-6.

31. Id. at 37 (italics removed).


34. Graham argued that An Act of Parliament from 1786 gave power to the Bishops of England to consecrate American Bishops. The Archbishop of Canterbury (who proposed and implemented the Act) corrected Graham’s misconceptions. The Act was meant to allow for the consecration of three American Bishops, who thereafter would consecrate all further American Bishops under the College of Bishops of America. Id. at 19-22.
seems the true objective was to protect church lands owned by the Protestant Episcopal Church in Vermont from the post-Revolution reordering that might make the lands subject to claims of the Vermont Legislature or the College of Bishops of America. Graham utterly failed at arranging the Vermont bishop’s consecration in England, despite spending several months there arguing his cause. He published a paper setting out his failure to achieve the desired outcome in the bishop case. When he returned from England in 1795, he arranged a position as clerk with Senator Stephen Bradley of Vermont in his Washington D. C. office. But, within a year Graham and Bradley had a severe falling out which ended with Graham fleeing once again, this time to Philadelphia, where he suffered a nervous breakdown. His brother, David Graham, a successful lawyer in New York City, collected John and brought him to New York to work in his office. In New York, Graham continued to publish documents memorializing his arguable failures, an odd habit that he would follow in years to come.

In 1811, Graham published a collection of narratives of some of his criminal cases. Of the twenty-three cases in that monograph, he lost fifteen. One supposes he thought his arguments worth preserving in any event. In one case, he sought a new trial for a client convicted of stealing a turkey. Graham moved to vacate his client’s conviction by contending that a dead turkey—whose head, wings, and feet had been removed—is not a turkey. He argued that “instead of its being a turkey, it was only the skeleton or dead body of a turkey. This I take to be sound logic; since it could not fly, having no wings; and having no head, it could not see; and having no toes, it could not walk . . . . Ergo, it cannot be a turkey, as charged in the indictment, but must be considered a dead carcass . . . .” His motion for a new trial was denied.

Other losses included defending a client charged with assault and battery on the ground that the victim had been working on the Sabbath and thus was “literally and truly in the service of the devil.” He defended a slave against a charge of bigamy on the ground that a slave, who had no right to make “any civil contract,” could not validly marry and thus could not be guilty of marrying twice. Part of his defense was an attack on slavery: Slavery is the evil, Graham

35. A True Copy of the Proceedings of John A. Graham, Esq., LLD, supra, 12.
36. See supra, footnote 33.
39. While in England, Graham may have picked up the English barristers’ habit of publishing narratives of trials and circulating them as a form of advertisement.
40. Graham at 34, People v. James Bluet.
41. Id. at 48, People v. Sebray Bogert.
42. Id. at 57, People v. Williams.
said: "Make the slave free—there is the remedy." He was, of course, correct on the slavery issue, but the jury convicted on the bigamy charge.

While Graham himself seemed charmed by his own orations, nothing suggests he was particularly brilliant or capable of developing new constitutional protections by examining and extrapolating from the newly-ratified New York Constitution. Indeed, Graham’s suggestion of the Magistrate’s Warning in 1823 seems to spring from the mind of a salesman, not a legal scholar. But another legal mind with unquestionable talent and learning had been slowly and methodically revising the laws of the Territory of Orleans (and later Louisiana) since 1805. Edward Livingston, the eleventh child of Judge Robert R. Livingston of New York, drafted a simplified code of civil laws and procedure for the Territory of Orleans and published it in 1807. After Louisiana gained statehood in 1812, Livingston, Louis Moreau-Lislet, and Pierre Derbigny were paid $3,500 each to translate the Spanish code, Partidas, for use by the state legislature, courts and lawyers. At that point, the state of the law in Louisiana was a serious muddle. The adopted Louisiana Constitution of 1812 only read, “all laws now in force in this territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed by the legislature.” This, in effect, meant that the state courts were operating under French and Spanish laws with random injections of American common law.

On March 14, 1822, the Louisiana State Legislature chose three jurisconsults—Livingston, Derbigny and Moreau-Lislet—to revise the Civil Code, prepare a Commercial Code, and formulate a “treatise on the rules of civil actions and a system of practice to be observed by all the courts.” But even before commencing work on the Civil and Commercial Codes, Livingston was busily working on a proposed Penal Code. Just the day before, March 13, Livingston submitted his preliminary report to the General Assembly relative to the progress of his work on the Penal Code. This was almost eleven months before Graham’s argument in the Maxwell case.

43. Id. (emphasis in original).
44. In 1805, an Act was passed charging Livingston with the writing of a simplified code of civil practice and procedure for the Territory of Orleans. Territory of Orleans Acts, 1805 at 144-88, 210-60.
46. Louisiana Acts, 44-46 (1819); Moreau-Lislet, Louis and Carleton, The Laws of Las Siete Partidas, which are Still in Force in the State of Louisiana (Henry, trans., New Orleans, 1820).
47. La. Const. of 1812, Art. IV, § 11.
49. Edward Livingston. Report Made to the General Assembly of the State of Louisiana, on the Plan of a Penal Code for the Said State (New Orleans, 1822); Louisiana House Journal, 76-7 (French ed., 1822). The Assembly also ordered that two thousand copies be printed – one thousand in English and one thousand in French. Id. at 108.
In this first Report to the General Assembly on his proposed Penal Code, Livingston published an allusion to his Magistrate Warning. In explaining the details of the fourth proposed book on criminal procedure he wrote, “It regulates the mode in which complaints and accusations are to be made; designates the proper persons to receive them, and directs their duty in conducting the examination; taking evidence on the complaint and ordering the arrest.” Later in the text Livingston added, “The Fourth [book] is nearly complete.”

In his Introductory Report to the Code of Procedure, which was presented to the Louisiana General Assembly, Livingston shared his thought process on the necessity of the Magistrate’s Warning:

After weighing these and other arguments on both sides of this important question, I came to this conclusion, that it would be unwise to abandon the advantage to be derived from an examination of the accused; but at the same time, that justice required us to reduce to their lowest term the two inseparable evils attached to this mode of proceeding, and I thought that this might be effected by restricting the magistrate to a prescribed form of interrogatory, so drawn that no innocent person could be entrapped by answering them; while, at the same time, evasions or untrue answers might frequently lead to the detection of guilt; and to avoid inaccuracies in recording the answers, the interrogatories are pointed only to such simple circumstances as can be detailed with the greatest simplicity of language, and they are not considered as complete until they have been signed by the party and corrected by him, so as to express exactly the idea he meant to convey; if we add to this that he has the assistance of counsel, and has heard what the witnesses against him have deposed, it will be found that the accused is in no danger of being circumvented or intimidated to his prejudice in the preparatory examination. He is first apprized that although he may refuse to answer the interrogatories that are about to be put to him, or answer them in any way he may think fit, yet a false answer, or his refusal to give any, must operate against him on the trial. This consequence is inevitable, and under our present practice, where he is expressly told that he is at perfect liberty to answer or not, as he pleases, which implies that no injury to him can result from his silence, the same result is produced; and the prisoner is invited to silence by being assured that it will do him no injury, when in the nature of things the jury cannot but infer guilt from false representations, or from silence, without any motive but that of concealing the truth; either of which circumstances, when they occur, are given in evidence according to our present practice. It was, therefore, thought, that justice to the prisoner as well as to the public, required that full notice should be

50. Edward Livingston, Report Made to the General Assembly, supra, at 84.
51. Id. at 91.
given of the deductions that would be drawn from his silence or evasions.\textsuperscript{52}

We believe that this report was written before 1823.\textsuperscript{53} If so, the italicized part in the quotation above is the earliest reference we have seen to the idea that a suspect should have counsel present as protection against the pressure of the magistrate’s examination. On May 1, 1821, Livingston published a “Circular in the Relation to the Code,” which he sent to the Governors of each state for their dispersal and feedback.\textsuperscript{54} Although the first Circular dealt with penitentiaries and whether or not certain levels of punishment served as deterrents for crime, later circulars asked explicit questions about the definitions of crimes and included drafts of his reports to the Louisiana legislature. It is likely that the germ of the idea of magistrate’s warnings also appeared in these circulars.

On December 7, 1821, Daniel Rogers, publisher of the \textit{New York City Hall Recorder} wrote Livingston.\textsuperscript{55} In the letter Rogers says that he saw Livingston’s Circular asking for commentary on the criminal law and he identified himself as the publisher of “The New York City Hall Recorder – a work of Reports.” Rogers enclosed a volume for Livingston’s use and offered to send further volumes. This letter is the best evidence that John Graham saw Livingston’s circular before he argued the \textit{Maxwell} case. Rogers was the nominative reporter for all the cases argued in the Mayor’s Court and he and Graham would have occupied the same courtroom on a regular basis. Rogers might have shared Livingston’s Circular with Graham or Graham could have gotten one directly from Livingston if it was sent to local lawyers.

Livingston had a long association with the New York Mayor’s Court and it makes perfect sense that he would have sent circulars to practitioners within the

\textsuperscript{52} \textbf{Edward Livingston}, “Introductory Report to The Code of Procedure” in \textit{A System of Penal Law for the State of Louisiana, Consisting of a Code of Crimes and Punishments, A Code of Procedure, A Code of Evidence, A Code of Reform and Prison Discipline, A Book of Definitions, Prepared Under the Authority of the Said State} (James Kay, Jun. & Co., Philadelphia, 1833), 208-214 (italics added). Livingston’s handwritten draft version also includes reference to a concern that suspects might lie to the magistrate: “implies that no injury to him can result from his silence \textit{or the falsehood of his answer}, the same result is produced; and the prisoner is invited to silence \textit{or misrepresentation} by being assured that it will do him no injury.” \textit{Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 75, Folder 5 “Introductory Report to the Code of Procedure,” p. 24. [Note: The words in italics and bold were omitted from Livingston’s published version, but are present in his hand-written draft.]}\textsuperscript{53}

\textsuperscript{53} It is difficult to pinpoint the date of the drafting and/or publication of the \textit{Introductory Report for the Code of Procedure}. The handwritten draft in the Princeton collection bears no date and while the publication date in New Orleans was 1827, Livingston made his preliminary report on a penal code to the Louisiana legislature in 1822, stating that the fourth book was “nearly complete.” That suggests that the introductory report was in existence in 1822.\textsuperscript{54}\textit{Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 72, Folder 1, “Circulars 1821 – 1824.”}\textsuperscript{55}\textit{Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 73, Folder 51.}
court. He was appointed United States attorney for the District of New York on March 27, 1801 and was appointed Mayor of New York shortly thereafter. As Mayor of New York, Livingston presided over the Court of Common Pleas, having both civil and criminal jurisdiction. This was known colloquially as the Mayor’s Court. The cases brought before the Mayor’s Court included those nominally reported by Rogers—such as Hiram Maxwell’s theft case. Indeed, Livingston wrote and published the first nominative reporter out of the Mayor’s Court covering the cases he presided over in 1802.

We also know that Livingston’s circle of correspondents for the testing of his ideas on reforms to the penal code was broad. In 1822, John Adams wrote Livingston that he could no longer read or write, but had the manuscript read to him and “wholeheartedly agrees” with pages 13-20 of the manuscript. On October 15, 1822, William Turner, a lawyer from Georgia wrote, “I have seen a copy of your report to the legislature of Louisiana of the Criminal Code of that State . . . .” and he requested copies of further reports. On July 10, 1822 James Madison wrote that he also received a copy of the report, but Madison worried that simplifying the law would “distort” its power. James Workman wrote because he did not agree with Livingston’s definition of fraud and wanted to propose another. In 1822, Livingston’s first report to the Assembly on the progress on writing the Penal Code was published in New Orleans. This exchange of ideas and comments on Livingston’s draft code by and between other legal professionals before 1823 suggests that the idea of the Magistrate’s Warning was probably already being circulated by Livingston and that Graham probably got his counsel idea from Livingston. The reach of Livingston’s ideas only increased. In 1824, Jeremy Bentham arranged for Livingston’s first report

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56. Hatchet, Edward Livingston: Jeffersonian Republican, Jacksonian Democrat, supra, 76.
57. Id. at 78; By the time of the Hiram Maxwell case, the Mayor no longer presided over the Mayor’s Court. Instead, the Recorder of the City of New York took over the role. See, James Wilton Brooks, History of the Court of Common Please of the City and County of New York (New York, 1896).
58. Wheeler seems to have taken over as editor of the nominative reporters for the Mayor’s Court cases after Rogers. See footnote 26.
59. Edward Livingston. Judicial Opinions, delivered in the Mayor’s Court of the City of New York, in the year 1802 (D. Longworth at the Shakespeare Gallery, 1803.).
60. Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 74, Folder 22.
61. Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 73, Folder 13.
62. Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 74, Folder 45.
on the Penal Code to the Louisiana Assembly to be published in England for the reference of lawyers and scholars.\textsuperscript{64} In 1825, it was published in Paris.\textsuperscript{65}

We thus believe that by 1822, Livingston was circulating the idea of the Magistrate’s Warning to the New York legal community through his circulars, correspondence and early reports to the Louisiana General Assembly. That explains why a rather pedestrian lawyer like John Graham could conceive a sophisticated interpretation of the 1821 New York Constitution. The next task is to track how the Livingston warning made its way into the New York statutes.

It’s important to understand that, like Livingston, the men charged with revising the New York Statutes communicated far and wide to gather new thoughts, as well as to validate and test their ideas for legal reform. In May of 1825, John Duer, by then the \textit{de facto} leader of the revisers of the New York Statutes, wrote Anthony Hammond, Esq., of the Inner Temple in London to gain his comments on the revisers’ intentions. Hammond led an effort in the British Parliament to consolidate and amend the laws of England and to create a new “code.” The revisers in New York were having a difficult time getting their hands on Hammond’s writings and suggestions, having access only to “public prints and fugitive works.”\textsuperscript{66} On January 6, 1826 Hammond transmitted copies of the plans for a British revised penal code to the New York revisers.\textsuperscript{67} The shared objective of both sets of legal reformers—those in New York and those in England—was the distillation of common law to code.\textsuperscript{68} In the minds of both groups of men the greatest problem with the common law was the lack of lay knowledge of the law and predictability. In Hammond’s words, “Upon the occurrence of every new case the question arises, what will be the opinion of the court? . . . New causes are not decided by reference to the abstract rule of right, but from analogy to previous decisions.”\textsuperscript{69}

The revisers submitted their annotated reports and suggestions to the Judiciary Committee of the New York Senate between January 5, 1827 and December 15, 1828 in rolling order. They took many liberties from previous statutory revisions by reducing both customary practice in the courts and common law to statute. The revisers followed each proposed provision with a note on its provenance. After the proposed duty of a magistrate to examine a

\begin{thebibliography}{99}
\bibitem{64} \textsc{Edward Livingston.} \textit{Project of a New Penal Code for the State of Louisiana} (London, 1824); \textit{Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Box 72, Folder 13, Letter from Jeremy Bentham to Edward Livingston, dated London, 23 February 1830 in which Bentham details the circumstances of publication.}


\bibitem{66} \textsc{John Duer.} \textit{Correspondence Between the Commissioners of New York, Appointed to Revise the Laws of That State, and Anthony Hammond, Esq. of the Inner Temple London,} (1826), Making of Modern Law Database, Image 3.

\bibitem{67} \textit{Id.} at Image 7.

\bibitem{68} \textit{Id.} at Image 26, page 25, § V.

\bibitem{69} \textit{Id.} at Image 27, page 26.
\end{thebibliography}
suspect the note read, “Conformable to practice and to 2 R.L. 507.”\textsuperscript{70} Some citations read, “Declaratory,” while others, such as the Magistrate’s Warning, read, “New.”\textsuperscript{71} The two “new” provisions relevant to our inquiry read:

§ 14 The magistrate shall then proceed to examine the prisoner in relation to the offence charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed of the charge made against him, and shall be allowed a reasonable time to send for and advise with counsel. If desired by the person arrested, his counsel may be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; but such counsel shall not be permitted to interrupt the examination, nor to object to any question put by the magistrate, nor to put any question to the prisoner during his examination.

[New.]

§ 15. At the commencement of the examination, the prisoner shall be informed by the magistrate, that he is at liberty to refuse to answer any question that may be put to him, or to answer such question in any manner he may think proper; but he shall also be cautioned, that a refusal to answer, without sufficient reason or a departure from the truth, will operate as a circumstance against him, as well on the question of his commitment, as upon his trial.\textsuperscript{72}

[Ib.]\textsuperscript{73}

Section 15 is almost a word for word copy of Edward Livingston’s draft of his Penal Code for Louisiana:

Art. 173. The magistrate shall then proceed to the examination of the person accused in the following manner:

\textsuperscript{70} New York (State), Commissioners Appointed to Revise the Statute Laws of the State of New York. Reports of the Commissioners Appointed Act of April 21, 1825 to Revise the Statute Laws of the State, Made January 6, 1827-October 15, 1828; with Drafts of Chapters of the Proposed Revision, Amendments, Etc. (Albany, Croswell & Van Benthuysen, 1827-1828), Pt. IV, Ch. II, § 2. (“2 R.L. 507” refers to the Revised Laws of 1813, page 507) [Note: the only full four volume copy of the Commissioners’ Reports is at Lillian Goldman Law Library at Yale Law School.].

\textsuperscript{71} The citation reads, “Id.” a reference to “Ibid.” and a repeat of the citation after § 14 which reads, “New.”

\textsuperscript{72} Id. at § 15.

\textsuperscript{73} Members of the NY Judiciary Committee edited the language before it passed into law. § 14 as ratified ends “his counsel may be present during examination of the complainant and the witnesses on the part of the prosecution, and during examination of the prisoner.” § 15 as ratified reads, “At the commencement of the examination, the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him.” New York (State), The Revised Statutes of the State of New-York: Passed During 1827 and 1828 (Albany, 1829), Part IV, Title II, § 14, §15.
1st. He must be informed that, although he is at liberty to answer in what manner he may think proper to the questions that shall be put to him, or not to answer them at all, yet a departure from the truth, or a refusal to answer without assigning a sufficient reason, must operate as a circumstance against him, as well on the question of commitment as of his guilt or innocence on the trial.74

We think it fair to conclude that the New York revisers had Livingston’s draft penal code before them when they drafted § 15. The remaining mystery is § 14.75 The early part of § 14 tracks the then-existing New York law about magistrate examinations—i.e., that the examination not be under oath and that the prisoner be advised of the charge against him. But the part about the right to consult with counsel and the right to have counsel present appears in Livingston’s draft penal code a few provisions later but is oddly limited to a second, later examination by the magistrate: “If the accused or the public prosecutor request that a further examination take place” . . . “[t]he prisoner may have the assistance of such counsel as he may employ, but the Magistrate has no authority to assign counsel.”76 A reference to the right to counsel at the initial examination does, of course, appear in Livingston’s Introductory Report to the Code of Procedure: “if we add to this that he has the assistance of counsel, and has heard what the witnesses against him have deposed, it will be found that the accused is in no danger of being circumvented or intimidated to his prejudice in the preparatory examination.” While this phrasing does not provide the details contained in § 14—e.g., that counsel be present during the examination not only of the accused but also of the prosecution witnesses—the notion that counsel could protect the accused from being circumvented or intimidated implies that counsel would be present during the examination.

Why this phrasing appears in the Introductory Report and not in the Code of Procedure, a part of the final Penal Code, where Livingston felt the right to counsel only matured at a second examination, is yet another mystery. We offer two explanations. In 1824, after publication of his Introductory Report, Livingston was in New York City putting final notes on the engrossed copy of

74. EDWARD LIVINGSTON, THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE, CONSISTING OF SYSTEMS OF PENAL LAW FOR THE STATE OF LOUISIANA AND FOR THE UNITED STATES OF AMERICA: WITH THE INTRODUCTORY REPORTS TO THE SAME: TO WHICH IS PREFIXED AN INTRODUCTION, Vol. II, Chapter IV, 237 (Published by the National Prison Association of the United States of America, New York, 1873); This was originally published as EDWARD LIVINGSTON, SYSTEM OF PENAL LAWS, PREPARED BY THE STATE OF LOUISIANA, COMPRISING CODES OF OFFENSES AND PUNISHMENTS, OF PROCEDURE, OF PRISON DISCIPLINE, AND OF EVIDENCE APPLICABLE TO CIVIL AND CRIMINAL CASES. And a Book of Definitions of technical words was used. (New Orleans; Printed by B. Levy, 1824).

75. The language used by the revisers in § 14 is not that finally adopted in the New York Statutes of 1829. The difference in language is attributable to changes made by members of the New York Judiciary committee before the Code was ratified.

76. EDWARD LIVINGSTON. CODE OF PROCEDURE: FOR GIVING EFFECT TO THE PENAL CODE OF THE STATE OF LOUISIANA (New Orleans, 1825), 51-52.
the entire Penal Code for the printer. According to several accounts, a fire broke out during the night in Livingston’s library and burned all copies.\textsuperscript{77} Livingston spent the next two years piecing back together his great work, often with the assistance of notes, circulars and copies he had disseminated to friends who were kind enough to send them back to Livingston when they learned of the tragedy.\textsuperscript{78} Despite the great effort, the final version was a “phoenix of what had been destroyed.”\textsuperscript{79} In 1826, Livingston finished the whole project anew, but the fire and Livingston’s hurried effort to reconstruct the great work may account for the missing guarantee of counsel during the initial examination in the final \textit{Code of Procedure}.\textsuperscript{80}

A second explanation is political. Livingston might very well have thought his penal code would never pass the Louisiana General Assembly if counsel was routinely available in magistrate examinations, and indeed it did not pass even with a reduced role for counsel.\textsuperscript{81} New York in this period had a strong anti-government sentiment. Indeed, the Anti-Federalists were so powerful in New York at the end of the eighteenth century that the New York constitutional convention barely ratified the United States Constitution and did so in a message proposing twenty-five items in a Bill of Rights and thirty-one additional amendments.\textsuperscript{82} That anti-government sentiment might have made the New York legislature prefer the more robust right to counsel in Livingston’s \textit{Introductory Report} over the one in his draft penal code.

In 1828, Livingston published “A System of Penal Law for The United States of America” for the consideration of the U.S. House of Representatives. Among many of his suggestions from the Penal Code of Louisiana, he also incorporated his Magistrate’s Warning for use on the federal level.\textsuperscript{83} But despite wide

\textsuperscript{77} \textsc{Charles Haven Hunt}, \textit{Life of Edward Livingston} (New York, 1864), 257-58.

\textsuperscript{78} Ms. Department of Rare Books and Special Collections, Princeton University Library, Edward Livingston Papers, Boxes 72-74 contain many correspondences from friends and colleagues sending back drafts and information Livingston had sent them relating to his draft of the Penal Code.

\textsuperscript{79} \textit{Hunt, Life of Edward Livingston, supra}, 257.

\textsuperscript{80} The Code and its component parts were published rather piecemeal in Louisiana, so it seems reasonable that Livingston would have redrafted the Code of Procedure and sent it for publication before the entire Code was completed in 1826.

\textsuperscript{81} \textsc{Hatcher, Edward Livingston, supra}, 283-85 (explaining that Livingston was a “‘liberal who attempted to translate into practice his theory of the protection of civil liberties by practical measures.’

\textsuperscript{82} Gordon Lloyd, “Introduction to the New York Ratifying Convention,” The American Founding, Ratification of the Constitution, available at http://teachingamericanhistory.org/ratification/newyork/ (last visited April 13, 2016). The vote was 30-27. The delegates to the New York convention debated for three weeks after Virginia became the tenth state to ratify the new constitution, thus dissolving the Confederation. The only issue before the New York convention at that stage was whether to join the new country or go it alone. And it still took three weeks to (barely) vanquish the Anti-federalists!!

approbation for Livingston’s Penal Code, the world was not ready: not the legislators of Louisiana and certainly not Congress. Livingston was “a liberal who attempted to translate into practice his theory of the protection of civil liberties by practical measures.” The Penal Code was never passed in Louisiana and never even proposed in Congress.

Unless we find more direct evidence for the details in § 14, we are left with the following relatively informed speculation: The idea for warning of the right not to answer came from Livingston as did, probably, the notion of the right to the assistance of counsel (from his introductory report). Graham probably got his four-part warnings from a Livingston circular. And despite Graham’s attempt to influence the legal world, he was probably about as successful at that as he was in claiming that a dead turkey is not a turkey.

Discovering who first thought of warnings as a remedy to the power imbalance between interrogators and suspects is important to historians. To everyone else in the legal community, the larger point is that as early as 1736 it was recognized that the suspect was at a disadvantage when being questioned by the State; as early as 1813 Dickinson recognized that warning of the right not to answer questions was an appropriate safeguard; and as early as 1821 Livingston realized that the right not to answer and the right to the assistance of counsel were necessary to prevent the accused from “being circumvented or intimidated to his prejudice.”

This history suggests that Miranda taps into some deeply-held fairness principle; it also explains why Miranda remains iconic even in the face of relentless attacks by philosophers, lawyers, and various Supreme Courts. Three chief justices—Warren Burger, William Rehnquist, and John Roberts—have been quite hostile to Miranda. Yet, here it stands. Happy Birthday, Miranda, at age 50, or, if we trace back to Livingston, at age 195!

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84. HATCHER, EDWARD LIVINGSTON, supra, 284 (citing Mitchell Franklin, Concerning the Historic Importance of Edward Livingston, 11 TULANE LAW REVIEW 163 (1937)).
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:

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** 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[ing] 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.

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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. [T]he efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of ‘persuasion.’” The standard

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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. 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, or in combination with other factors, be deemed coercive. The Court also rejected police use of sleep deprivation as an interrogation tactic. In some cases, the Court pointed to the withholding of nourishment from the suspect as leading to a finding of coercion. The Court discarded certain uses of deception, as in 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. The Court also rejected confessions obtained through the use of threats of legal action involving the suspect’s family members, such as Lynumn v. Illinois, 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 Harris v. South Carolina, 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

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17. See, e.g., 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. See Ashcraft v. Tennessee, 322 U.S. 143, 153-54 (1944) (holding that interrogation for 36 hours straight was “inherently coercive”).
19. 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); 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).
20. See Greenwald v. Wisconsin, 390 U.S. 519, 520-21 (1968) (per curiam) (interrogation was coercive in part because suspect was not able to sleep on wooden plank provided as bed); Clewis, 386 U.S. at 712 (“inadequate sleep” along with other factors rendered suspect’s interrogation coercive); Culombe v. Connecticut, 367 U.S. 568, 622 (1961) (plurality); Leyra v. Denno, 347 U.S. 556, 559-60 (1954); Stein, 346 U.S. at 185; Watts v. Indiana, 338 U.S. 49, 53 (1949) (plurality); Ashcraft, 322 U.S. at 153.
21. 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.”); Reck v. Pate, 367 U.S. 433, 441 (1961) (“During the entire period preceding his confessions, Reck was without adequate food . . . .”); 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); Clewis, 386 U.S. at 712 (citing “inadequate sleep and food,” among other factors, as supporting a finding of coercion); 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.”

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.”35 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.36

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.37 After briefly mentioning cases involving physical coercion, including a then-recent case involving police who burned a suspect’s back with lighted cigarettes,38 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.”39 The Court acknowledged that interrogation practices had generally transformed from the physically to the psychologically oriented,40 and then catalogued several types of interrogation tactics used to place psychological pressure on suspects to speak against their interests.41 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.”42 The Court determined that “compulsion” (though not necessarily coercion) was “inherent in custodial surroundings.”43 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.”44

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}
[T]he 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. . . . If . . . 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, \textit{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

\textsuperscript{45} See Clymer, \textit{supra} note 3, at 457 (observing that academic commentary “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 “viola[t] 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

\begin{itemize}
\item \textsuperscript{53} \textit{Id.} (emphasis added).
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id. at} 478.
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id. at} 479.
\item \textsuperscript{59} 168 U.S. 532 (1897).
\item \textsuperscript{60} See \textit{id.} at 534.
\item \textsuperscript{61} See \textit{id.} at 537.
\end{itemize}
a statement that he saw you do the murder.”\textsuperscript{62}\footnote{\textsuperscript{62}. \textit{Id.} at 539 (internal quotation marks omitted).} 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}\footnote{\textsuperscript{63}. \textit{See id.}} Bram stupidly replied: “[H]e could not see me from there.”\textsuperscript{64}\footnote{\textsuperscript{64}. \textit{Id.} (internal quotation marks omitted).} 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}\footnote{\textsuperscript{65}. \textit{Id.}}

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}\footnote{\textsuperscript{66}. \textit{Id.} at 543.}

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}\footnote{\textsuperscript{67}. \textit{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.").}

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}\footnote{\textsuperscript{68}. \textit{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.").}} 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}\footnote{\textsuperscript{69}. \textit{Id.}} 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}\footnote{\textsuperscript{70}. \textit{Id.} at 551.} The Court stopped short of declaring that any custodial interrogation by the police must necessarily amount to

\begin{itemize}
\item a statement that he saw you do the murder.
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\item Bram stupidly replied: “[H]e could not see me from there.”
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\item The Supreme Court agreed. The Court identified this as a Self-Incrimination Clause issue:
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\item 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. 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.” 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.” The Court stopped short of declaring that any custodial interrogation by the police must necessarily amount to
\end{itemize}
compulsion.71 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.72

Notice the stark disjunction between the conduct condemned as a violation of the Due Process Clause of the Fourteenth Amendment in the coerced confession cases73 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.74 But then, in 1964, in Malloy v. Hogan,75 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.76 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.\(^\text{77}\) And it relies heavily upon *Bram* in applying the Clause to the interrogation room.\(^\text{78}\) 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.\(^\text{79}\)

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.”\(^\text{80}\) 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 . . . .”\(^\text{81}\) 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.”\(^\text{82}\) 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.”\(^\text{83}\) And it closed Part III of the opinion, just after describing the


\(^{78}\) See *id.* at 461-62.

\(^{79}\) 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).

\(^{80}\) *Miranda*, 384 U.S. at 439.

\(^{81}\) Id. at 445.

\(^{82}\) Id. at 444.

\(^{83}\) Id. at 476; see Loewy, supra note 1, at 916 (“*Miranda*’s holding . . . focuses on the impropriety of use . . . .”).
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].” 84


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. 85 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.

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

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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. Eagan, 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.\textsuperscript{89} If \textit{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 \textit{Miranda} is most confounding.

As for physical fruits, the leading case is \textit{United States v. Patane}.\textsuperscript{90} There, a police officer upon arresting Patane began reading him the \textit{Miranda} warnings, but Patane interrupted and stated that he knew his rights.\textsuperscript{91} The officer did not continue but instead asked about the whereabouts of Patane’s gun.\textsuperscript{92} Patane replied that it was in his bedroom.\textsuperscript{93} Patane was later charged with possession of a firearm by a convicted felon.\textsuperscript{94} In the Supreme Court, the Government conceded that Patane’s statements were suppressible as unwarned responses to interrogation.\textsuperscript{95} The question for the Court was whether the gun itself should not be suppressed.\textsuperscript{96}

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 \textit{Miranda}: “The \textit{Miranda} rule is not a code of police conduct, and police do not violate the Constitution (or even the \textit{Miranda} rule, for that matter) by mere failures to warn.”\textsuperscript{97} And this is true whether the failure is “negligent or . . . deliberate.”\textsuperscript{98} That is to say, \textit{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.”\textsuperscript{99}

Instead, the plurality explicitly adopted the admissibility model: “Potential violations [of \textit{Miranda}] occur, if at all, only upon the admission of unwarned statements into evidence at trial.”\textsuperscript{100} That is because \textit{Miranda} was grounded in

\begin{itemize}
\item \textsuperscript{89} See Loewy, \textit{supra} note 1, at 908 (“\textit{E}vidence obtained from an unconstitutional search and seizure is excluded because of the police misconduct by which it was obtained.”).
\item \textsuperscript{90} 542 U.S. 630 (2004).
\item \textsuperscript{91} \textit{Id.} at 635 (plurality).
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} \textit{Id.}
\item \textsuperscript{94} \textit{Id.} (citing 18 U.S.C. § 922(g)(1)).
\item \textsuperscript{95} \textit{Id.} at 635 n.1.
\item \textsuperscript{96} \textit{Id.} at 633-34.
\item \textsuperscript{97} \textit{Id.} at 637. \textit{See also id.} at 641 (“\textit{A} mere failure to give \textit{Miranda} warnings does not, by itself, violate a suspect’s constitutional rights \textit{or even the Miranda rule}.” (emphasis added)).
\item \textsuperscript{98} \textit{Patane}, 542 U.S. at 641.
\item \textsuperscript{99} \textit{Id.} at 635 n.1. \textit{See also id.} at 643 (“\textit{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.”).
\item \textsuperscript{100} \textit{Patane}, 542 U.S. at 642.
\end{itemize}
the Self-Incrimination Clause.\textsuperscript{101} 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,”\textsuperscript{102} Thus, “Miranda itself makes clear that its focus was on the admissibility of statements.”\textsuperscript{103}

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,\textsuperscript{104} 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.”\textsuperscript{105} 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.\textsuperscript{106} 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.”\textsuperscript{107} 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.”\textsuperscript{108}

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.”\textsuperscript{109} Justice Souter characterized the

\begin{itemize}
  \item \textsuperscript{101} Id. at 636 ("[T]he Miranda rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause.").
  \item \textsuperscript{102} Id. at 640.
  \item \textsuperscript{103} Id. at 642 n.3.
  \item \textsuperscript{104} See Pizzi & Hoffman, supra note 29, at 839 (observing that Justice Kennedy’s opinion in Patane is “difficult to gauge”).
  \item \textsuperscript{105} Patane, 542 U.S. at 644 (Kennedy, J., concurring in the judgment).
  \item \textsuperscript{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.").
  \item \textsuperscript{107} Id. at 645 (Kennedy, J., concurring in the judgment).
  \item \textsuperscript{108} Id. at 645 (alteration in original).
  \item \textsuperscript{109} Id. (Souter, J., dissenting).
\end{itemize}
failure to warn here as “[un]justified” and “[un]mitigated” by any overriding interest.\footnote{110} He expressed concern that the Court’s decision would act as “an . . . inducement for interrogators to ignore the [Miranda] rules,”\footnote{111} and encourage them “to flout Miranda when there may be physical evidence to be gained.”\footnote{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,”\footnote{113} by which courts should “exclude physical evidence derived from unwarned questioning unless the failure to provide Miranda . . . warnings was in good faith.”\footnote{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.\footnote{115} The tactic worked: after about thirty to forty minutes of pre-warning questioning, Seibert made incriminating statements.\footnote{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.\footnote{117} While the defendant’s initial statements were inarguably inadmissible pursuant to Miranda, the question was whether the later statements were properly admitted.\footnote{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,\footnote{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

\begin{footnotes}
\footnotetext{110}{Id. at 647.}
\footnotetext{111}{Id. at 645.}
\footnotetext{112}{Id. at 647.}
\footnotetext{113}{Id. (Breyer, J., dissenting).}
\footnotetext{114}{Id. at 648.}
\footnotetext{115}{542 U.S. 600, 605-06 (2004) (plurality opinion).}
\footnotetext{116}{See id. at 604-05.}
\footnotetext{117}{See id. at 605-06.}
\footnotetext{118}{See id. at 604.}
\footnotetext{119}{See Kinports, supra note 7, at 101 (discussing the “ambivalence” that characterized the plurality opinion in Seibert).}
\end{footnotes}
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:

[T]he 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,” a

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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 objective 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 (“[T]he plurality correctly focuses 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,” and a “technique,” a practice having a particular “object.” This language reeks of intentionality. Moreover, the plurality distinguished the Court’s earlier decision in Oregon v. Elstad by arguing that the initial, unwarned statement in that case was the result of “innocent neglect of Miranda” and a “good-faith Miranda mistake.” 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.”

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,” “undermin[ing] the Miranda warning,” an “intentional misrepresentation,” a “distort[ion] [of] the meaning of Miranda,” and an “abuse.” Justice Kennedy also repeatedly characterized this police conduct as a “violation” of Miranda, and a “deliberate” one at that. He characterized the suppression of unwarned statements as a “remedy” for such a violation. And he rejected the plurality’s approach that shunted to the side the good or bad faith of the interrogator. 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.”

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[y[ing] 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 Mirandacuriously, 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

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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, 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. 162 The Court in *Harris* and *Hass* assumed for the sake of argument that the *Miranda* “exclusionary rule has a deterrent effect on proscribed police conduct.” 163 But it rejected the notion that “impermissible police conduct will be encouraged” by permitting impeachment use of unwarned or post-invocation statements. 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. 165 That is to say, the marginal utility in deterring *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.” 166 Thus, applying the *Miranda* exclusionary rule fails a cost/benefit analysis.

Justice Brennan, in dissent in each case, joined by Justice Marshall (and by Justice Douglas in *Harris*), also premised his argument on the need to “deter[] improper police conduct.” 167 He also relied on *Walder* but viewed that case more narrowly. 168 In his view, the Court’s rulings in *Harris* and *Hass* would encourage police to engage in “practices in disregard of the Constitution,” in order to secure valuable impeachment evidence for trial. 169 He objected to the result in *Hass* in particular, pointing out that, while a police officer might be encouraged to issue the warnings even after *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 *Miranda’s* requirement that” interrogation cease. 170 And, beyond deterrence, he cited other

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

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

164. *Harris*, 401 U.S. at 225; *see also 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.”).

165. *See Harris*, 401 U.S. at 225 (“*S*ufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.”); *see also 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.”).

166. *Harris*, 401 U.S. at 225; *see also 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)).


169. *Id.* at 232.

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 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
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, \textsuperscript{177} Miranda itself seems to command that interrogation must “cease” when either the right to silence or to counsel is invoked by the suspect.\textsuperscript{178} Subsequent cases have reiterated this command.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{182} This has been viewed as a right to avoid interrogation altogether.\textsuperscript{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.\textsuperscript{184} Roberson, a suspect in custody, invoked his right to counsel.\textsuperscript{185} Three days later, a second officer, unaware of the prior invocation, interrogated

\textsuperscript{177} See supra notes 51-56 and accompanying text.
\textsuperscript{179} See Davis v. United States, 512 U.S. 452, 454 (1994) (“[L]aw enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation.”); Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (“When 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) (“If the suspect requests counsel, the interrogation must cease until an attorney is present.”) (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966))); 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))).
\textsuperscript{180} See Miranda, 384 U.S. at 474; see also Mosley, 423 U.S. at 103.
\textsuperscript{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.
\textsuperscript{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.”); Solem v. Stumes, 465 U.S. 638, 655 (1984) (Stevens, J., dissenting) (“[P]olice may not interrogate a prisoner after he has asked for the assistance of a lawyer.”).
\textsuperscript{183} See generally Laurent Sacharoff, Miranda’s Hidden Right, 63 ALA. L. REV. 535 (2012).
\textsuperscript{184} 486 U.S. 675 (1988).
\textsuperscript{185} See id. at 678.
him about a different crime and obtained incriminating statements. 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.”

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.” 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.” 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.” 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. 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

186. See id.
187. Id. at 687.
188. Id.
189. Id.
190. Id. at 688.
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 reinitiating 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, by holding the suspect’s subjective impressions to an objective measure of reasonableness. 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. 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. Thus, in *Davis v. United States*, the Court held that invocation must be unequivocal to be operative. 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,’” and required, in essence, a statement that can reasonably be construed *only* as such an expression. 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.” 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.” 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

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197. *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)).

198. *Cf.* *Davis*, 512 U.S. at 458-59 (using objective standard in part “to avoid difficulties of proof”).

199. *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.

200. 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.”


203. *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”).

204. *Id.* at 461 (plurality).

unreasonable. In effect, we have a *Chevron* rule\textsuperscript{206} for the police.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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*.\textsuperscript{210} There, the unarmed Innis was arrested on suspicion of having murdered a cab driver with a shotgun.\textsuperscript{211} He was given his *Miranda* warnings and he invoked his right to counsel.\textsuperscript{212} In the police car en route to the police station, two of the three officers present engaged in a


\textsuperscript{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).

\textsuperscript{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.”).

\textsuperscript{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.”).

\textsuperscript{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).

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

\textsuperscript{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. Innis interrupted and told them that he would
lead them to the gun, which he then did. The gun and Innis’s statements
leading the police to it were introduced against him at trial. Their admissibility
hinged on whether the conversation between the two officers in front of Innis
amounted to “interrogation” for purposes of *Miranda*.  

The Court held that no interrogation had occurred. The Court
acknowledged that statements and actions, not just questions, could amount to
the “functional equivalent” of “express questioning.” 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.”  

Some language in *Innis* suggests that the Court had the admissibility model
of *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 *Miranda* was primarily about how
individual suspects subjectively experience custodial interrogation. It wrote that
the

> definition focuses primarily upon the perceptions of the suspect, rather
> than the intent of the police. This focus reflects the fact that the
> *Miranda* safeguards were designed to vest a suspect in custody with an
> added measure of protection against coercive police practices, without
> regard to objective proof of the underlying intent of the police.

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

\[213. \text{ See id. at 294-95.} \]
\[214. \text{ See id. at 295.} \]
\[215. \text{ See id. at 295-96.} \]
\[216. \text{ See id. at 298 (“The issue . . . is whether [Innis] was ’interrogated’ by the police officers . . . .”). But see Kit Kinports, *What does Edwards Ban?: Interrogating, Badgering, or Initiating Contact?*, 43 N. Ky. L. Rev. 361 (2016).} \]
\[217. \text{ See Innis, 446 U.S. at 302.} \]
\[218. \text{ Id. at 300-01.} \]
\[219. \text{ Id. at 301 (footnote omitted).} \]
\[220. \text{ Id.} \]
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.”221

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 should have known were reasonably likely to elicit an incriminating response.”222 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.”223

This language evokes the police-conduct model of 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 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 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,

221. Id. at 301 n.7.
222. Id. at 301-02.
223. Id. at 302 n.8.
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 incriminat ing 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,224 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.225 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.”226 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.”227 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.228 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.\textsuperscript{229}

In fact, we see these two models of Miranda at war in \textit{New York v. Quarles},\textsuperscript{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.\textsuperscript{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.\textsuperscript{232} The Court, in an opinion by then-Justice Rehnquist, held that the statements and the gun were admissible.\textsuperscript{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”\textsuperscript{234} and as “requiring police to give to suspects in custody” the warnings.\textsuperscript{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).\textsuperscript{236} The Miranda Court “was willing to bear that cost.”\textsuperscript{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.”\textsuperscript{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,\textsuperscript{239} which is not a rule of admissibility but instead renders otherwise unreasonable police conduct reasonable. And, to hammer the

\begin{footnotes}
\item[229] But see Mannheimer, \textit{supra} note 177, at 1162-68 (advancing a different rationale for the “public safety” exception).
\item[231] See id. at 651-52.
\item[232] See id. at 652.
\item[233] See id. at 657-58.
\item[234] Id. at 654.
\item[235] Id. at 656.
\item[236] Id. at 656-57.
\item[237] Id. at 657.
\item[238] Id. at 651 (emphasis added).
\item[239] See id. at 653 n.3 (emphasis added).
\end{footnotes}
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. 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.” 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.” 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 Miranda need not apply “to a situation in which police officers ask questions reasonably prompted by concern for the public safety.” The best reading of the italicized language is that the questions must actually be “prompted by” public-safety concerns, as well as being reasonably related to those concerns. 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.” 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. 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 Quarles exception would apply.

The dissenters in Quarles, predictably, adopted the admissibility approach to 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 . . . Miranda . . . proscribe this sort of emergency questioning.” Rather, “[a]ll the Fifth Amendment forbids is the introduction of

240. See id. at 658 n.7; accord Loewy, supra note 1, at 924 (pointing to this language in concluding that “[t]he Court analyzed [Quarles] as a police practices case”).
241. See Quarles, 467 U.S. at 659 n.8.
242. Id. at 656.
243. Id.
245. Quarles, 467 U.S. at 658-59.
246. See Kinports, supra note 7, at 108-09.
coerced confessions at trial."\textsuperscript{248} Similarly, Justice O’Connor in her partial dissent wrote that “\textit{Miranda} has never been read to prohibit the police from asking questions to secure the public safety.”\textsuperscript{249} 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.\textsuperscript{250} For Justice O’Connor, as for Justice Marshall, it was not a question of police conduct but of admissibility. Indeed, because \textit{Miranda} governed admissibility only of testimonial evidence, she would have permitted admission of the gun.\textsuperscript{251}

\textbf{B. Confusion in Recent Cases}

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

\textbf{1. Custody}

We can also see a distinction between a police-conduct approach to \textit{Miranda} and an admissibility approach when it comes to questions of custody. The Court has held that \textit{Miranda} warnings are necessary only if the person being interrogated is also in custody.\textsuperscript{252} 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."\textsuperscript{253} In determining whether there is custody, courts “apply an objective test.”\textsuperscript{254} 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.\textsuperscript{255}

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

\begin{itemize}
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id. at 664 (O’Connor, J., concurring in the judgment in part and dissenting in part).
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id. at 665-69 (O’Connor, J., concurring in the judgment in part and dissenting in part). This was, of course, the general approach taken later by the plurality in United States v. Patane, 542 U.S. 630, 637-62 (2004) (plurality opinion), which, curiously, Justice O’Connor declined to join. See supra notes 91-109.
\item \textsuperscript{252} See, e.g., Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam).
\item \textsuperscript{254} Id.
\end{itemize}
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.”

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 2400 (“Such conclusions apply broadly to children as a class.”); see also 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 offing. 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

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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.282 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.”283 Thompkins said that he did,284 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.285 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].’”286 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 suspect287 and that a suspect in custody has a “right to cut off questioning” that can be exercised by invoking either right.288 Here, however, the Court held that invocation of the right to silence, just like invocation of the right to counsel,289 must be “unambiguous” to be operable.290 Thompkins’s silence thus did not amount to invocation.291

The Court next turned to the second issue: whether Thompkins validly waived his Miranda rights.292 The crux of this issue was whether the waiver had to be obtained before police could even interrogate Thompkins293 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) (“_Miranda_ 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.”

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.” 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.’”

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. 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. 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

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300. *Id.* at 2264 (emphasis added).
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

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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.”).
WHAT DOES EDWARDS BAN?: INTERROGATING, BADGERING, OR INITIATING CONTACT?

Kit Kinports*

I. INTRODUCTION

The suspects who are best served by Miranda today are the small minority who actually assert their rights, particularly those who invoke the right to counsel.1 Michigan v. Mosley requires the police to “scrupulously honor” the rights of suspects who wish to remain silent,2 and the Edwards v. Arizona line of cases provides even greater protection to those who ask for a lawyer.3 Precisely what bars Edwards erects has been the subject of some controversy, however, as the Supreme Court for many years fluctuated between describing Edwards as simply prohibiting the police from interrogating suspects and taking the broader view that Edwards prevents law enforcement officials from even approaching suspects in ways that do not qualify as “interrogation” for purposes of Miranda.

Unsurprisingly, the mixed signals coming from the Supreme Court generated a division among the lower courts, a conflict that was seemingly resolved in favor of the broader interpretation by the Court’s 2010 opinion in Maryland v. Shatzer.4 In dictum in Shatzer, the majority took the position that Edwards bars not just interrogation, but also “subsequent attempts at interrogation,” “requests for interrogation,” and “any efforts to get [the suspect] to change his mind.”5 Despite Shatzer, however, the lower courts continue to be divided.

This Article discusses the post-Shatzer record on this issue, criticizing the courts that have ignored Shatzer’s straightforward language and continue to limit Edwards to circumstances where police conduct rose to the level of

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* Professor of Law and Polisher Family Distinguished Faculty Scholar, Penn State Law. I am very grateful to Michael Mannheimer for inviting me to contribute to this symposium and to the other participants for their insights. Special thanks are due to George Thomas for his thoughtful comments on an earlier draft.

1. See Richard A. Leo, Miranda’s Irrelevance: Questioning the Relevance of Miranda in the Twenty-First Century, 99 MICH. L. REV. 1000, 1009 (2001) (citing studies finding that about 80% of suspects waive their Miranda rights); George C. Thomas III, Stories About Miranda, 102 MICH. L. REV. 1959, 1976 (2004) (reporting similar figures, and noting that “[m]ore than 10 times as many suspects waived Miranda as invoked” their rights); see also William J. Stuntz, Miranda’s Mistake, 99 MICH. L. REV. 975, 988 (2001) (citing the fact that “[a]lmost no one invokes his Miranda rights once questioning has begun” as evidence that “Miranda is not working”). But cf. Lawrence Rosenthal, Against Orthodoxy: Miranda Is Not Prophylactic and the Constitution Is Not Perfect, 10 CHAPMAN L. REV. 579, 609 (2007) (responding that Miranda “produces valid waivers under long-settled conceptions of waiver,” and, while those waivers “may often be foolish, . . . they are made with full awareness of the rights foregone”).


5. Id. at 105, 113 n.8.
“interrogation.” The Article also makes the broader point that even seemingly precise legal rules, like the one the Court created in Edwards, have the potential to unravel in surprising ways.

In defending the broader interpretation of the Edwards prohibition, the Article proceeds in four parts. Part I addresses the Supreme Court case law leading up to Shatzer and then the Shatzer dictum, concluding that Shatzer’s conception of Edwards’ scope is more faithful to the Court’s opinion in Edwards itself. Part II then describes the lower courts’ treatment of Shatzer and their conflicting views on the reach of the Edwards ban. Turning to the policy considerations underlying the Edwards line of cases, Part III maintains that those concerns likewise support the broader view of Edwards and goes on to advocate that cases involving post-invocation confessions be analyzed by asking which party reinitiated the conversation, applying the same standard of initiation to both the suspect and the police. Under this approach, the type of comments made by a suspect that would be considered initiation and thereby would remove her from the Edwards shield would likewise be treated as initiation when made by law enforcement officials and thus would invalidate the suspect’s subsequent waiver of Miranda. Part IV concludes.

II. THE Edwards LINE OF CASES

A. The Court’s Pre-Shatzer Precedent

In 1975, the Supreme Court focused for the first time on suspects who assert their Miranda rights, holding in Michigan v. Mosley that the police must “scrupulously honor” the rights of suspects who want to remain silent.6 The Court found that standard met on the facts before it, given that interrogation ended “immediately” after Mosley invoked his rights, he was given a “significant” break of more than two hours, and it was a different police officer who subsequently readministered Miranda warnings and questioned Mosley about “an unrelated” crime.7

Six years later, Edwards v. Arizona adopted a different approach for those who instead invoke the right to counsel, holding that a suspect who has “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, unless the accused himself initiates further communication, exchanges, or conversations with the police.”8 “[A] valid waiver” of the right to counsel, the Court admonished, “cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation.”9

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7. Id. at 104, 106.
9. Id. at 484.
The Court later extended the Edwards protection in Arizona v. Roberson to apply to a case reminiscent of Mosley where police wanted to discuss a charge different from the one on the table when the suspect first asked for a lawyer.\(^{10}\) The Court distinguished Mosley on the ground that invoking the right to counsel creates a “presumption” that the suspect “considers himself unable to deal with the pressures of custodial interrogation without legal assistance”—a presumption, the Court thought, that “does not disappear simply because the police have approached the suspect . . . about a separate investigation.”\(^{11}\) Roberson also refused to create a good-faith exception to the Edwards rule, reasoning that “Edwards focuses on the state of mind of the suspect and not of the police.”\(^{12}\)

The Edwards shield was then broadened still further in Minnick v. Mississippi to protect a suspect who had been given an opportunity to speak to a lawyer subsequent to his invocation of the right to counsel.\(^{13}\) Refusing to take the position that “Edwards terminates once counsel has consulted with the suspect,” the Court instead read Edwards to prohibit “police-initiated interrogation” unless a lawyer was actually with the suspect “at the time of questioning.”\(^{14}\) Assuming a suspect asserts the right to counsel sufficiently clearly,\(^{15}\) and does not fall into the trap of subsequently “initiat[ing]” contact with the police,\(^{16}\) then, the Supreme Court’s case law provides a greater degree of


\(^{11}\) Id. at 683. But cf. Berghuis v. Thompkins, 560 U.S. 370, 381 (2010) (finding “no principled reason to apply different standards” of invocation depending on which right a suspect happened to assert).

\(^{12}\) Roberson, 486 U.S. at 687. See also Michael J.Z. Mannheimer, The Two Mirandas, 43 N. Ky. L. Rev. 342 (2016) (citing this discussion in Roberson to illustrate the discrepancies in the Court’s precedents on the fundamental question whether Miranda was meant to regulate police conduct or to address the admissibility of suspects’ statements).


\(^{14}\) Id. at 151, 153.

\(^{15}\) See Davis v. United States, 512 U.S. 452, 459 (1994) (holding that the Edwards protection is triggered only if a suspect “unambiguously request[s] counsel, . . . sufficiently clearly that a reasonable police officer . . . would understand the statement to be a request for an attorney”). Davis’ clear invocation rule has deservedly come under heavy fire. See, e.g., Janet E. Ainsworth, In a Different Register: The Pragmatics of Powerlessness in Police Interrogation, 103 Yale L.J. 259, 302 (1993) (arguing that expecting suspects to make “direct, assertive, unqualified invitations of counsel” is not only inconsistent with Miranda’s basic premise that custodial interrogation is inherently coercive, but is also “a gendered doctrine that privileges male speech norms, . . . thus disadvantag[ing] women and other marginalized and relatively powerless groups in society”); Tonja Jacobi, Miranda 2.0, 50 U.C. Davis L. Rev. 72-73 (2016), available at http://ssrn.com/abstract=2656405 (recommending that police either inform suspects they must unambiguously invoke Miranda or ask whether they wish to assert their rights); Kit Kinports, Criminal Procedure in Perspective, 98 J. Crim. L. & Criminology 71, 106-07 (2007) (observing that Davis’ reasonable police officer standard strayed from the Court’s focus on the suspect’s perspective in other Miranda cases); Laurent Sacharoff, Miranda, Berghuis, and the Ambiguous Right to Cut Off Police Questioning, 43 N. Ky. L. Rev. 391 (2016) (noting that some of the case law applying Davis essentially reasons that “no means yes”).

\(^{16}\) Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (plurality opinion) (holding that the defendant lost the protection of Edwards by asking, “Well, what is going to happen to me now?”).
protection to suspects who ask for a lawyer than to those who invoke the right to remain silent.\textsuperscript{17}

Exactly what conduct is barred by \textit{Edwards} has been the subject of debate, however, as the Supreme Court for many years alternated between describing \textit{Edwards} as simply prohibiting the police from interrogating suspects and adopting the broader position that they may not reinitiate contact with suspects in ways that might not constitute “interrogation” within the meaning of \textit{Miranda}—for example, giving suspects information about the case or asking whether they have changed their minds about wishing to speak with a lawyer.\textsuperscript{18} In discussing the relevant cases below, I shall refer to these, respectively, as the narrow and broad interpretations of the \textit{Edwards} ban.\textsuperscript{19}

\begin{enumerate}
  \item \textit{Edwards v. Arizona}

The confusion arguably began with \textit{Edwards} itself. \textit{Edwards} was decided just a year after \textit{Rhode Island v. Innis} had determined that “interrogation” for

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For further discussion of \textit{Bradshaw’s} initiation exception, see \textit{infra} notes 144-48 and accompanying text.

\textsuperscript{17} For further discussion of the rationale underlying the Court’s decision to differentiate between the two types of invocations, see \textit{infra} notes 41-43 and accompanying text. The distinction nevertheless remains controversial. Compare Geoffrey S. Corn, \textit{Miranda, Secret Questioning, and the Right to Counsel}, 66 \textit{Ark. L. Rev.} 931, 947, 949 (2013) (observing that Mosley and \textit{Edwards} are based on “different premise[s]” and that the suspect who asks for a lawyer “place[s]" the police “on notice” that she “does not feel capable of dealing with” them alone), and William J. Stuntz, \textit{Waiving Rights in Criminal Procedure}, 75 VA. L. Rev. 761, 821 (1988) (agreeing that “the seeming arbitrariness of the distinction” can be explained on this ground), with Steven P. Grossman, \textit{Separate but Equal: Miranda’s Rights to Silence and Counsel}, 96 MARQ. L. Rev. 151, 153, 154 (2012) (arguing that the “distinction . . . was highly questionable from its genesis” and is “unsupported by either theoretical or pragmatic justifications”); and Yale Kamisar, \textit{The Edwards and Bradshaw Cases: The Court Giveth and the Court Taketh Away, in 5 The Supreme Court: Trends and Developments 1982-1983}, at 153, 157 (Jesse H. Choper et al. eds., 1984) (questioning whether “[t]he average person” really distinguishes between the two rights, and concluding that “either Mosley was wrongly decided or \textit{Edwards} was”). See also Marcy Strauss, \textit{Reinterrogation}, 22 \textit{Hastings Const. L.Q.} 359, 384 (1995) (noting that \textit{Miranda} was “at best equivocal” on this point).

\textsuperscript{18} See Maryland \textit{v. Shatzer}, 559 U.S. 98, 115 (2010) (distinguishing between “reinterrogating” and “asking . . . permission to be interrogated” (emphasis omitted)); 2 Wayne R. Lafave et al., \textit{Criminal Procedure} § 6.7(c), at 782 & n.111, 787 & n.133 (3d ed. 2007) (citing conflicting lower court cases on the question whether police engage in “interrogation” when they provide information about the evidence they have collected or the charges a suspect might face).

\textsuperscript{19} Compare Richard A. Leo \& Welsh S. White, \textit{Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda}, 84 \textit{Minn. L. Rev.} 397, 428 & n.156 (1999) (interpreting \textit{Edwards} as allowing police to “subly persuade[es]” a suspect to change her mind “[s]o long as the police persuasion does not amount to interrogation,” though recognizing that the Court’s opinion “may be read” more broadly to prohibit police from “attempting to induce a waiver”); with Corn, supra note 17, at 941 (reading \textit{Edwards} and its progeny, including \textit{Shatzer}, to bar “even a police request for a suspect to reconsider his invocation”); and Stuntz, supra note 17, at 819 (endorsing the broad view that \textit{Edwards} “cuts the police off entirely” so that they “cannot refuse to take no for an answer”).
purposes of *Miranda* consists of “either express questioning or its functional equivalent,” with the latter defined as “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.”20 Opening with a quotation from *Miranda*, the majority in *Edwards* observed that, once a suspect invokes the right to counsel, “the interrogation must cease until an attorney is present.”21 The Court’s reference here to “the interrogation” presumably relates to the interrogation session already in progress or about to begin when a suspect asserted her rights, especially given that the *Miranda* opinion at that point was discussing “the right to cut off questioning” “at any time prior to or during questioning.”22 Alternatively, however, the *Edwards* Court could have meant that police conduct falling short of “interrogation” as defined in *Innis* need not “cease” upon a suspect’s invocation of her rights.

The most direct support in the Court’s decision in *Edwards* for reading the ruling narrowly is the unqualified statement that police may not “reinterrogate” a suspect who has invoked the right to counsel.23 But the rest of the opinion is either more equivocal or supports the broader interpretation of the *Edwards* ban.

Notably, *Innis’* interrogation standard does not appear anywhere in the majority’s opinion in *Edwards*. This omission is somewhat surprising given that *Innis* marked the first time the Court had interpreted the concept of “interrogation” for *Miranda* purposes and presumably was fresh in the Justices’ minds. If “interrogation” was meant to be a key component of the *Edwards* analysis, one would have expected the Court’s ruling to include at least the definition of the term.

The *Edwards* majority did cite to *Innis* following its observation that “[a]bsent [custodial] interrogation, there would have been no infringement of the

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21. *Edwards* v. Arizona, 451 U.S. 477, 482 (1981) (quoting *Miranda* v. Arizona, 384 U.S. 436, 474 (1966)). This phrase is a staple feature in the *Edwards* line of cases. See, e.g., *Davis* v. United States, 512 U.S. 452, 462 (1994) (“We held in *Edwards* that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present”); see also *Minnick* v. Mississippi, 498 U.S. 146, 150 (1990); *Arizona* v. *Roberson*, 486 U.S. 675, 680 (1988). In practice, however, invoking the right to counsel may end the interrogation session, but it does not typically result in the appearance of an actual lawyer. See Mark A. Godsey, Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings, 90 MINN. L. REV. 781, 804, 797 (2006) (observing that the “*Miranda* right to counsel is in reality an empty promise” given that “[f]orty years of experience” has shown that, contrary to the *Miranda* Court’s “factual assumptions,” “no attorney is provided” in “the vast majority” of cases when a suspect asserts the right to counsel); see also *Shatzer*, 559 U.S. at 121 (Stevens, J., concurring in the judgment) (pointing out that a suspect who asked for, and never received, an opportunity to consult with counsel is “likely to feel that the police lied to him and that he really does not have any right to a lawyer”).


right that Edwards invoked and there would be no occasion to determine whether
there had been a valid waiver. But this comment is ambiguous: it appeared in
the context of a discussion explaining the options available to the police had
Edwards been the one to reinitiate communications with them. In that event, the
Court said, the officers could have “listen[ed] to his voluntary, volunteered
statements” because Miranda only guarantees the right to counsel “at any
custodial interrogation.” The police are always permitted to keep an ear open
for comments a suspect happens to volunteer, however, and therefore this
reference says little about whether they may employ active strategies short of
“interrogation” to try to persuade a suspect to change her mind about wanting a
lawyer. Moreover, Edwards apparently cited Innis here to support the last part of
the “[a]bsent custodial interrogation” sentence—for the proposition that Innis
made “sufficiently clear” that judges need not engage in a waiver inquiry if no
interrogation took place, an issue unrelated to the intended reach of the Edwards
ban.

At the end of the opinion, Edwards referred to Innis again, this time in a
context that did allude to Innis’ conception of “interrogation.” The Court noted
that Edwards’ confession was inadmissible because he “was subjected to
custodial interrogation . . . within the meaning of Rhode Island v. Innis . . . and . . .
. this occurred at the instance of the authorities.” But this comment seems to be
directed at the “interrogation” that occurred after Edwards agreed to speak to the
officers and not the detectives’ conduct that preceded and may have facilitated
that “interrogation.” Additionally, this language indicates that the Court
thought it important not only that interrogation à la Innis occurred but also that
the interrogation came about “at the instance” of the police—i.e., it was not
initiated by Edwards. The conjunctive structure of the sentence thus tends to
support the broader view that Edwards bars the police from doing anything to
initiate a resumption of interrogation once a suspect asks for a lawyer.

25. Id. at 485-86.
26. See Miranda, 384 U.S. at 478 (noting that “[v]olunteered statements of any kind are not . . .
affected by our holding today”).
27. Edwards, 451 U.S. at 486 (citing Rhode Island v. Innis, 446 U.S. 291, 298 n.2 (1980),
where the Court declined to analyze whether Innis had “waived his right under Miranda to be free
from interrogation until counsel was present” given its conclusion that he “was not ‘interrogated’
for Miranda purposes”).
28. Id. at 487.
29. It is not entirely clear what happened in the interrogation room after Edwards was re-
Mirandized and told the officers, “I’ll tell you anything you want to know, but I don’t want it on
tape.” Id. at 479. The majority said only that Edwards “thereupon implicated himself in the
crime,” id., but Justice Powell’s separate opinion indicated that there “clearly was questioning” and
Edwards “was subjected to renewed interrogation.” Id. at 490 (Powell, J., concurring in the result).
30. The Edwards majority’s only other citation to Innis is simply a restatement of the Edwards
holding: “just last Term, in a case where a suspect in custody had invoked his Miranda right to
counsel, the Court again referred to the ‘undisputed right’ under Miranda to remain silent and to be
Despite these few inconclusive references to *Rhode Island v. Innis*, the clear import of the *Edwards* opinion supports reading the decision broadly. Recall the *Edwards* Court’s summary of its holding set out above. A suspect who has invoked the right to counsel may be “subject[ed] to further interrogation,” presumably as defined in *Innis*, under only two circumstances: where either “counsel has been made available” to the suspect or she was the one to “initiate[ ] further communication, exchanges, or conversations with the police.” On the other hand, an effective *Miranda* waiver cannot be proven “by showing only that [the suspect] responded to further police-initiated custodial interrogation.” This language indisputably suggests that renewed “interrogation” of a suspect who has invoked the right to counsel may not be initiated by the police—for example, by approaching the suspect, readministering *Miranda* warnings, and asking if she has changed her mind—unless, of course, that conversation takes place in the presence of counsel.

Similarly, in making the point that Edwards was not “powerless to countermand his election” and thereby leaving open the possibility that under some circumstances the prosecution would be allowed to introduce “incriminating statements [he] made . . . prior to . . . having access to counsel,” the Court explained, “[H]ad Edwards initiated the meeting . . ., nothing . . . would prohibit the police from merely listening to his voluntary, volunteered statements free of interrogation ‘until he had consulted with a lawyer.’” *Id.* at 485 (majority opinion) (quoting *Innis*, 446 U.S. at 298).

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31. *See supra* notes 8-9 and accompanying text.


33. *Id.* at 484 (emphasis added). For subsequent opinions to the same effect, see *Montejo v. Louisiana*, 556 U.S. 778, 797 (2009) (noting that if the defendant invoked his right to counsel, “no interrogation should have taken place unless Montejo initiated it”); *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (“In our view, a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning”); *Michigan v. Harvey*, 494 U.S. 344, 349 (1990) (describing *Edwards* as providing that “any waiver . . . given in a discussion initiated by the police is presumed invalid”); *Arizona v. Roberson*, 486 U.S. 675, 686 (1988) (“[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling.”); *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam) (summarizing *Edwards* as providing that, “if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked”); *Solem v. Stumes*, 465 U.S. 638, 646 (1984) ("*Edwards* established a new test for when [a] waiver would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication."); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion) (“We recently restated the requirement . . . to be that before 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.’” (quoting *Wyrick v. Fields*, 459 U.S. 42, 46 (1982) (per curiam))).

34. For the view that this conduct does not rise to the level of interrogation, see *supra* note 18 and accompanying text and *infra* note 39 and accompanying text.
and using them against him at the trial."³⁵ This language confirms that a suspect-initiated conversation—and not a change of heart induced by the police through means short of “interrogation”—is the only scenario that can ultimately lead to a second interrogation session. And even then, the police may only “listen” to statements the suspect is willing to “volunteer”; they may not engage in interrogation absent a waiver.

Elaborating on the waiver analysis, the Court observed in a footnote that “frequently,” in “a meeting initiated by the accused, the conversation is not wholly one-sided” and the officers may well “say or do something that clearly would be ‘interrogation.’”³⁶ Those circumstances, the Court explained, would trigger a waiver inquiry to be resolved by considering “the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.”³⁷ But here again, the reference to “interrogation” focuses on police conduct following a suspect’s reinitiation of communications, not their actions that led up to and influenced the suspect’s decision to retract the request for counsel.

The Court’s application of its standard to the facts of Edwards likewise supports the broad reading of the opinion. In finding a violation of Edwards’ Miranda rights, the Court identified the following “critical facts”: Edwards invoked his rights; he was not given an opportunity to consult with counsel; and “the police . . . returned the next morning to confront him and, as a result of the meeting, secured incriminating oral admissions.”³⁸ But the meeting the following day began, not with anything that could plausibly be considered the functional equivalent of interrogation, but instead with the officers “identif[y]ing themselves, state[ing] they wanted to talk to [Edwards], and inform[ing] him of his Miranda rights.”³⁹ The Court’s conclusion that “Edwards was subjected to custodial interrogation . . . within the meaning of Rhode Island v. Innis and that this occurred at the instance of the authorities” was based on the premise that “the police returned to him the next day” and did not do so “at his suggestion or

³⁶. Id. at 486 n.9.
³⁷. Id. See also Bradshaw, 462 U.S. at 1044 (interpreting this footnote to mean that “‘initiation’ of a conversation by a defendant” does not “amount to a waiver of a previously invoked right to counsel”; instead, “where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver” of the right to counsel); id. at 1048 (Powell, J., concurring in the judgment) (acknowledging that the other eight Justices all endorsed this “two-step analysis”).
³⁸. Edwards, 451 U.S. at 482.
³⁹. Id. at 479. See Smith v. Illinois, 469 U.S. 91, 100-01 (1984) (Rehnquist, J., dissenting) (arguing that police did not engage in interrogation by completing Miranda warnings); LAFAYE ET AL., supra note 18, § 6.7(c), at 787 n.131 (citing lower court case law agreeing that providing Miranda warnings does not qualify as interrogation).
Again, the key was that the police were the ones to initiate the conversation, not that in doing so their conduct rose to the level of interrogation.

Further supporting the position that Edwards was meant to be interpreted broadly is the fact that the majority opinion was authored by Justice White. Justice White was the first member of the Court to perceive a distinction between suspects who invoke the right to silence and those who request counsel. Writing separately in Mosley, Justice White expressed the view that the former group, who had “chosen . . . to make [their] own decisions regarding [their] conversations with the authorities, . . . should not be deprived even temporarily of any information relevant to the decision.” On the other hand, Justice White continued, the police have no business supplying that same information to suspects who have asked for a lawyer. “[T]he reasons to keep the lines of communication . . . open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice,” Justice White pointed out, because, in that case, “[t]he authorities may . . . communicate with him through an attorney.” Justice White was referring here to “information” that today might not fall within the Innis definition of interrogation: telling suspects that the evidence against them was “unusually strong” or that their “immediate cooperation . . . would redound to [their] benefit.” Although Mosley predated both Edwards and, more importantly, Innis, Justice White seemed to be under the impression that the police are not permitted to supply any information about the case to suspects who have invoked the right to counsel.

The broad interpretation of the Court’s opinion in Edwards is also confirmed by the approach taken by the Justices writing separately, who expressed a willingness to support the narrower view that law enforcement officials should be allowed to reinitiate contact with a suspect who has invoked the right to counsel. Concurring in the result, Justice Powell, joined by Justice Rehnquist, disagreed with the majority’s “emphasis on [the] single element [of] ‘initiation’” and instead thought that “police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney.” Chief Justice Burger likewise concurred only in the judgment, refusing to endorse “a special rule” specifying how suspects “may waive the right to be free from interrogation” and noting that Innis had “rejected” the idea that “any ‘prompting’ of a person in custody is somehow evil per se.”

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40. Edwards, 451 U.S. at 487; see also id. at 485 (referring to “the interrogation initiated by the police”).
42. Id. at 110 n.2.
43. Id. at 109 n.1. For conflicting views as to whether such statements qualify as interrogation, see infra notes 92-103 & 151 and accompanying text.
44. Edwards, 451 U.S. at 491, 490 (Powell, J., concurring in the result). For the view that such an inquiry does not rise to the level of interrogation, see supra note 18 and accompanying text.
minority supports the inference that the majority intended to prohibit the type of police conduct their colleagues would have condoned and therefore corroborates other evidence in the Court’s opinion suggesting it meant for its ruling in Edwards to be read broadly.

2. Before and After Edwards

Although the Court’s intent in Edwards seems relatively transparent, language in other Supreme Court decisions has waffled between the broad and narrow view of what restrictions on police conduct follow from an invocation of the right to counsel. None of the relevant majority opinions discuss the issue in any detail and most of them support the broad interpretation of the Edwards ban, but at times the Justices have suggested the police are safe unless their actions rose to the level of “interrogation” as defined in Rhode Island v. Innis.

Beginning with Innis itself, that case would presumably be analyzed under Edwards today given that the defendant there invoked the right to counsel. While the Court cannot be faulted for failing to anticipate the ruling in Edwards, the majority did not cite Mosley or the “scrupulously honor” test despite the fact that Innis had asserted his Miranda rights. Nevertheless, Innis did refer to the same discussion in Miranda concerning suspects who invoke the right to counsel that the Edwards Court would quote the following year: “In Miranda v. Arizona, the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present.”

In the sentence that immediately followed, however, the Innis majority described “[t]he issue in this case” as whether Innis “was ‘interrogated’ in violation of the standards promulgated” in Miranda. Later in the opinion, the Court made a similar comment, noting that the parties agreed Innis had invoked his right to counsel and “therefore” “[t]he issue . . . [was] whether [he] was ‘interrogated’ . . . in violation of [his] undisputed right . . . to remain silent until he had consulted with a lawyer.” Although these observations provide support for the narrow view of the Edwards ban, it is somewhat speculative to read too much into this language in trying to interpret a line of cases that would not begin for another year.

47. Only Justice Stevens’ dissent mentioned Mosley, arguing that the Court’s opinion in that case must at minimum bar “deliberate attempts to elicit statements” from suspects who have asserted their rights. Id. at 310 (Stevens, J., dissenting).
48. Id. at 293 (majority opinion); see supra note 21 and accompanying text.
49. Innis, 446 U.S. at 293.
50. Id. at 298. Cf. id. at 309, 311 (Stevens, J., dissenting) (interpreting Miranda to require that “any type of interrogation cease until an attorney was present,” though adopting a broader definition of “interrogation” that would encompass any police conduct that “appear[ed] to call for a response” or was “designed to do so”). For criticism of Innis’ standard and outcome, see infra notes 139-40 and accompanying text.
51. For other opinions that predate both Innis and Edwards but nevertheless provide some tentative support for the narrow interpretation of Edwards, see Michigan v. Mosley, 423 U.S. 96, 104 (1975) (seemingly distinguishing between “resum[ing] the questioning” and trying to
Arizona v. Mauro, however, post-dated Edwards and nevertheless tracked the decision in Innis. Despite the fact that Mauro invoked the right to counsel, the Court focused solely on whether the Innis definition of interrogation was satisfied. Although the Court quoted the Edwards holding, it then treated the case no differently than if Mauro had never asserted his rights. The majority observed that Mauro had invoked and never waived his right to counsel and then, mirroring the language in Innis quoted above, asserted that “[t]he sole issue, then, is whether the officers’ subsequent actions rose to the level of interrogation [within] the language of Innis.”

Dictum in the Court’s opinion in Arizona v. Roberson arguably provides further support for the narrow view of the Edwards ban. The Roberson Court mentioned in passing that law enforcement officials are “free to inform a suspect who has invoked the right to counsel about “the facts of [a] second investigation as long as such communication does not constitute interrogation” within the meaning of Innis. In the very next sentence, however, the majority observed that Edwards “made clear” that additional conversations initiated by a suspect “are perfectly valid,” suggesting that police may be permitted to provide information about another investigation only in cases where the suspect has asked “what the new investigation is about.”

Moreover, elsewhere the Roberson Court seemed to adopt the broader view of Edwards, noting that “any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the inherently compelling pressures’ and not the purely voluntary choice of the suspect.” The use of the terms “behest” and “instigation” suggests the Court was concerned about any police-initiated contact with a suspect, whether or not it rose to the level of interrogation. The Roberson majority went on to quote “persuade Mosley to reconsider his position”); Miranda v. Arizona, 384 U.S. 436, 484, 485 (1966) (characterizing as “consistent with the procedure which we delineate today” FBI practices that included allowing “the interview” to “be continued” following an invocation of the right to counsel “as to all matters other than the person’s own guilt or innocence”).

53. See id. at 522.
54. See id. at 525-26.
55. Id. at 527; see also id. at 532 (Stevens, J., dissenting) (noting that Mauro had requested a lawyer and therefore “could not be subjected to interrogation until he either received the assistance of counsel or initiated a conversation with the police,” and because “neither event occurred, the . . . evidence must be excluded if it was the product of ‘interrogation’ within the meaning of Rhode Island v. Innis”). For criticism of Mauro’s standard and outcome, see infra notes 139-40 and accompanying text.
57. Id. at 687 (citing Rhode Island v. Innis, 446 U.S. 291 (1980)). For a lower court opinion relying on this language to support the narrow reading of Edwards, see Hartman v. State, 2013 Ind. LEXIS 417, at *6-7 (Ind. May 31, 2013).
59. Id. at 681 (emphasis added) (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)); see also id. at 683 (referring to the police “approach[ing]” a suspect “about a separate investigation”).
similar language from Justice White’s separate opinion in Mosley, which, as noted above, is consistent with the more expansive interpretation of Edwards: “As Justice White has explained, ‘the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities’ insistence to make a statement without counsel’s presence may properly be viewed with skepticism.’”

Roberson is not the only Supreme Court opinion to endorse a broad reading of the Edwards shield. In Smith v. Illinois, the Court found “‘no justification’” for an officer’s decision to “‘proceed[] through to the end of the Miranda warnings’” after the defendant had invoked the right to counsel and “‘in the course of doing so misrepresent[] . . . that [the defendant] had to talk to the interrogator.’” The majority thereby rejected the view expressed in Justice Rehnquist’s dissent that, while Edwards “requires interrogation to cease, . . . here no ‘interrogation’ was being conducted by the police; they were simply in the process of giving petitioner his full Miranda warnings.” Rather, the Court voiced the more wide-ranging concern that Edwards was designed to prevent law enforcement officials “through ‘[badgering]’ or ‘overreaching’—explicit or subtle, deliberate or unintentional—[from] wear[ing] down the accused and persuad[ing] him to incriminate himself notwithstanding his earlier request for counsel’s assistance.” Again, the Court did not suggest that these “subtle” forms of “badgering” need to rise to the level of “interrogation” as defined in Innis.

Another opinion supporting a more generous reading of Edwards is Minnick v. Mississippi, where the Court justified holding that the Edwards protection continues even after a suspect has been given an opportunity to speak to a lawyer as “‘an appropriate and necessary application of the Edwards rule.’” “A single consultation with an attorney,” the Court explained, “does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and . . . may increase as custody is prolonged.” Writing in dissent, Justice Scalia, joined by Chief Justice Rehnquist, repeatedly interpreted the majority opinion as barring police conduct that does not qualify as “interrogation.” The dissenters accused the Court of adopting “a rule excluding all confessions that follow upon even the slightest

60. Id. (emphasis added) (quoting Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring in the result)). For further discussion of Justice White’s opinion in Mosley, see supra notes 41-43 and accompanying text.


62. Id. at 100-01 (Rehnquist, J., dissenting).

63. Id. at 98 (majority opinion) (quoting Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) (plurality opinion); Fare v. Michael C., 442 U.S. 707, 719 (1979)). For further discussion of the Court’s concern with police badgering, see infra notes 128-31 and accompanying text.


65. Id.
They described the majority opinion as holding that “a person in custody who has once asked for counsel cannot thereafter be approached by the police unless counsel is present.” And they criticized the Court for “permanently prevent[ing] a police-initiated waiver” following the invocation of the right to counsel, thus “mak[ing] it largely impossible for the police to urge a prisoner who has initially declined to confess to change his mind—or indeed, even to ask whether he has changed his mind.”

Justice Scalia’s recurring use of these expansive terms to describe the Court’s ruling could not have escaped the attention of the majority, which notably never bothered to deny his characterization of its opinion. Rather, the Court’s only response was the observation that the Edwards line of cases “does not foreclose finding a waiver. . . , provided the accused has initiated the conversation or discussions with the authorities.” But, the Court continued, that finding could not be made on the facts of Minnick because “[t]here can be no doubt that the interrogation in question was initiated by the police; it was a formal interview which petitioner was compelled to attend.” As in Edwards, the meeting in Minnick began with the administration of Miranda warnings, not with police conduct that could arguably qualify as the functional equivalent of interrogation. Like Edwards, Roberson, and Smith, then, Minnick focused on whether the police were the ones to reopen the conversation, not whether they were able to convince the defendant to change his mind by means short of interrogation.

Although the broad reading of the Edwards ban is most faithful to the Court’s opinion in that case as well as the predominant view expressed in other

66. Id. at 164 (Scalia, J., dissenting) (emphasis added).
67. Id. at 159 (emphasis added).
68. Id. at 163 (emphasis added); see also id. at 162 (charging that “an irrebuttable presumption that any police-prompted confession is the result of ignorance of rights, or of coercion, has no genuine basis in fact”); id. at 167 (noting that police may not “urge, or even ask, a person in custody to do what is right”).
69. Id. at 156 (majority opinion).
70. Id.
71. See id. at 149; see also supra note 39 and accompanying text.
72. For other opinions interpreting the Edwards ban to extend beyond “interrogation,” see Montejo v. Louisiana, 556 U.S. 778, 794-95 (2009) (summarizing Edwards as providing that, once a suspect asserts the right to counsel, “not only must the immediate contact end, but ‘badgering’ by later requests is prohibited”); McNeil v. Wisconsin, 501 U.S. 171, 176-77 (1991) (observing that a suspect who has invoked the right to counsel “may not be approached for further interrogation” and the police may not “subsequently initiate an encounter in the absence of counsel”); Connecticut v. Barrett, 479 U.S. 523, 535 n.7 (1987) (Brennan, J., concurring in the judgment) (observing that the police violated Edwards when they twice “inquired whether or not [Barrett] had changed his mind,” thereby “attempt[ing] to persuade [him] to waive the right he had asserted . . . absent any indication from Barrett that he had changed his mind on this point”); Oregon v. Bradshaw, 462 U.S. 1039, 1049, 1050 (1983) (Powell, J., concurring in the judgment) (describing Edwards as “focus[ing] on the reopening of communication with the accused by the police,” so that “a court never gets to the second step” of the analysis—the validity of a suspect’s waiver—“unless the accused was the first to speak and to say the right thing”).
Supreme Court precedent, language in some of the Court’s decisions seemingly endorses the narrow reading, treating Innis’ definition of interrogation as the controlling standard in determining what police may do following an invocation of the right to counsel. The next section turns to the Court’s most recent discussion of this issue in Maryland v. Shatzer.

B. The Shatzer Dictum

Unsurprisingly, the conflicting signals coming from the Supreme Court generated a division among the lower courts, with some adopting the narrow position that Edwards bars only police tactics that rise to the level of “interrogation” under Rhode Island v. Innis and others interpreting the Supreme Court’s opinions to prohibit a wider variety of police conduct. The Court seemingly resolved that conflict in favor of the broader view in its 2010 decision in Maryland v. Shatzer. Although the relevant language appeared in dictum, Shatzer represents the Court’s most extensive and direct discussion of the issue to date.

In the course of announcing the so-called break-in-custody exception to Edwards, Justice Scalia’s majority opinion in Shatzer returned to the themes expressed in his dissent twenty years earlier in Minnick. Edwards, the Court asserted in Shatzer, bars “subsequent attempts” at interrogation, “requests for interrogation,” and in fact “any efforts to get [the suspect] to change his mind.” Quoting the Roberson admonition set out above that, following an invocation of the right to counsel, any waiver of Miranda must come from “the suspect’s own instigation” rather than “at the authorities’ behest,” the Shatzer majority explained that “subsequent requests for interrogation pose a significantly greater risk of coercion,” both because of police officers’ “persistence in trying to get the suspect to talk” and because “the continued pressure” of custody is “likely to increase as custody is prolonged.” A narrower ban, the Court pointed out,
would enable law enforcement officials to “take advantage of the mounting coercive pressures of ‘prolonged police custody’ by repeatedly attempting to question a suspect who requested counsel until the suspect is ‘badgered into submission.’”

Lest there be any doubt, the Shatzer Court then criticized Justice Stevens’ separate opinion for speaking in terms of “‘reinterrogat[ing]’ a suspect.” The “fallacy” of Justice Stevens’ argument, the majority cautioned, “is that we are not talking about ‘reinterrogating’ the suspect; we are talking about asking his permission to be interrogated.” This is clearly a broader reading of Edwards than the view that police do not violate the Miranda rights of a suspect who has asserted the right to counsel unless their conduct constitutes “interrogation” as defined in Innis. And notably none of the Justices disavowed that interpretation of the Edwards line of cases.

Although the term “reinterrogate” appeared in Justice Stevens’ opinion, his response to the majority’s criticism of the word seemingly supported the broader view of the Edwards ban: he agreed with Justice Scalia that “[p]olice may not continue to ask . . . a suspect [who has invoked the right to counsel] whether they may interrogate him until that suspect has a lawyer present.

If Shatzer was meant to put an end to the controversy surrounding the scope of Edwards, that message has been slow to reach some of the lower courts. Their treatment of this issue in the wake of Shatzer is the subject of the following section.

II. THE POST-SHATZER RECORD IN THE LOWER COURTS

Despite the clear import of the Shatzer dictum, the conflict in the lower courts persists, with some courts continuing to take the narrow view that the Edwards ban is limited to police actions that rise to the level of “interrogation”

‘wear down the accused’ than did the first such request” (quoting Smith v. Illinois, 469 U.S. 91, 98 (1984) (per curiam)).

80. Id. at 105 (emphasis added) (quoting Roberson, 486 U.S. at 686; id. at 690 (Kennedy, J., dissenting)); see also id. at 107 (referring to “the later attempted interrogation”); id. at 117 (referencing “attempts at interrogation”). For discussion of the relationship between Innis’ definition of interrogation and the intent of the police, see infra note 139 and accompanying text.81. Shatzer, 559 U.S. at 115 (quoting id. at 121 (Stevens, J., concurring in the judgment)).

82. Id. Likewise, at oral argument, Justice Scalia asked the State’s attorney: “I thought that you couldn’t approach him. I thought that once he’s invoked his right to counsel, you can’t approach him and say, would you like to talk now? Right? Isn’t that . . . the rule?” Transcript of Oral Argument at 26, Maryland v. Shatzer, 559 U.S. 98 (2010) (No. 08-680).

83. Justice Thomas disagreed with the majority’s fourteen-day break-in-custody rule and would have refused to apply Edwards to any “interrogations that occur after custody ends,” but his opinion did not address the Court’s discussion of what law enforcement conduct is barred by Edwards. Shatzer, 559 U.S. at 118 (Thomas, J., concurring in part and concurring in the judgment).

84. Id. at 121 n.2 (Stevens, J., concurring in the judgment); see also id. at 123 (agreeing that police may not “‘coerce’ or ‘badger’” a suspect who has invoked the right to counsel into “abandoning” that right (quoting id. at 106 (majority opinion))).
under *Rhode Island v. Innis*. Law enforcement officials in these jurisdictions are therefore allowed to engage in tactics designed to persuade suspects who have invoked the right to counsel to change their minds—so long as their conduct cannot be characterized as the functional equivalent of interrogation. Other courts, however, take the Supreme Court at its word and adhere to the more generous interpretation of *Edwards*.

An illustration of a case in the former camp is *McKinney v. Ludwick*, where a state law enforcement official told McKinney, following his invocation of the right to counsel, that he might face federal charges and therefore could be subject to the death penalty.\(^85\) Apparently picking up on that comment the following morning, McKinney said he wanted to talk to the detective “‘to see what the Feds had against him and how the case was going to proceed.’”\(^86\) The Sixth Circuit quoted the *Shatzer* dictum prohibiting the police from “‘tak[ing] advant[age]’” of the custodial environment “‘by repeatedly attempting to question’” suspects until they are “‘badgered into submission’” and also acknowledged that McKinney had been subjected to “a type of ‘subtle compulsion’ to cooperate.”\(^87\) Nevertheless, the Sixth Circuit viewed *Innis*’ definition of interrogation as controlling, observing that it was “by no means clear” the officer had engaged in the functional equivalent of interrogation, rather than the “‘subtle’” pressure tactics permitted by *Innis* and therefore, according to the court of appeals, “not foreclosed by *Miranda* and *Edwards*.”\(^88\)

In applying *Innis* to the facts before it, the Sixth Circuit thought the question was a “close” one, but ultimately upheld the state court’s conclusion that the *Innis* standard was satisfied under the deferential standard of review required by AEDPA.\(^89\) But the Sixth Circuit also deferred to the state court’s finding that McKinney came within the initiation exception, rejecting his argument that “his request to talk to police was precipitated by [the] death-penalty comment.”\(^90\) Although the court quoted *Shatzer*’s concern about “‘the mounting coercive pressures of prolonged police custody,’” it reasoned that “[a]n entire night [had] passed” and the fact that McKinney had not responded “immediately” to the detective’s statement “‘reduc[ed] the likelihood that [he] was under any compulsion to confess.’”\(^91\) Therefore, the Sixth Circuit concluded that “any

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86. Id. (quoting the detective).
87. Id. at 491 (quoting *Shatzer*, 559 U.S. at 105; *Rhode Island v. Innis*, 446 U.S. 291, 303 (1980)).
88. Id. at 490 (quoting *Innis*, 446 U.S. at 303); see also id. at 489 (using the *Innis* standard to define “[t]he ‘interrogation’ precluded” by *Edwards*).
89. Id. at 490-91.
90. Id. at 490.
91. Id. at 491 (quoting *Shatzer*, 559 U.S. at 105; Holman v. Kemna, 212 F.3d 413, 419 (8th Cir. 2000)).
coercive effect” of the detective’s comments “had subsided” by the time McKinney asked to speak to him the following morning.92

In Benjamin v. State, the Mississippi Supreme Court, like the Sixth Circuit in McKinney, quoted Shatzer’s language purporting to prohibit police from “‘tak[ing] advantage’ of custody and “‘repeatedly attempting to question’” suspects who have sought counsel, but nevertheless applied Innis’ definition of interrogation.93 The transcript of the post-invocation interrogation room conversation in Benjamin reveals that the fourteen-year-old murder suspect was obviously concerned about spending the night in jail, and the officer commented that “it may be best to just wait until tomorrow and talk, . . . and let him stay back there in jail tonight . . . . We don’t really need to talk to him. We just wanted his side of it.”94 In response to Benjamin’s inquiry whether he was going to be locked up, the officer said, “[w]ell that has a lot to do with what you talk about and everything,” even though, according to the state supreme court, “it was a virtual certainty that Benjamin would be incarcerated that night no matter what he told the police.”95 The officer also told Benjamin the police did not think he was “the shooter,” but then went on to warn him, “you’re either going to have to tell your side of the story or we’re going to go with what everybody else is saying . . . . Tell me what happened last Thursday evening.”96 The court ultimately concluded that the police engaged in the functional equivalent of interrogation because they “encourage[d] a parent to pressure a fourteen-year-old suspect to talk” and “foster[ed] the suspect’s mistaken belief that talking would allow him to avoid a night in jail.”97

In State v. Adamcik, the Idaho Supreme Court also adopted the narrow view of Edwards but reached the opposite conclusion in applying Innis to facts comparable to Benjamin.98 Detectives in that case told a sixteen-year-old suspect who had invoked his right to counsel that they had “overwhelming evidence,” including a confession from the other suspect as well as a knife and masks used in the murder, and that his “full cooperation [could] do nothing but help [him] at this point.”99 “You know exactly what happened and what you need to do,” the officers said.100 In finding no violation of Edwards, the state supreme court did

92. Id. at 492.
94. Id. at 119.
95. Id. at 120.
96. Id. at 125 (Pierce, J., dissenting).
97. Id. at 123 (majority opinion). For other opinions viewing Innis as controlling, but finding that its standard was met, see United States v. Wysinger, 683 F.3d 784, 796 (7th Cir. 2012) (ruling that Edwards was violated when officer asked if the suspect had any drugs or money in his van and “challenged the truth of [his] explanation” why he was in the area); Hartman v. State, 2013 Ind. LEXIS 417, at *9-14 (Ind. May 31, 2013) (reaching the same conclusion where officer read the search warrant to the suspect and asked if he had any questions).
99. Id. at 439.
100. Id.
not acknowledge the Supreme Court’s ruling in *Shatzer*, but did cite the Court’s earlier opinion in *United States v. Davis* for the similar proposition that “the rationale behind prohibiting the police from attempting to reinitiate communications with a suspect after he invokes his right to counsel was to prevent the defendant from being badgered into waiving his rights.”

Nevertheless, the Idaho Supreme Court viewed the *Innis* definition of interrogation as controlling, affirming the district court’s conclusion that the officers’ comments were “in line with a recitation of the evidence gathered against [Adamcik], rather than an interrogational line of questioning reasonably likely to evoke an incriminat[ng] response.”

Although the district court thought the officers’ comments were “coated with a layer of precariousness,” the Idaho Supreme Court noted, the lower court concluded that they did not “rise to the level in which an objective observer would conclude [they] were designed to invite comment from [Adamcik].”

A final, though somewhat more ambiguous, illustration of a case interpreting *Edwards* narrowly is *United States v. Maza*. In finding that a request for consent to search the suspect’s body and property did not violate *Edwards*, the Navy-Marine Corps Court of Criminal Appeals applied the *Innis* definition of interrogation, noting that “the Supreme Court has never extended the *Edwards* prophylactic rule to bar non-interrogative interaction between police and a suspect following that suspect’s request for counsel.”

The court therefore rejected a “broader per se rule” banning “all law enforcement-initiated communication” on the grounds that, “taken to its logical conclusion, virtually any non-interrogative communicative[ion], or conversation[]” by law enforcement officials after a suspect invoked the right to counsel could lead to “a

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101. Id. at 442 (emphasis added) (citing Davis v. United States, 512 U.S. 452, 458 (1994)).
102. Id. at 443.
103. Id. (quoting district court) (also concluding that the suspect’s responses were triggered by his father’s questions rather than the officers’ comments). For other opinions that have ignored *Shatzer* in reading the *Edwards* ban narrowly, see United States v. Wysinger, 683 F.3d 784, 796, 803 (7th Cir. 2012); Mickey v. Ayers, 606 F.3d 1223, 1235 (9th Cir. 2010); Gillett v. State, 56 So. 3d 469, 486 (Miss. 2010). For opinions that have at least been aware of the existence of the *Shatzer* decision and nevertheless interpreted *Edwards* narrowly, see United States v. Hutchins, 72 M.J. 294, 300-01 (C.A.A.F. 2013) (Ryan, J., concurring in the result) (endorsing the narrow view of *Edwards* despite the majority opinion’s citation to *Shatzer*); id. at 305, 307-08 (Baker, C.J., dissenting) (same); Hartman v. State, 2013 Ind. LEXIS 417, at *8-9, 13-14 (Ind. May 31, 2013) (citing *Shatzer’s* break-in-custody exception, but ignoring the dictum relevant to this issue).
105. Id. at 523, see id. at 524 (noting that “the ‘Miranda-Edwards regime . . . [does not] govern . . . noninterrogative types of interactions between the defendant and the State’” (quoting *Montejo v. Louisiana*, 556 U.S. 778, 795 (2009)))). But cf. *Montejo*, 556 U.S. at 795 (offering lineups as an example of a “noninterrogative interrogation[ ]” that does not “involve ‘inherently compelling pressures’” (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966))). See generally LAFAVE ET AL., supra note 18, § 6.7(c), at 787 & n.128 (citing lower court cases agreeing that asking for consent to search does not constitute “interrogation”).
permanent bar to further interrogation regardless of an accused’s desire to initiate a conversation.”

On the other hand, in the face of precedent from the Court of Appeals for the Armed Forces that gave the Shatzer dictum a more literal reading, the Maza court conceded “the general proposition that there may be certain factual circumstances . . . where law enforcement-initiated communication, short of interrogation, ‘may’ violate Edwards.” Likewise, the court suggested a somewhat broader view of the Edwards ban when it observed that law enforcement officials may engage in “post-invocation interaction” with a suspect that is “not interrogative in nature, or indicative of ‘badgering.’” In support, the court cited Shatzer’s concern about police “‘[tak[ing]] advantage’” of custody “‘by repeatedly attempting to question’” suspects, but then immediately turned around and associated Shatzer, not with a generous reading of Edwards, but with the Supreme Court’s “apparent trend to narrow Edwards’s prophylactic contours” (because it created the break-in-custody exception). The Maza court, therefore, seemed more sympathetic to the narrow interpretation of Edwards but, bound by precedent, acknowledged a slightly broader approach.

Other courts, by contrast, have unequivocally endorsed the view that is most faithful to the language in Edwards and called for by the Shatzer dictum. In United States v. Hutchins, the Court of Appeals for the Armed Forces precedent distinguished in Maza, the court concluded that Edwards was violated because an investigator “initiated contact . . . to further the investigation” by requesting consent to search Hutchins’ possessions and also made “an implicit accusatory

106. Maza, 73 M.J. at 520, 524 (quoting Edwards v. Arizona, 451 U.S. 477, 485 (1981)); see also id. at 521 (fearing that a broader ban “effectively prohibits all post-invocation admissions by an accused if the police engage in any conversation following an accused’s invitation”).
107. Id. at 522 (citing Hutchins, 72 M.J. at 298).
108. Id. at 525 (emphasis added).
109. Id. (quoting Maryland v. Shatzer, 559 U.S. 98, 105 (2010)).
110. Id. at 525 (citing Shatzer, 559 U.S. at 109); see also id. at 517 (citing Shatzer for the proposition that Edwards is “not constitutionally-based, but rather a judicially-created prophylaxis”).
111. For other cases that do not clearly specify which interpretation of Edwards they are endorsing, see United States v. Valadez-Nonato, 2011 U.S. Dist. LEXIS 116036, at *9-10, 12 (D. Idaho Oct. 6, 2011) (citing the Innis standard as well as Shatzer’s “‘badgered into submission’” language, but finding an Edwards violation because the officer’s statement that she “[g]ave [the suspect] a shot to be accountable and honest” was “a repetition of an interrogation tactic” that represented “a continuing . . . effort to obtain a confession” and to “‘[p]ressur[e] the Defendant to keep talking’” (quoting Shatzer, 559 U.S. at 105)); Manley v. State, 698 S.E.2d 301, 309 (Ga. 2010) (observing, without citing either Shatzer or Innis, that “any questioning should have stopped immediately” and concluding that detectives violated Edwards by asking questions to confirm whether the suspect wanted a lawyer or wanted to speak to them); State v. Ortega, 813 N.W.2d 86, 94, 96-97 (Minn. 2012) (applying the Innis standard despite recognizing that the police “could not interview Ortega unless he reinitiated discussions with them,” but then finding unobjectionable the officer’s statement that he “wouldn’t mind . . . getting [Ortega’s] side of the story” because the officer “did not attempt to pressure or coerce Ortega” and did not “suggest that . . . Ortega’s side of the story would remain unknown or [his] silence would otherwise hamper his defense”).
statement” by “remind[ing] Hutchins that he was under investigation” for certain crimes.112 Although the court cited Shatzer generally on the coerciveness of custody, it did not specifically mention the Supreme Court’s dictum in dismissing Innis as irrelevant on the ground that “the issue . . . is not whether the request for consent to search was an ‘interrogation’” but whether it was “a reinitiation of ‘further communication’ prohibited by Edwards.”113

In United States v. Edenso, the district court did expressly cite Shatzer’s reference to “attempted interrogation[s]” in holding broadly that, if a police officer makes comments that are either “(1) the functional equivalent of interrogation, (2) designed to generate the retraction of an earlier request for counsel or (3) made to keep a dialogue going, a suspect cannot be said to have initiated further conversation.”114 On the facts before it, the court found an Edwards violation because the agent’s suggestion that it would be “better” for the suspect to speak to the FBI was “intended to coax Edenso into submitting to an interview” and thus “a contrived attempt to get around the Edwards rule and to inspire Edenso to talk . . . in the hopes of getting a confession.”115

In Carr v. State, the Indiana Supreme Court similarly relied on Shatzer in finding that Edwards was violated when a detective “fail[ed] to immediately cease communications,” but instead “continued by inviting the defendant to talk,” telling him that “kn[e]w what happened” and “just wanted to know why.”116 The officer also tried to reassure the suspect that “[i]t might not be as bad as it appears,” and the court thought the detective’s comment about “lesser degrees” of murder was “an open-ended invitation encouraging further communication.”117 The court therefore concluded that the defendant’s confession was “the result of police instigation, not further communication voluntarily initiated” by him.118

112. Hutchins, 72 M.J. at 298-99 & n.10; see also id. at 298 (noting that the official’s “purpose was to seek Hutchins’s cooperation in the ongoing investigation”). Cf. Maza, 73 M.J. at 522 (distinguishing Hutchins on the grounds that “a unique set of circumstances” was involved there because the defendant was “held essentially in solitary confinement within a combat zone of a foreign country”).

113. Hutchins, 72 M.J. at 298, 299 n.9.


115. Id. at *11.


117. Id. at 1105, 1106.

118. Id. at 1106; see also id. at 1107 (noting that the detective “prolonged the conversation and thus instigated the subsequent dialogue”). For other opinions relying on Shatzer in taking a broad view of the Edwards ban, see Cazares v. Evans, 2010 U.S. Dist. LEXIS 142142, at *98 (C.D. Cal. Nov. 8, 2010) (suggesting that detective violated Edwards by asking the “innocuous question” whether the suspect was aware he was going to court the following day, even though the question did not lead to an incriminating response); People v. Bridgeford, 194 Cal. Rptr. 3d 336, 346, 348 (Cal. Ct. App. 2015) (finding Edwards violation because “further conversations [were] initiated by the police” when a deputy approached the suspect and “informed him that [a detective] wished to speak with him further about the homicide investigation” (quoting People v. Thomas, 281 P.3d 361, 373 (Cal. 2012))); State v. Edler, 833 N.W.2d 564, 567, 573 (Wis. 2013) (concluding that Edwards
Some courts have adopted the broad view of the *Edwards* ban without citing *Shatzer* at all. In *United States v. Thomas*, for example, the Eleventh Circuit observed that police may not “‘ask questions, discuss the case, or present the accused with possible sentences and the benefits of cooperation.’” Therefore, the court held, the officers did not conform to the dictates *Edwards* when they “not only continued discussing Thomas’s case, but . . . also pressed on her the possible ‘benefits of cooperation’ as well [as] the penalties of disobedience.” Likewise, the Sixth Circuit concluded that *Edwards* was violated in *Moore v. Berghuis* when an officer informed Moore that he had not been successful in contacting Moore’s attorney, but had only reached the answering service, and then inquired whether Moore wished to speak to him. Although Moore ultimately waived his rights and agreed to talk, the court found a failure to comply with *Edwards* because the suspect had not initiated the conversation.

The Court’s opinion in *Shatzer* has not succeeded, therefore, in putting to rest the controversy concerning the reach of *Edwards*. The next section goes on to analyze whether the policy rationales that animated *Edwards* call for a broad or narrow reading of the case and to propose a solution to this persistent conflict that serves those policies.

### III. RESOLVING THE CONFLICT AND EFFECTUATING THE POLICIES UNDERLYING *EDWARDS*

The broader interpretation of the *Edwards* ban is supported not only by the Court’s unequivocal language in *Shatzer*, but also by the policy considerations the *Edwards* rule was intended to further. Although several alternative approaches would give effect to those policies as well as the *Shatzer* dictum, the one that would require the least disruption to the Supreme Court’s *Miranda* jurisprudence is to apply the same standard of initiation to both suspects and the police in cases involving post-invocation confessions. Under this proposal, the same type of comment on the part of a suspect that would trigger *Edwards*’ initiation exception and thereby take her out of the *Edwards* protection would

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119. United States v. Thomas, 521 F. App’x 878, 882 (11th Cir. 2013) (per curiam) (quoting United States v. Gomez, 927 F.2d 1530, 1539 (11th Cir. 1991)).
120. *Id*.
122. See *id*. at 888-89.
likewise be considered initiation if made by a police officer and thus would invalidate the suspect’s subsequent waiver of *Miranda*.

The Supreme Court has identified three related policies underlying the *Edwards* line of cases. First, *Edwards* is designed to respect the decisions made by suspects. In the words of the *Shatzer* Court, the “fundamental purpose” of the *Edwards* ban is to “[p]reserve[e] the integrity of an accused’s choice to communicate with police only through counsel.” As the Court put it elsewhere, *Edwards* “‘prophylactic rule . . . ‘protect[s] a suspect’s voluntary choice not to speak outside his lawyer’s presence.”

Any post-invocation efforts on the part of the police to extend or reopen a conversation with a suspect are inconsistent with the suspect’s preference to communicate through counsel. Likewise, law enforcement officials do not respect the decisions made by suspects when they second-guess those choices and try to explain the benefits of cooperating and talking to the police without a lawyer. Thus, restricting the reach of *Edwards* to police conduct that rises to the level of interrogation undermines the policy of deferring to suspects’ wishes. Although the Navy-Marine Corps Court of Criminal Appeals disagreed in United States v. Maza, contending that a broad reading of *Edwards* would “permanent[ly] bar” interrogation even when the suspect “desire[d]” to retract her invocation of counsel, that court’s concern ignored the Supreme Court’s repeated admonition that a suspect who actually “desires” to resume communications with the police simply has to initiate the conversation herself.

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125. See, e.g., Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It – and What Happened to It*, 5 Ohio St. J. Crim. L. 163, 187 (2007) (observing that police “are tricking the suspect” when they create “the false impression that it is in his best interest to tell them his side of the story”); Leo & White, supra note 19, at 436 (charging that “focusing the suspect’s attention on the importance of telling his story . . . totally undermin[es] the *Miranda* warnings’ effect”); Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1537-38 (2008) (noting that police “distort[] suspects’ perceptions of their choices” when they “lead[] them to believe they will benefit by making a statement”).


A second, related policy underlying the Edwards line of cases is to protect suspects from police “badgering.” In Shatzer, for example, the Court observed that the Edwards ban “prevent[s] police from badgering a defendant into waiving his previously asserted Miranda rights.”\textsuperscript{128}

Allowing the police to engage in any tactics short of “interrogation” disserves this “antibadgering rationale.”\textsuperscript{129} As the Court explained in Smith v. Illinois, without the Edwards shield, the police could engage in “explicit or subtle” forms of “[badgering]” that would eventually “wear down the accused and persuade him to incriminate himself.”\textsuperscript{130} The “subtle” techniques that could succeed in “wear[ing] down” a suspect’s resolve include attempts designed to persuade the suspect to change her mind that would not necessarily qualify as the functional equivalent of interrogation—such as explaining the strength of the evidence against her or the benefits of cooperating with the police.\textsuperscript{131} Permitting the police to pepper a suspect with statements about her dire situation leaves room for a good deal of badgering even if it does not amount to interrogation under Innis.

Finally, the Shatzer Court noted, Edwards is based on the premise that a suspect who requests a lawyer has “indicate[d] that ‘he is not capable of undergoing . . . questioning without advice of counsel.’”\textsuperscript{132} The majority in Arizona v. Roberson likewise quoted from Justice White’s separate opinion in Mosley to the same effect: the suspect who has invoked the right to counsel has “expressed his own view that he is not competent to deal with the authorities without legal advice.”\textsuperscript{133}

In such cases, the suspect’s “discomfit,” the Court made clear in Roberson, is “presume[d] to persist unless the suspect . . . initiates further communication”—

\textsuperscript{128} Shatzer, 559 U.S. at 106 (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)); see also Montejo, 556 U.S. at 789 (observing that Edwards is “meant to prevent police from badgering defendants into changing their minds about their rights”). For other opinions citing the badgering concern, see Davis, 512 U.S. at 458; Minnick, 498 U.S. at 150; Bradshaw, 462 U.S. at 1044. But cf. Stuntz, supra note 17, at 819 (finding this rationale “not terribly convincing” and “overprotective” because “waiting several hours and asking a suspect if he has changed his mind” does not “send the signal that he has no choice but to say yes”).

\textsuperscript{129} Montejo, 556 U.S. at 788.


\textsuperscript{131} See supra notes 18 & 43 and accompanying text and infra note 139 and accompanying text.


\textsuperscript{133} Roberson, 486 U.S. at 681 (quoting Michigan v. Mosley, 423 U.S. 96, 110 n. 2 (1975) (White, J., concurring in the result)); see George C. Thomas III, Happy Birthday, Miranda, 43 N. KY. L. REV. 300 (2016) (tracing the long history of the law’s concern with the power imbalances that lead to confessions); see also Laura L. Appleman, A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice, 128 HARV. L. REV. F. 91, 94-95 (2015) (listing “custodial interrogation” as one example of “the asymmetrical nature of the criminal justice system”).
not unless the police are able to persuade her to change her mind. As noted above, any justification for “keep[ing] the lines of communication . . . open” between the police and a suspect disappears once the right to counsel has been invoked because at that point the police can, and should, “communicate with [the suspect] through an attorney.”

Suspects who have admitted that they feel outmatched in the interrogation room are the last ones who should be forced to invoke their right to counsel a second time. Thus, any police efforts to continue or reinitiate a conversation without the suspect’s lawyer contravene this rationale as well.

In order to give effect to the Court’s opinions in Edwards and Shatzer as well as the policies underlying the Edwards line of cases, the Edwards ban should not be restricted to police conduct that rises to the level of interrogation under Rhode Island v. Innis. Admittedly, the view that post-invocation confessions reflect either police interrogation or suspect initiation is not unreasonable as an abstract matter. But that strict dichotomy is indefensible given the prevailing definitions of interrogation and initiation. Effectuating the policies underlying Edwards requires either the reformulation of one of those concepts or the recognition of a third category of cases—i.e., where police initiated contact with, but did not interrogate, a suspect.

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134. Roberson, 486 U.S. at 684; see also id. at 681 (warning that when a suspect has conveyed this sense of incompetence, a confession made “at the authorities’ insistence” should be viewed with skepticism” (quoting Mosley, 423 U.S. at 110 n.2 (White, J., concurring in the result))); Corn, supra note 17, at 932 (observing that “contacting a suspect to elicit a subsequent Miranda waiver effectively exploits [the suspect’s] expressed vulnerability”).

135. Mosley, 423 U.S. at 110 n.2 (White, J., concurring in the result); see supra note 42 and accompanying text.


137. The Court has also cited “the virtues of a bright-line rule” as a consideration animating the Edwards line of cases. Roberson, 486 U.S. at 681; see also Minnix v. Mississippi, 498 U.S. 146, 151 (1990) (touting Edwards for “the clarity of its command and the certainty of its application”); Smith v. Illinois, 469 U.S. 91, 98 (1984) (per curiam) (noting that Edwards “set forth a ‘bright-line rule’” (quoting Solem v. Stumes, 465 U.S. 638, 646 (1984))). But Shatzer discounted the importance of that rationale, see Shatzer, 559 U.S. at 112 (arguing that “clarity and certainty are not goals in themselves,” but instead are “valuable only when they reasonably further the achievement of some substantive end”), and the Court has willingly tolerated ambiguity in some of its rulings in this area. See Davis v. United States, 512 U.S. 452, 474-75 & n.7, 469 (1994) (Souter, J., concurring in the judgment) (questioning the clarity of the majority’s unambiguous invocation rule and advocating an alternative approach that would avoid “fine distinctions and intricate rules”); Mosley, 423 U.S. at 115 (Brennan, J., dissenting) (criticizing the majority’s “vague and ineffective procedural standard”). For a discussion of the Court’s fluctuating commitment to administrability concerns in its criminal procedure jurisprudence, see Kienports, supra note 15, at 126-29.

One possible alternative would be to expand the narrow confines of *Innis*’ definition of interrogation, to encompass deliberate police attempts to elicit information,139 or at least to apply *Innis*’ concept of the functional equivalent of questioning in a more realistic manner so that, for example, the police do not need a specific reason to believe a suspect is “peculiarly susceptible” to a classic interrogation technique in order for them to realize the tactic is “reasonably likely to elicit an incriminating response.”140 Another solution would be to narrow the concept of initiation, so that a suspect does not lose the protection of *Edwards* by asking what is going to happen to her “only minutes after” invoking the right to counsel.141 Both of these options have much to recommend them, but they would require dramatic changes in the Court’s definitions of interrogation and initiation and therefore seem less likely to receive approval from a majority of the Justices.

A more modest approach that would lead to an interpretation of *Edwards* faithful to both the *Shatzer* dictum and the policies underlying this line of cases would be to apply the same standard used in analyzing whether a suspect has initiated further communication with the police to law enforcement officials as well. Under this proposal, post-invocation initiation by police officers would invalidate the suspect’s subsequent waiver of *Miranda* and render any statements she made inadmissible.142

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139. See Rhode Island v. *Innis*, 446 U.S. 291, 302 n.7, 300 n.4 (1980) (noting that the intent of the police, though “not . . . irrelevant,” is not controlling and justifying the refusal to follow the Sixth Amendment approach, which prohibits officers from “‘deliberately [eliciting]’ incriminating information,” on the grounds that the Fifth and Sixth Amendments involve “quite distinct” policy concerns and therefore “are not necessarily interchangeable” (quoting *Massiah* v. United States, 377 U.S. 201, 206 (1964)); see also Arizona v. *Mauro*, 481 U.S. 520, 528 (1987) (observing that “[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself”). *But cf. Innis*, 446 U.S. at 305 (Marshall, J., dissenting) (arguing that a suspect is interrogated “whenever police conduct is intended or likely to produce a response”); id. at 310 (Stevens, J., dissenting) (maintaining that police should be prohibited from “making deliberate attempts to elicit statements”).

140. *Innis*, 446 U.S. at 302 (reasoning that the absence of evidence that police “were aware that [Innis] was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children” suggested that the officers’ expression of concern about a disabled child finding the murder weapon was not the functional equivalent of express questioning); see also *Mauro*, 481 U.S. at 528 (noting that the officers’ “aware[ness] of th[e] possibility” that Mauro might make an incriminating comment when they recorded his conversation with his wife did not satisfy the definition of interrogation). *But cf. id.* at 531 (Stevens, J., dissenting) (contending that the police engaged in a “powerful psychological ploy” by exploiting “Mrs. Mauro’s request to visit her husband” and “setting up a confrontation between them”); *Innis*, 446 U.S. at 306 (Marshall, J., dissenting) (pointing out that “one can scarcely imagine a stronger appeal to the conscience of . . . any suspect” than the one used in that case); id. at 312 (Stevens, J., dissenting) (commenting that “most suspects are unlikely to incriminate themselves even when questioned directly”); Jesse C. Stewart, *Note, The Untold Story of Rhode Island v. Innis: Justice Potter Stewart and the Development of Modern Self-Incrimination Doctrine*, 97 Va. L. Rev. 431, 469, 471 (2011) (arguing that Justice Stewart’s majority opinion in *Innis* was “designed to clarify and reinforce the Sixth Amendment right to counsel under *Massiah*” and, while it also “revitalized the *Miranda* doctrine,” going even further and “vindicat[ing] Thomas Innis . . . likely would have cost him his solid majority”).


142. The question whether a sufficient gap in time between police attempts to reopen the conversation and a suspect’s subsequent initiation of communications can act to remove the taint of the *Edwards* violation, or instead increases the coercive pressure on the suspect to speak, is beyond
The initiation exception has its roots in Edwards v. Arizona, where the Court suggested that a suspect who asserts the right to counsel loses the protection afforded by that decision if she “initiates further communication, exchanges, or conversations with the police.”\footnote{Id.} In Oregon v. Bradshaw, the plurality elaborated on the scope of the initiation exception, making clear that it does not come into play simply because a suspect makes a comment “relating to routine incidents of the custodial relationship” (such as asking for water or a phone call).\footnote{Id. at 1055 & n.3 (Marshall, J., dissenting) (pointing out that Bradshaw’s focus was understandably on suspect-initiated communication because the question before the Court there was whether the initiation exception applied to a defendant who asked, “Well, what is going to happen to me now?”).} A suspect, however, who expresses “a desire . . . to open up a more generalized discussion relating directly or indirectly to the investigation” leaves the protective shield of Edwards.\footnote{Edwards v. Arizona, 451 U.S. 477, 485 (1981).}

Bradshaw’s focus was understandably on suspect-initiated communication because the question before the Court there was whether the initiation exception applied to a defendant who asked, “Well, what is going to happen to me now?”\footnote{Id. at 1045; see also id. at 1046 (noting that Bradshaw “evinced a willingness and a desire for a generalized discussion about the investigation”); id. at 1055 (Marshall, J., dissenting) (agreeing that the initiation exception applies when a suspect “demonstrate[s] a desire to discuss the subject matter of the criminal investigation”). For discussion of the two-step inquiry mandated by Bradshaw, see supra note 37 and accompanying text.} Nevertheless, language in the plurality opinion referred to law enforcement officials as well, and the Justices manifested no intent to apply a different standard depending on whether the initiation allegedly came at the hands of the suspect or the police. Thus, the plurality noted, “there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to ‘initiate’ any conversation or dialogue.”\footnote{Bradshaw, 462 U.S. at 1052.}

While a wholesale endorsement of everything the plurality had to say in Bradshaw may be difficult to stomach,\footnote{See, e.g., Bradshaw, 462 U.S. at 1055 & n.3 (Marshall, J., dissenting) (pointing out that Bradshaw’s question “might well have evinced a desire for a ‘generalized’ discussion” if “posed by Jean-Paul Sartre before a class of philosophy students,” but here Bradshaw’s “‘only desire’ was to find out where the police were going to take him” and the officer “took advantage of [the] inquiry to commence once again his questioning” (quoting id. at 1045 (majority opinion))); Leo & White, supra note 19, at 427 (arguing that the Bradshaw standard of initiation could apply “whenever a suspect says anything that could be construed by the police as pertaining to the charges against him”); James J. Tomkovicz, Standards for Invocation and Waiver of Counsel in Confession Contexts, 71 IOWA L. REV. 975, 1033-34 (1986) (criticizing Bradshaw’s definition as “overinclusive[ ]” because it extends to “many situations in which suspects may not have changed their minds”).} there is no justification for allowing the

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\item Bradshaw, 462 U.S. at 1045; see also id. at 1046 (distinguishing comments that are “merely a necessary inquiry arising out of the incidents of the custodial relationship”).
\item Id. at 1045; see also id. at 1045-46 (noting that Bradshaw “evinced a willingness and a desire for a generalized discussion about the investigation”); id. at 1055 (Marshall, J., dissenting) (agreeing that the initiation exception applies when a suspect “demonstrate[s] a desire to discuss the subject matter of the criminal investigation”). For discussion of the two-step inquiry mandated by Bradshaw, see supra note 37 and accompanying text.
\item Bradshaw, 462 U.S. at 1042.
\item Id. at 1045; see also id. (“Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally ‘initiate’ a conversation in the sense in which that word was used in Edwards.”). Cf. Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (excluding from the definition of “interrogation” police words or conduct “normally attendant to arrest and custody”).
\item See, e.g., Bradshaw, 462 U.S. at 1055 & n.3 (Marshall, J., dissenting) (pointing out that Bradshaw’s question “might well have evinced a desire for a ‘generalized’ discussion” if “posed by Jean-Paul Sartre before a class of philosophy students,” but here Bradshaw’s “‘only desire’ was to find out where the police were going to take him” and the officer “took advantage of [the] inquiry to commence once again his questioning” (quoting id. at 1045 (majority opinion))); Leo & White, supra note 19, at 427 (arguing that the Bradshaw standard of initiation could apply “whenever a suspect says anything that could be construed by the police as pertaining to the charges against him”); James J. Tomkovicz, Standards for Invocation and Waiver of Counsel in Confession Contexts, 71 IOWA L. REV. 975, 1033-34 (1986) (criticizing Bradshaw’s definition as “overinclusive[ ]” because it extends to “many situations in which suspects may not have changed their minds”).
\end{itemize}
police to play by different rules.\textsuperscript{149} Thus, if a suspect is deemed to initiate further communications by asking what charges or sentence she could face, an officer who decides with no prompting to volunteer information about potential charges or sentences should likewise be seen as reopening the conversation.\textsuperscript{150} If asking the police about the evidence they have collected triggers the initiation exception, then taking the initiative to inform the suspect about that evidence should also be seen as initiation.\textsuperscript{151} And if the initiation exception applies when a suspect like Bradshaw inquires about the next step in the process, the police should also be deemed to have resumed the conversation when they offer an unsolicited explanation of what the suspect can expect to happen as the case progresses.

Conversation is a two-way street, and the courts should be equally stingy or generous in interpreting the words chosen by suspects and law enforcement officials.\textsuperscript{152} The same type of comments from a suspect that are considered initiation and thus remove her from the Edwards shield should likewise be treated as initiation when made by law enforcement officials and therefore should invalidate the suspect’s subsequent waiver of Miranda. Although this approach creates a middle ground between suspect initiation and police interrogation, it gives effect to the Court’s language in Edwards and Shatzer and protects the policy interests underlying those cases without deviating from the Court’s case law in this area.

\section*{IV. Conclusion}

The suspects who take the Miranda warnings to heart and assert the right to counsel account for only a small subset of those subjected to custodial


\textsuperscript{150} \textit{Compare} Lafave et al., supra note 18, § 6.9(f), at 849-50 nn.138-39 (citing conflicting lower court cases on the issue whether such a question from a suspect triggers the initiation exception), \textit{with id.} § 6.7(c), at 787 & n.133 (citing conflicting lower court cases on the issue whether such a statement by the police constitutes “interrogation”).

\textsuperscript{151} \textit{Compare} Liddell v. Kramer, 2011 U.S. Dist. LEXIS 134788, at *34-35 (C.D. Cal. July 26, 2011) (concluding that the initiation exception was triggered when the suspect asked what evidence the police had against him), \textit{with Lafave et al., supra} note 18, § 6.7(c), at 782 & n.111 (citing conflicting lower court cases on the issue whether such a statement by the police constitutes “interrogation”), \textit{and id.} § 6.9(f), at 841 (same). \textit{Cf.} Innis, 446 U.S. at 299 (noting that “psychological ploys” like “[posing] ‘the guilt’” of the suspect “amount to interrogation” (quoting Miranda v. Arizona, 384 U.S. 436, 450 (1966))).

\textsuperscript{152} \textit{Compare} Bradshaw, 462 U.S. at 1045-46, \textit{and} Lafave et al., supra note 18, § 6.9(f), at 849-50 nn.138-39 (citing conflicting lower court cases on the issue whether such a question from a suspect triggers the initiation exception), \textit{with United States} v. Maza, 73 M.J. 507, 519, 525 (N.-M. Ct. Crim. App. 2014) (finding that the officer’s comment that he planned to seek judicial authorization to search the suspect had “a proper purpose”—“to reduce the appellee’s stress by explaining to him why he would be sitting in the room for an extended period”—and did not constitute the functional equivalent of interrogation).

\textsuperscript{153} For a similar critique of other aspects of the Court’s Miranda jurisprudence, see Kinports, \textit{supra} note 76, at 401-03, 413-14, 431-33.
interrogation, but the response to those invocations on the part of some law enforcement officials is part of a general pattern of strategic police attempts to manipulate and undermine \textit{Miranda}.\footnote{154. \textit{See}, e.g., Kamisar, \textit{supra} note 125, at 186 (charging that police have engaged in a pattern of “‘circumventing,’ ‘evading,’ or ‘disregarding’” \textit{Miranda}); Leo, \textit{supra} note 1, at 1021, 1027 (concluding that “police have transformed \textit{Miranda} into a tool of law enforcement” such that “\textit{Miranda} has now become a standard part of the machine”).} Despite the purportedly per se nature of the \textit{Edwards} rule and the clear import of the \textit{Shatzer} dictum, some officers continue to engage in flagrant post-invocation attempts to persuade suspects to change their minds.

In \textit{Dorsey v. United States}, for example, the D.C. Court of Appeals concluded that police investigating the assault and robbery of an elderly victim “badger[ed]” the defendant “with a vengeance” for more than five hours following his invocation of the right to counsel.\footnote{155. \textit{Dorsey v. United States}, 60 A.3d 1171, 1198 (D.C. 2013) (en banc).} Their tactics included “depriv[ing] him of needed sleep,” “disparag[ing] [his] desire to talk to a lawyer,” “appeal[ing] to [his] ‘conscience’ and his feelings for his mother,” “misrepresent[ing] the benefits of confessing before consulting with counsel,” “threaten[ing] that the prosecutors would ‘up the charges,’” and “exaggerat[ing] the strength of the evidence against him.”\footnote{156. \textit{Id.} at 1197, 1201; \textit{see also} United States v. Thomas, 521 F. App’x 878, 880 (11th Cir. 2013) (per curiam) (finding that the defendant asserted the right to counsel “long before the police claim[ed] she did,” but that they “continued interrogating Thomas, discussing the case, discussing the benefits of talking, and warning her of the consequences of not talking,” including telling her that other charges could be brought against her, offering to “help her out” by calling the prosecutor “if she cooperated,” and “not[ing] in passing that they soon would be arresting [her] boyfriend”).} More disturbing is that, six years after \textit{Shatzer}, a number of lower courts are continuing to let them get away with it.\footnote{157. \textit{See}, e.g., Steven A. Drizin & Richard A. Leo, \textit{The Problem of False Confessions in the Post-DNA World}, 82 N.C. L. REV. 891, 996 (2004) (concluding, based on study of false confessions, that jurors “appear to treat confession evidence as more probative than any other piece of case evidence and thus as essentially dispositive of the defendant’s guilt – even when the confession lacks corroboration”). \textit{See also} Paul G. Cassell & Richard Fowles, \textit{Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement}, 50 STAN. L. REV. 1055, 1082-87 (1998) (attributing reductions in clearance rates for some violent and property crimes to \textit{Miranda}’s limitations on police questioning). \textit{But cf.} Charles D. Weisselberg, \textit{Saving Miranda}, 84 CORNELL L. REV. 109, 170-77 (1998) (citing contrary empirical studies).}
Interpreting Edwards narrowly, as banning only police conduct that constitutes the functional equivalent of interrogation under Rhode Island v. Innis, not only contravenes the language of the Supreme Court’s opinions in this area but also disserves the policy rationales underlying Edwards. In order to remain faithful to the language and reasoning in the Court’s precedents, the same standard of initiation should apply to both suspects and the police. Accordingly, the same type of statements made by a suspect that trigger the initiation exception and thereby take her out of the Edwards protection should likewise be considered initiation when made by law enforcement officials and thus should invalidate the suspect’s subsequent waiver of her Miranda rights.
**Miranda, Berghuis, and the Ambiguous Right to Cut off Police Questioning**

Laurent Sacharoff

**ABSTRACT**

*Miranda v. Arizona* requires police warn suspects they have the right to remain silent and the right to counsel. It also requires that if a suspect invokes his right to remain silent or his right to counsel, the police must terminate the interrogation. But the warnings do not tell the suspect he has the right to end the questioning, or how he may end it. Worse, despite a failure to explain the right, the Court in 2010 in *Berghuis v. Thompkins*, required that suspects invoke the right “unambiguously.”

This requirement—that suspects invoke unambiguously a right they do not know exists—has created tremendous uncertainty in lower courts. These courts have no concrete standard against which to measure whether an assertion of the right was unambiguous. This article surveys the recent case law to show how a test that was supposed to simplify whether suspects had invoked their right by imposing an objective, plain meaning test has simply shifted the debate and confusion to what counts as “unambiguous.”

I. INTRODUCTION

The Court in *Miranda v. Arizona* required police warn suspects they have the right to remain silent and the right to counsel during any interrogation. But *Miranda* also created an important new right for suspects that scholars rarely discuss expressly: the right to cut off police questioning. Indeed, the Court in *Miranda* identified lengthy questioning as a chief culprit in creating a potentially coercive atmosphere, compounded by a suspect’s belief that the police will interrogate until he talks. Cases of course report instances of interrogations lasting hours or days. The Court therefore gave suspects the right the end the interrogation at any time they wished.

But in 2010, the Court in *Berghuis v. Thompkins* made clear that suspects must *invoke* this right. They must express to the police that they wish to end the interrogation. Merely remaining silent will not, in itself, indicate to the police...
that they should stop the interrogation. Moreover, the Court required that suspects invoke this right to cut off police questioning unambiguously.

The Court’s requirement, that suspects invoke the right to cut off questioning and do so unambiguously, seems sensible but becomes unfair when we consider that the police never tell suspects they have the right to cut off questioning. Rather, the *Miranda* warnings merely tell the suspect she has the “right to remain silent.” This warning about remaining silent does not alert the ordinary person that they may also cut off the questioning.

The Court has thus played a strange linguistic trick on suspects: to end the questioning, to assert one right, you must unambiguously invoke another right. You, lay person, must understand that the law has created a strange legal fiction in which the words “remain silent” actually mean “police must stop questioning.”

Under the earlier case of *Davis v. United States*, the same principles apply to the right to counsel during interrogation. If the suspect invokes the right to counsel, the police must end the questioning. But nothing about the warnings tells suspects that they may end the interrogation by asserting a different right, the right to counsel.

This article shows how the Court’s failure in *Berghuis* to warn suspects that they have a separate right to cut off questioning and how to invoke it, coupled with the requirement that those same suspects invoke the right unambiguously, has created needless confusion for police and litigation in the courts. This article surveys the recent lower court case law. It shows that the goal of *Berghuis* and *Davis*, to create a bright-line, objective test, has failed to come to fruition. The test has shifted the uncertainty from whether the suspect has invoked to whether he has done so unambiguously.

More troubling, the case law often reveals courts uncommonly eager to find that suspects have failed to invoke—even when their statement literally invokes. Courts will point to context, or a suspect’s subjective motivation for invoking, or claim the suspect merely wishes to stop discussing a particular topic, to find that he or she has not invoked.

In Part I, this article first summarizes *Miranda’s* new right—the right to cut off police questioning—before considering the more recent Court requirement that suspects invoke the right to cut off police questioning unambiguously. Part II then surveys the lower court cases applying this test.

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5. Id. Technically, if a suspect requests a lawyer, the police may supply one and then continue the questioning; of course, the police almost never do, because a lawyer will simply tell his client to remain silent. As a result, when a suspect requests counsel, they effectively invoke the right to end questioning.
II. PART ONE

The Court in *Miranda* created numerous new rights that we must disentangle before we can explore that particular right at issue in this article: the right to cut off police questioning.

First, in *Miranda* and the cases immediately preceding it, the Court began to apply the Fifth Amendment right against self-incrimination to the states and the police stationhouse. But this shift alone did not make much difference because the Court had already used the Due Process Clause of the 14th Amendment to regulate police interrogations.

Rather, the big step in *Miranda* was to create a set of additional protective rights that would help protect the central Fifth Amendment right to remain silent as against government coercion. The first of these rights, of course were the warnings themselves. The Court held that before the police interrogate a suspect who is in custody, they must provide the four familiar warnings.

But it is important to understand that these warnings, and the requirement that they be read, are contingent upon several facts. First, the suspect must be in custody. Second, the police must be questioning the suspect. In other words, the police may question a suspect on the street during a traffic stop without reading the *Miranda* warnings, and the police may arrest a suspect without the warnings as long as they do not question him.

There remains a third, often ignored contingency, however: the police only have to warn the suspect if they are going to use his statements at trial. This is not a test but a consequence. In other words, there is no test that tries to determine at the time whether the police intend to use the suspect’s words against him. Rather, as a later rule of evidence, a suspect’s statements will not be admissible at trial if they were obtained in violation of *Miranda*.

But conversely, if the police question a suspect without providing the warnings, or continue to question a suspect after she has invoked the right to remain silent, the police have not actually “violated” any right yet. The violation of the right only becomes complete upon introducing the statement at trial.

Put another way, if the police purportedly violate *Miranda* but then never prosecute the suspect, that suspect has no right of action against the state for a violation of any right. For example, in *Chavez v Martinez*, the police questioned the suspect without warnings and in violation of *Miranda*. He was never actually charged or brought to trial. He sued, and the Court held that the police conduct

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12. Though splintered, a majority agreed that the Fifth Amendment provided no standalone Section 1983 claim.
did violate *Miranda* but that this violation did not give rise to a claim or cause of action. The police did not violate any right of the defendant by questioning him in violation of *Miranda* since they did not subsequently attempt to use those statements. (The police did violate due process, possibly, for other reasons).

The Ninth Circuit\(^{13}\) has similarly held that the violation of the Fifth Amendment becomes ripe when the government introduces a person’s statement at some later criminal proceeding such as a grand jury or a hearing; it need not necessarily be a formal trial.

This contingency will become relevant below when we discuss suspects who invoke the *Miranda* right to counsel contingent on them being charged. Thus, when a suspect says, “I want a lawyer if you’re going to charge me,” this contingency merely reflects the contingency built into the right itself. A suspect does not have a standalone right to counsel during questioning if the state does not use her statements against her.

With these contingencies in mind, we can now turn to the warnings themselves. The Court in *Miranda* required police to tell suspects they have four basic rights when in custody and subject to interrogation. First, they have the “right to remain silent.” Second, they are warned that if they speak, what they say can be used against them. Third, they have the right to counsel. And fourth, if they cannot afford counsel, the state will provide it.

Again, it is important to emphasize that this “right to counsel” is contingent on questioning and on later use of any statement. In other words, if, after the warnings, the police simply put the suspect in a cell without questioning him, and the suspect says, “Hey, where’s my lawyer,” the police do not actually have any duty to supply a lawyer. Only if they question him must they supply a lawyer, and, again, only if the state uses any statements at trial does the failure to provide a lawyer violate any actual right of the defendant.

We can contrast this *Miranda* right to a lawyer, a Fifth Amendment right to counsel if you will, with the true, Sixth Amendment right to counsel that arises later, once the state has formally charged a defendant by way of indictment, criminal information, or some other means. At that point, a defendant truly can demand a lawyer, at least at critical phases such as a suppression hearing, a line up, a plea negotiation or, of course, trial.

### A. The Missing Right

Perhaps one of the most important rights the Court created in *Miranda* was the right of a suspect to terminate the interrogation. As the Court made clear, if a suspect invokes his right to remain silent, the police must end the questioning. If the suspect requests a lawyer, the police must either provide a lawyer, or cease the questioning. In nearly all cases, the police will not supply a lawyer but rather cease questioning.

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\(^{13}\) Crowe v. County of San Diego, 608 F.3d 406 (9th Cir. 2010).
As a result, the right to counsel, in practice, operates almost exactly like the right to remain silent: as a trigger to ending the interrogation. That is, if a suspect wishes to end the interrogation, she must either say, “I wish to remain silent,” or “I want a lawyer.” Either incantation will require that the police stop questioning.

The Court in *Miranda* considered this right to cut off questioning to be essential to the collection of rights it was creating to address the inherently coercive atmosphere of police stationhouse questioning. One of the chief problems it identified was the practice of police in indefinite questioning. A typical suspect will believe that the police will continue to interrogate him until she talks, and so she might as well give in and talk.

The Court sought to address this coercive effect of endless questioning by supplying suspects with this powerful new tool: the power to end the interrogation. Before *Miranda*, a suspect always had the inherent and Fifth Amendment right to remain silent in the sense that he did not need to speak. He could simply remain silent.

But this right of a suspect to literally not speak did not mean that the police had any obligation to cease questioning, and of course they often would continue to question a suspect who remained silent, or spoke only sporadically. Again, the Court in *Miranda* worried that these lengthy interrogations would wear down suspects who in theory wished to remain silent.

The new right to cut off questioning thus came as a revolution. Now, the suspect need merely recite the magic words and the police must stop questioning. The suspect can invoke this right immediately, with the result that the police cannot question him at all, or the suspect can invoke the right at any time during the interrogation. This latter rule also changed existing Fifth Amendment case law.

This new right to selectively speak or end questioning represented a new rule as well. Before *Miranda*, if a person began to testify, say on direct examination at trial or in testimony before Congress, that person could not then selectively invoke the Fifth Amendment right to remain silent as against even incriminating questions on cross examination. A person who testifies on a given subject usually waives their Fifth Amendment right to remain silent.

But *Miranda* said this rule does not apply to police interrogations. A suspect can selectively invoke the right to remain silent and the right to cut off questioning. A suspect can say self-serving, positive things, and then refuse to answer follow up questions designed to test the truth of his assertions. Again, *Miranda* gave suspects this new, powerful tool to help dispel the coercive atmosphere of in custody police interrogations.

Indeed, at the time of the writing of *Miranda*, Chief Justice Earl Warren recognized he was creating a new right in suspects not only to remain silent but

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14. Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010) (“A suspect may remain selectively silent by answering some questions and then refusing to answer others…” And “a suspect may invoke his right to silence, ‘at any time.’”).
also to end the interrogation with a few magic words.\textsuperscript{15} We know this because Warren circulated a draft of his \textit{Miranda} opinion to Justice Brennan only, seeking comments.\textsuperscript{16} In a letter back to the Chief Justice, Brennan noted that the \textit{Miranda} opinion creates this new right to cut off questioning.

Another problem which appears for the first time in this summary paragraph is whether “right to silence” means merely a right not to answer questions or, additionally, a right to control the course of questioning, to the extent of being able to enforce a wish that interrogation cease.\textsuperscript{17}

Perhaps the chief flaw in the \textit{Miranda} case, however, is that the opinion creates this new, powerful right for suspects to end questioning, but never requires that police warn suspects they have this right. The warnings tell suspects they have the right “to remain silent,” but nothing about that right tells them they have the additional, perhaps more powerful right to end the questioning. Indeed, after having been warned they have the right to remain silent, if the police nevertheless continue to question them (as they may), a reasonable suspect would likely not realize that she need merely say, “I wish to remain silent,” to end the questioning.

Again, Justice Brennan in his letter to the Chief Justice made precisely this point. He noted that the opinion created a right to terminate questioning but did not tell suspects they have this right. He wondered whether it would not be better to warn suspects they have this right so they can employ it when necessary.

The accused must be told only that he need not answer . . . Should he not be told of his full power?\textsuperscript{18}

The Chief Justice’s clerks, in their memo to the Chief Justice, summarized Brennan’s suggestion but wrote that it would be better not to include such an additional warning informing suspects they could cut off questioning. They did so not because they disagreed with the suggestion on its own terms, but to ensure the opinion was internally consistent with other sections. In particular, in an earlier section, the opinion pointed to the long-standing FBI warnings as justification for requiring the \textit{Miranda} warnings, and those FBI warnings did not warn of any right to cut off questioning. The clerks worried that their reliance on

\begin{footnotesize}
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\item[15.] Sacharoff, supra note 2 at 550.
\item[16.] Draft Opinion of Chief Justice Earl Warren at 31, Miranda v. Arizona, 384 U.S. 436 (May 9, 1966) (Nos. 584, 759-61 (unpublished draft opinion on file with author and Library of Congress)).
\item[17.] Letter from William J. Brennan, Justice, Supreme Court of the United States, to Earl Warren, Chief Justice, Supreme Court of the United States (May 11, 1966) (on file with author and the Library of Congress).
\item[18.] Id.
\end{itemize}
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the FBI practice would be undermined if they deviated from the warnings the FBI supplied suspects.\textsuperscript{19}

As a result, the final opinion in \textit{Miranda} mirrored the draft; it created and emphasized a new, powerful right for suspects—the right to cut off questioning—but deliberately did not provide suspects with a warning that they had such a right.

A corollary follows: by failing to inform suspects they have the right to end questioning, the police also fail to give suspects the \textit{language} with which to invoke this right. This matters because the Supreme Court has more recently required that suspect invoke the right to cut off questioning \textit{unambiguously}.\textsuperscript{20} That means they must invoke the right to remain silent or the right to a lawyer unambiguously before police must cease questioning.

The problem, of course, is how can we expect a suspect to invoke a right unambiguously when we neither tell her she has such a right or name it in a way that she has the language to invoke it. After all, the actual right at issue is the right to cut off questioning. But the words needed to invoke it, because of a legal fiction, are either “I wish to remain silent,” or “I want a lawyer,” neither of which, on their face, actually relate to the more specific right of cutting off questioning.

Finally, as a practical matter, police have largely followed \textit{Miranda} by limiting their warnings to those required. According to one study surveying \textit{Miranda} warnings actually given in 560 jurisdictions, nearly all—98.2\%—failed to warn suspects they enjoy a right to end the interrogation.\textsuperscript{21}

I will elaborate upon this standard of unambiguous invocation further in the next two subsections.

1. Right to Counsel

The unambiguous invocation rule started first with invoking the right to counsel before it migrated to the right to remain silent. In \textit{Davis v. United States},\textsuperscript{22} the defendant said, “Maybe I should talk to a lawyer.” The Court held this was not an unambiguous request for counsel and therefore did not trigger the right to counsel (meaning the right to cut off questioning). As a consequence, the police were free to continue questioning despite this purported invocation.

Justice Souter, in concurrence, would have required a rule that if a suspect makes an ambiguous request, the police must seek clarification on the lawyer question before continuing with substantive interrogation about the crime. He

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Berghuis, 560 U.S. 730. & 2003 & \\
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also said that in this case the police had sought clarification, and the defendant clarified that he did not require a lawyer before he would answer questions. Since the police satisfied Justice Souter’s rule, he concurred in the judgment.

But the majority rejected Justice Souter’s rule and held that the police do not need to seek clarification. If the suspect makes an ambiguous invocation only, the police can simply continue substantive questioning about the crime, though the Court indicated it might be better practice to seek clarification.

The Court justified the rule on several grounds. First, the right to a lawyer during interrogation, and the right to end questioning upon invocation, is essentially a right invented by the Supreme Court in Miranda and Edwards. After all, the Court wrote, the true Sixth Amendment right to counsel does not attach until later, after the state has commenced a case against the defendant. Suspects in police custody have no constitutional right to a lawyer. The Miranda right to counsel, or to cut off questions without counsel, is a prophylactic protection not required by the constitution directly.

The Court did not quite expressly make the logical link, but it suggested that this subconstitutional status of the Miranda right to counsel means that it should apply only if the suspect unambiguously invokes. Whether this is simply politics, a result-oriented way to narrow the right, or something else remains elusive.

But the Court also adduced a more practical reason for its rule. A rule requiring an unambiguous invocation will provide easier guidance to law enforcement in determining whether they can continue to question. It will also make matters of proof easier, presumably at a later trial. As we will see below, the rule has itself spawned uncertainty in the case law, merely shifting the uncertainty from an ambiguous statement to an inquiry into what counts as an unambiguous assertion.

In other words, the Court confidently proclaims: “A statement either is such an assertion of the right to counsel or it is not.” This statement of course betrays a serious misunderstanding of language, law, and life. Few statements are unambiguous once lawyers start arguing over them; indeed, few statements are truly unambiguous even in ordinary life. Language simply does not work that way. Again, the cases discussed below makes this clear.

But what the cases below make even more clear is this: the Davis case insists suspects invoke their right to counsel unambiguously when this is not even really the right they are invoking. As Davis itself recognizes, suspects do not really enjoy a standalone right to counsel before arraignment. Rather, they enjoy a right to not be questioned without a lawyer if they ask for one. But in reality, as noted above, law enforcement almost never supplies a lawyer.

23. *Id.* (“The Sixth Amendment right to counsel attached only at the initiation of adversary criminal proceedings . . . .”).
24. *Id.* (“To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry.”).
25. *Id.*
As a consequence, the real right a person invokes when she says she wants a lawyer is simply the right to cut off questioning. To say a person must unambiguously invoke the right to cut off questioning by saying the magic but different phrase, “I want a lawyer,” simply creates unnecessary confusion. In fact, it borders on Orwellian to require a suspect to invoke one right with the words of another right.

2. Right to Remain Silent

In 2010 in *Berghuis v. Thompkins*, the Court extended the *Davis* rule to the “right to remain silent.” In that case, the police read the defendant his *Miranda* warnings and then questioned him for nearly three hours while he remained almost entirely silent. Only at the end, after the police invoked God, did the suspect confess.

The defendant argued that remaining silent for nearly three hours itself invoked the right to remain silent. How else can one invoke the right to remain silent by remaining silent? The Court disagreed. It agreed that one can certainly simply remain silent, but to invoke the right to cut off police questioning, a suspect must expressly invoke the “right to remain silent,” and do so unambiguously.

In *Berghuis*, even more than in *Davis*, the Court’s failure to identify the actual right at issue confused the issue, both analytically for courts and practically for suspects and police. As discussed above, *Miranda* and the Fifth Amendment itself afforded the defendant the right to literally not say anything in the face of police questioning. But *Miranda* did more: it created the powerful right of a defendant to *end* the questioning.

The *Berghuis* case involved the strange situation of a suspect who did not waive his right to remain silent by talking but also who did not expressly *invoke* his right to remain silent by saying he wished to remain silent. Instead, he merely remained silent.

In many ways, *Berghuis* makes sense. If a person wants to take advantage of his right to remain silent, he can simply remain silent. If he wants to assert the separate right to cut off police questioning, he must invoke that right in some way. Indeed, it appears both the majority and the dissent agreed that a suspect must invoke the right to cut off police questioning; they merely disagreed over whether one must do so unambiguously. The majority, of course, held that one must.

So far so good. The problem with *Berghuis* arises when we realize that the police do not warn suspects that they enjoy this separate right to cut off police questioning. As a consequence, suspects do not realize that by stating the words, “I wish to remain silent,” they also will cut off police questioning. Indeed, an

ordinary person would probably assume that if they want to remain silent, they need do nothing more than remain silent.

As in *Davis*, only worse, suspects do not have the language to invoke the right to cut off questioning, both because they do not realize they have the right and the only cognate right they’ve been given, the right to remain silent, does not by its own terms relate to cutting off questioning.

To put it another way, the Court in *Berghuis* says that to invoke the right to cut off questioning unambiguously, the suspect need only say he wishes “to remain silent.” But even those words, the very words the Court approves, do not unambiguously invoke the right to cut off questioning. An officer unfamiliar with the legal fictions created by *Miranda* would be entitled to say, “okay, you wish to remain silent. I will continue to question you, however.” Outside *Miranda*’s strange logic, such conduct would be consistent.

As with *Davis*, the Court’s holding in *Berghuis* has led to great uncertainty in lower courts. Suspects, unwarned that they have the right to cut off police questioning or how to do so, fumble toward invoking the right. Similarly, courts, without a clear statement of the right actually being invoked, likewise stumble toward a standard of what even counts as invoking the right unambiguously.

B. An Objective Test

Finally, both *Davis* and *Berghuis* created an objective test. Rather than inquire into the subjective motivations of suspect or officer, the Court tried to fashion a test analogous to the plain meaning rule for contract interpretation. What would a reasonable officer understand the literal words to mean, in context. The goal, the Court insisted, was to create an easy to apply test in which officers will immediately know whether a suspect has invoked or not.

Conversely, one assumes that if a suspect utters the magic words, like any incantation, they should take effect without considering his or her subjective motivation.

To briefly elaborate, one can think of a suspect’s invocation of the right to cut off questioning under *Davis* and *Berghuis* as an invocation by way of special words that have legally operative effect, much as saying “I accept” to a contract offer has the legal effect of creating a contract. In the contract context, courts do not inquire into the subjective motivation leading a person to form a contract, at least in determining whether there is a contract.27 If the person utters the magic words, I accept, and does so with apparent sincerity, the courts will find a contract. If the person forms the contract for good reasons or bad, from careful thought or upon mere impulse, the person has nevertheless formed a contract.28


28. Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954) (“We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention”).
Indeed, even if the person secretly has no intention of fulfilling his end of the bargain,\textsuperscript{29} if a reasonable person would understand his words to be those of acceptance, he has formed a contract.

So it goes in many areas of the law that involve legally operative words. Wills,\textsuperscript{30} gifts,\textsuperscript{31} and consent\textsuperscript{32} all arise from the plain meaning of the words themselves without inquiry into whether the person acted impulsively or with care. Of course, if the conduct veers into the irrational\textsuperscript{33} and the person making the statement is legally incompetent because of mental illness, then we will inquire into his mental state. But courts require a person to “show that his mind was ‘so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction.’”\textsuperscript{34} But short of such incompetence, courts will recognize the legally operative effect of the incantation of words such as “acceptance” if made.

The Court in \textit{Davis} and \textit{Berghuis} appear to have established a similar framework for invoking the right to cut off police questioning. They insist upon an objective, unambiguous assertion. But they say a person has either invoked or not. Such language, such formalism, seems to mean that if a defendant does not use the magic words, or expresses hesitancy, she is lost; conversely, however, if she states the words in the appropriate form, courts ought not to defeat the invocation by considering other factors such as subjective motivation. We will consider these questions more carefully below.

We now turn to the recent case law to explore how these tests play out.

\textbf{III. CATEGORIES OF AMBIGUITY}

The lower courts on both the state and federal level have created a bewildering array of ambiguity-categories. In some cases, I have found categories for the cases, but in many, the courts themselves have essentially created categories, such as the “mere frustration” category, in which a court ignores a suspect’s plain language invoking of the right to remain silent by pointing to his subjective motivation in making the invocation.

Some categories make sense as categories, though their results often deviate from the rules in \textit{Berghuis} and \textit{Davis}. Other categories, such as the “mere frustration” category, seem illegitimate across the board. Again, both \textit{Berghuis} and \textit{Davis} make clear the inquiry should be objective based upon the language

\begin{itemize}
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Linton v. United States, 630 F.3d 1211, 1218 (9th Cir. 2011) (“Washington probate law similarly follows an ‘objective manifestation’ method of interpretation in the exegesis of will, donative documents that are close cousins of gift documents”).
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Florida v. Jimeno, 500 U.S. 248, 251 (1991) (“The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange.”).
\item \textsuperscript{33} STA Travel (New York), Ltd. v. Raymond, 603 N.Y.S.2d 8 (N.Y. App. Div. 1993).
\item \textsuperscript{34} Blatt v. Manhattan Medical Group, P.C., 519 N.Y.S.2d 973 (N.Y. App. Div. 1987).
\end{itemize}
the suspect uses and not based upon a subjective inquiry into the suspect’s motives.

The section will start with cases in which the suspect’s plain words invoke the right to a lawyer, but in which the court uses various techniques to avoid the plain import of those words to find ambiguity. These techniques are not always without merit; after all, they do look at the larger context. But they often appear to be results oriented, choosing or sometimes cherry-picking the broader context to avoid the plain meaning of the more narrow sentence or two invoking the right.

This section will then address other categories relating more directly to the specific language used by the suspect. Do words such as “maybe,” or “mind if I don’t say anything” represent equivocation or mere figures of speech? Courts often divide on this issue. Do requests for a lawyer become equivocal when phrased as a question, even though the very concept “request” implies a question? Again, courts divide on the issue.

A. Context Cases

One of the more general techniques courts use to discern whether a reasonable officer would understand a suspect’s statement to be an unambiguous invocation of the right to cut off questioning, whether by invoking the right to remain silent or the right to counsel, involves examining the context of the statement. In theory, of course, the literal language of any statement must be addressed in context. Unfortunately, courts often use the banner of context to render an unambiguous assertion ambiguous.

They will point to context to say the suspect was not invoking a right to remain silent in general but merely wanted to stop talking about a particular topic. They will find in the clearest words such as “I plead the Fifth,” some kind of ambiguity. They will find in statements such as, “I’m through, I wanna be taken into custody,” an ambiguity.

Perhaps the most extreme example comes from *Anderson v. Terhune*.35 I consider this case in some depth because it shows how willing courts and police can be to use various techniques to waive away an assertion. In *Anderson*, the police detectives suspected Anderson of murder. The victim had been found with a drug pipe near him. The detective was therefore asking the defendant whether he smoked dope and, if so, whether he smoked with a pipe. The detective asked numerous times, “what kind of pipe.” At this point, the defendant sought to end the interview:

Anderson: “Uh! I’m through with this. I’m through. I wanna be taken into custody, with my parole….”

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35. 516 F.3d 781 (9th Cir. 2008).
Officer: “Well, you already are. I wanna know what kinda pipes you have.”

Anderson: “I plead the [F]ifth.”

Officer: Plead the [F]ifth. What’s that?”

As hinted above, the officers began the game by pretending to find the term “the Fifth,” in this context, ambiguous. True, a hyper literal adolescent might argue that the “Fifth” is ambiguous and require one to say, “The Fifth Amendment to the United States Constitution,” or, “The Fifth Amendment as applied to the states by the Fourteenth Amendment,” etc. This behavior illustrates that any statement can be rendered ambiguous if one is so determined.

Second, the suspect said he was “through,” and wanted to be taken into custody. These words surely must invoke the right to cut off questioning even if they do not use the precise language, “I wish to remain silent.” Again, this echoes the original problem with Berghuis, requiring suspects invoke the right to cut off questioning unambiguously and yet failing to warn or expressly provide language for that invocation. Consequently, an officer can claim that “I’m through, I wanna be taken into custody,” is not sufficient to invoke. The officer can further claim that since the person is already in custody, the request is essentially meaningless.

The lower California appellate court held that the suspect had not invoked by pointing to the larger context. It held that the suspect’s invocation of language as unambiguous as saying “I plead the [F]ifth,” merely meant, or could have been understood by a reasonable officer as having meant, “I no longer wish to speak on this particular subject, but I’m happy to continue the questioning in general.” Again, any statement can be rendered ambiguous by one determined to do so.

The Ninth Circuit reversed, even on the highly deferential AEDPA habeas standard. It held that Anderson’s statement, “I plead the [F]ifth,” particularly in context, invoked unambiguously. It chastised the lower court for “manufacturing” an ambiguity where none existed, and held that the lower court had made an “unreasonable determination of the facts.”

And yet the lower court determination comes from a Supreme Court standard that is unclear because the right has not been identified and at least hostile in tone to defendant’s assertions of Miranda rights to begin with. Courts take up the test of “unambiguous invocation” to insert any context they choose. Again, context matters, and many can differ about the meaning of words in context; the Supreme Court’s confident prediction that a person “either invokes or does not” itself makes no sense. But as the Ninth Circuit in Anderson said:

It is not that context is unimportant, but it simply cannot be manufactured by straining to raise a question regarding the intended scope of a facially unambiguous invocation of the right to silence.

Despite this observation, the courts below routinely do precisely that: find reasons to transform a facially unambiguous assertion into an ambiguous one.
B. Subjective Motive

Many courts will avoid the plain meaning of the suspect’s words by pointing to what the suspect subjectively wanted, or what was subjectively motivating him or her to make the invocation. These cases seem to violate the plain direction of *Berghuis* and *Davis*. Those cases told us to look at the words of the suspect objectively to determine whether they unambiguously invoked. Why a suspect chooses to invoke should not matter.

Similarly, *Berghuis* and *Davis* create a framework in which invoking the right to cut off questioning has become a legally operative incantation. Say the magic words and you have invoked. The price, however, for this bright line rule and this *per se* prophylactic protection is that you must do so unambiguously. Again, as a magic incantation based on legally operative words, subjective motivation should not matter. Yet for many courts, it does.

1. Momentary Frustration Test

The California “momentary frustration” test best illustrates how courts will use a defendant’s subjective motive to wipe away the plain meaning of his objective words invoking the right.

For example, in *People v. Musselwhite*, the suspect said, “I don’t want to talk about this.” The California Supreme Court essentially conceded that the plain meaning invoked a right to remain silent and cut off police questioning, but nevertheless held his invocation was ambiguous and therefore not effective because the defendant had spoken in “momentary frustration.”

The Court did not explain why subjective motivation mattered as long as the suspect’s language invoked the right, but seemed to target what the defendant *really* wanted, and by really it meant what the defendant would have wanted if he had not been momentarily frustrated. Thus, the Court seemed not even to be inquiring into the defendant’s actual subjective motive only, frustration, but also inferring that absent that unfortunate emotion to which humans are prone, the defendant would have rationally not wanted to invoke. This is a strange conclusion because almost all suspects, if acting rationally, *would* invoke. Invoking silence is almost always the better and more rational course.

Perhaps worse, even if the defendant’s subjective motivation for invoking mattered, the defendant in *Musselwhite* did not invoke out of frustration anyway. Rather, he said he was invoking because the police were getting him “confused” and “nervous.” Those reasons are precisely the types of reasons *Miranda* created a right to cut off questioning.

Similarly, the same court in *People v. Jennings* sidestepped a clear invocation by asserting the defendant was frustrated. The defendant said both

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37. 760 P.2d 963 (Cal. 1988).
“I’m not saying shit to you no more man,” and “That’s it. I shut up.” The Court concluded, despite his plain language, that the suspect was speaking merely out of “momentary frustration and animosity” toward one of the officers.

And as in *Musselwhite*, the defendant here in *Jennings* also gave his reasons for invoking, and again they were not frustration. Rather, the defendant said he was invoking because he was scared. “You’re scaring the living shit out of me. I’m not going to talk. You have got the shit scared out of me.” As in *Musselwhite*, fear of being exposed in a contradiction matches the precise reasons underlying the *Miranda* warnings—to give suspects the tools to avoid the coercive atmosphere of the interrogation room.

These relatively early, 1988, California Supreme Court cases set the stage for later cases, including those as recent as 2016, in which courts have continued to rely on the “momentary frustration” rationale. Thus, in *People v. Harper*, the suspect said, “I don’t want to be here and I don’t want to talk with you guys.” He then continued, “I don’t want to talk to nobody.” The trial court held that he had not invoked the right to remain silent. He was upset and his outburst should be seen as merely a reflection of his frustration. Moreover, it wasn’t the police in particular he didn’t want to talk to; he didn’t want to talk to anybody. Somehow, in the court’s view, one invokes only if one particularly wants to remain silent with respect to the police. (Even though he also said he didn’t want to speak with them).

This case went far enough that the court reversed on appeal, holding that his words were an unambiguous invocation, and he did not lose his right simply because he did not wish to speak to anyone including the police.

The defendant in *People v. Martinez*, on the other hand, did not fare so well. He told the police, “I don’t want to continue with all this. I want to go to rest.” These words, though unambiguous on their face, were transformed into an ambiguous statement by the court’s observation that the suspect said them motivated, subjectively, by “momentary frustration” or “animosity.” (It apparently could not decide which). Again, the whole point of the *Berghuis* and *Davis* cases emphasis on an objective test was to avoid precisely this type of inquiry into subjective motives. Those courts sought a test police could clearly apply without resorting to psychology.

Other cases ignore the nature of the right to cut off questioning by failing to understand language that should invoke the right. In *Powers v. Davey*, for example, the defendant said three times that he did not “wanna hear it.” These words should invoke the right not to be questioned because the defendant is almost literally saying he does not want to be questioned. To say three times that “I don’t wanna hear it,” surely invokes the right more than the formal phrase, “I

wish to remain silent.” Nevertheless, the lower court held the statement was ambiguous, not so much because it was in the wrong form as because it was the product of momentary frustration, and the federal court upheld this holding on the deferential AEDPA standard.

Finally, courts have employed the same “momentary frustration” standard in wiping away a plain invocation of the right to counsel. In People v. Williams, the defendant said, “I want to see my attorney cause you’re all bullshitting now.” The police continued the questioning. The California Supreme Court held the defendant had not invoked because his statement was “an expression of frustration.” It reached this conclusion because it came during a particularly heated back and forth with the police, who had accused the defendant of murder.

Again, the very point of the right to end questioning, whether by invoking the right to silence or the right to counsel, is to avoid the emotional distress caused by interrogation over serious crimes such as murder.

2. Other Motives

Courts often look to other subjective motives to avoid the plain meaning of a suspect’s invocation, such as taunts, game-playing, or even discomfort.

In United States v. Sherrod, for example, during the Miranda warnings, the defendant asked what he was charged with. The detective refused to tell him, insisting they finish the warnings, even though of course Miranda does not preclude the police from giving the suspect information prior to warnings.

In response, the suspect said, “I’m not going to talk about nothin’.” The Seventh Circuit seemed to concede the words themselves invoked, but that he had not unambiguously invoked because his assertion was really “a taunt—even a provocation.” Oddly the Seventh Circuit seemed to say it was both an invocation and a taunt, but that the taunt aspect somehow superseded the invocation aspect. It “is as much a taunt—even a provocation—as it is an invocation.” This concession, that the statement was both taunt and invocation, shows how much reliance the Seventh Circuit placed not on construing the meaning of the words, or even their intended meaning, but on determining whether the anterior motivation for the invocation was the correct one. For unknown reasons, taunting or provoking are, for the Seventh Circuit, illegitimate reasons for invoking.

In People v. Davis, the detectives accused him of the murder; he stood up and said, “Well then book me and let’s get a lawyer and let’s go for it, man, you know.” The court conceded the words invoked a lawyer but held that the defendant had failed to invoke unambiguously because we should see the

42. People v. Williams, 233 P.3d 1000 (Cal. 2010).
43. 445 F.3d 980 (7th Cir. 2006).
44. 208 P.3d 78 (Cal. 2009).
statement as a “challenge.” The court wrote that the “defendant was using as much technique as the people who were questioning him.”

As above, the court confuses subjective motive with invocation. Even if the defendant wanted to invoke as a challenge rather than for some other reason, he still invoked. Moreover, one wonders why the court interpreted this invocation as a challenge; after all, it was only when the officers directly accused him of the murder that he invoked. The timing suggests not a challenge but a pretty good time for a suspect to invoke under any theory that a suspect has the right to.

Finally, in Williams, discussed above, the court held that the suspect’s invocation was invalid not only because of “momentary frustration,” but also because he was “game playing.”

3. Summary: The Right Reasons

The conclusion we can draw from the above cases are two-fold. First, the courts ignore the requirement in Berghuis and Davis to focus on the objective meaning of the words in determining invocation. They are not looking beyond the words to context to determine the meaning of those words. The meaning is clear, as the courts concede. Rather, they are looking at the emotions that motivated the invocation. If those emotions are of the wrong kind, then the invocation does not count.

Of course, the first answer, as discussed above, to this inquiry into subjective motivation is that it is simply out of bounds. If the suspect invokes, it does not matter why.

Moreover, the court often attributes the wrong reason anyway. In almost all these cases, the person invokes exactly when the detectives have shifted gears from friendlier, more general questions to direct accusations of the crime, or far more pointed questions about contradictions in the story. The courts point to precisely this escalation as evidence that the suspect’s invocation is brought on by frustration or other emotion and therefore not real. But the sudden move toward direct accusation or other more serious interrogation techniques seems precisely the time when a suspect should invoke, at least from his own point of view.

But the second observation reveals a deeper distrust the courts have of defendants and suspects. To these courts, suspects are experience criminals constantly gaming the system, or emotional children who don’t know what they are really doing. When frustrated, the invocations don’t count because they don’t know what’s best for them when they are frustrated, and we should discount their invocation. Also as noted above, this is strange since invocation is almost always in the suspect’s best interests.

45. Williams, 233 P.3 1000 (“When the officers began directly accusing him of having abducted the victim, however, he stood up” and made his ambiguous invocation).
On the other hand, many of these cases discussed above involve very serious, brutal, and at times incomprehensible crimes—brutality that might help explain the outcomes. In Sherrod, discussed above, the defendant was a 24-year-old who had had 29 prior arrests and 8 convictions. He randomly carjacked a Cadillac escalade, murdering the driver for no apparent reason. In this context one understands the Seventh Circuit’s desire to find that he was playing games or taunting when he invoked his right to remain silent; nevertheless, invoke he did.

The Davis case involved Richard Allen Davis, who kidnapped and murdered 12-year-old Polly Klaas. Davis too had a very long criminal record, as well as a history of mental illness. When the jury convicted him to death, he gestured obscenely in the courtroom; during sentencing, he read a statement that that claimed Polly Klass had said, “Just don’t do me like my dad,” before he killed her—provoking Klaas’ father, who was in the courtroom, to yell, “Oh, burn in hell, Davis! Fuck you!”

Given Davis’s history and courtroom outbursts, one can easily see why the California Supreme Court would want to denominate his statement to detectives that he was done talking as a taunt and provocation rather than as an invocation.

The Williams case involved a murderer who kidnapped and robbed a woman, shot her in the hand, ordered her to get into the trunk of her car, locked her there, doused the car with gasoline, and then burned her to death. The judge sentenced him to death in 1992. Again, one cannot entirely blame the Ninth Circuit for finding a reason to hold that the invocation was invalid for some reason, even if that reason rests upon an illegitimate look at subjective motivation, momentary frustration, and game-playing.

Musselwhite, meanwhile, was convicted and sentenced to death for murder during a crime spree involving multiple robberies and rapes, and culminating in the murder in Musselwhite with a venetian blind cord.

These serious death penalty cases help explain why courts might stretch the test; it also illustrates why brutal criminal cases make bad law.

A second reason explaining these “momentary frustration” cases, and other subjective motivation cases, lies in the timing. In some of these cases, the defendant does not assert immediately after the warnings, but rather during an ongoing interrogation. In the rough and tumble, back and forth of an ongoing interrogation, as tempers flare, it is far more understandable that a reasonable officer would not really pause to consider the literal words of the defendant, or not really want to. That is, the officers, and the court, want to think that the technical plain language invocation does not really count as invocation once they’ve built up some momentum in the interrogation, just as they are getting somewhere.

But of course the moment when tempers flare and the police are just getting somewhere is precisely when *Miranda* guarantees suspects the right to end the interrogation. Moreover, *Davis* and *Berghuis* created a literal, technical invocation rule; courts cannot use the plain meaning rule against defendants when it suits them, but then ignore the technical aspect of invocation when a suspects has successfully incanted the magic words.

C. Conditional Cases

In many cases the suspect will make his request in a form that appears conditional. These cases primarily arise on the context of a request for counsel rather than an assertion of the right to remain silent. A suspect may say that if the police are going to charge him, he would like a lawyer. Courts struggle with these scenarios, again in part because they do not understand the underlying right to begin with. The right itself is conditional, so any assertion of the right is likely to be in a conditional form in any event.

As noted above, *Miranda* does not afford suspects a generalized right to remain silent. Rather, it only applies if the suspect has been arrested and if the police question him. Thus, if the police arrest a suspect but do not question him, *Miranda* does not apply. But more important, with respect to the right to a lawyer, if the police arrest a suspect who asserts his right to a lawyer, the police do not have to give him a lawyer. They only have to stop questioning him. In other words, even if he asks for a lawyer, the police have not violated his right to counsel by failing to provide him a lawyer as long as they cease the interrogation. His right to a lawyer only applies now if they do question him. In other words, his right to a lawyer, the right he asserts, is conditional on their continued questioning.

Finally, and perhaps most importantly, *Miranda* has another contingency relevant here. It also only applies if the government actually charges him and brings him to trial. The Supreme Court has made clear *Miranda* is a rule of evidence. That is, the police do not violate *Miranda*, or likely any other right, if they question an unwarned suspect in custody whom they had probable cause to arrest. Rather, they violate *Miranda* only if and when they attempt to introduce that evidence at trial.

This second if looms large in the invocation cases, or would if courts properly understood the right. That is, the *Miranda* right to remain silent, right to counsel, and right to cut off questioning are all provisional and ultimately contingent on the government charging the defendant and bringing him to trial. Thus when suspects say they want a lawyer if they’re going to be charge, they are asserting precisely the correct contours of the *Miranda* right, which itself is contingent on the defendant being charged.

The foregoing represents a more theoretical framework, but the conditional cases also reflect courts finding yet another way to avoid a finding of invocation.
The conditions the suspect posed seem technicalities at best, and a fair reading of the statement seems to be a request for a lawyer.

For example, in *State v. Effler,* immediately upon receiving the Miranda warnings, the defendant said, “I do want a court-appointed lawyer.” The detective responded with, “okay.” The defendant then added, “if I go to jail.” The detective ultimately continued questioning and the defendant confessed.

The Iowa Supreme Court affirmed (by an equally divided court) the trial court’s determination that the defendant had failed to invoke. The phrase, “if I go to jail,” created an ambiguity. Even though there was no opinion for the court on this issue, one of the Justices voting to affirm so vaunted form over substance that it is worth exploring in detail.

The plain import of the defendant’s statement that he wants a lawyer if he goes to jail is that if the police intend to hold him on charges. If the police are going to release him, he obviously won’t need a lawyer. Indeed, the condition the defendant has placed parallels the right itself: a defendant has the right to counsel *only if* he is questioned in custody. If the police determine that they will release him, the suspect no longer has the right to counsel (provided by the government). Or, if the police hold him but do not question him, the suspect has no right to a lawyer. Only if they hold him and question him—which is almost precisely the condition the suspect himself asserted.

But Justice Streit’s opinion ignores both the common sense meaning of the suspect’s statement as well as the nature of the underlying right. Justice Streit writes that the suspect might have meant that he wants a lawyer *when* he goes to jail, but not now. That defies common sense but more important, a suspect *does not have the right* to a lawyer “when” he goes to jail. He only has a right to lawyer when the police question him in the interrogation room before they sent him to jail.

In addition, Justice Streit writes that the police do not charge a defendant or know whether he will be charge, prosecutors do. Therefore, the police do not know whether the condition the suspect has created—essentially, he wants a lawyer *if* he ends up being charged—will come true.

But no reasonable police officer would believe that the defendant was drawing a distinction between formal charges and the charges upon which the police are holding the defendant. After all, even before the prosecutors file an indictment or criminal information commencing the case under Rothgery, the police may only hold a defendant on *some* charge. The Fourth Amendment prohibits seizing and detaining a person without probable cause to believe they have committed a crime. Justice Streit is simply wrong to assert that the police do not “charge” a defendant with a crime, even if that only means holding him on suspicion of *some* crime pending a formal charging instrument.

48. 769 N.W.2d 880 (Iowa 2009).
49. *Id.* (Streit, J. opinion).
Justice Streit’s opinion veered into scholasticism when he began to parse the difference between the statement, “I want a lawyer if I go to jail,” and “if I am going to jail”—as if these differences affected the plain meaning of the defendant’s clear request. Unless you are releasing me now, give me a lawyer. What could be more clear?

But Justice Streit is not alone. Numerous courts have pulled the same stunt, taking a defendant’s condition that the police know perfectly well and transforming it by some improper use of words like “charge” into something entirely different.

For example, in State v. Spears.50 There, the defendant said, “You want to arrest me for stealing, then let me call a lawyer and I’ll have a lawyer appointed to me an, because this is going no where.” The Court held he had not invoked because the police “responded that they were not going to arrest [the] defendant.” The problem with this explanation, as the court itself concedes, is that the suspect was in custody. In other words, they had arrested him and the very condition that the suspect asserted had already come true.

D. Form of a Question

The Court in Davis v. United States51 required that the defendant “request” counsel, not that the defendant “demand” counsel.52 A request, by its very nature, will often come in the form of a question. And many courts recognize that a suspect does invoke the right to counsel even though his request comes in the form of a question.

For example, the statements, “Can I get a lawyer in here?”53 or “Can I get an attorney right now, man?”54 were both held to invoke unambiguously.

But many courts come to the opposite conclusion, holding that a suspect who asks for counsel with a question have failed to invoke unambiguously. These holdings again ignore the nature of the underlying right, which by its nature can be invoked by a statement in the form of a question.

For example, in Commonwealth v. Hilliard,55 immediately after receiving his Miranda warnings, including the right to counsel, the defendant “asked, ‘Can I have someone else present too, I mean just for my safety, like a lawyer like y’all just said?’”

The Court held the defendant had failed to unambiguously invoke. He was merely seeking clarification of his right, the court held, without any explanation of how the context could possibly lead to such a conclusion. The defendant had just been told he has the right to counsel. He asked if he could therefore have

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52. Id. (“the suspect must unambiguously request counsel.”).
54. Alvarez v. Gomez, 185 F.3d 995, 998 (9th Cir. 1999).
55. 613 S.E.2d 579 (Va. 2005).
counsel, as he was just told he could. Nothing in the context suggest he was seeking clarification, other than the fact that his request came in the form of a question. But again, that’s how requests are made.

Making matters worse, the suspect expressly said he wanted a lawyer for his safety. A chief purpose of the *Miranda* right to counsel is to ameliorate the coercive and threatening atmosphere of custodial interrogation. Hilliard was thus requesting counsel for the precise reason that *Miranda* envisioned, using the precise words of a request, even referring to the officer’s statement that he could have a lawyer.

On the other hand, the same court recognized that the defendant did invoke successfully later in the dialogue when he said, “Can I get a lawyer in here?” The statement was in the form of a question but for some reason that does not clearly emerge from the opinion, the court deemed this question to be an unambiguous request.

I do not mean to argue that the form of a question can never render a request ambiguous. If the defendant asks the detectives whether he needs a lawyer, such a request does raise an ambiguity. For example, in *State v. Harris*, the defendant stated, “If I need a lawyer, tell me now.” Though not in the form of a question, this statement reads like a question, a request not for a lawyer but for additional information. But this question stands in stark contrast, in my view, to the simply request, “Can I have a lawyer?”

**E. Subsequent Words**

Courts will sometimes use a suspect’s subsequent statements or even his later willingness to answer questions to show that his earlier, plain-meaning invocation did not really mean to invoke. This violates the clear dictates of Supreme Court precedent. After all, the whole point is that once a defendant invokes counsel, we become concerned that the police will try to get him to change his mind through questioning; the court has clearly ruled that out. A defendant’s willingness to later answer questions therefore cannot transform an earlier invocation into something else.

Courts nevertheless find a suspect’s “no” ambiguous based upon later equivocation or merely answering questions.

Perhaps the most extreme case arose in *Garcia v. Long*. There, the detective asked the defendant, “now, having that [i.e., your *Miranda* rights] in mind, do you wish to talk to me?” Answer: “no.” The lower California appellate court held this “no” was ambiguous because the suspect later equivocated about talking to the detective when the detective persisted. The Ninth Circuit reversed, even under the deferential AEDPA standard, holding that the “no” was unambiguous.

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56. 741 N.W.2d 1, 6 (Iowa 2007).
58. 808 F.3d 771 (9th Cir. 2015).
and could not be overridden by any later equivocation. Once the suspect invokes, the questioning must stop, and the detective should never have arrived at that later equivocation.

Similarly, in *United States v. Hawk*,59 the defendant clearly says “no,” in response to whether he wants to answer questions without a lawyer present. The court nevertheless held his later words in response to further questions made this unambiguous assertion ambiguous.

The particular dialogue bears repeating since it illustrates a typical case. Thus, the detective in *Hawk* asked the defendant himself to read aloud the waiver form, which ends with the sentence: “At this time, I am willing to answer questions without a lawyer present.” The following dialogue ensued:

Sergeant: You agree with that?
Hawk: Not really
Sergeant: Not really?
Hawk: No. (emphasis added)
Sergeant: So, I mean, do you not want to talk to us?
Hawk: I don’t agree with it, but…

The sergeant then made a long speech about how it’s his choice, etc. but ends up persuading him to talk.

The court found the defendant’s statement ambiguous via a few methods. First, it simply ignored the defendant’s “no,” pointing to the “not really” as ambiguous. Second, it pointed to the defendant’s later statement, “I don’t agree with it, but…” as demonstrating that his earlier statements were ambiguous.

In *Powers v. Daveys*, the court similarly pointed to the fact that the defendant answered questions to show that his earlier invocation did not really count.60

IV. CONCLUSION

The Court in *Berghuis* and *Davis* sought to establish a clear, bright-line rule for when suspects invoke the right to cut off questioning. It hoped this rule would make it clear to police when suspects were invoking. It similarly envisioned that the rule would obviate the need for litigation over whether suspects had invoked.

In reality, the rule has merely shifted the inquiry from whether the suspect invoked to whether she did so unambiguously. This problem arises, I have argued, in part because of a mismatch between the right and the warnings. The right the suspect seeks to invoke is really the right to cut off police questioning. But the *Miranda* warnings only tell suspects they have the “right to remain

silent,” and “the right to counsel.” These latter two rights say nothing about cutting off questioning.

Worse, the existing rights fail to give suspects the language with which to invoke the right unambiguously. The warnings similarly fail to give courts a standard against which to measure the suspect’s purported invocation.

Not surprisingly, in light of this mismatch, lower courts have struggled to determine whether a suspect has invoked in a given case. When in doubt, court have often ignored the plain meaning words of the suspect, using dubious context arguments such as the suspect’s subjective motivation, to find that the suspect did not really intend to invoke. She was merely frustrated, for example.

Finally, we see in some lower court cases a determination to find that a suspect has not invoked, despite clear language invoking, because of an overall hostility to the Miranda rights, a hostility present in the leading Supreme Court cases such as Berghuis and Davis. Unfortunately, this hostility has turned the ambiguity test upside down, ignoring plain meaning in favor of a more subjective inquiry.
Miranda’s Truth: The Importance of Adversarial Testing and Dignity in Confession Law

Meghan J. Ryan*

I. Introduction

In 1966, the Supreme Court decided the landmark case of Miranda v. Arizona.1 The case involved the consolidation of four cases—State v. Miranda,2 People v. Vignera,3 Westover v. United States,4 and People v. Stewart5—in which the defendants signed written confessions during police interrogations but were not informed of their rights not to incriminate themselves and to retain lawyers.6 Each of the defendants was convicted after the written confession was entered into evidence at trial.7 In a 5–4 decision, the Supreme Court reversed these convictions,8 determining that the confession of an accused that was obtained during custodial interrogation must be excluded from trial unless sufficient procedural safeguards were taken to protect the accused’s right against self-incrimination.9 In particular, a defendant should be apprised “that he has a right to remain silent, that any statement

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* Gerald J. Ford Research Fellow and Associate Professor of Law, Southern Methodist University Dedman School of Law. I thank Michael Mannheimer and the Northern Kentucky University Law Review for inviting me to participate in this excellent symposium. I also thank the other panelists: Laura Appleman, Paul Cassell, Mark Godsey, Tonja Jacobi, Kit Kinports, Richard Leo, Larry Rosenthal, Laurent Sacharoff, Chuck Weisselberg, and George Thomas for sharing their insights on the landmark decision of Miranda v. Arizona.

4. Westover v. United States, 342 F.2d 684 (9th Cir. 1965).
6. See Miranda, 384 U.S. at 491–99. In the Stewart case, the record was actually silent about whether the defendant had been apprised of his rights. See id. at 497–99. As the Supreme Court explained:

Nothing in the record specifically indicates whether Stewart was or was not advised of his right to remain silent or his right to counsel. In a number of instances, however, the interrogating officers were asked to recount everything that was said during the interrogations. None indicated that Stewart was ever advised of his rights.

Id. at 497–98. The Court concluded that, on such a silent record, it would “not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded.” Id. at 498.

7. See id. at 491–99.
8. See id. (reversing the Arizona Supreme Court in Miranda v. Arizona, reversing the New York Court of Appeals in Vignera v. New York, reversing the U.S. Court of Appeals for the Ninth Circuit in Westover v. United States, and affirming the California Supreme Court’s reversal of conviction in California v. Stewart).
9. See id. at 444.
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.”

The *Miranda* opinion is explicitly based on the Fifth Amendment right that one cannot be compelled to be a witness against oneself in a criminal case. But *Miranda* is really rooted in a constellation of constitutional rights that includes not only the right not to incriminate oneself but also the rights to the assistance of counsel and due process. In fact, assistance of counsel is central to *Miranda*, and, as the Court has defined the boundaries of *Miranda* in subsequent cases, its analysis seems to hew quite closely to its due process coercion analysis that predated *Miranda*.

The Court has interpreted this constellation of constitutional rights in a number of ways. And much of the Court’s reasoning related to these decisions revolve around at least four constitutional values: truth-finding, adversarial testing, human dignity, and equality. The *Miranda* decision highlights the importance of adversarial testing and dignity. The Court stated that the then-existing custodial interrogation environment was “destructive of human dignity” and that “the privilege against self-incrimination [is the] essential mainstay of our adversary system.” “To maintain a ‘fair state-individual balance,’” the Court explained, and to preserve the privilege against self-incrimination, certain warnings ought to be given to the defendant undergoing custodial interrogation.

Despite *Miranda*’s focus on the values of adversarial testing and human dignity, many modern discussions of confession law focus instead on the value of truth-finding. The concern is that modern interrogation methods—which still make use of questionable psychological techniques—do not further this important goal. Indeed, false confessions are one of the leading causes of wrongful conviction. This focus

10. *Id.* The Court suggested that other procedural safeguards could be taken instead, but these warnings specifically articulated in the *Miranda* opinion have become the standard way by which to protect the right against self-incrimination. See *id.* (stating that the above-articulated warnings should be given “unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it”).

11. See *id.* at 439, 457–58 (“The current practice of incommunicado interrogation is at odds with one of our Nation’s most cherished principles—that the individual may not be compelled to incriminate himself.”); *see also* U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . . .”).

12. See *Miranda*, 384 U.S. at 442, 465–66, 469–95 (“[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.”); *see also* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence.”).


15. *Id.* at 460.

16. *Id.*

on truth is important, but it is also important that the truth-finding goal is not overstated and does not eclipse other important constitutional values like adversarial testing and human dignity, which take center stage in *Miranda*.

II. THE EBB AND FLOW OF *MIRANDA*

Before *Miranda* was decided in 1966, the admissibility of confessions was generally governed by the Due Process Clauses of the Fifth and Fourteenth Amendments. Ordinarily, a confession was admissible so long as, under the totality of the circumstances, it was not coerced—it was voluntarily given. For example, in the 1936 case of *Brown v. Mississippi*, the Court stated that using physical force to obtain a confession—such as by severely whipping the defendant—was coercive and thus violated the Due Process Clause. In 1944, in *Ashcraft v. Tennessee*, the Court found that, even if the police did not use physical force to obtain the confession, but instead used otherwise coercive methods like depriving the suspect of sleep, there was a Due Process Clause violation and the confession had to be excluded. In *Escobedo v. Illinois*, in 1964, the Court moved a step closer to the *Miranda* ruling by invoking the Sixth Amendment’s Assistance-of-Counsel provision in the confession context and holding that, when a defendant asked for his lawyer and the police did not abide by this request, the suspect’s subsequent confession was inadmissible in court.

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18. See U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”); U.S. Const. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”); Oregon v. Elstad, 470 U.S. 298, 304 (1985) (“Prior to *Miranda*, the admissibility of an accused’s in-custody statements was judged solely by whether they were ‘voluntary’ within the meaning of the Due Process Clause.”).

19. See Haynes v. Washington, 373 U.S. 503, 515–17 (1963); see also *Miranda*, 384 U.S. at 506–08 (Harlan, J., dissenting) (summarizing the Court’s due process jurisprudence in the context of confessions before *Miranda* was decided).


21. See id. at 286 (“It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.”).


23. See id. at 154 (stating that the Court cannot, “consistently with Constitutional due process of law, hold voluntary a confession where” the suspect was continuously interrogated “for thirty-six hours without rest or sleep in an effort to extract a ‘voluntary’ confession”).


25. See id. at 490–91 (holding that the accused was denied his Sixth Amendment right to counsel because the investigation had begun focusing on the defendant as a suspect—the defendant “had[ ] been taken into police custody, the police [had] carr[ied] out a process of interrogations that len[t] itself to eliciting incriminating statements,” the defendant “ha[d] requested and been denied an opportunity to consult with his lawyer, and the police ha[d] not effectively warned him of his absolute constitutional right to remain silent”); see also U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.”); *Miranda v. Arizona*, 384 U.S. 436, 440 (1966) (citing *Escobedo*).
The Court’s decision in *Miranda* was groundbreaking. After *Miranda*, police departments across the country were forced to begin warning suspects who were interrogated while in custody that they had the right to remain silent and the right to an attorney.\textsuperscript{26} There has been significant debate about the full effects of *Miranda*, such as whether the decision has impaired police officers’ and prosecutors’ abilities to find and convict offenders and whether any such drawbacks are worth the values espoused in *Miranda*.\textsuperscript{27} Regardless, this right to a *Miranda* warning has become perhaps the most well-known constitutional right.\textsuperscript{28} Most American adults can easily recite the *Miranda* warnings, probably because of their constant repetition on police procedural television shows.\textsuperscript{29}

\textsuperscript{26} Of course, because *Miranda* is a rule enforced at the admissibility stage of trial, some police officers still neglect to mirandize suspects and instead just forgo admission of any resulting confessions at trial. See Steven D. Clymer, *Are Police Free to Disregard Miranda*, 112 Yale L.J. 447, 448 (2002) (observing that “one can find passages in both *Miranda* and its progeny that appear to command police compliance with the *Miranda* rules and conflicting passages that describe those rules in terms of their effect on admissibility” but stating that “[o]nly the latter passages cohere with the language of the privilege, immunity doctrine, the penalty cases, the Court’s explicit descriptions of the privilege as a ‘trial right,’ the steps that the Court took to travel from the privilege to the *Miranda* rules, and the lower courts’ § 1983 decisions”); Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich. L. Rev. 1121, 1122 (2001) (stating that Supreme Court decisions that followed in *Miranda*’s wake have led to a “‘new vision’ of *Miranda*” that the seminal case “sets forth a nonconstitutional rule of evidence that need only be followed when officers seek a statement to introduce in the prosecution’s case-in-chief at trial”); see also *Custodial Interrogations*, 34 Geo. L.J. Ann. Rev. Crim. Proc. 158, 166 (2005) (“The Court has limited the remedy for a *Miranda* violation to the exclusion of testimonial evidence obtained in violation of *Miranda*.”); supra note 10 (noting that the *Miranda* Court left room for other procedural safeguards to be taken instead of what has become known as “mirandizing” the defendant).

\textsuperscript{27} See, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. 1055, 1060, 1107–32 (arguing that “*Miranda* has in fact handcuffed the cops and that society should begin to explore other, less costly ways of regulating police interrogation”); Stephen J. Schulhofer, Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism, 99 Mich. L. Rev. 941, 943 (2001) (“*Miranda* probably prevents some confessions, but it also helps the police obtain others. The great weight of the evidence suggests that the *Miranda* system, as currently administered, causes no net reduction in confession rates, clearance rates, or conviction rates.”); George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona*: “Embedded” in Our National Culture?, 29 Crime & Just. 203, 207–08, 254–56 (2002) (“[A]s it now exists, the *Miranda* rule does not seriously obstruct law enforcement interests. Indeed, in operation *Miranda* might further law enforcement interests more than it does the interests of suspects.”).

\textsuperscript{28} See Dickerson v. United States, 530 U.S. 428, 443 (2000) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”); Clymer, supra note 26, at 449 (“*Miranda v. Arizona* is the Supreme Court’s best-known criminal justice decision.”); Richard A. Leo, The Impact of *Miranda Revisited*, 86 J. Crim. L. & Criminology 621, 627 (1996) (stating that *Miranda* is “possibly the most famous court case in American history’’); Charles D. Weisselberg, Saving *Miranda*, 84 Cornell L. Rev. 109, 110 (1998) (“*Miranda v. Arizona* may be the United States Supreme Court’s best-known decision.”). But see infra text accompanying notes 50–56 (explaining that there have been real questions about whether *Miranda* warnings are actually a constitutional right).

\textsuperscript{29} See Clymer, supra note 26, at 449 (suggesting that most Americans’ understandings of *Miranda* are derived from “police television programs, movies, or books”); Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 Mich. L. Rev. 1000, 1000 (2001) (“The *Miranda* warnings themselves have become so well-known through the media of
Even though the Court took a substantial leap forward in *Miranda*, it tried to downplay the case’s groundbreaking nature. The Court argued that the decision was “not an innovation in [the Court’s] jurisprudence, but [was instead] an application of principles long recognized and applied in other settings.”

Although this seems like a mischaracterization of the decision, one can understand why the majority painted the decision as no constitutional innovation: Many believe that the Court should strive to be consistent in its jurisprudence; it ought to apply the law and not legislate from the bench. As Chief Justice Roberts famously explained in his senate confirmation hearings: “Judges are like umpires. Umpires don’t make the rules; they apply them.”

The *Miranda* decision arguably went far beyond calling balls and strikes, so the Court sought to deemphasize the revolutionary nature of the decision.

Characterizing the television that most people recognize them immediately.”); Frederick Schauer, *The Miranda Warning*, 88 WASH. L. REV. 155, 155 (2013) (“Largely as a consequence of American television and movies, *Miranda v. Arizona* may well be the most famous appellate case in the world.”).


> Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them.

The role of an umpire and a judge is critical. They make sure everybody plays by the rules.

But it is a limited role. Nobody ever went to a ball game to see the umpire.

Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.

And judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.


32. Of course Justice Roberts’s view of the judge as simply calling balls and strikes is an oversimplification of judges’ roles. See supra note 31. Arguably, the *Miranda* decision could be categorized as judicial activism, though. See, e.g., John H. Blume et. al., *Education and Interrogation: Comparing Brown and Miranda*, 90 CORNELL L. REV. 321, 337 (2005) (suggesting
decision as no innovation in the Court’s jurisprudence was important to maintaining the Court’s legitimacy.

Despite the effort the Court took to justify the decision, the Court has been chipping away at Miranda in recent decades. For example, in Berkemer v. McCarty, the Court cut back on the custody requirement of Miranda by finding that a drunk driver was not in custody when he was pulled over and questioned by a state highway patrol officer. The Court has also suggested that Terry stops are not custodial and thus Miranda does not apply in those instances. The Court has further narrowed Miranda through the scope of the interrogation requirement. In Pennsylvania v. Muniz, for example, a plurality of the Court explained that certain questions—those related to “routine booking information” like name, address, height, weight, and eye color, which are used for identification purposes—fall outside of Miranda’s scope.

The Court has continued to narrow Miranda in other ways as well. For example, in Harris v. New York, the Court held that un-mirandized statements may be used for impeachment purposes: “The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense . . . .” In New York v. Quarles, the Court held that there is a public safety exception to

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34. See id. at 441 (“[W]e find nothing in the record that indicates that respondent should have been given Miranda warnings at any point prior to the time Trooper Williams placed him under arrest. . . . [W]e reject the contention that the initial stop of respondent’s car, by itself, rendered him ‘in custody.’”).
35. See Maryland v. Shatzer, 559 U.S. 98, 113 (2010) (“[T]he temporary and relatively nonthreatening detention involved in a traffic stop or Terry stop does not constitute Miranda custody.”); Berkemer, 468 U.S. at 440 (stating that the “nonthreatening character of detentions of this sort explains the absence of any suggestion in [the Court’s] opinions that Terry stops are subject to the dictates of Miranda”). A “Terry stop,” also known as a “stop and frisk,” is “[a] police officer’s brief detention, questioning, and search of a person for a concealed weapon when the officer reasonably suspects that the person has committed or is about to commit a crime.” Stop-and-Frisk, BLACK’S LAW DICTIONARY (10th ed. 2014).
37. See id. at 601 (noting a “routine booking question” exception which exempts from Miranda’s coverage questions to secure the ‘biographical data necessary to complete booking or pretrial services’”).
39. See id. at 226 (“The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner’s credibility was appropriately impeached by use of his earlier conflicting statements.”).
40. Id.
When the objective purpose of law enforcement is to obtain information to safeguard the public rather than to elicit an incriminating statement from the suspect, *Miranda* does not apply; instead, “a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.” In *Oregon v. Elstad*, the Court determined that the “fruits” of un-mirandized statements are admissible. The Court explained that failure to provide *Miranda* warnings creates a presumption of due process compulsion, but, although this presumption is irrebuttable, mere failure to provide such warnings does not taint certain fruits of the confession—here a subsequent voluntary statement. Otherwise, this would stretch the fabric of *Miranda* too far. “[T]he primary criterion of admissibility” in this context, the Court elucidated, “remains the old due process voluntariness test.”

The limitations on *Miranda* have become so significant that in 2000, in the case of *Dickerson v. United States*, there was a real question of whether *Miranda* is actually a rule of constitutional import. Indeed, the Court has stated over the years that “[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself,” that it is “prophylactic” in nature, that a violation of *Miranda* does not involve “actual infringement of the suspect’s constitutional rights,”

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42. See id. at 655–56 (“We hold that on these facts there is a ‘public safety’ exception to the requirement that *Miranda* warnings be given before a suspect’s answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved.”).
43. See id. at 657 (“We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”).
44. Id.
46. See id. at 307–09 (“[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution’s case in chief, does not require that the statements and their fruits be discarded as inherently tainted.”).
47. See id.
48. See id. at 308–09.
49. Id. at 307–08 (internal quotations and alterations omitted).
51. See generally id. (examining whether *Miranda* constitutes “a constitutional decision of [the] Court”). After *Dickerson*, the Court continued to cut back on *Miranda*. See, e.g., *Howes v. Fields*, 132 S. Ct. 1181, 1188–89 (2012) (suggesting in an opinion reversing a grant of habeas corpus that the Court’s “decisions do not clearly establish that a prisoner is always in custody for purposes of *Miranda* whenever a prisoner is isolated from the general prison population and questioned about conduct outside the prison”); *Chavez v. Martinez*, 538 U.S. 760, 768–73 (2003) (holding that a suspect’s confession elicited in violation of *Miranda* did not provide a basis for a civil action under 42 U.S.C. § 1983).
54. *Elstad*, 470 U.S. at 308 (stating that a *Miranda* violation is not an “actual infringement of . . . constitutional rights” in light of the Court’s holding and reasoning in *Michigan v. Tucker*).
made by law enforcement officers in administering the prophylactic *Miranda* procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself," and that *Miranda*’s “procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected”—that they “were not intended to ‘create a constitutional straightjacket’ . . . but rather to provide practical reinforcement for the right.”

Considering all of these statements playing down the importance of *Miranda*, the breadth of the landmark decision seems to have narrowed. Indeed, as the Court has continued sketching the boundaries of *Miranda* over the years, it has arguably returned to something closer to a Due Process Clause coercion and voluntariness analysis.

### III. An Array of Constitutional Values

*Miranda* is ordinarily considered a case premised on the Fifth Amendment right not to incriminate oneself. Indeed, the *Miranda* Court stated that the case dealt with “the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment of the Constitution not to be compelled to incriminate himself.” Yet *Miranda* and its progeny, as well as an array of constitutional criminal procedure cases, rely on a *constellation* of constitutional provisions. *Miranda*, for example, relied not only on the Self-Incrimination Clause, but it was also built on the Due Process and Assistance-of-Counsel Clauses. Its analysis was based on an earlier case—*Escobedo v. Illinois*—which explicitly relied on both the Self-Incrimination Clause and the Assistance-of-Counsel Clause of the Sixth Amendment. Further,

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55. *Id.* at 308–09.
57. See generally Thomas, *supra* note 13, at 1083 (arguing that, “[w]hatever the *Miranda* majority contemplated, courts deciding *Miranda* issues after the Supreme Court’s seminal case were “somewhat hostile” to *Miranda* and “have transformed *Miranda* from a case about the Fifth Amendment privilege against self incrimination to one about due process”); see also Susan R. Klein, *Miranda’s Exceptions in a Post-Dickerson World*, 91 *J. CRIM. L. & CRIMINOLOGY* 567, 568 (2001) (noting Professor Thomas’s “key insight” that *Miranda* has been effectively transformed . . . from a case that all but mandated defense attorney participation in custodial interrogations to dispel inherent compulsion, to a case about providing the minimal amount of notice to a defendant about his privilege against self-incrimination such that a court can uphold his confession as voluntary”); *supra* text accompanying notes 18–25 (summarizing the Court’s due process test).
58. *See U.S. CONST. amend. V* (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).
60. *See id.* at 442, 469.
62. *See Miranda*, 384 U.S. at 442 (explaining the basis for the Court’s holding in *Escobedo*); *Escobedo*, 378 U.S. at 479, 488 (stating that the “critical question” in the case was whether there was a violation of the Sixth Amendment right to counsel and stating that “[o]ur Constitution . . .
the *Miranda* Court explained that, because “[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators”—a due process concern—“the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege.”63 The Court’s general concerns about the police interrogation methods at play in *Miranda* mirror the Court’s coercion concerns expressed in its due process cases.64 As the dissenting Justices in *Miranda* pointed out, though, the methods were less extreme in *Miranda* than in cases in which the Court had previously found due process violations.65 Still, the *Miranda* Court relied on both the Due Process and Assistance-of-Counsel Clauses in addition to the Self-Incrimination Clause. And the case is not unique in relying on an array of constitutional provisions. Beyond the constitutional provisions themselves, though, the Court regularly relies on at least four important constitutional criminal procedural values. These are the values of adversarial testing, truth-finding, dignity, and equality.

In many cases, including *Miranda*, the Court has discussed the importance of the adversarial system under this constellation of constitutional clauses. Adversarial testing is essential to ensuring a constitutionally fair trial, and pitting the government against the defendant is also thought to strengthen the reliability of the outcome at trial.66 Perhaps the best examples of the Court relying on this adversarial-testing value are in the landmark right-to-counsel cases of *Gideon v. Wainwright*67 and *Strickland v. Washington*.68 In these cases, the Court referred to the fundamental fairness goal of providing a defendant with effective assistance of counsel. In *Gideon*, the Court found that the constitutional requirement of fairness entitles indigent defendants to have counsel appointed for them.69 The Court explained: It is “an obvious truth” that, “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a

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63. *Miranda*, 384 U.S. at 469; see also supra text accompanying notes 18–25 (laying out the Court’s Due Process analysis).
64. *See Miranda*, 384 U.S. at 469; see also supra text accompanying notes 18–25 (laying out the Court’s Due Process analysis).
65. *See Miranda*, 384 U.S. at 524–25 (Harlan, J., dissenting); id. at 535 (White, J., dissenting) (“If the rule announced today were truly based on a conclusion that all confessions resulting from custodial interrogation are coerced, then it would simply have no rational foundation.”).
66. *See Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964) (referring to “our fundamental values and most noble aspirations,” which include “our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load” (internal quotations omitted)). There is, however, some debate about whether the adversarial system is better at finding truth than an inquisitorial system. See WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE 44 (5th ed. 2009).
lawyer, cannot be assured a fair trial unless counsel is provided for him.” 70 In Strickland, the Court stated that the Sixth Amendment right to the assistance of counsel means a “right to the effective assistance of counsel.” 71 The Court explained that the Due Process Clause guarantees the right to a fair trial and that the Assistance of Counsel Clause specifies some of the rights essential to such a fair trial. 72 This fairness guarantee includes subjecting evidence “to adversarial testing[,] . . . [and] [t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” 73 Accordingly, if a criminal defendant’s attorney provides ineffective assistance of counsel, and there is a reasonable probability that the result would have otherwise been different—that confidence in the verdict has been undermined—the defendant is entitled to a new trial. 74

The Court similarly highlighted the importance of adversarial testing in Crane v. Kentucky, 75 in which a unanimous Court examined whether the defendant’s evidence about the “physical and psychological environment in which [his] confession was obtained” was admissible at trial. 76 The Court stated that, “[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” 77 Continuing on, the Court explained that excluding the type of evidence at issue would “deprive[] a defendant of the basic right to have the prosecutor’s case encounter and survive the crucible of meaningful adversarial testing.” 78 To preserve this value of adversarial testing, the Court ruled that the evidence should have been admitted at trial. 79

When assessing an issue under the constellation of criminal constitutional rights at play in Miranda, the Court has also focused on the value of truth-finding, indicating that proper outcomes in the criminal justice system—the conviction of the guilty and the acquittal of the innocent—is important. For

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70. Id. at 344.
72. See id. at 684–85 (emphasis added) (“The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . . .”).
73. Id. at 685.
74. See id. at 691–96.
76. Id. at 684.
77. Id. at 690.
78. Id. at 690–91.
79. See id. at 692.
example, in *Brady v. Maryland*, the Court suggested that requiring the prosecution to turn over material exculpatory information to the defendant serves the truth-finding goal of the Due Process Clause. Through the lens of fairness, the Court explained that “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair,” and it is the prosecutor’s job to achieve justice, not necessarily win the case. The right outcome of trial—truth of guilt and innocence—is the goal rather than just convicting the defendant regardless of the evidence. This value of truth-finding seemed to outweigh the adversarial-testing aspect of fairness here.

The Court was more explicit about the truth-finding goal of due process in its 1970 case of *Williams v. Florida*. There, the Court rejected the defendant’s argument that he should not have to comply with a state rule requiring him to provide pretrial notice of his alibi defense because it would deprive him of constitutional due process or a fair trial. Responding to the allegation that the state rule was at odds with the game-like nature of the adversary system, the Court stated that “[t]he adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.” Instead, the Court explained, the rule was “designed to enhance the search for truth in the criminal trial,” and, “[g]iven the ease with which an alibi can be fabricated, the State’s interest in protecting itself against an eleventh-hour defense is both obvious and legitimate.” Although the Court found truth-finding to trump adversarial testing, this is not always the case, and other values remain similarly important.

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81. Id. at 87.
82. See id. at 87–88 & n.2.
83. LaFave et al. have distinguished truth-finding from “[m]inimizing [e]rroneous [c]onvictions.” See *LaFave et al., supra* note 66, at 42–43, 46. They explained that, “[i]n its emphasis on reliable factfinding, the truthfinding goal seeks to ensure equally the accuracy of both guilty verdicts and acquittals.” Id. at 46. In contrast, the value of “minimizing erroneous convictions” places a premium on “the accuracy of the guilty verdict,” “reflect[ing] a desire to minimize the chance of convicting an innocent person even at the price of increasing the chance that a guilty person may escape conviction.” Id.
85. See id. at 81. The state rule “require[d] a defendant, on written demand of the prosecuting attorney, to give notice in advance of trial if the defendant intend[ed] to claim an alibi, and to furnish the prosecuting attorney with information as to the place where he claim[ed] to have been and with the names and addresses of the alibi witnesses he intend[ed] to use.” Id. at 79.
86. Id. at 82.
87. Id. at 81.
88. For example, although they would arguably serve the value of truth-finding, open-file discovery rules are not constitutionally mandated, and prudential limits on litigating claims alleging proof of actual innocence are routinely upheld. See Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2126 (2010) (“Open-file discovery clearly goes beyond what is required by either the constitution or ethical rules.”); Don J. DeGabielle & Eliot F. Turner, *Ethics, Justice, and Prosecution*, 32 REV. LITIG. 279, 293 (2013) (asserting that “the Court has made clear that open-file discovery is not constitutionally required under *Brady*”); Ryan & Adams, supra note 17, at 1106–09 (noting limitations on collateral attacks).
The Court has also relied on the value of dignity in deciding important constitutional criminal procedure questions. In addition to the Court’s reference to dignity in *Miranda*, the Court has discussed this value in several other cases. For example, the Court has said that the Sixth Amendment “right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused’s best possible defense.”

Expounding on this idea in *Indiana v. Edwards*, the Court referred to a defendant’s dignity in approving a higher competency standard for a defendant to represent himself. It explained that a state may require a higher competency standard to represent oneself than simply the competency to stand trial because “a right of self-representation at trial will not ‘affirm the dignity’ of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel.”

The Court was concerned that a defendant’s self-representation could result in a humiliating spectacle rather than positively serve the defendant. Further, it could result in an unfair trial. Although the Court’s conception of dignity may vary somewhat from case to case, it remains a significant factor in the determination of cases under this constellation of constitutional provisions.

Finally, the Court has looked at the value of equality. Equal treatment among various defendants is a value less frequently cited by the Court under these constitutional provisions, but the Court does occasionally invoke this consideration as well. The *Gideon* case, for example, emphasized the importance of “every defendant stand[ing] equal before the law.” This essential component of fairness, the Court explained, “cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him” while a rich man is competently assisted by counsel.

Being treated equally under the law is essential and has a foothold alongside the values of adversarial testing, truth-finding, and dignity in the Court’s analysis under the constellation of rights embodied in the Self-Incrimination, Assistance-of-Counsel, and Due Process Clauses of the Constitution.

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91. *See id.* at 176–77.
92. *Id.* at 176.
93. *See id.* (concluding that, “given the defendant’s uncertain mental state,” self-representation at trial could result in a “spectacle” that is “at least as likely to prove humiliating as ennobling”). The *Edwards* Court’s conception of dignity is arguably at odds with the autonomy-based conception of dignity, which could have supported allowing the defendant to represent himself without meeting this higher state threshold of competence.
94. *See id.* at 176–77.
96. *Id.*
IV. ADVERSARIAL TESTING AND DIGNITY IN MIRANDA

The Miranda Court heavily relied on two of the four values generally invoked in criminal procedure cases relying on a constellation of constitutional provisions like the Self-Incrimination, Assistance-of-Counsel, and Due Process Clauses. More specifically, the Court focused on the two interrelated concepts of adversarial testing and human dignity. The Self-Incrimination Clause on which Miranda explicitly relied provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." 97 The Miranda Court explained that "the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." 98 This entails two distinct values. First, the Court stated that the privilege requiring the government, "by its own independent labors," to produce evidence against the defendant exists "[t]o maintain a ‘fair-state-individual balance,’ to require the government ‘to shoulder the entire load.’" 99 This highlights the value of adversarial testing. 100 Second, the Court explained that the privilege requires the state "to respect the inviolability of the human personality" 101 and noted that the interrogation techniques then employed by the police were "destructive of human dignity." 102 This latter focus on dignity, as well as the Court’s emphasis on adversarial testing, was central to the Court’s analysis.

Miranda did not really focus on the values of equality or truth-finding, though. Perhaps it should not be surprising that the Court neglected to discuss equality. The Court’s appeal to this worthy goal seems to be much less frequent in the Court’s analysis of this constellation of rights. Despite the Court’s inattention to equality, the Miranda decision probably does further this important value by ensuring, at least in theory, that even the uninformed learn about their constitutional right to the assistance of counsel and their right not to incriminate themselves. 103 This puts these at-risk defendants on a more equal playing field.

97. U.S. Const. amend. V.
99. Id.
100. Professor Wayne LaFave et al. have disaggregated “adversarial” and “accusatorial” objectives. See LAFAVE ET AL., supra note 66, at 43–46. According to them, “[t]he adversarial element assigns to the participants the responsibility for developing the legal and factual issues of the case, while the accusatorial element allocates burdens as between the parties with respect to the adjudication of guilt.” Id. at 46. However, as LaFave et al. noted, some courts consider these accusatorial aspects to be part of adversarial testing. See id. at 43. Following this latter approach, this article treats the two as an aggregated whole—as the value of adversarial testing.
101. Miranda, 384 U.S. at 460.
102. Id. at 457.
103. This is certainly debatable, as many defendants do not understand their Miranda rights even once they are given a Miranda warning. See I. Bruce Frumkin & Alfredo Garcia, Psychological Evaluations and the Competency to Waive Miranda Rights, CHAMPION, Nov. 2003, at 12 (“Individuals under the age of 15, and older suspects with lower than average intelligence, are generally not able to fully understand and waive their Miranda rights.”).
It is more striking that *Miranda* did not focus on truth-finding. As Justice Harlan suggested in his dissent, there is a real risk that the rule the majority set forth in the case could cut against this important value. Justice Harlan explained that, while defense counsel’s role at trial is crucial because an understanding of technical points of law and evidence are essential at trial, in the station house a defense lawyer “may become an obstacle to truth-finding.” According to Justice Harlan, there could “be little doubt that the Court’s new code would markedly decrease the number of confessions.” Without these confessions, the criminal justice system would be hamstrung in finding the truth of what happened in a case. Moreover, the remedy the Court applied in *Miranda*—the exclusion of un-mirandized confessions—keeps evidence from the jury that could very well be reliable—at least in some cases.

In contrast to the *Miranda* majority’s neglect of the truth-finding goal, today, probably the most well-publicized concern with respect to confessions is their truthfulness—their reliability. In recent years, it has come to light that many criminal defendants falsely confess. According to the National Registry of Exonerations, which reports known exonerations beginning in 1989, of the 1,940 exonerations that have been recorded, 234—or about 12%—involved a false confession. These statistics and further research as to why individuals confess have led to resonant calls for courts to guard against blind reliance on these tools of wrongful conviction by, for example, conducting pretrial hearings on the reliability of confessions and admitting expert testimony about the possibility of wrongful confessions.

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104. See *Miranda*, 384 U.S. at 514–16 (Harlan, J., dissenting). There is a rich literature debating whether the *Miranda* decision actually furthers or hinders truth-finding. See supra note 27 and accompanying text.


106. Id. at 516.

107. See id. at 514–16.

108. See Jeffrey Standen, *The Politics of Miranda*, 12 CORNELL J.L. & PUB. POL’Y 555, 566 (2003) (“*Miranda* occasionally excludes from evidence confessions that are reliable, relevant, and voluntary because the *Miranda* warnings, presumably already known by the suspect by heart, were not provided in full or in a timely fashion.”). It is important to note that *Miranda* might actually further truth-finding, as it excludes unreliable confessions. See Ryan & Adams, supra note 17, at 1091–93 (discussing the possibility of false confessions).


110. See id.

111. See Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 59, 764–65, 801–08 (2013) (“Upon a motion by the defense, courts in criminal cases should evaluate the reliability of confession evidence, which could be undertaken at the same pretrial hearing in which they assess voluntariness.”).

This focus on truth has permeated criminal law and procedure, morphing into something of an obsession. From the discovery that the FBI has given erroneous testimony on hair analysis in over 95% of their re-examined cases in which that evidence was involved, to the breakout true-crime documentaries Serial and Making a Murderer, which told the dramatic stories of possible real-life wrongful convictions and were followed by millions, the media has pummeled us with numerous stories of innocent people likely being wrongfully convicted. Beyond this general theme of truth-finding, a whole host of particular criminal law and procedure issues have begun to revolve around this seductive value. Recent research on the reliability of eyewitness testimony, confidential informant testimony, arson evidence, shaken baby syndrome diagnoses, and even fingerprint evidence has led to cries for reform in an overwhelming number of criminal law and procedure areas. And some courts and legislatures are slowly heeding these calls by, for example, requiring new procedures for eyewitness identifications, corroboration for snitch testimony, and re-examination of evidence used at trial.

Why this focus on truth? During the course of the last few decades, we have been faced with evidence of a shocking number of wrongful convictions. The National Registry of Exonerations places the current number of wrongful convictions at 1,940. A substantial portion of these exonerations (436, or 22%)

113. See Ryan & Adams, supra note 17, at 1084 (noting “the recent revelation that FBI forensic experts gave flawed testimony in over 95% of re-examined cases in which the experts provided hair analysis testimony”); Spencer S. Hsu, FBI Admits Flaws in Hair Analysis Over Decades, WASH. POST, Apr. 18, 2015, https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html.


115. See Mekado Murphy, Behind ‘Making a Murderer,’ a New Documentary Series on Netflix, N.Y. TIMES, Dec. 20, 2015, http://www.nytimes.com/2015/12/21/arts/television/behind-making-a-murderer-a-new-documentary-series-on-netflix.html?_r=0 (reporting the background of Making a Murderer, a serialized true-crime documentary that tells the story of Steven Avery, who served eighteen years in prison for sexual assault, was exonerated for that offense, and then was later arrested, convicted, and sentenced to life in prison for the crime of murder).


117. See, e.g., TEX. CRIM. PROC. CODE ANN. § art. 38.075(a) (2009) (“A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant’s interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed.”).

118. See, e.g., generally Ex parte Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996) (superseded by statute on other grounds) (granting the petitioner a writ of habeas corpus based on his claim of actual innocence that was grounded in new evidence—the recantation of victim testimony).

119. See The National Registry of Exonerations, supra note 17.
was identified through the use of DNA evidence. DNA evidence has been heavily relied upon in criminal cases since it was first introduced in criminal courts in 1986. DNA evidence is thought to be incredibly reliable, due in part to its development from the research culture of universities and in part to the low probabilities that two samples of DNA would match if not sourced from the same individual. In 2009, the National Academy of Sciences issued a report entitled Strengthening Forensic Science in the United States: A Path Forward, which explained that DNA evidence is the “gold standard” of forensic evidence; unlike bite-mark evidence, tool-mark evidence, and hair analysis (to name a few), DNA evidence has the potential to get us to the truth of what happened in a case.

Although our focus on truth may have been triggered by the overwhelming numbers of exonerations, it is really tools like DNA analysis that have catalyzed this focus on truth. Recent advances in science and technology have imbued us with considerable confidence in assessing the truth—whether that be the discovery that Einstein’s theory of relativity is correct, or that Higgs-boson particles really do exist (well, at least probably), or that Mr. Smith murdered Mr. Jones. We are, at least in some jurisdictions, making progress toward truth by, for example, improving eyewitness testimony through more careful line-

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120. See id.
122. See Nat’l Academy of Sci., Strengthening Forensic Science in the United States: A Path Forward 130 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf. This is in contrast to the other forensic science disciplines that were generally birthed in police stations and forensic science laboratories. These arenas do not have the same type of research cultures that can be found in research universities. See id.
123. See id.
124. Ryan & Adams, supra note 17, at 1080; see Nat’l Academy of Sci., supra note 122, at 130 (“DNA typing is now universally recognized as the standard against which many other forensic individualization techniques are judged. DNA enjoys this preeminent position because of its reliability and the fact that, absent fraud or an error in labeling or handling, the probabilities of false positive are quantifiable and often miniscule.”). Of course DNA evidence is subject to error as well. See infra text accompanying notes 133–135.
125. See Dennis Overbye, Gravitational Waves Detected, Confirming Einstein’s Theory, N.Y. TIMES, Feb. 11, 2016 (“A team of scientists announced on Thursday that they had heard and recorded the sound of two black holes colliding a billion light-years away, a fleeting chirp that fulfilled the last prediction of Einstein’s general theory of relativity.”). Still, DNA can often get us to the truth of a case.
126. See The ATLAS Collaboration, A Particle Consistent with the Higgs Boson Observed with the ATLAS Detector at the Large Hadron Collider, 338 SCI. 1576, 1581–82 (2012).
127. Cf. Meghan J. Ryan, Finality and Rehabilitation, 4 Wake Forest J.L. & Pol’y 121, 141 (2014) (“Along with our confidence in the power of DNA evidence that has revealed the wrongfulness of hundreds of convictions, we seem to be confident that we are not as blinded by fear and vengeance as our predecessors and can instead make better determinations of proportionate and just punishment.”).
ups, improving our knowledge on the reliability of forensic sciences like arson science and bite mark evidence, and opening up case files to criminal defendants. Even the long-standing practice of sentencing is being overhauled by inserting data into sentencing determinations—a system referred to as evidence-based sentencing. As our scientific and technological tools like DNA analysis have improved, our confidence in finding the truth has swelled.

But Miranda is not about truth-finding. It is instead about adversarial testing and human dignity. Our recent focus on truth-finding risks overshadowing these other important criminal justice values. But why do we care about these goals aside from truth-finding? Isn’t truth the most important goal of our criminal justice system?

Despite our advances in science and technology, truth may be difficult to come by. And certainty of truth is generally impossible. We recognize the impossibility of the certainty of truth by our burden of proof in criminal cases—


130. See, e.g., N.C. GEN. STAT. § 15A-903(a) (2013) (“Upon motion of the defendant, the court must order . . . [t]he State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committed or the prosecution of the defendant.”). See generally Ryan & Adams, supra note 17, at 1110–19 (laying out a number of “steps in the right direction” toward cutting back on questionable tools used to convict potentially innocent defendants).

131. See Roger K. Warren, Evidence-Based Sentencing: Are We Up to the Task?, 23 FED. SENT’G REP. 153, 153 (2010) (“The concept of EBS dates back to adoption by the Conference of Chief Justices and the Conference of State Court Administrators in August 2007 of a formal resolution in support of ‘state efforts to adopt sentencing and corrections policies and programs based on the best research evidence of practices shown to be effective in reducing recidivism.’”)

proof beyond a reasonable doubt. We do not require certainty of guilt—not because certainty of guilt is undesirable but because certainty of guilt is exceedingly difficult to come by. Even DNA analysis, in which we place so much faith, is not infallible. Not only is there some small probability that an unknown blood sample found at the crime scene will have the same DNA profile as a known blood sample in the database even though the samples are not from the same source, but there are also numerous errors that can occur in taking and analyzing those samples that could taint the results. For example, there can be cross-contamination in the laboratory, the forensic scientist may err in running the samples or interpreting the results, or the forensic scientist may lie about the results. Furthermore, just because an individual’s DNA is found at a crime scene does not mean that the individual committed the crime at issue.

Just as in the past, we cannot necessarily know the truth. The adversarial system is one way that we have attempted to uncover the truth, though. The thought is that pitting the prosecution against the defense will cause the truth to come out because each side will voraciously tear away at the other’s case. Indeed, circumstances often guarantee that the parties will be starkly opposed. The defendant, with a lot at stake, has a strong incentive to uncover exculpatory evidence—of course with the assistance of counsel. The defendant might also have the greatest knowledge about the facts of the case. The prosecutor, on the other hand, has incentive to develop facts that inculpate the defendant. His or her career success could very well be affected by the case’s outcome. But the prosecutor is also charged with seeking justice; he or she is not to pursue a conviction not supported by at least probable cause. Still, these circumstances generally set the stage for a rigorous contest.

133. See In re Winship, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

134. See NAT’L ACADEMY OF SCI., supra note 122, at 130; Ryan & Adams, supra note 17, at 1083.

135. See Ryan & Adams, supra note 17, at 1083; Meghan J. Ryan, Remedyng Wrongful Execution, 45 U. Mich. J.L. Reform 261, 274 n.89 (2012) (“While DNA evidence can be ‘uniquely probative’ of a defendant’s innocence, it is not conclusive. For example, the defendant may not have left behind any of his DNA, and the trace DNA evidence examined could belong to his partner or an innocent individual.” (internal citations omitted)).

136. Of course the effectiveness of this defendant-defense counsel team could in reality be hampered by limited resources for defense counsel and the defendant’s possible pretrial confinement.


To the extent that the truth cannot be determined by pitting the prosecution against the defense, the result of this adversarial-testing approach favors the defendant. In these circumstances, it is appropriate to adopt prophylactic rules that protect innocent persons as well as those who are guilty. This sentiment is reflected in our criminal justice system’s strict proof-beyond-a-reasonable-doubt standard that must be met by the prosecution. Indeed, as William Blackstone stated, it is “better that ten guilty persons escape, than that one innocent suffer.” Of course the effectiveness of this prophylactic measure is limited by the resources available to the defendant. The sorry state of funding for public defense in this country certainly undermines the effectiveness of this strategy. The effectiveness of the prophylaxis may also be limited by outside influences like the reverse CSI-effect—where the jury might be more likely to convict because of the heightened value it places on forensic evidence—which could give the prosecution an edge. Despite these limitations, the strategy of adversarial testing recognizes the significant limitation of focusing solely on the truth: certainty of truth is ordinarily unobtainable. This is so even though many of our scientific and technological tools aimed at truth are more powerful than ever before and even though many of our substantive and procedural rules are more accommodating of truth-finding than in the past.

In addition to highlighting the value of adversarial testing, Miranda touted the value of human dignity. But what is this protection of dignity all about? Although the concept of dignity has been criticized for being vague or meaningless, the Court has referred to dignity across different constitutional

139. Note that LaFave et al. have considered this to be an aspect of “accusatorial burdens” rather than “adversary adjudication.” LAFAVE ET AL., supra note 66, at 43–46; supra note 100. It is also worth noting that this idea that the adversarial-testing approach favors the defendant is dependent on the defendant having adequate counsel and sufficient investigatory resources—an assumption that very will may not hold in the milieu of today’s criminal justice system. See infra text accompanying note 142.

140. See In re Winship, 397 U.S. 358, 364 (1970); supra text accompanying note 133. According to LaFave et al., this is considered to be an aspect of “accusatorial burdens” rather than “adversary adjudication.” LAFAVE ET AL., supra note 66, at 43–46; supra notes 100 & 139.

141. 4 WILLIAM BLACKSTONE, COMMENTARIES *352; see also Alexander Volokh, N Guilty Men, 146 U. PA. L. REV. 173, 208 (1997).


144. See Meghan J. Ryan, Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment, 2016 ILL. L. REV. 2129, 2139 (2016); see also Helga Kuhse, Is There a Tension Between Autonomy and Dignity?, in 2 BIOETHICS AND BIOLAW 61, 72 (Peter Kemp et al. eds. 2000) (asserting that dignity is “nothing more than a short-hand expression for people’s moral intuitions and feelings”); Ruth Macklin, Dignity is a Useless Concept, 327 BRITISH MED. J. 1419, 1419 (2003) (“[A]ppeals to dignity are either vague restatements of other, more precise, notions or mere slogans
clauses. For example, the Court has repeatedly stated that the Eighth Amendment prohibition on cruel and unusual punishments is premised on preserving the dignity of man.\textsuperscript{145} While it is not entirely clear what the Court is referring to here, it seems that the Court is suggesting that it is important to take into account the individual offender in determining punishment, not take a merely utilitarian approach to punishment.\textsuperscript{146} The Court’s conception of dignity seems to vary across constitutional disciplines and among individual cases. In \textit{Miranda}, the Court refers to dignity in the context of examining the coercive techniques employed by police officers in attempting to obtain confessions.\textsuperscript{147} The \textit{Miranda} Court seemed concerned about more than the physical inviolability and autonomy of the suspect, though, as previously existing due process protections already prohibited obtaining confessions through physical force and other coercive methods like sleep deprivation.\textsuperscript{148} Invoking the Self-Incrimination Clause, the Court also seemed troubled by police officers’ reliance on psychological techniques in obtaining confessions.\textsuperscript{149} The Court thus seemed committed to protecting the dignity of one’s mind rather than just physical inviolability and autonomy. Indeed, one’s mind holds a special place in criminal law. Just as the home has a special status in the law—often individuals engaging in self-defense are not required to retreat from the home,\textsuperscript{150} and there is generally greater Fourth Amendment protection in the home—\textsuperscript{151} an individual’s mind also

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\textsuperscript{146} See Ryan, supra note 144.

\textsuperscript{147} See \textit{Miranda} v. Arizona, 384 U.S. 436, 445–58 (1966) (discussing the “widespread” use of “physical brutality” and psychological manipulation employed in police interrogation and stating that “[a]n understanding of the nature and setting of this in-custody interrogation is essential to [the \textit{Miranda}] decision”)

\textsuperscript{148} See supra text accompanying notes 18–23. As the \textit{Miranda} Court noted, however, the effectiveness of these due process protections was somewhat questionable at the time the case was decided. See \textit{Miranda}, 384 U.S. at 445–47. Although due process jurisprudence at the time prohibited the use of force to elicit confessions, “[t]he use of physical brutality and violence [was] not, unfortunately relegated to the past or to any part of the country.” \textit{Id.} at 446. A then-recent example of this was from “Kings County, New York, [where] the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party.” \textit{Id.} Further, the remedy for a due process violation is the same as a remedy for a \textit{Miranda} violation—exclusion of the evidence. See Scott A. McCreight, \textit{Colorado v. Connelly: Due Process Challenges to Confessions and Evidentiary Reliability Interests}, 73 \textit{Iowa L. Rev.} 207, 222 (1987) (“Exclusion of the evidence is the only available remedy to enforce the due process right.”); \textit{supra} note 26.

\textsuperscript{149} See \textit{Miranda}, 384 U.S. at 448–58.

\textsuperscript{150} See Catherine L. Carpenter, \textit{Of the Enemy Within, the Castle Doctrine, and Self-Defense}, 86 \textit{Marq. L. Rev.} 653, 665–66 (2003) (“[C]ourts agree that there is no duty to retreat when claiming the defense of one’s habitation.”).

\textsuperscript{151} See \textit{Wayne R. LaFave, I Search & Seizure: A Treatise on the Fourth Amendment} § 2.3(b) (5th ed.) (“The home ‘is accorded the full range of Fourth Amendment protections,’ for it is
holds a special status. For example, one ordinarily cannot be convicted for just having evil thoughts; *actus reus* is generally required for conviction. Similarly, as the Fifth Amendment states, one cannot be forced to testify against oneself. Respecting the dignity of the offender’s mind could even have real implications for the police practices of today that employ deception and trickery. Perhaps engaging in such practices results in invading the interstices of the suspect’s mind and in this way violates his dignity. Regardless of the full meaning of this concept of dignity, there are values beyond just truth-finding that should not be forgotten. Just like we sacrifice truth for the sake of privacy when a judge excludes probative evidence that was found in violation of the Fourth Amendment, values such as dignity remain important even aside from their relationship to truth.

V. CONCLUSION

In a criminal justice world that increasingly focuses on science and technology in the hope of ascertaining truth, there is a risk that other important criminal justice values will be pushed aside. The *Miranda* case, which was decided during a time less focused on truth-finding, laid out the still relevant values of adversarial testing and human dignity. In recent years, though, the Court has chipped away at the power of *Miranda*, and the criminal justice system has often set aside these essential values as it has honed in on the importance of truth-finding. But adversarial testing and dignity—whatever exactly it means—continue to be important. Despite our confidence in new science and technology, truth—and especially certainty of truth—remains elusive. Adversarial testing aims at seeking the truth while simultaneously acknowledging the difficulties associated with this. It also serves as a prophylactic to lessen the chance that an innocent person may suffer. This approach is far from perfect, and it has the cost of possibly freeing some guilty offenders, but, as a society, we have found this to be an important value of the criminal justice system. Respecting dignity is at the core of our criminal justice system and the individual rights enumerated in our Constitution. We care not only about punishing the guilty and freeing the quite clearly a place as to which there exists a justified expectation of privacy against unreasonable intrusion.” (quoting Lewis v. United States, 385 U.S. 206, 211 (1966)).

152. See WAYNE R. LAFAVE, CRIMINAL LAW 320–21 (5th ed. 2010) (“Bad thoughts alone cannot constitute a crime; there must be an act, or an omission to act where there is a legal duty to act.”).

153. See U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . . .”).


155. But cf. supra notes 100, 139–140 and accompanying text (noting that this is sometimes labeled as a component of “accusatorial burdens” rather than adversarial testing).
innocent, but we also care about respecting each individual, regardless of that person’s guilt. This is for the sake of the individual but also for the sake of society as a whole. It is essential that these important values not be sacrificed for the sake of today’s alluring truth-finding goal.
DO YOU UNDERSTAND YOUR RIGHTS AS I HAVE READ THEM TO YOU?
UNDERSTANDING THE WARNINGS FIFTY YEARS POST MIRANDA

Jessica L. Powell

I. INTRODUCTION

Since the landmark Miranda decision, the Miranda warnings have permeated American culture by way of crime novels, television shows, and movies. Indeed, the Supreme Court has acknowledged that, “Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.” With this permeation in American culture, one would think that most suspects would understand the Miranda warnings. Social science studies conducted over the years after Miranda, however, indicate that the opposite may be true.

Although the Supreme Court decided Miranda in 1966, it was not until the 1980’s that suspects’ comprehension of Miranda began to attract significant attention of researchers. The initial inquiries into Miranda comprehension looked at the vocabulary of the warnings. Since that time, numerous psychological, linguistic, and criminology scholars have conducted empirical research regarding a suspect’s ability to understand, and therefore knowingly and intelligently waive, his or her Miranda rights. This article will explore several studies that expose potential barriers to a suspect’s understanding of the Miranda warnings as well as proposed Miranda reforms meant to increase a suspect’s understanding.

4. See, e.g., Rogers, supra note 3, at 301-302.
Before embarking on an analysis of various social science studies regarding *Miranda*, it is necessary first to briefly summarize the origin and purpose of the historic *Miranda* decision, including what it means to waive one’s rights. Part II then reviews studies regarding a suspect’s ability to understand the *Miranda* Warnings, specifically the effect of language disorders, mental disorders, stress, suggestibility, and delivery techniques on comprehension of the *Miranda* Warnings. Part III discusses the most popular of the myriad of proposed *Miranda* reforms. Part IV sets out which of the proposed reforms is best and why.

“*No person … shall be compelled in any criminal case to be a witness against himself.*”

II. THE *MIRANDA* WARNINGS

*Miranda*’s constitutional basis is, of course, found within the 5th amendment of the Constitution, which in pertinent part prohibits compelled incriminatory statements in criminal cases. By the time *Miranda* was decided, torture or the “third degree” to elicit a confession was no longer common. Although the Supreme Court was still concerned about physical coercion at the time of *Miranda*, it focused on the suspects’ psychological integrity and the nature of custodial interrogations.

A. Origin and Purpose

In *Miranda v. Arizona*, the Supreme Court held that custodial interrogations involve “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” Such “compelling pressures” have the potential to undermine one’s Fifth Amendment privilege against self-incrimination. To combat the inherently coercive nature of custodial interrogations and to allow suspects the opportunity to exercise his or her Fifth Amendment privilege, the Supreme Court mandated what it called “procedural safeguards,” or warnings that must precede a custodial interrogation or any resulting statements are inadmissible. Those safeguards have come to be known as the “*Miranda* warnings” or “*Miranda* rights.”

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8. U.S. CONST. amend. V.
9. *Id.*; *Dickerson*, 530 U.S. at 437-444 (holding *Miranda* as a constitutional rule).
11. See *id.* at 7.
13. *Id.* at 467-468.
14. *Id.* at 467-479.
The Miranda warnings were meant to advise the suspect of his or her fifth amendment rights, or specifically that the suspect “has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to an attorney, and that is he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation.”

The Supreme Court later held that no specific formulation of the Miranda warnings is required so long as the police conveyed the essence of the Miranda’s warnings. The burden is on the government, however, to prove by the preponderance of the evidence that the police gave the suspect the Miranda warnings and that he or she validly waived them. If the government does not meet this burden, then the government cannot admit the testimonial evidence obtained during an interrogation at trial.

B. Waiver

Police may gather admissible evidence by questioning a suspect provided that the suspect is advised of her Miranda rights and she knowingly, intelligently, and voluntarily waived them. That is, for a waiver to be valid, first “the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”

Courts look at the ‘totality of the circumstances surrounding the interrogation’ to determine whether a waiver is valid. In doing so, it considers facts such as the suspect’s age, intelligence, mental condition, education, and experience.

III. RESEARCH INTO UNDERSTANDING THE WARNINGS

Social science research discussed in this article grew out of questions regarding whether certain suspects are capable of understanding their Miranda rights enough to knowingly and intelligently waive them. Initially the research appeared to focus on subsets of individuals, such as juvenile suspects and those

15. Id. at 479.
17. Miranda, 384 U.S. at 475.
18. Id. at 479 (“But 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 him.”).
19. Id.
21. Id.
with conditions that may potentially limit understanding the *Miranda* warnings, but has recently grown to include broad studies of all suspects as a whole.\(^{23}\)

**A. The Language of Miranda**

Although no specific formulation of the *Miranda* Warnings is required, the Supreme Court did state that those held for interrogation must be “clearly informed” of their rights.\(^{24}\) However, what is “clear” to a high school graduate may not be so to someone with, for example, a seventh grade education. The measure of clarity for understanding *Miranda* is, as noted previously, whether the suspect was fully aware “of both the nature of the right being abandoned and the consequences of the decision to abandon it.”\(^{25}\)

1. **Vocabulary**

Research into the vocabulary of the *Miranda* warnings stems from the notion that knowledge of the individual words in *Miranda* is critical to understanding the *Miranda* warnings in total.\(^{26}\) In other words, a suspect’s ability to understand key *Miranda* terms is related to, and may be indictor of, the suspect’s ability to comprehend the *Miranda* Warnings.\(^{27}\)

Initial *Miranda* vocabulary research focused on a single formulation of the *Miranda* warnings and the comprehension of six key *Miranda* words by juveniles.\(^{28}\) This research found that the warning “was problematic for many offenders because of uncommon words… or polysemous terms with specialized legal meanings.”\(^{29}\)

Because there is no fixed formulation of *Miranda* required, the generalizability of this early research was limited.\(^{30}\) Later research, however, took into account the wide variations of the *Miranda* warnings and replicated the initial research’s findings.\(^{31}\) For example, in 2007, a large-scale survey of *Miranda* warnings was conducted.\(^{32}\) Out of the 448 different American
jurisdictions that responded, 560 *Miranda* Warnings were submitted. Of those warnings, 95% of them had their own, unique formulation—that is, there were 532 different phrasings of the *Miranda* warnings. The length of the warnings varied from 49 to 547 words. The reading comprehension level of the words also varied from grade 2.8 to post-graduate.

Overall, research into the vocabulary of the *Miranda* warnings has been consistent with the 2007 study. Considering that between 10-12% of the prison population has an 8th grade education or less and that about 40% did not complete high school or obtain a GED, the vocabulary level of *Miranda* warnings may be too high for a significant number of suspects to understand.

2. Reading Level and Comprehension

Along with *Miranda* vocabulary, forensic psychologists have studied the comprehension and reading level of the *Miranda* warnings. Reading comprehension is the ability to derive meaning from words. Reading level is defined as the school-grade level at which an individual can read and understand written material. The reading level at which a person can read while understanding 99% of the vocabulary and comprehending at least 90% of the material is his or her independent reading level. The reading level at which a person understands less than 90% of the vocabulary and comprehends less than 50% (i.e., does not understand the materials) is called his or her frustration level. Research has shown that generally two grade levels above a person’s independent reading level is a person’s frustration level.

Reading levels, and particularly a suspect’s frustration level, are important to *Miranda* comprehension because studies have shown that the reading level of the various formulations of the *Miranda* warnings varies greatly, from the fourth to the fourteenth grade level. Additionally, studies have shown that juvenile

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33. *Id.* at 181.
34. *Id.*
35. *Id.*
36. *Id.*
37. See, e.g., *Id.* at 130-131.
39. See Rogers, supra note 26 at 388-389.
41. *Id.* at 126.
42. *Id.*
43. *Id.* at 127.
44. *Id.*
45. *Id.*
46. *Id.* at 128-129. The variance in reading level is due to the numerous different formulations of the warnings. See section A infra.
warnings were overall more difficult to comprehend than adult warnings.\textsuperscript{47} Therefore, according to research, a defendant who has a sixth grade reading level will not be able to understand a \textit{Miranda} warning written at an eight-grade level or above (the defendant’s frustration level).\textsuperscript{48}

Overall, research indicates that both reading level and word comprehension are important factors in an individual’s ability to understand the \textit{Miranda} warnings, and that difficulties with either can impair an individual’s ability to intelligently and knowing waive those rights.

\textbf{B. Language Disorders and Miranda}

Somewhat related to the impact of a person’s reading level and word comprehension, and also likely to impact a person’s ability to understand the \textit{Miranda} warnings, are language disorders.\textsuperscript{49} The American Speech-Language-Hearing Association describes language disorders as when “a person has trouble understanding others (receptive language), or sharing thoughts, ideas, and feelings completely (expressive language).”\textsuperscript{50} Language disorders can be caused by a variety of things, including certain medical conditions, developmental conditions, and other factors, such as deprivation of speech during formative years.\textsuperscript{51}

Language disorders can occur in children and adults.\textsuperscript{52} Due to the difficulties that those with language disorders have communicating with those around them, those with language disorders are at a highly increased risk of psychiatric, academic, cognitive, social, and behavioral problems.\textsuperscript{53} Language deficits can also have significant behavioral effects, which are called pragmatics.\textsuperscript{54} For example, it is common for children with language disorders to have difficulty

\textsuperscript{47} Id. at 128-133 (The author of this study hypothesized that attempts to “dumb down” the warnings for juveniles resulted in the warnings becoming more difficult to comprehend and suggested different wording and composition. Also, street law programs appear to increase Miranda understanding among juveniles).
\textsuperscript{48} Id. at 128.
\textsuperscript{49} Language disorders are exceedingly complex and can affect many different individuals in a myriad of ways. This article provides only a cursory overview of this very interesting, and pervasive, set of conditions.
\textsuperscript{53} LaVigne, \textit{supra} note 51, at 55.
\textsuperscript{54} Id. at 56.
answering questions, initiating and maintaining conversations, and keeping from making inappropriate or off-topic comments.55

Individuals with language disorders also can lack the ability to self-regulate and may act impulsively, irresponsibly, and even aggressively.56 As such, it is not surprising that there is a high prevalence of language disorders among incarcerated individuals.57 For example, the Mendota Juvenile Detention Center (MJTC), a mental health facility for delinquent adolescent males who were too violent for the juvenile correction system, tests 25% of their population for language disorders.58 Those tested “consistently fall within the bottom one percent of the population at large... The multidisciplinary staff at MJTC also believes that ‘many of the behavioral difficulties [the youths at MJTC] struggle with can often be attributed to communication barriers of some sort.’”59 Research suggests that a large number of adult offenders have language disorders as well.60

Language disorders can directly impact a suspect’s ability to understand the Miranda warnings. Research shows that “language is the key to cognitive functioning,” and a deficit in language can impair a person’s ability to understand written, verbal, and non-verbal communications.61 As such, a language disorder can seriously interfere with a suspect’s understanding of his or her Miranda rights.62 To be able to make a knowing and intelligent waiver of one’s Miranda rights, “defendants must have the ability to process the language of the warnings, knowledge of the vocabulary and concepts, and the ability to generalize or apply the information to their own situations.”63 A person with a language disorder may not be able to perform any or all of these tasks.64

C. Barriers to Understanding Miranda due to Mental Disorders

1. Intellectual Disabilities

When considering barriers to understanding of any kind, the first thing likely to come to a one’s mind is an intellectual disability (“ID”). ID has been historically classified as having an intelligence quotient (“IQ”) of 70 or below

55. Id. at 56-58 (“As these children get older they will be unable to read social situations, body language, or conform to the rules of social engagement, and may appear ‘uncooperative at least, or more seriously, rude or insulting.’”).
56. Id. at 61-62.
57. Id. at 42.
58. Id. at 41.
59. Id. at 41-42.
60. Id. at 91.
61. Id. at 59.
62. Id. at 74-75.
63. Id. at 74.
64. Id. at 74-75.
with an onset prior to the attainment of age 18. Current diagnostic standards, however, downplay the importance of the IQ test, noting that those with similar IQs may function very differently. Current diagnostic criteria state that ID is a disorder with an onset during the developmental period (before attainment of age 18) that includes both intellectual and adaptive functioning deficits. Intellectual deficits include deficits in reasoning, problem-solving, planning, abstract thinking, judgment, academic learning, learning from experience, and practical understanding (measured by intelligence tests and clinical interview). Deficits in adaptive functioning are those that result in a failure to meet standards for personal independence and social responsibility with limited functioning in one or more daily activities, such as communication and social participation, across multiple environments (i.e., home, school, and work). ID is a chronic condition; although it can be ameliorated somewhat through therapies and special education, there is no cure.

Several studies have been conducted over the years regarding the ability of individuals with ID to make knowing and intelligent Miranda waivers. As a disorder that is characterized by a limited intelligence, it should not be surprising that these studies have shown that those with ID have an impaired ability to understand the Miranda warnings as compared to those with average intelligence. What may be surprising, however, is that these studies found that those with even mild ID (IQ of 50-55 to around 70) exhibited significant difficulty understanding the Miranda warnings. For example, in a study of 60 individuals with mild ID, 50% of them failed to answer a single question correctly on a standardized Miranda comprehension measure.

Beyond a subnormal IQ, individuals with ID generally have other characteristics that may impair their ability to knowingly and intelligently waive

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66. For example, one person with a full scale IQ of 69 may be able to drive, work, and live independently while another may not be able to sustain concentration effectively for gainful employment.
68. Id.
69. Id.
72. Id. at 60-63.
their *Miranda* rights. Specifically, individuals with ID may be more easily influenced by others, have a strong desire to please others, more likely to acquiesce, and less likely to decipher the motives of others. Some researchers have found that these traits make individuals with ID more suggestible in the context of police interrogations and thus are more likely to waive their rights.

2. Other Mental Disorders

Intellectual Disorders are not the only disorders that affect intellectual functioning, however. For example, dementia, which is a name for a group of symptoms describing “a brain disorder that seriously affects a person’s ability to carry out daily activities” (e.g. Alzheimer’s), can dramatically impact a person’s intellectual and adaptive function. Organic Brain Syndrome, which is decreased mental function due to a disease other than a psychiatric illness (e.g., a stroke), is another example. Any impairment that can dramatically affect a person’s intellectual and adaptive function can affect a person’s ability to understand the *Miranda* warnings.

Even mental impairments that are not defined by a decline in cognitive functioning, such as depression, anxiety, and schizophrenia, can limit a person’s ability to understand *Miranda* warnings. For example, in a study of 75 psychiatric patients, 60% did not understand at least one *Miranda* right.

D. Suggestibility and Stress

1. Stress

Depending on the circumstances, stress can be either “good” or “bad.” Stress can be “good” in some situations because it can cause one to narrow attention and focus. Stress can be “bad,” however, because it can impair cognitive function. For example, high levels of stress can negatively affect memory,
understanding, processing information, and performance. In 2012, Professors Scherr and Madon performed an experiment to determine whether stress negatively or positively affected a person’s ability to comprehend the *Miranda* warnings. In this study, 30 college students were assigned to a partner. They were then asked to perform two tasks independently and one task jointly. The partners (to which each college-student participant was assigned) each asked the student for help in completing one of the individual tasks. The “stressor” was then imposed to half of the college students (the other half was the control group): they were accused of cheating. Afterwards, all of the college students underwent standardized *Miranda* comprehension testing. The results showed that those who were accused of cheating scored significantly lower on *Miranda* comprehension than those who were not accused of cheating, suggesting that stress detrimentally impacts *Miranda* understanding.

2. Suggestibility

Suggestibility is the “[e]motional characteristic where ideas or attitudes of other person is accepted without criticism.” Some individuals are more suggestible than others. Specifically, individuals with intellectual disabilities, juveniles, and some mentally ill individuals will generally defer to authority figures more than non-impaired adults, even in the absence of coercion.

Two aspects of suggestibility are particularly problematic in an interrogation setting: (1) the tendency to give conforming responses to leading questions, and (2) the tendency to change one’s answers in response to feedback. These are problematic because during an interrogation, law enforcement officers can use techniques, such as leading questions and minimizing (discussed below), which can lead to involuntary *Miranda* waivers and/or false confessions.

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81. Id.
82. Id.
83. Id. at 276-278
84. Id.
85. Id.
86. Id.
87. Id.
88. Id. at 278-280.
Of all the factors that may limit the understanding of "Miranda," suggestibility is one of the most controversial. It is controversial partially because most people falsely believe that an innocent person would not waive her rights and confess to a crime that she did not commit.93 In fact, the Innocence Project reports that of the first 325 DNA exonerations, 27% of the exonerees had waived their rights and pled guilty to crimes that they did not commit.94 Suggestibility in this context is important because if a person is highly suggestible, she may waive her rights without understanding them and confess to a crime she did not commit merely because she is giving the interrogator the answer she thinks the interrogator wants to hear.95

Suggestibility is also controversial because the testing for it has not been widely accepted by the courts96 and some of the psychological community has criticized it.97 G. H. Gudjonsson developed the Gudjonsson Suggestibility Scales ("GSS") to test for suggestibility in the context of interrogations and confession between the 1980's and 1990's.98 Suggestibility, as measured by GSS, has been used to attack the “voluntary” requirement for "Miranda" waivers (i.e., if a person is highly suggestible, then he or she is incapable of voluntarily waiving); however, most attacks on waivers have come from research papers rather than court cases.99 Research regarding using the GSS to measure the “voluntariness” of "Miranda" waivers has largely focused on the intellectually disabled and

93. O’Connell, supra note 91, at 361.
95. See O’Connell, supra note 91, at 361.
96. Compare, People v. Shanklin, 2014 IL App (1st) 120084, ¶ 80, 6 N.E.3d 288, 304 appeal denied, 8 N.E.3d 1052 (Ill. 2014) (“On all this evidence, we cannot say the trial court erred in granting a Frye hearing on the admissibility of defendant’s GSS results, where the acceptance of the GSS in the field of forensic psychology was unsettled despite its almost 30-year existence and, thus, remained a novel scientific methodology.”), with Floyd v. Cain, 62 So.3d 57 (2011) (Mem) (GSS results used as part of rationale for new trial).
98. Id. at 66-67. Under this test, the examiner reads a lengthy paragraph to the subject and then asks the subject 20 standardized questions, 15 of which are leading (or rather, misleading) questions. The response to the misleading questions yields one score. Regardless of the subject’s performance, he or she is told that they have to go through the questions again and to “try to be more accurate.” If the subject changes answers, then a second score is produced. The first score, called a “Yield score” measures the likelihood of the individual to give conforming responses to misleading questions. The second score, called the “Shift score,” measures the individual’s tendency to change one’s answers in response to feedback. The two scores are added together to provide a Total Suggestibility Score. E.g., Bruce Frumkin & Alfredo Garcia, Psychological Evaluations and the Competency to Waive Miranda Rights, 27 CHAMPION 12, 17 (2013).
99. Id. at 19 (Noting that voluntariness is measured at the time of the waiver); Rogers, supra note 97, at 67-68 (“[a] Westlaw search using “Gudjonsson Suggestibility Scaled” yielded only a handful of appellate cases […] Several … have allowed GSS-based testimony without reviewing its scientific admissibility… [Others] are divided over the admissibility of the GSS….”). This author replicated this search. Westlaw produced 29 cases total (a low number considering the GSS is about 30 years old), many of which did not speak to its admissibility. Those that did speak to its scientific admissibility were split in opinion.
juveniles. Studies have found that intellectually disabled individuals generally scored in the suggestible range, but results regarding juveniles and adult offenders generally have been mixed.

One study looked at the suggestibility of nearly 400 pretrial defendants in order to determine whether suggestibility was related to Miranda comprehension. It found that “most highly suggestible defendants do not experience their choices as being influenced by external coercion” and that “high levels of suggestibility appear to play no direct role for diminished abilities in Miranda comprehension and reasoning.” Despite these findings, other forensic experts continue to hold that the GSS is a valid indicator of voluntariness. In sum, “[P]rominent forensic experts are divided on both its relevance and validity for these [Miranda waiver] determinations.”

E. The “Average” Suspect

The majority of research into a suspect’s ability to understand the Miranda warnings has focused on conditions that affect a suspect’s understanding; however, there is a good deal of research that indicates that a large percentage of suspects have a deficient understanding of their rights. Professor Richard Rogers framed the research question as this: “Primed with thousands of televised episodes of police shows such as Law & Order, most Americans instantly recognize the phrase ‘you have the right to remain silent,’ and can supply the next few lines from rote memory. Does this mean, however, that we are truly knowledgeable about our Miranda rights?”

The research so far answers, “Not necessarily.” For example, in a study published in 2010, 149 pre-trial criminal defendants and 119 college undergraduates were administered tests to measure Miranda understanding, intelligence, and academic achievement. The results were rather surprising. 31.1% of the defendants and 29.6% of the college students believed that if they remained silent, their silence could be used against them. 52% of the defendants and 29% of the college students believed that if they asked to say something “off the record,” then the police could not use that statement against them. 30.2% of the defendants and 41.5% of the college students believed that

100. Rogers, supra note 97, at 68-69.
101. Id.
102. Id. at 69-78.
103. Id. at 76-77.
104. See, e.g., Frumkin, supra note 98.
105. Rogers, supra note 97, at 69.
107. Id. at 5.
108. Rogers, supra note 3, at 305.
109. Id. at 307.
110. Id.
after asking for a lawyer, the police can continue to ask questions until the lawyer arrives. 111 37.2% of defendants and 26.9% of college students believed that once the right to remain silent has been waived, the waiver is permanent. 112 32% of defendants and 39.8% of college students believed that if the police lied to you, you could retract your statement without hurting your case. 113 25.9% of defendants and 20.3% of college students believed that unless they signed a waiver, the police could not use what they said against them. 114 These findings were fairly consistent with a 2008 study consisting solely of college students. 115

F. Interrogations

In Miranda, the Supreme Court noted that law enforcement officials have used both physical and psychological coercion to undermine a subject’s will to resist interrogation. 116 Yet, the Court did not outright ban the use of psychological coercion. Instead, it provided the Miranda warnings to balance the scale between the inherently coercive nature of custodial interrogations and a suspect’s ability to exercise his or her Fifth Amendment rights. 117

The Supreme Court relied on interrogation manuals for insight into what happens during a custodial interrogation. 118 Until fairly recently, most research relied upon these as well. 119 Below is a review of research into how the police deliver the Miranda warnings and a study based on self-report by police officers.

1. Miranda Delivery Techniques

Studies have demonstrated that the police often use two techniques in the delivery of the Miranda warnings that may affect a suspect’s understanding: minimization of the rights and the speed of delivery. 120

Minimization of the Miranda rights occurs when the police reduce the meaning of the warnings to a technicality, or otherwise minimize the importance of the warnings. 121 The purpose of minimization techniques is to trivialize the legal significance of Miranda rights to be the “equivalent to other standardized bureaucratic forms that one signs without reading or giving much thought” and to

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111. Id.
112. Id.
113. Id. at 308.
114. Id. at 307.
115. Rogers, supra note 106, at 5.
117. Miranda, 384 U.S. at 448-455.
118. Id.
119. E.g., Leo, supra note 92, at 267.
120. Domanico, supra note 92, at 15-17.
121. E.g., Richard A. Leo & Welsh S. White, Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with Obstacles Posed by Miranda, 84 MINN. L. REV. 397, 433. See also Domanico, supra note 92, at 15-16 (describing minimizing techniques such as referring to the warnings as “just something we have to do” or “it’s part of the formality” in 45% of the cases).
“communicate that the interrogator expects the suspect ... to execute the waiver and respond to subsequent questioning.”

Studies have shown that minimization of the Miranda warnings does lead to an increased number of suspects waiving their rights. For example, one study noted a 24% increased waiver rate between those who were told that their Miranda rights were important and those where Miranda was trivialized.

The speed of the delivery of Miranda warnings can also affect a suspect’s comprehension of the warnings. Generally, the faster a person speaks, the less the listener understands. If a police officer states the Miranda warnings quickly, then the suspect may not understand her rights and therefore may not be able to “intelligently and knowingly” waive them. One study looked at the rate of speed at which detective orally delivered the Miranda warnings to determine whether police delivered the warnings at a speed that would impair comprehension. In that study, the detectives spoke at a rate of 268 words per minute, a speed at which comprehension declines. Beyond limiting comprehension, speaking the warnings quickly can also minimize or trivialize the warnings and can enforce the perception that the warnings are a mere formality.

2. Police Self-Report

Social scientists have conducted studies through direct observation, reviewing recorded material, and clinical experiments to determine a suspect’s understanding of and the overall effectiveness of the Miranda warnings, but what do the police think about their own practices? A 2007 study, based on the self-report of 631 investigators from 16 police departments in 5 states, sought to obtain from the police themselves information about certain aspects of their work. Based on these responses, the study compared the self-report with other empirical research.

The survey sent to participants focused on, among other things, truth detection abilities and Miranda warnings and waivers. The results confirmed one aspect of what most television police dramas portray: that the police conduct

122. Leo, supra note 3, at 1019.
123. E.g., Domanico, supra note 92, at 15-17.
125. See, e.g., Domanico, supra note 92, at 17.
126. See id. at 17.
127. Id.
128. Id.
129. Id.
130. Leo, supra note 3, at 1018.
132. Id.
133. Id.
interrogations in a small, private room, isolated from the suspects’ friends and family. The study found, however, that the coercive measures that are common in police dramas, such as physically intimidating the suspect, do not occur very often. The police participants reported that suspects waived their Miranda rights 83% of the time, which is consistent with other research.

The participating police officers estimated that their own deception detection skills as being 77% accurate. This self-reported estimate is consistent with other studies that showed that police believed that they could detect whether the suspect was telling the truth with 85% accuracy. The ability to detect the truth is important because “[o]nce a specific suspect is targeted, police interviews and interrogations are thereafter guided by the presumption of guilt.” Once the police subject a suspect to interrogation, techniques such as minimization can induce an invalid waiver of Miranda rights. Therefore, a police officer’s false assumption that a suspect is guilty can lead to an invalid waiver. Disturbingly, studies of police investigators have found that they cannot reliably distinguish between truths and lies any better than other people. That is, a flip of a coin is just as good at distinguishing truth from fiction as police detectives.

As part of another study, 97 police chiefs and 320 college students responded to a survey regarding the Miranda warnings in order to gauge their attitudes about them. Among other things, this study found that the police chiefs generally thought that offenders already knew their rights, were more likely to agree that the Court should get rid of the warnings, and were more likely to agree that the warnings make it more difficult for them to do their jobs. These findings may not be surprising, but they are important to both point out how law enforcement’s perception of Miranda may directly conflict with reality (i.e., that many suspects do not understand their rights) and how law enforcement may perceive any proposed Miranda reform.

134. Id. at 388.
135. Id. at 388, 394 (reporting that 73% of those who responded said that they never use physical intimidation).
136. Id. at 389.
137. Id.
139. Id. at 13.
140. Id.
141. Id. at 14.

143. Id.
IV. PROPOSED REFORMS

When the Supreme Court first handed down the *Miranda* decision, many, including the police, thought that the warnings would severely hamper police investigations and would result in murderers and rapists going free.\(^{145}\) In the fifty years since the *Miranda* decision, studies have shown that the initial fears over *Miranda* were unjustified.\(^{146}\) Despite the *Miranda* warnings, most suspects waive their rights (78 – 96%).\(^{147}\) That is not to say that *Miranda* had no effect. As Professor Richard Leo noted, *Miranda* has had at least four long-term impacts:

First, *Miranda* has increased the professionalism of police detectives, removing the last entrenched vestiges of the third degree. Second, *Miranda* has transformed the culture of police detecting in America by fundamentally reframing how police talk and think about the process of custodial interrogation. Third, *Miranda* has increased public awareness of constitutional rights. And fourth, *Miranda* has inspired police to develop more specialized, more sophisticated, and seemingly more effective techniques with which to elicit inculpatory statements from custodial suspects.\(^{148}\)

Why then do so many suspects waive their rights? Social science studies, including those discussed herein, have shown that certain groups, particularly the mentally disordered, those with language impairments, and those with limited vocabulary and reading levels, may not understand the *Miranda* warnings. Further, those who do have the cognitive ability to understand the *Miranda* rights may not understand the importance of those rights due to police techniques such as minimization. To that end, one researcher has gone so far as to say that if “the goal of *Miranda* was to reduce the kinds of interrogation techniques and custodial pressures that create stationhouse compulsion and coercion, then it appears to have failed miserably.”\(^{149}\)

Researchers have proposed several potential reforms to *Miranda* with the intent to better protect the Fifth Amendment rights of suspects. On one end of the spectrum, some researchers have called for a total overhaul of police interrogation procedures.\(^{150}\) On the other end, researchers have suggested simply requiring the police to record all interrogations.\(^{151}\) This section will discuss the most prevalent of the recommendations: a complete overhaul, mandatory presence of an attorney or neutral third party, mandatory intelligence testing,  

\(^{145}\). Leo, *supra* note 3, at 1016.  
\(^{146}\). Id.  
\(^{147}\). Id. at 1012.  
\(^{148}\). Id. at 1026.  
\(^{149}\). Id. at 1021.  
\(^{151}\). E.g., id. at 25-27; Leo, *supra* note 3, at 1028.
additional police training, prohibiting minimization techniques, re-writing *Miranda*, standardizing *Miranda* delivery, and mandatory electronic recording.

A. A Complete Overhaul

Those advocating for a complete overhaul of the American interrogation procedures argue that the *Miranda* warnings do not adequately protect suspects’ rights due to the reasons previously discussed.\(^ {152} \) Without adequate protection of suspects’ rights, they argue that the guilt-presumptive, confrontational nature of current interrogation practices leads to an unacceptable amount of false confessions.\(^ {153} \) Therefore, advocates of a complete overhaul of interrogation techniques argue that the United States should adopt and make mandatory an investigational interrogation process (instead of the current “confrontational” model).\(^ {154} \) They cite studies that have shown that investigative interrogations lower the rate of false confessions without lowering the rate of true confessions.\(^ {155} \) Advocates of a complete overhaul of interrogation techniques therefore argue that the United States should adopt and make mandatory investigational / inquisitorial interrogation process.\(^ {156} \)

American police interrogations predominantly follow a confrontational, guilt-presumptive model that’s goal is to illicit a confession.\(^ {157} \) The most used confrontational model employed in the United States is called the “Reid Technique.”\(^ {158} \)

The Reid Technique of interrogation is presented as a nine-step process, but the various steps can usefully be reduced to three: isolation, confrontation, and minimization. The process begins by placing the suspect in a small, barely-furnished room, apart from friends, family, familiar surroundings, or any support system. This isolation increases the suspect’s anxiety and eagerness to extricate himself from the situation.

The interrogation itself typically begins with an accusation of the suspect, buttressed by the suggestion that the interrogators have irrefutable evidence, sometimes fabricated. Denials of guilt are aggressively cut off. The idea is to communicate to the suspect the futility of maintaining innocence. Subsequently, the interrogators seek to minimize the nature or consequences of the crime. Minimization

\(^ {152} \) See, e.g., Kassin, *supra* note 10, at 27-28.

\(^ {153} \) Leo, *supra* note 138, at 12 (reporting studies of exonerations found that 14% to 60% of wrongful convictions involved false confessions).

\(^ {154} \) See, e.g., Kassin, *supra* note 10, at 27.

\(^ {155} \) Id. at 28.

\(^ {156} \) Id. at 27.

\(^ {157} \) E.g., id. at 27-28 (2010); RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 108-166 (Harvard Univ. Press, 2008).

themes, which include (but are not limited to) accident, justification, provocation, mitigating circumstances, and secondary role, lead the suspect to infer that he will be treated leniently if only he confesses. Confrontation brings on despair; minimization supplies a lifeline. Together, they break down many suspects.\textsuperscript{159}

The Reid Technique is only to be used when the investigator is reasonably certain of the suspect’s guilt.\textsuperscript{160} Reasonable certainty of guilt is obtained via evidence and non-confrontational interviews, during which the investigator observes the suspect’s verbal and non-verbal responses.\textsuperscript{161} The problem with the investigator determining guilt based on the subject’s responses is that, as noted previously, studies of police investigators have found that they cannot reliably distinguish between truths and lies any better than other people.\textsuperscript{162}

The investigatory model, on the other hand, is an information-gathering approach that seeks to establish a working relationship with the suspect and prohibits deception.\textsuperscript{163} The interrogator tries to establish a rapport with the suspect, asks open-ended questions, and practices active listening.\textsuperscript{164} Several countries have adopted investigational interrogations as a matter of national policy.\textsuperscript{165} For example, starting the in the 1980’s after some high profile cases of false confessions, Britain moved away from the accusatorial interrogation model to an investigative model.\textsuperscript{166}

Britain’s PEACE model (Planning & Preparation, Engage & Explain, Account, Closure, Evaluation) of interrogation, “is based upon rapport, respect, and prohibits the use of deception and psychological manipulation on the part of the operator … It is often referred to as a ‘fact-finding’ mission that does not presume guilt, but instead uses open-ended questions to discern the truth. It is associated with the operator actively listening to the subject and developing rapport. In contrast, the accusatorial method of interrogation presumes guilt, seeks to establish control, and uses psychologically manipulative techniques to confront the source. The main goal of this approach is to elicit a confession.”\textsuperscript{167} Studies have shown that this investigatory interrogation technique not only significantly reduced the use of psychologically manipulative tactics, but that they enabled investigators to inculpate offenders “by obtaining from them useful, evidence generating information about the crime.”\textsuperscript{168}

\textsuperscript{160} Id. at 807.
\textsuperscript{161} Id.
\textsuperscript{162} E.g., Leo supra note 138, at 14.
\textsuperscript{164} Id.
\textsuperscript{165} Kassin, supra note 10, at 28.
\textsuperscript{166} Id. at 27-28.
\textsuperscript{167} Kelly, supra note 163, at 166.
\textsuperscript{168} Kassin, supra note 10, at 28.
B. Presence of an Attorney

Another proposed Miranda reform is to require that an attorney or neutral third party be present during every interrogation, or adopting a per se rule prohibiting officers from interrogating suspects until the suspect has spoken with an attorney.169 The general idea is that by having an attorney or neutral third party present, that person can make sure that the suspect does understand his or her rights.170

The presence of an attorney or neutral third party is especially advocated to protect vulnerable populations, such as those with an intellectual disability.171 Proponents argue that mandating a neutral third party or an attorney be present during an interrogation of a person with a cognitive impairment will ensure that the individual understand the questions asked and the implications of the answers given.172 Proponents say that this would not only protect the suspect’s rights, but would be vital evidence if the validity of the Miranda waiver were ever challenged.173

C. Mandatory Intelligence Testing

In order to identify suspects with a cognitive impairment, some researchers have urged for the mandatory administration of an intelligence test prior to being Mirandized.174 By using an intelligence test, the police would be able to “distinguish those who are unable to understand their Miranda rights due to a developmental disability, and thus unable to knowingly waive them, from those who can understand them.”175 If the intelligence test indicates that a person can comprehend the Miranda warnings, then the police can administer the warnings and proceed with interrogation.176 If, however, intelligence testing indicated that a suspect is unable to understand the Miranda warnings, the police would then

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171. E.g., Kassin, supra note 10, at 30.
172. E.g., id.
173. E.g., Ogletree, supra note 170, at 1842-1843.
175. Id. at 277.
176. Id. at 278.
have to take additional steps, such as a more detailed dialogue with the suspect, in order to help the suspect understand the *Miranda* rights.\footnote{177}{Id.}

\textbf{D. Police Training}

There are two separate proposed reforms to police training regarding *Miranda*: training regarding vulnerable populations\footnote{178}{E.g., Kassin, supra note 10, at 30-31.} and training regarding the psychology of interrogations.\footnote{179}{E.g., id.; Leo, supra note 138, at 26.} The proposed reform of additional police training regarding vulnerable populations is premised on the same notion as mandatory intelligence testing: identifying vulnerable suspects and modifying how *Miranda* is given to those suspects to protect their rights. As Patricia Devoy succinctly stated:

\begin{quote}
“The primary problem developmentally disabled individuals face during interrogations is that police officers do not know the individuals are developmentally disabled. As a result, police officers administer the *Miranda* warnings and use the same interrogation tactics used on individuals of ordinary intelligence, resulting in a high rate of involuntary waivers and false confessions by developmentally disabled individuals. Thus, steps need to be taken to ensure police officers recognize these individuals and verify their comprehension of the *Miranda* rights before the interrogation for the crime begins.”\footnote{180}{Devoy, supra note 70, at 273.}
\end{quote}

To aid police officers in identifying individuals with developmental disabilities, Ms. Devoy suggests training both at the academy (“pre-service" training) and routine refresher trainings / seminars (“in-service” training).\footnote{181}{Id. at 273-275.}

Researchers who advocate for police training regarding the psychology of interrogations seek to inform police officers how their own perceptions and interrogation techniques can lead to invalid waivers and false confessions.\footnote{182}{E.g., Leo, supra note 138, at 26-27.} For example, advocates wish to teach police officers how studies have shown that minimizing techniques increase the likelihood of invalid waivers and false confessions, particularly among vulnerable populations.\footnote{183}{Id. at 29-30.} Further, advocates for this reform seek to teach police officers that scientific studies show that their “lie detection” abilities or intuition regarding guilt or innocence cannot be trusted (see section II(E) supra), and that relying on those intuitions can lead to erroneous judgments.\footnote{184}{Leo, supra note 138, at 13-17, 26.}
E. Banning Minimization

Some researchers argue that minimization techniques are so prone to bring about invalid waivers that they should be prohibited. As noted previously, one study demonstrated a significant increase in waivers and a decrease in Miranda comprehension when minimization tactics were used. Advocates of banning the minimization of the Miranda warnings argue that one cannot be fully aware of the importance of the rights or the consequences of abandoning them if the importance and consequences of the rights are trivialized.

F. Re-Writing and Standardizing Miranda

As noted previously, one barrier to Miranda comprehension is that its vocabulary, sentence structure, and overall comprehensibility are often above the level that a suspect possesses. Due to this, a large number of researchers have proposed that Miranda should be re-written so that it is understandable to most suspects.

G. The Delivery of the Miranda Warnings

Researchers have suggested two different reforms regarding the delivery of Miranda: standardization and the use of delivery methods to ensure understanding. Researchers who advocate for the standardization of Miranda delivery seek to combat the variables in Miranda delivery that can affect understanding, such as the method and location of the delivery. Since not every variable can be controlled, other researchers suggest using a delivery method that ensures understanding. Although the exact formulations of this delivery method varies among researchers, this method generally calls for a conversational approach to Miranda, where the police officer will ask the suspect to define key vocabulary words and to rephrase an important concept in his own words. If the suspect demonstrates confusion, misunderstanding, or misconceptions, then the police officer will provide clarification to ensure understanding.

185. See Domanico, supra note 92, at 22; Leo, supra note 121, at 433-439.
187. See Domanico, supra note, at 19.
188. See supra Part II.
189. E.g., LaVigne, supra note 51, at 113-115. See also Rogers, supra note 28, at135 (“Simple text revisions could greatly increase the comprehensibility of the Miranda warnings.”).
191. E.g., Kahn, supra note 40, 134-135.
192. E.g., Ferguson, supra note 190, at 1439.
193. E.g., Id. at 1474.
194. E.g., id.; Dominico, supra note 92, at 20-21.
H. Mandatory Electronic Recording

One problem common to all of these proposed reforms described above is that it would be difficult to insure compliance because the bulk of interrogations occur in isolation. Thus, most researchers include mandatory electronic recording (both video and audio) of all interrogations as part of their recommended reforms to Miranda. 195

Advocates of mandatory electronic recording of all interrogations say that recording alone may go a long way towards protecting and honoring the Miranda rights of suspects. First, having a recording of the Miranda portion of the police interrogation can help a court determine whether a suspect voluntarily, intelligently, and knowingly waived his or her rights. 196 As Professor Richard Leo stated, “The fundamental value of electronic recording is that it creates an objective, comprehensive, and reviewable record of the interrogation for all parties.”197 Secondly, electronic recording of interrogations may decrease the use of psychologically coercive tactics or, at the very least, can provide a suspect evidence for a motion to suppress if the police used such tactics. 198 Lastly, electronic recording of interrogations would also allow scholars access to valuable empirical data, which would in turn lead to meaningful research and suggestions for improvement. 199

V. THE BEST OF THE PROPOSED REFORMS

The research discussed herein indicates that the Miranda warnings are not an adequate procedural safeguard to protect the Fifth Amendment rights for all suspects. Further, the research is largely critical of police, specifically police interrogation tactics. In considering the Miranda research and proposed reforms, one should understand that the social scientists’ recommendations stem primarily from a different ‘view of the world’ than that of the police. Specifically, social scientists approach Miranda research with a focus on protecting a suspect’s rights. The police, on the other hand, are trying to do their jobs, which is to “catch the bad guy.” 200 At its core, the call to reform Miranda brings these two important goals (i.e., protecting the rights of the accused and crime control) into conflict. The solution, then, must balance these goals. 201 Some may argue that

195. E.g., Leo, supra note 3, at 1028-1029.
196. E.g., Dominico, supra note 92, at 19.
197. Leo, supra note 3, at 1028.
198. See Leo, supra note 138, at 27.
199. Id.
200. See, e.g., Herbert L. Packer, Two Models of the Criminal Process, 113 U. PA. L. REV. 1 (1964); see also Chris W. Eskridge, Liberty v. Order: the Ultimate Confrontation (1993). That is not to say that the police do not care about a suspect’s constitutional rights. The police merely have a different objective than social scientists, which must be considered to find an effective solution to Miranda’s shortcomings.
201. See, e.g., Hon. J. Harvey Wilkinson III, In Defense of American Criminal Justice, 67 Vand. L. Rev. 1099, 1108-1109 (2014) (“A tension between these two supreme values cannot be
the *Miranda* doctrine as it stands currently sufficiently balances these goals, but the sheer volume of *Miranda* scholarship calling for changes indicates otherwise. Indeed, there is scholarship calling for *Miranda* reform both due to *Miranda*’s ineffectiveness of protecting a suspect’s fifth amendment rights (rights based argument) and because *Miranda* leads to lost convictions (crime control argument).202

“How can we calibrate the balance struck by our system so as to avoid the concededly deplorable outcomes of conviction of an innocent man and exoneration of the guilty?”203 The ideal solution would be a system that successfully honored individual rights, including vulnerable populations, while convicting only the guilty.204 Ideally, the solution would be a collaborative effort between academics, bar associations, defense, prosecution, police, and judges’ organizations.205 Thus far, an ideal solution has not been found and there has not been sufficient collaboration thus far to believe that one is on the horizon anytime soon; however, in the interim, some proposed reforms may improve the current situation.

A. Discussion of Proposed Reforms

The idea of a new, improved interrogation method that will cure all of *Miranda*’s shortcomings is enticing; however, there are a few problems with this proposed reform. Although the studies coming out so far appear promising,206 it is not clear that an investigatory interrogation model will protect suspects any better than *Miranda* does. Equally as important, more research regarding this interrogation method’s efficacy of catching “the bad guy” is needed. If a new interrogation technique is proven to be as effective at solving crimes, it would be easier to convince law enforcement to embrace the new technique. Without such evidence- or worse, if the evidence indicates the new technique is less effective-changing techniques would be a very hard sale.
The feasibility of the proposed reform must be considered as well. Such a reform would need to be enacted legislatively, which means it would be impossible to implement in one fail swoop. Additionally, it would probably take something dramatic to embolden lawmakers to implement such a change. Without something dramatic occurring to spark lawmakers into action, it would likely, as Professor Michael Cicchini stated regarding a different proposed \textit{Miranda} reform, “[R]equire more substantive change than our entrenched and snail-paced system of justice can currently accommodate.” Lastly, a total overhaul of American interrogation procedures would require a significant amount of time and resources to implement. For this reason, it is probably the least likely of the proposed \textit{Miranda} reforms to gain support from lawmakers at this time.

Even if state legislatures enacted such a change, the Supreme Court would either have to overrule \textit{Miranda} or find the new legislation to be equally as effective at preventing coerced confessions as \textit{Miranda}, otherwise the new, sans-\textit{Miranda} interrogation technique would be found unconstitutional.

Significant amount of time and resources required also stands as impediments to other proposed reforms, specifically requiring the presence of an attorney or neutral third party during interrogation and mandatory intelligence testing. For example, specifically requiring the presence of an attorney or neutral third party during an interrogation would likely require most police stations have a lawyer present at all times, which the \textit{Miranda} opinion itself does not require. States would likely argue that this would be cost prohibitive, and they would have a valid point. For example, in Kentucky, the state police has sixteen regional posts scattered across the state. Assuming that one attorney per regional post would be sufficient to have an attorney present at each interrogation, and assuming the lowest possible salary for an attorney employed with the state, the cost for the attorneys’ salaries would be over $620,000 a year, not including benefits. This number just considers the state police. If

\begin{itemize}
\item \textbf{207.} The Supreme Court could theoretically implement such a sweeping change, if it determined that implementation would serve to give constitutional guidelines to law enforcement and to safeguard a fundamental right (the rationales it used in finding \textit{Miranda} to be a constitutional case). \textit{Dickerson v. United States}, 530 U.S. 428, 429 (2000). Although the ultimate make-up of the Court is unclear at this time, it is highly unlikely that the Court would do such a thing.
\item \textbf{209.} \textit{Dickerson v. United States}, 530 U.S. 428, 429 (2000) (stating legislation must be at least as effective as the \textit{Miranda} warnings at apprising the accused of her rights in order to be constitutional).
\item \textbf{210.} \textit{Miranda} at 474.
\item \textbf{213.} $3,230.84 \times 12 \times 16$.
\end{itemize}
one considers the number of attorneys that would be needed to cover city, county, and other departments, the high cost quickly becomes apparent. There are other problems with these proposed reforms as well. For example, if mandatory intelligence testing were required prior to being Mirandized, then issues regarding the validity of the testing, the effort of the test taker, and qualifications of the test administrator would arise in the form of pre-trial motions. If the presence of an attorney or neutral third party were required, then defense counsel would likely raise issue with the neutrality and/or effectiveness of the attorney or third party. The result of both proposed reforms, then, could actually result in more pre-trial proceedings and questions as to whether a suspect “knowingly and intelligently” waived his or her rights than they would resolve.

Reforming police training to include trainings on vulnerable populations and the psychology of interrogations would require additional time and resources, but those would likely be comparatively small as the trainings would be relatively short and could be implemented at times where law enforcement personnel are already undergoing training, such as at the academy and at regularly scheduled refresher trainings. The main “con” to additional training is that it is not a “fail safe” solution: its effectiveness would depend on the quality of training and the receptiveness of the student.

Banning minimization of the Miranda warnings may increase Miranda comprehension and reduce invalid waivers as researchers suggest; however, such a ban does not address other barriers to understanding the warnings, such as ID and language disorders. Additionally, such a ban would be hard to monitor and regulate. For example, most interrogations are not recorded. How is a court to know whether an interrogator used minimization techniques? Additionally, such a ban may increase pre-trial motions. For example, defense could raise a motion to exclude because the interrogator gave the warnings at X many words per minute and not the prescribed Y words per minute. In short, a ban on minimization tactics could ultimately lead to more problems than it would solve.

Re-writing and standardizing the Miranda warnings so that they are understandable to most suspects would be a cheap reform to implement; however, doing so is not as easy as it may seem. For example, some studies show that simplified Miranda warnings do not increase understanding and that attempts to simplify the warnings actually resulted in warnings that were less comprehensible. Additionally, simplified warnings might still be ineffective in increasing Miranda comprehension among suspects with an intellectual

disability.\textsuperscript{215} Lastly, this proposed reform runs contrary to \textit{California v. Prysock}, in which the Supreme Court held that there was no rigid rule as to the content of the warnings.\textsuperscript{216} So to implement standardized, simplified warnings, the Supreme Court would either have to overrule \textit{Prysock}, or all legislative bodies would have to enact such a rule. Neither of which appear to be a possibility at this point.

Mandating a conversational delivery of the \textit{Miranda} warnings would have the benefit of increasing \textit{Miranda} comprehension and it would be effective among vulnerable populations. Although this proposed reform would require training of law enforcement, it is comparatively cost effective and would be easy to implement. The drawback to this proposed reform is that it will not likely be supported by law enforcement or those who lean towards the crime control model. That is, law enforcement and those concerned with crime control would likely think that this purposed reform would interfere with the investigative process and would result in increased lost confessions.\textsuperscript{217} Research into the conversational delivery of the \textit{Miranda} warnings and its effect on confessions may be worthwhile to address law enforcement concerns. If, however, we truly want suspects to be knowledgeable of their rights, then the conversational method of \textit{Miranda} delivery seems best fitted towards that end.\textsuperscript{218}

Simply electronically recording all interrogation procedures appears to be the most favored of all of the proposed reforms. This is not surprising because it would be relatively low-cost to implement\textsuperscript{219}, would likely reduce the number of pretrial motions\textsuperscript{220}, and would, when needed, aid courts in determining the validity of the waiver\textsuperscript{221}. Additionally, studies have not found a significant reduction in confessions with recording.\textsuperscript{222} Lastly, mandating electronic recording of interrogations is not a sweeping reform, but rather a modification of

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\item 217. These same concerns have been voiced regarding \textit{Miranda} ever since it was decided (and even in its dissent), so it seems reasonable to infer that they would be raised again if its delivery method was standardized. \textit{See}, e.g., \textit{Miranda v. Arizona}, 384 U.S. 436,516 (Harlin, J., dissenting) ("What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it.").
\item 221. \textit{E.g.}, Findley, supra note 220, at 161-162.
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procedures already in place. As such, the police and lawmakers are more likely
to accept this reform.

Despite its support and significant benefits, mandating electronic recordings
can have some negative consequences. For example, although mandatory
recording may discourage improper interrogation practices while on camera, it
will do nothing to stop law enforcement officers from finding a “work-around,”
such as pre-interrogation questioning or “missing” or incomplete recordings.\textsuperscript{223}

Additionally, electronic recordings may not be as “objective” as they appear.
For example, law enforcement officers may only tape the last part of the
interrogation. According to research, this is problematic for two reasons, “First,
the jury sees a final self-incriminating statement but not the circumstances that
led up to it, thus perhaps increasing perceptions of voluntariness. Second, after
recounting a story over and over again, a suspect is likely to show less emotion
and appear unusually callous.”\textsuperscript{224}

Beyond potentially projecting an inaccurate view of the defendant to the jury,
mandatory electronic recording may not provide an objective record in another
way. Studies have shown that people tend to think that a video interrogation with
just the suspect in frame is less coercive than if the suspect and interrogator are
both in the frame.\textsuperscript{225} This is a phenomenon called “camera perspective bias.”

Even if both the interrogator(s) and the suspect are in the frame of the
camera, human psychology may influence how a jury may regard the “objective”
recording. For example, research has found that people tend to think that a
person acts a certain way because of some internal cause, even when external
pressures can account for them.\textsuperscript{226} So, even if a recording shows police using
coercive tactics, people will still tend to believe that the suspect confessed
“because she wanted to” and not because of the coercive tactics.

The problems inherent to electronic recording can be ameliorated, if not
nearly eliminated, if strict guidelines for electronic recording were imposed.
Specifically, electronic recording should be mandatory every time law
enforcement questions a suspect and for the entirety of the questioning. Such
recording should require both the interrogator(s) and the suspect equally
within the camera’s frame. Judges and advocates should also be aware of the
psychological pitfalls of recordings and do their best to guard themselves, and the
jury, against them.

Several states have already implemented mandatory electronic recording
through either legislation or judicial ruling.\textsuperscript{227} With the current public interest in

\textsuperscript{223} Slobogin, supra note 219, at 315.
\textsuperscript{224} Saul M. Kassin, The Psychology of Confession Evidence, 52 AM. PSYCHOL. 221, 230
(1997).
\textsuperscript{225} E.g., id.
\textsuperscript{226} G. Daniel Lassiter, Psychological Science and Sound Public Policy: Video Recording of
Custodial Interrogations, 65 AM. PSYCHOL. 768, 773 (2010).
\textsuperscript{227} Id. at 769.
recording police conduct, the likelihood of implementing this reform in other states appears to be good and far more likely than the other proposed reforms.

B. The Best for Now... Maybe Later?

The absolutely best way to counter the inherently coercive nature of police interrogations would be to remove the coerciveness from the interrogation. The problem is it is not clear whether the investigative model of interrogation, or any other model for that matter, would effectively do that. It is also not clear how a less coercive interrogation would affect crime control efforts. More extensive research into the effectiveness of investigative models, such as Britain’s PEACE model, in comparison to our adversary model and other investigative models is desperately needed. There is a middle ground to be found, but more research and collaboration between all parties involved is needed to find it. In short, the “best” solution has not yet been definitively identified, but there is hope that one will be found one day. Until then, there are a couple of easily implemented, low cost short-term reforms that should be sought.

Of the short-term, low cost reforms, mandatory electronic recording is the most beneficial because of the potential evidentiary value of the recording. This reform, however, must be uniform and precise to be effective. Recordings should be used every time a suspect is questioned, for the entirety of the questioning, and should include the suspect and the interrogators in the camera’s view to avoid the biases and psychological affects that recordings can create.

Electronically recording interrogations may not go far enough to protect a suspect’s rights, particularly if the suspect is, for example, intellectually deficient. If we except Miranda’s principal that knowledge of the right helps protects suspects from the compelling psychological pressures of an interrogation, and / or if we believe that we want an informed people (specifically that suspects be informed of their rights)\(^\text{228}\), then mandating a delivery method that ensures understanding is the ideal solution. Additionally, requiring the conversational delivery of Miranda warnings would not require a significant increase in cost or court time.

Taken together, mandating electronic recording and a conversational delivery of the Miranda warnings would provide the suspect with better protection of his or her rights and would aid courts in determining the validity of the waiver. Equally as important, these recommended reforms are unlikely to thwart law enforcement’s goal of crime control. These proposed reforms would not drastically alter the current balance between protecting the suspect’s rights and crime control, but would only nudge the balance slightly closer to even by providing a bit more protection for particularly vulnerable suspects.

Ideally, however, mandating police trainings on both vulnerable populations and the psychology of interrogations would be included with these proposed reforms.

\(^{228}\) See notes 204 and 218 supra.
reforms. These trainings would not only educate law enforcement regarding vulnerable populations and the limitations of their perceptions, but may go a long way to helping law enforcement understand why *Miranda* reform is needed.

These three modest reforms, implemented in tandem, would be ideal; however, such a goal is likely unrealistic. Instead, advocates for reform should first push legislatures for the most popular proposed reform: electronic recording. Once that is obtained, advocates should push for additional police training because it is not as likely to meet opposition as the conversational delivery. A mandated, conversational delivery of *Miranda* is the “harder sale” of the three proposed reform. If, however, additional research or a brave district willing to try it can show its benefits, both as to how a suspect’s responses to a conversational delivery of *Miranda* can provide evidence of a valid waiver and how it can identify vulnerable suspects, then it would be much easier to convince law enforcement and law makers of its value.

VI. CONCLUSION

Even though the *Miranda* decision will celebrate its fiftieth birthday within a few months, questions regarding its effectiveness of protecting Fifth Amendment rights remain. The prevalence of these questions is based largely on a wide, ever-growing body of research that shows not only that the *Miranda* warnings are not an adequate procedural safeguard to protect the Fifth amendment rights for all suspects, but that the warnings wholly fail in some contexts.

As the research discussed herein has shown, there are many barriers to understanding the *Miranda* warnings, particularly among suspects with cognitive, psychiatric, and language disorders. This is problematic since these vulnerable groups are overrepresented in the criminal justice system.229 Even among non-vulnerable groups, the majority of suspects waive their *Miranda* rights. There are many potential reasons for this, but police tactics such as minimization of the importance of the *Miranda* rights have been shown to significantly affect *Miranda* understanding and ultimately *Miranda* waivers. Despite the psychological effectiveness of these techniques at bypassing *Miranda*, they are currently permissible (i.e., not considered “coercive” by the courts).

Researchers have proposed several reforms to *Miranda* and interrogations to better safeguard suspects Fifth Amendment rights. Since the goal of *Miranda* was to counter the inherently coercive nature of custodial interrogations, it would seem logical that the best protection for Fifth Amendment rights would be to remove the coerciveness of custodial interrogations and replace it with an

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investigatory model such as Britain’s PEACE method. This may indeed be the best solution, but more research and collaboration is needed.

Until a large-scale solution is found, reforms that are cheaper and easier to implement and that enable courts to better determine whether a waiver was knowing, voluntary, and intelligent under current law should be pursued. Such modest reforms suggested by researchers include simplifying the language and reading level of the Miranda warnings, standardizing the warnings, providing police training regarding vulnerable populations and psychological evidence regarding interrogations, and electronically recording all interrogations. Of these proposed modest reforms, electronic recording of all interrogations appears to have the most support among social scientists and most beneficial because of the potential evidentiary value of the recordings.

Barring a total overhaul of interrogation procedures, implementation of a few proposed reforms is necessary in order to ensure a suspect understands the Miranda rights. Specifically, a conversational approach to Miranda that ensures understanding coupled with an electronic recording of the interrogation, including the Miranda conversation, would both ensure the suspect’s rights and provide law enforcement with evidence showing a valid waiver. Adding mandatory police training on vulnerable populations and the psychology of interrogations would have the benefit of having a more informed police force who, in turn, may be receptive or understanding of the need for Miranda reform.

Until reforms are implemented, legal professionals need to be aware of the many factors that can limit a defendant’s ability to understand the Miranda warnings. Researchers need to continue to explore and test alternatives to the accusatory interrogation model and other methods aimed at better protecting suspects’ rights. Researchers and those in the legal profession should also work with law enforcement and law makers on a more permanent solution.
VIRTUALLY CERTAIN TO FRUSTRATE: THE APPLICATION OF THE PRIVATE SEARCH DOCTRINE TO COMPUTERS AND COMPUTER STORAGE DEVICES

John M. Walton III

I. INTRODUCTION

The Fourth Amendment of the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches …, shall not be violated, and no [w]arrants shall issue, but upon probable cause …”¹ A “search” for purposes of the Fourth Amendment, is one in which a governmental intrusion infringes upon a legitimate expectation of privacy.² A legitimate expectation of privacy exists when an individual holds an actual—subjective—expectation of privacy that society is prepared to acknowledge as reasonable.³ Except for “specifically established and well-delineated exceptions,” a Fourth Amendment “search” is per se unreasonable without first obtaining a warrant based upon probable cause.⁴ The Fourth Amendment, however, protects against an unreasonable search conducted only by a government agent.⁵ The Fourth Amendment does not afford protection against a search initiated by a private actor, even one that is unreasonable, unless the private actor is acting as an “agent of the government” or “with the participation or knowledge of a government official.”⁶

Under the private search doctrine, a government agent may search an individual’s property without a warrant as long as the subsequent government search does not exceed the scope of a private actor’s earlier search, which

¹. U.S. Const. amend. IV.
³. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); Cf. United States v. Jones, 132 S. Ct. 945, 952 (2012) (finding that the Katz reasonable-expectation-of-privacy test was not the only test for determining if a search occurred, and the Katz test “has been added to, not substituted for, the common-law trespassory test”).
⁵. Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (noting that the origin and history of the Fourth Amendment demonstrates an intent to limit only the activities of government agencies).
The reasoning behind the private search doctrine is that a private actor’s search of another individual’s property frustrates any reasonable expectation of privacy an individual may have with regards to the property. A subsequent government search, which merely replicates the private actor’s search, infringes no reasonable expectation of privacy and is therefore not a “search” within the meaning of the Fourth Amendment. Conversely, when the subsequent government search exceeds the scope of the private actor’s search, and therefore infringes on a reasonable expectation of privacy that the private search did not frustrate, the government expansion of the private search is a “search” within the meaning of the Fourth Amendment.

The United States Courts of Appeals are currently split on an important issue concerning the application of the private search doctrine to computers: whether the correct measuring unit, in applying the private search doctrine to computers, is the physical device, the folder, the file, or the data. The Fifth and Seventh Circuit Courts of Appeals have decided that the proper measuring unit is the physical device. In using the physical device as the appropriate measuring unit, a government agent may conduct a warrantless search of the entire computer even if the private actor viewed only one file during the initial private search. The Sixth Circuit Court of Appeals, however, has decided that the appropriate measuring unit when applying the private search doctrine to computers is the file

8. See id. at 117 (observing that the Fourth Amendment does not forbid the government from using now-nonprivate information).
10. Id.
11. See Orin S. Kerr, Searches and Seizures in a Digital World, 119 HARV. L. REV. 531, 554-57 (2005) (discussing whether the proper “zone” of a computer search is the physical box, virtual file, or exposed data); Thomas K. Clancy, The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and Primer, 75 MISS. L.J. 193, 239-40 (2005) (opining whether the appropriate container is the computer, an individual disk, the directory, the file folders, or each individual file, and ultimately concluding “a computer should be viewed as a physical container with a series of electronic “containers”- that is, directories, folders, and files that must be each separately opened [and each separate opening is the examination of a new container.”); Benjamin Holley, Note, Digitizing the Fourth Amendment: Limiting the Private Search Exception in Computer Investigations, 96 VA. L. REV. 677, 690-711 (2010) (discussing three approaches to limiting the scope of government search following a private search: files, folders, or disks, and ultimately coming to the conclusion that courts should adopt the file based approach); see also Orin Kerr, Sixth Circuit Creates Circuit Split on Private Search Doctrine for Computers, VOLOKH CONSPIRACY (MAY 20, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/20/sixth-circuit-creates-circuit-split-on-private-search-doctrine-for-computers/.
12. See United States v. Runyan, 275 F.3d 449, 464-65 (5th Cir. 2001) (holding that government agent did not exceed the scope of the initial private search by examining more files on computer disk than the private actor); Rann v. Atchison, 689 F.3d 832, 837 (7th Cir. 2012) (holding that the government agent did not exceed the scope of the initial private search by viewing more images contained within digital media devices); See also Kerr, supra note 11.
13. See Runyan, 275 at 464-65; Atchison, 689 F.3d at 837; See also Kerr, supra note 11.
or the data and not the physical device.\textsuperscript{14} In using the file or data as the appropriate measuring unit, a government agent may conduct an after-occurring warrantless search of only the files or data that the private actor viewed during the initial search of a computer.\textsuperscript{15}

Under the private search doctrine, a government agent must be able to proceed with “virtual certainty” that in performing the subsequent government search he will learn nothing more than what the private actor has communicated to him regarding the initial search.\textsuperscript{16} However, due to the distinct differences between “physical containers” like those at issue in the originating cases of the private search doctrine and computers, which hold various types of data in vast amounts, meeting the “virtual certainty” requirement—no matter whether courts use the physical device approach or the data or file approach—is not an absolute certainty.\textsuperscript{17} Although precluding the application of the private search doctrine to computers for reasons of impracticability is certainly sufficient, a more substantive reason is the extensive privacy interests involved in the search of computers.\textsuperscript{18} Computers potentially hold vast amounts of private information, information that before the advent of computers and similar technological advances typically was only found within the home.\textsuperscript{19} In light of the extensive

\textsuperscript{14} See United States v. Lichtenberger, 786 F.3d 478, 491 (6th Cir. 2015) (finding that the government agent exceeded the scope of the initial search by viewing files on defendant’s laptop that defendant’s girlfriend had not viewed); See also Kerr, supra note 11; Cf. United States v. Johnson, 806 F.3d 1323, 1336 (11th Cir. 2015) (finding the subsequent government search exceeded the scope of the private search when law enforcement viewed a video on defendant’s cell phone that the private party had not viewed. The court notes that “[w]hile [the private party’s] private search of the cell phone might have removed certain information from the Fourth Amendment’s protections, it did not expose every part of the information contained in the cell phone); for a discussion against the use of the file or data as the appropriate measuring unit, see generally Katie Matejka, Note, United States v. Lichtenberger: The Sixth Circuit Improperly Narrowed the Private Search Doctrine of the Fourth Amendment in a Case of Child Pornography, 49 CREIGHTON L. REV. 177 (2015).

\textsuperscript{15} See Lichtenberger, 786 F.3d at 491; See also United States v. Odoni, 782 F.3d 1226, 1239 (11th Cir. 2015) (finding that the defendant had no reasonable expectation of privacy in his data files to the extent the private actor searched the data files); See also Kerr, supra note 11.


\textsuperscript{17} See id. at 111 (involving an “ordinary cardboard box wrapped in brown paper”); Walter v. United States, 447 U.S. 649, 651 (1980) (involving “12 large, securely sealed packages containing 871 boxes of 8-millimeter film”).

\textsuperscript{18} See Riley v. California, 134 S.Ct. 2473, 2485 (2014) (finding the search incident-to-arrest exception inapplicable to cell phones because of “vast quantities of personal information” modern cell phones contain).

\textsuperscript{19} See id. at 2489-90 (noting (1) a cell phone, which can be considered a “minicomputer,” “collects in one place many distinct types of information”—videos, emails, financial records, medical records, etc.; (2) “a cell phone’s capacity allows just one type of information to convey far more information than previously possible”—“[t]he sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions”; (3) a cell phone carries data that dates back to the purchase of the phone, which provides law enforcement access to information covering an extended period of time; and (4) the “element of pervasiveness that characterizes cell phones but not physical records” gives law enforcement access to personal information that they would hardly ever come across prior to the digital age); See
privacy interests at stake, and the impracticability of applying the private search doctrine to computers, courts should preclude the government’s use of the private search doctrine when the “container” involved is a computer, and hold that a government agent must obtain a warrant before searching a computer absent an exception to the warrant requirement.

Part II-A of this Note discusses the Supreme Court decisions of Burdeau v. McDowell, Walter v. United States, and United States v. Jacobsen, each of which played a key role in the development of the private search doctrine. Part II-B provides (1) the background facts and holdings for United States v. Runyan and Rann v. Atchison, in which the Fifth and the Seventh Circuit Courts of Appeals, respectively, determined that the “physical device” is the appropriate unit of measurement when applying the private search doctrine to computers and computer storage devices (“Computer[s]”); and (2) the background facts and holding for United States v. Lichtenberger in which the Sixth Circuit Court of Appeals determined that the data or file is the proper measuring unit when applying the private search doctrine to computers. Part III-A analyzes the problems with courts using the physical device approach whereas Part III-B analyzes the problems with courts using the data or file approach. Part IV discusses the distinct differences between searches of physical containers like those at issue in Walter and Jacobsen and computers, which involve much greater interests in privacy. Part V concludes that because of the extensive privacy interests at stake, and the impracticability of applying the private search doctrine to computers—under either the physical device approach or the data or file approach—courts should preclude the government’s use of the private search doctrine when the “container” involved is a computer.

II. ORIGINS OF THE PRIVATE SEARCH DOCTRINE AND THE CIRCUIT SPLIT IN APPLYING THE PRIVATE SEARCH DOCTRINE TO COMPUTERS

A. The Originating Cases of the Private Search Doctrine

1. Burdeau v. McDowell

Nearly one hundred years ago, in Burdeau v. McDowell, the Supreme Court held that private searches and seizures are outside the scope of the Fourth Amendment. In Burdeau, private detectives working for the defendant’s former

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20. See Wayne R. LaFave, Search and Seizure, § 1.8(a) (5th ed.) (discussing the “Burdeau” rule).
21. Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (finding that the “origin and history clearly show that the [Fourth Amendment] was intended as a restraint upon the activities of a
employer searched defendant’s private office and confiscated various private papers from within two locked safes and a locked desk. The papers, some of which were incriminating, were then turned over to plaintiff, Special Assistant to the Attorney General of the United States, who intended to present the incriminatory evidence to a grand jury investigating defendant for fraudulent use of the mails. Defendant asserted an infringement of his Fourth Amendment rights against unreasonable searches and seizures because the papers would not have been available for plaintiff’s use in the grand jury investigation if not for private detectives stealing the papers from his office. The Court held that since the government came into possession of the incriminating papers from defendant’s office as a result of the acts of private detectives, and not through acts of its own volition, the Fourth Amendment did not apply. The Court saw no reason why the wrongful acts of private individuals wholly unconnected with the government should prevent the government from holding papers of an incriminatory nature for use in the prosecution of an offense.

2. Walter v. United States

Nearly sixty years after Burdeau, the Court set forth some limitations on the private search doctrine. In Walter v. United States, a private carrier unintentionally shipped to the wrong address “12 large, securely sealed packages containing 871 boxes of 8-millimeter film depicting homosexual activities.” Employees from the company who had accidentally received the shipment opened each of the packages and discovered the individual boxes of film, each of which contained “suggestive drawings” on one side and “explicit descriptions of the contents” on the other side. One of the employees, after opening one or two boxes of film, was unsuccessful in his attempt to reveal the actual contents of the film by holding it up to light. After receiving a call from the employees to pick up the packages, agents from the Federal Bureau of Investigation (“FBI”), who made no effort to obtain a warrant, viewed the films on a projector.

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22. Id. at 473.
23. Id. at 470, 474.
24. Id. at 474.
25. Id. at 475.
26. Id. at 476.
29. Id. at 651-52.
30. Id. at 652.
31. Id.
government brought obscenity-related charges against the defendants, and the defendants moved to suppress the evidence.32

In a plurality opinion, authored by Justice Stevens, the Court held that a subsequent government search following on the heels of a private search “may not exceed the scope of the private search...”33 Justice Stevens noted that a private party search frustrates the reasonable expectation of privacy one may have in a package only to the extent the private party has searched the package, but a reasonable expectation of privacy remains in the part of the package that the private party has not searched.34 The Fourth Amendment affords protection to government searches in which a reasonable expectation of privacy remains in whole or in part.35 In Walter, the government could search the films to the same extent that the employees, who were private parties, had searched the films.36 However, the government’s use of the projector to view the films was a “significant expansion of the search that had been conducted previously by a private party” and “must be characterized as a separate search,” which “was not supported by exigency or by warrant.”37

Justice Blackmun, in his dissenting opinion, argued that a reasonable expectation of privacy in the films did not exist because the film containers, with “suggestive” drawings on the one side and “explicit” descriptions on the other, “clearly revealed the nature of their contents.”38 Justice Blackmun asserted that the FBI’s subsequent use of a projector to view the films did not constitute a new search subject to the Fourth Amendment because the private search, in revealing the contents of the films, had frustrated any reasonable expectation of privacy in the films.39 Justice Blackmun contended “[t]he films in question were in a state no different from Justice S[tevens’] hypothetical gun case when they reached the FBI.”40 To the contrary, Justice Stevens, in his opinion for the Court, argued that

32. Id.
33. Id. at 657 (observing that “if a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party’s invasion of another person’s privacy.”).
34. Walter, 447 U.S. at 659.
35. See id. at 659 n.13 (noting that “a partial invasion cannot automatically justify a total invasion”); Cf. United States v. Rabinowitz, 176 F.2d 732, 735 (2d Cir. 1949), rev’d, 339 U.S. 56 (1950) (concerning a search incident-to-arrest, J. Learned Hand observed: “It is true that when one has been arrested in his home or office, his privacy has already been invaded; but that interest, though lost, is altogether separate from the interest in protecting his papers from indiscriminate rummage, even though both are customarily grouped together as parts of the ‘right of privacy.’”) Judge Hand’s view was eventually substantiated in Chimel v. California, 395 U.S. 752 (1969), which rejected the Court’s decision in Rabinowitz.).
36. Walter, 447 U.S at 656.
37. Id. at 657 n.10 (pointing out: “The fact that the labels on the boxes established probable cause to believe the films were obscene clearly cannot excuse the failure to obtain a warrant; for if probable cause dispensed with the necessity of a warrant, one would never be needed.”).
38. Id. at 663 (Blackmun, J., dissenting).
39. See id. at 665 (Blackmun, J., dissenting) (noting that the content of the films “were obvious from the condition of the package”).
40. Id. at 665 (Blackmun, J., dissenting).
a reasonable expectation of privacy remained in the films because “[p]rior to the [g]overnment screening one could only draw inferences about what was on the films.” Justice Stevens maintained that the films in question are unlike a gun case being delivered to a carrier in which “there could then be no expectation that the contents would remain private.”

3. United States v. Jacobsen

In Jacobsen, employees of a private freight carrier discovered a package that had been damaged and torn by a forklift. Pursuant to a written company policy concerning insurance claims the employees opened the package to examine its contents for damage. The package, a standard cardboard box wrapped in brown paper, contained crumpled newspaper and a 10-inch tube made of silver duct tape. The employees, a supervisor and an office manager, cut open the tube, and discovered “a series of four zip-lock plastic bags, the outermost enclosing the other three and the innermost containing about six and a half ounces of white powder.” After observing the white powder, the employees contacted the Drug Enforcement Administration (“DEA”), and, sometime before the arrival of the first DEA agent, placed the bags back inside the tube and placed the tube along with the crumpled newspaper inside the cardboard box. When the first DEA agent arrived, he removed the tube from the open box, took the four zip-lock bags out of the tube and, after observing the white powder, removed a trace of the white powder from each of the four bags with a knife blade. The DEA agent administered a field test of the white powder, which verified the white powder was cocaine. DEA agents, who arrived shortly after the first DEA agent, conducted a second field test confirming the results of the first test, “rewrapped the package, obtained a warrant to search the place to which it was addressed, executed the warrant, and arrested [defendants].” The government brought charges against the defendants for possession of an illegal substance with intent to distribute, and the defendants moved to suppress the evidence. The trial court denied the defendants’ motion to suppress the evidence, and the defendants appealed their conviction. Applying the Court’s holding in Walter, the Court of Appeals reversed, holding that the DEA agent’s “removal of the plastic bags, the

41. Walter, 447 U.S at 657.
42. See id. at 658, n.12.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.at 111-12.
49. Jacobsen, 466 U.S. at 112.
50. Id.
51. Id.
52. Id.
taking of samples, and the chemical analysis of these samples constituted a violation of defendants' fourth amendment rights.\(^{53}\)

In a majority opinion, authored by Justice Stevens, the Court reaffirmed the standard that a majority of the Court adopted in \textit{Walter} in which “[t]he additional invasions of [defendants’] privacy by the government must be tested by the degree to which they exceeded the scope of the private search.”\(^{54}\) The Court noted “[i]t is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information.”\(^{55}\) In other words, the Fourth Amendment does not prohibit the government from using “now-nonprivate information”—i.e. information a private party has obtained as a result of a private search—because a frustration of the reasonable expectation of privacy has already occurred.\(^{56}\) The Court pointed out that the Fourth Amendment does, however, prohibit the government from using information in which a frustration of the reasonable expectation of privacy has not already occurred.\(^{57}\) “In such a case the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant.”\(^{58}\)

In \textit{Jacobsen}, the Court held that the DEA agents’ “removal of the tube from the box and the removal of the plastic bags from the tube and a trace of powder from the innermost bag” infringed no legitimate expectation of privacy, and therefore were not “search(es) within the meaning of the Fourth Amendment.”\(^{59}\) The Court also held that the chemical test of the white powder, which raised a separate issue, was not a search subject to the Fourth Amendment.\(^{60}\) Regarding the removal of the tube from the cardboard box, which the employees had placed back in the box along with the crumpled newspaper, the Court reasoned that the DEA agent learned nothing of any significance that the employees of the private freight carrier had not already learned during their private search.\(^{61}\) The Court pointed out that when the first agent arrived on scene, the

\(^{53}\) See \textit{id.} at 112 (citing United States v. Jacobsen, 683 F.2d 296, 300 (8th Cir. 1982)).
\(^{54}\) \textit{Id.} at 115 (citing \textit{Walter} v. United States, 447 U.S. 649 (1980)).
\(^{55}\) \textit{Jacobsen}, 466 U.S. at 117.
\(^{56}\) \textit{Id.}
\(^{57}\) \textit{Id.}
\(^{58}\) \textit{Id.} at 117-18.
\(^{59}\) \textit{Id.} at 118-24.
\(^{60}\) \textit{Id.} at 123-24 (pursuant to the binary search doctrine, the Court noted that the “interest in ‘privately’ possessing cocaine [is] illegitimate [and] thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’ fact, compromises no legitimate privacy interest); see, e.g., United States v. Place, 462 U.S. 696 (1983) (holding that a canine sniff by a well-trained narcotics dog to detect the presence of narcotics is not a “search” within the meaning of the Fourth Amendment. The Court reasoned that a canine sniff is \textit{sui generis}, revealing only the presence or absence of narcotics and revealing nothing about noncontraband items.); Illinois v. Caballes, 543 U.S. 405 (2005) (holding that a canine sniff conducted during a concededly lawful traffic stop, which only reveals the location of narcotics, does not violate the Fourth Amendment.).
\(^{61}\) See \textit{Jacobsen}, 466 U.S. at 119.
he knew from the private employees’ testimony, which defendants concede the agents were free to utilize, that the box “contained nothing of significance except a tube containing plastic bags and, ultimately, white powder.”62 The Court observed that even assuming “the white powder was not itself in ‘plain view’…, there was a virtual certainty [emphasis added] that nothing else of significance was in the package…and its contents would not tell [the agent] anything more than he had already been told [by the employees of the private freight carrier].”63 In moving the crumpled newspaper aside and picking up the tube, the Court noted that the only “advantage the [g]overnment gained…was [in] merely avoiding the risk of flaw in the employees’ recollection, [and not] in further infringing [defendants’] privacy.”64 In searching the container to the same extent as the employees of the private freight carrier, the DEA agent’s search was not a “search” within the meaning of the Fourth Amendment.65 The prior search by the employees of the private freight carrier had frustrated any reasonable expectation of privacy the defendants may have had with regard to the container’s contents.66

Concerning the “removal of the plastic bags from the tube and the agent’s visual inspection of their contents,” and the opening of the plastic bags to remove a trace of the white powder, the Court pointed out the agent learned nothing more than what the private employees had already learned during the initial private search.67 Although the agents exceeded the scope of the initial search conducted by the private employees, who had not physically examined the contents of the plastic bags containing the white powder, the Court declared that the package could no longer support a legitimate expectation of privacy.68 By examining the contents of the package to the same extent as the private employees, the agents observed white powder in a transparent plastic bag, and learned nothing more than the private employees from its mere removal.69 The “removal of the plastic bags from the tube and the agent’s inspection of their contents,” did not infringe a legitimate expectation of privacy, and therefore was not a “search” with the meaning of the Fourth Amendment.70

B. Circuit Split: The Private Search Doctrine and Computers

In applying the private search doctrine to computers, courts are confronted with a difficult question: Once a private party views a file on a computer, what exactly has the private party searched for purposes of later reconstruction by a

62. Id. at 118.
63. Id. at 119.
64. Id.
65. See id. at 120.
66. See id.
67. Jacobsen, 466 U.S. at 120.
68. See id.
69. See id. at 121.
70. Id. at 120.
government agent? In other words, once a private party views a file on a computer, may the government agent conduct a warrantless search of the data, the file, the folder, or the physical device without violating the Fourth Amendment. In determining the appropriate measuring unit, the Fifth and Seventh Circuit Courts of Appeals have concluded that the proper unit is the physical device while the Sixth Circuit Court of Appeals has decided that the proper unit is the data or the file. In using the physical device as the appropriate measuring unit, a private search of only one file would allow the government to conduct a warrantless search of the entire computer. However, in using the file or the data as the proper measuring unit, a private search of one file would only allow a government agent to conduct a warrantless search of the same file or the data that the private party searched.

1. The “Physical Device” Approach

   a. United States v. Runyan

   In Runyan, defendant’s wife made several trips, accompanied at different times by her daughter from a previous marriage and other friends, to defendant’s ranch to retrieve personal property, which she had not taken with her when she left defendant to move in with her boyfriend. Defendant’s wife, after discovering that defendant had secured the gated entrance to the ranch with a chain and padlock and had also changed the locks to the house and barn after defendant’s filing for divorce, used bolt cutters to cut the chain on the gate and entered the house and barn by climbing through windows. In searching the barn, defendant’s wife, her daughter, and a friend, found a black duffel bag, which contained “pornography, compact disks, a Polaroid camera with film, a vibrator, and Polaroid pictures …” and “two waterproof ammunition boxes containing more pornography,” which were underneath the black duffel bag that defendant’s wife took back to her residence. In searching the house, defendant’s wife and six of her friends found “3.5 inch floppy disks, [compact disks], and ...
Z[ip] disks,” which were located next to a desktop computer that defendant’s wife claimed was hers. A friend of defendant’s wife took the computer and disks back to defendant’s wife’s residence, and viewed around 20 of the compact and floppy disks but none of the zip disks. In finding images of child pornography on the disks, the friend of defendant’s wife’s notified police and “turned over twenty-two CDs, ten Zip disks, and eleven floppy disks.” In a subsequent search, police conducted a “cursory review” of all of the storage media that the friend of defendant’s wife had delivered. Using the evidence obtained from the “cursory review,” police obtained a “warrant to search the desktop computer and all the disks for files containing [child pornography],” as well as a “warrant to search [defendant’s] ranch house…” After the trial court denied defendant’s motion to suppress the evidence “obtained directly and indirectly from the pre-warrant” police search of the storage media, a jury convicted defendant on various child pornography charges.

In determining whether the trial court erred in denying defendant’s motion to suppress the evidence obtained from the pre-warrant police search, the Fifth Circuit Court of Appeals dealt with two questions relevant to the application of the private search doctrine and computer storage media. First, the Fifth Circuit addressed whether police exceeded the scope of the private search by subsequently examining the entire collection of “containers”—twenty-two CDs, ten Zip disks, and eleven floppy disks—when the private party only searched selected containers from the collection. In making its determination, the Fifth Circuit discussed “two lines of authority from the other circuits,” which it deemed instructive in answering whether police could search a container that the private party did not search without exceeding the scope of the private party search. The Fifth Circuit noted that the Fourth and Tenth Circuit Courts of Appeals, in United States v. Kinney and United States v. Donnes, respectively, had both held that police exceed the scope of a private search when they search a container that a private party did not open, whereas the Eighth Circuit Court of

79. Id.
80. Id.
81. Id.
82. Runyan, 275 F.3d at 454-55.
83. Id. at 454.
84. Id. at 455.
85. Id. at 461.
86. Id. at 461-62.
87. Id. at 462.
88. 953 F.2d 863 (4th Cir. 1992) (finding that police exceeded the scope of the initial private search—in which defendant’s girlfriend found guns in defendant’s closet—by searching a canvas bag that defendant’s girlfriend had not opened during her initial search).
89. 947 F.2d 1430 (10th Cir. 1991) (holding that police exceeded the scope of initial private search by opening a camera lens case found inside a glove, which defendant’s landlord had found within defendant’s apartment and turned over to police).
Appeals, in *United States v. Bowman*¹⁰ had held that police do not exceed the scope of a private search by searching a container that a private party did not search.¹¹ The Fifth Circuit reconciled the differing lines of authority by using the Supreme Court’s decision in *Jacobsen* for the proposition that a police search that “enable[s]... [them] to learn nothing that had not previously been learned during the private search,” and merely confirms prior knowledge, does not exceed the scope of a private search.¹² Therefore, the Fifth Circuit concluded that police exceed the scope of a private search when they open a container that the private party has not opened unless the police are “substantially certain of what is inside the containers based on statements of the private [party], their replication of the private search, and their expertise.”¹³ Applying its conclusion to the instant case, the Fifth Circuit held the police exceeded the scope of the prior private search when they searched disks that the private party had not examined.¹⁴ Although the disks that the private party did not search were in the exact location as the disks they did search, the court noted that police could not have determined with “substantial certainty that all of the storage media...contained child pornography.”¹⁵

Second, the Fifth Circuit, in *Runyan*, addressed whether the police exceeded the scope of the private search by opening more files on each of the disks that the private party had examined.¹⁶ In coming to a resolution, the Fifth Circuit compared the relevant holdings of the Eighth and Eleventh Circuit Courts of Appeals.¹⁷ The Eighth Circuit in *Rouse*, held that police exceeded the scope of a prior private search by “[finding] and [examining] more items within an airline passenger’s bag than the airline employees had found ...”¹⁸ Alternatively, in *Simpson*, the Eleventh Circuit held that police do not exceed the scope of a prior private search by examining “more thoroughly” the same materials that the private party had searched.¹⁹ The Fifth Circuit, considered the holding in *Rouse*...

¹⁰ 907 F.2d 63 (8th Cir. 1990) (holding that police did not exceed the scope the initial private search—in which an airline employee opened one of five identical bundles contained within an unclaimed suitcase, and discovered cocaine—searching more bundles than during an airline employee’s private search).
¹¹ *Runyan*, 275 F.3d at 462.
¹³ *Id.* (explaining that “[s]uch an ‘expansion’ of the private search provides the police with no additional knowledge that they did not already obtain from the underlying private search and frustrates no expectation of privacy that has not already been frustrated”).
¹⁴ *Id.* at 464.
¹⁵ *Id.*
¹⁶ *Id.* at 464-65.
¹⁷ United States v. Runyan, 275 F.3d 449, 464-65 (5th Cir. 2001).
¹⁸ United States v. Rouse, 148 F.3d 1040, 1041 (8th Cir. 1998) (observing the government agents viewed items in which the defendant had a reasonable expectation of privacy).
¹⁹ United States v. Simpson, 904 F.2d 607, 610 (11th Cir. 1990) (noting government’s subsequent search of defendant’s cardboard box, which contained pornographic videos, did not exceed the scope of the initial private search for purposes of the Fourth Amendment merely
to be “inconsistent with the warrant requirement and the exclusionary rule,” and that under the reasoning in *Rouse* police would violate the Fourth Amendment “each time they happened to find an item within a container that the private searchers did not happen to find.” 100 In adopting the holding in *Simpson*, the Fifth Circuit noted that a private party frustrates an individual’s expectation of privacy with regards to the contents of a container once the private party opens and examines the contents of the container, and, therefore, police do not conduct “a new search for Fourth Amendment purposes each time they examine a particular item found within a container.” 101 In applying the holding to the instant case, the Fifth Circuit found that the police did not exceed the scope of the private search by searching more files on each of the disks than the private party had searched. 102

b. *Rann v. Atchison*

In *Atchison*, defendant’s fifteen-year-old daughter, after informing police at the police station that defendant had sexually assaulted and taken pornographic pictures of her, returned home to retrieve a memory card from her parent’s bedroom to give to police. 103 In searching the memory card, police discovered images of defendant sexually assaulting his fifteen-year-old daughter. 104 Shortly after defendant’s fifteen-year-old daughter interviewed with police, the mother of defendant’s fifteen-year-old daughter delivered a zip drive to police. 105 Upon examining the contents of the zip drive, police discovered pornographic images of defendant’s daughter when she was nine years of age as well as images of defendant’s stepdaughter when she was fifteen years of age. 106 At trial, the jury found defendant guilty of “two counts of criminal sexual assault and one count of possession of child pornography.” 107 Defendant appealed, arguing that his trial counsel was ineffective in failing to move to suppress the images discovered on the memory card and zip drive. 108 Defendant contended the police, in searching the memory card and zip drive, exceeded the scope of the private searches that defendant’s fifteen-year-old daughter and her mother had carried out before turning the storage media over to police. 109

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100. *Runyan*, 275 F.3d at 465.
101. *Id.*
102. *Id.*
103. *Rann v. Atchison*, 689 F.3d 832, 834 (7th Cir. 2012).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 833-34
108. *Id.* at 835.
The Seventh Circuit, having “not yet ruled on the application of Jacobsen to a subsequent police search of a privately searched digital storage device,” looked to the Fifth Circuit’s decision in Runyan for guidance.\textsuperscript{110} The Seventh Circuit, finding the analysis in Runyan to be persuasive, adopted the Fifth Circuit’s holding in which a government search of a closed container is valid as long as police are “substantially certain of what is inside the container based on statements of the private searches, their replication of the private search, and their expertise.”\textsuperscript{111} The Seventh Circuit noted that the holding in Runyan provides the correct balance with regards to the legitimate expectation of privacy an individual still holds in a digital storage device once a private party has conducted a search of the digital storage device and “the additional invasions of privacy by the government agent,” which “must be tested by the degree to which [police] exceeded the scope of the private search.”\textsuperscript{112} In applying the holding adopted from Runyan to the facts of the instant case, the Seventh Circuit found that since the defendant’s fifteen-year-old daughter and her mother “knew the contents of the digital media devices” when they handed them over to police, the police were “substantially certain the digital media devices contained child pornography.”\textsuperscript{113} The Seventh Circuit also noted that even if the police viewed more images on the digital media devices than the defendant’s fifteen-year-old daughter and her mother, the police, per the holding in Runyan, did not exceed the scope of the private search by conducting a more thorough search.\textsuperscript{114}

2. The Data or File Approach—United States v. Lichtenberger

In Lichtenberger, the defendant lived with his girlfriend at her mother’s residence.\textsuperscript{115} Upon learning from friends of the defendant’s girlfriend’s mother that the defendant had prior convictions relating to child pornography, the police were called to escort defendant off of the property.\textsuperscript{116} Officers responded to the residence, and, after determining that the defendant had a warrant for failing to register as a sex offender, arrested defendant.\textsuperscript{117} Shortly after police took the defendant into custody, the defendant’s girlfriend retrieved defendant’s laptop from the bedroom that she shared with the defendant.\textsuperscript{118} In searching defendant’s laptop, defendant’s girlfriend “clicked on different folders and eventually found thumbnail images of adults engaging in sexual acts with minors.”\textsuperscript{119} After clicking on one of the thumbnails to enlarge the image, defendant’s girlfriend

\textsuperscript{110} Id. at 836-38.
\textsuperscript{111} Id. at 836 (quoting United States v. Runyan, 275 F.3d 449, 465 ((5th Cir. 2001)).
\textsuperscript{112} Id. at 837 (quoting United States v. Jacobsen, 466 U.S. 109, 115 (1984)).
\textsuperscript{113} Id. at 838.
\textsuperscript{114} Id.
\textsuperscript{115} United States v. Lichtenberger, 786 F.3d 478, 480 (6th Cir. 2015).
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
took the laptop to the kitchen to show her mother what she had found.\textsuperscript{120} While in the kitchen, defendant’s girlfriend and her mother “clicked through several more sexually-explicit images involving minors.”\textsuperscript{121} The defendant’s girlfriend called police, and one of the officers who had responded to the residence earlier in the day responded back once again.\textsuperscript{122} Responding to the officer’s request to show him what she had discovered on defendant’s laptop, the defendant’s girlfriend “opened several folders and began clicking on random thumbnail images.”\textsuperscript{123} Recognizing the images to be child pornography, the officer requested the defendant’s girlfriend to turn the laptop off.\textsuperscript{124} After talking with the police chief on the phone, the officer asked the defendant’s girlfriend to bring him all of the defendant’s electronic devices.\textsuperscript{125} The defendant’s girlfriend gave the officer a “cell phone, flash drive and some marijuana.”\textsuperscript{126} Following his indictment on charges of “receipt, possession, and distribution of child pornography,” the defendant filed a motion to suppress the evidence obtained as a result of the officer’s warrantless search.\textsuperscript{127} At the suppression hearing, the defendant’s girlfriend testified that she had viewed nearly one hundred images of child pornography, and that of the “few pictures” she showed the officer she was uncertain whether “they were among the same images she had seen in her original search.”\textsuperscript{128} Confirming the defendant’s girlfriend’s testimony, the officer testified that the defendant’s girlfriend “showed him probably four or five photographs.”\textsuperscript{129} The district court granted the defendant’s motion to suppress, and the government appealed.\textsuperscript{130}

After determining that \textit{Jacobsen} governed the instant case, the Sixth Circuit addressed whether the officer’s subsequent search of defendant’s laptop exceeded scope of the initial private search that the defendant’s girlfriend conducted.\textsuperscript{131} The Sixth Circuit points out that the “critical measures” in determining whether a government search exceeds the scope of a private search are “how much information the government stands to gain when it re-examines evidence and, relatedly, how certain it is regarding what it will find.”\textsuperscript{132} The Sixth Circuit, remarking that these “critical measures” have guided its application of the private search doctrine for three decades, notes that government searches of “physical containers and spaces” are allowable in instances where officers are

\textsuperscript{120} \textit{Id.}
\textsuperscript{121} United States v. Lichtenberger, 786 F.3d 478, 480 (6th Cir. 2015).
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id. at} 480-81.
\textsuperscript{125} \textit{Id. at} 481.
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} United States v. Lichtenberger, 786 F.3d 478, 481 (6th Cir. 2015).
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id. at} 484-85 (citing United States v. Jacobsen, 466 U.S. 109, 119-20 (1984)).
\textsuperscript{132} \textit{Id. at} 485-86.
“virtually certain” of what they will find and there is little risk of seeing anything but contraband.133 However, when an officer’s subsequent search of a “physical space” goes further in scope than the earlier private search, the Sixth Circuit has refused to apply the private search doctrine.134

Observing “searches of physical spaces and the items they contain differ in significant ways from searches of complex electronic devices under the Fourth Amendment,” the Sixth Circuit found the Supreme Court’s decision in Riley v. California135 informative.136 In Riley, the Supreme Court held that the search-incident-to-arrest exception, which allows police to search items discovered on an arrestee’s person or in arrestee’s car without a warrant, did not extend to the search of data on a cell phone.137 The Supreme Court, in Riley, explained that in determining whether to excuse a particular type of search from the warrant requirement of the Fourth Amendment, the Court normally weighs the extent to which a particular type of search infringes on one’s privacy against the extent to which a warrantless search is necessary to promote legitimate government interests.138 In applying this balancing test to the search-incident-to-arrest exception, the Court in Riley weighed “the [legitimate] governmental interests of officer safety and preservation of evidence against the invasion of privacy inherent in searching the belongings someone has on their person at the time of arrest.”139 The Court noted that when the “belonging in question is a device like a cell phone,” the identified risks of “harm to officers and the destruction of evidence” are slight when compared to the privacy interests one has in a cell phone, which “place[s] vast quantities of personal information literally in the hands of individuals.”140 The Court in Riley found that the “privacy-related concerns” in devices like cell phones were “weighty enough,” despite the lessened expectations of privacy of an arrestee, to require police to obtain a warrant before searching the data of an arrestee’s cell phone absent consent or exigent circumstances.141

Applying the balancing test to the private search doctrine, the Sixth Circuit in Lichtenberger weighed the government’s interest in searching defendant’s laptop against the defendant’s privacy interest in the laptop.142 The Sixth Circuit explains that the “fundamentals of [the] inquiry” do not change solely because the item involved is an electronic device.143 The Sixth Circuit points out,

133. United States v. Lichtenberger, 786 F.3d 478, 486 (6th Cir. 2015).
134. Id.
136. Lichtenberger, 786 F.3d at 487.
137. Riley, 134 S.Ct. at 2485 (noting that a search of data on a cell phone “bears little resemblance to the type of brief physical search” involving physical objects).
139. Lichtenberger, 786 F.3d at 487.
140. Riley, 134 S.Ct. at 2484-85.
141. Id. at 2488 (citing Maryland v. King, 133 S.Ct. 1958, 1979 (2013)).
142. United States v. Lichtenberger, 786 F.3d 478, 488 (6th Cir. 2015).
143. Id.
however, that the nature of the electronic device significantly enhances the privacy interests at issue, which “add[s] weight to one side of the scale while the other remains the same.”\textsuperscript{144} The tipping of the scales becomes readily apparent in the “virtual certainty” requirement of the private search doctrine established in \textit{Jacobsen}.\textsuperscript{145} The Sixth Circuit notes in \textit{Lichtenberger} that, under \textit{Jacobsen}, the officer’s search of defendant’s laptop is allowable so long as his search did not exceed the scope of the defendant’s girlfriend’s prior private search.\textsuperscript{146} In order for the officer to stay within the scope of the initial private search, he had to “proceed with virtual certainty that the inspection of the laptop and its contents would not tell him anything more than he had already been told by defendant’s girlfriend.”\textsuperscript{147} The defendant’s girlfriend’s admission that she was uncertain whether the photographs she showed the officer were the same ones she had viewed in her initial search—as well as the officer’s admission that he may have directed the defendant’s girlfriend to open files she had not previously opened—led the court to find there was no virtual certainty that the officer’s search of defendant’s laptop disclosed only what defendant’s girlfriend had already told the officer.\textsuperscript{148} Although each of the photographs that defendant’s girlfriend showed the officer revealed images of child pornography, the Sixth Circuit found that it was not virtually certain that this would occur.\textsuperscript{149} “There was a very real possibility...that [the officer] could have discovered something else on [defendant’s] laptop that was private, legal, and unrelated to the allegations prompting the search—precisely the sort of discovery the \textit{Jacobsen} Court sought to avoid in articulating its beyond the scope test.”\textsuperscript{150}

The Sixth Circuit, in \textit{Lichtenberger}, contrasted the instant case with the Ninth Circuit case of \textit{United States v. Tosti},\textsuperscript{151} which also involved a police search of a laptop following on the heels of a private search where the private searcher found pornographic images.\textsuperscript{152} In \textit{Tosti}, the Ninth Circuit found that the detective’s subsequent search of defendant’s laptop was allowable under \textit{Jacobsen} because the detective only viewed photos that the private individual had already viewed.\textsuperscript{153} The Ninth Circuit noted that even though the private individual had only viewed thumbnail images during his initial search of defendant’s laptop, the detective’s viewing of enlarged versions of the thumbnails did not exceed the scope of the private search because the detective’s

\begin{thebibliography}{99}
\bibitem[144]{144} Id. (citing \textit{Riley v. California}, 134 S.Ct. 2473, 2488 (2014)).
\bibitem[145]{145} Id.
\bibitem[146]{146} Id. (citing \textit{United States v. Jacobsen}, 466 U.S. 109, 119 (1984)).
\bibitem[147]{147} Id. (citing \textit{United States v. Jacobsen}, 466 U.S. 109, 119 (1984)).
\bibitem[148]{148} \textit{United States v. Lichtenberger}, 786 F.3d 478, 488 (6th Cir. 2015).
\bibitem[149]{149} Id. at 489 (pointing out that the “same folders—labeled with numbers, not words—could have contained, for example, explicit photos of [defendant] himself: legal, unrelated to the crime alleged, and the most private sort of images”).
\bibitem[150]{150} Id. at 488-89.
\bibitem[151]{151} \textit{United States v. Tosti} 733 F.3d 816 (9th Cir. 2013).
\bibitem[152]{152} \textit{Lichtenberger}, 786 F.3d at 490.
\bibitem[153]{153} \textit{Tosti}, 733 F.3d at 821.
\end{thebibliography}
actions did not allow him to learn anything more than what the private individual had already told him.\textsuperscript{154} In \textit{Lichtenberger}, however, the defendant’s girlfriend cannot recall whether the files she opened with the officer were the same files she had opened during her initial private search.\textsuperscript{155} Therefore, there was a distinct possibility that the officer would learn more than what the defendant’s girlfriend had told him regarding her prior search of the laptop.\textsuperscript{156} The Sixth Circuit found the absence of “virtual certainty” when the officer searched the contents of defendant’s laptop “dispositive” in the instant case, and held that the officer had violated the defendant’s “Fourth Amendment rights to be free from an unreasonable search and seizure” when he exceeded the scope of defendant’s girlfriend’s earlier private search.\textsuperscript{157}

III. PROBLEMS THE APPLICATION OF THE PRIVATE SEARCH DOCTRINE TO COMPUTERS

\textbf{A. Problems With The Physical Device Approach}

Under the physical device approach, a private search of at least one file allows the government to perform a subsequent warrantless search of the entire computer without violating the Fourth Amendment.\textsuperscript{158} The opening of one file, under the physical device approach, frustrates any reasonable expectation of privacy an individual may have in the computer, and therefore allows the government to “examine the contents of the physical [device] in a more comprehensive manner” than the private searcher.\textsuperscript{159} However, given the fact that computers may contain “various types of data in vast amounts,” use of the “physical device” as the proper measuring unit is problematic when trying to meet the necessary requirements of the private search doctrine, which the Supreme Court established in \textit{Jacobsen}.\textsuperscript{160}

Under the private search doctrine, a government agent may perform a subsequent warrantless search of a container as long as the government search does not exceed the scope of the earlier private search.\textsuperscript{161} A private party, however, only frustrates the reasonable expectation of privacy to the extent the private party has searched the container, and where a reasonable expectation of privacy remains, in whole or in part, the Fourth Amendment affords protection against government searches.\textsuperscript{162} The Fifth and Seventh Circuit Courts of Appeals

\textsuperscript{154} Id.
\textsuperscript{155} Lichtenberger, 786 F.3d at 488.
\textsuperscript{156} See id. at 488-89.
\textsuperscript{157} Id. at 490-91.
\textsuperscript{158} See sources cited supra note 11.
\textsuperscript{159} See id.
\textsuperscript{160} See id.
\textsuperscript{162} Id. at 657-59.
in Runyan and Atchison determined that the “physical device” was the proper measuring unit in applying the private search doctrine to computers. In using the “physical device” approach, the Fifth and Seventh Circuit Courts of Appeals found that the private searchers had—in searching at least one file—frustrated the defendant’s reasonable expectation of privacy with regards to the entire contents of the computer. Under the “physical device” approach applied in Runyan and Atchison, a government agent may not open a computer where the private searcher has not opened at least one file, unless the government agent is virtually certain of what is inside the container based on the statements of the private searchers, their replication of the private search, and their expertise.

However, unlike the packages at issue in Walter and Jacobsen, which are limited by the size and volume of the container, computers can hold enormous amounts of data, which, theoretically—depending on the particular computer at issue, the types of files contained within, the storage capacity and the amount of storage used—could take days, weeks, and potentially even years to comb through. While it is conceivable that solely opening containers like those at issue in Walter and Jacobsen may frustrate one’s reasonable expectation of privacy with regard to the container’s entire contents, it is a rather huge leap to assert that the opening of one file would frustrate one’s reasonable expectation of privacy with regard to the entire contents of a computer.

A private individual or a group of private individuals could conceivably search all of the contents of a computer, and consequently frustrate any reasonable expectation of privacy one may have in the computer. However, in cases brought before the courts involving the private search doctrine and computers, the private party has stopped well short of searching the entire contents of the computer prior to turning the computer over to police. In searching only one file or even multiple files, a private searcher will leave enormous amounts of data in which a reasonable expectation of privacy remains. Therefore, under the “physical device” approach, a reasonable expectation of privacy in the computer will inevitably remain unless the private party has searched everything contained within the computer or unless the government can establish that in expanding on the initial private search there was “virtual

163. United States v. Runyan, 275 F.3d 449, 464-65 (5th Cir. 2001); Rann v. Atchison, 689 F.3d 832, 837 (7th Cir. 2012).
164. Runyan, 275 F.3d at 464; Atchison, 689 F.3d at 836-37.
165. Runyan, 275 F.3d at 463 (noting that in a search involving a number of closed containers, “[the] opening [of] a container that was not opened by private searchers would not necessarily be problematic if the police knew with substantial certainty, based on the statements of the private searchers, their replication of the private search, and their expertise, what they would find inside.”); Atchison, 689 F.3d at 836-37.
166. See e.g., United States v. United States v. Crist, 627 F. Supp. 2d 575, 577 (M.D. Pa. 2008) (private searcher viewed two video files); Cf. United States v. Wicks, 73 M.J. 93, 96-97 (C.A.A.F. 2014) (private searcher read a few text messages out of the 45,000 viewed during the subsequent government search).
“virtual certainty” that it would find nothing else of significance based on communications with the private party.167

A determination that a government agent examined more items within a container than a private individual did during the initial private search, however, is not dispositive.168 “The additional invasions of [a defendant’s] privacy must be tested by the degree to which they exceeded the scope of the private search.”169 In Jacobsen, the Court noted the Fourth Amendment does not forbid the government’s use of information that a private party has acquired as a result of a private search because a frustration of the reasonable expectation of privacy concerning the “now-nonprivate information” has already occurred.170 The Court in Jacobsen found that “[t]he advantage the Government gain[s] . . . [in] merely avoiding the risk of flaw in [a private searcher’s] recollection . . . hardly enhances any legitimate privacy interest, and is not protected by the Fourth Amendment.”171 Therefore, under Jacobsen, the government may examine an item that the private party did not search if the government can show that there was “virtual certainty” it would learn nothing more of significance than what the private searcher had already communicated to it regarding the initial private search of the container.172

In using the “physical device” as the appropriate measuring unit to apply the private search doctrine to computers, however, it is difficult to comprehend how the opening of one file by a private individual would give a government agent the “virtual certainty” necessary to search the entire computer. “By requiring a virtual certainty that the government’s [subsequent] search will reveal ‘nothing else of significance’ . . . the Court [in Jacobsen] was emphasizing that an antecedent private search does not amount to a free pass for the government to rummage through a person’s effects.”173 Once again, the difference between the containers at issue in Walter and Jacobsen and computers is key to the analysis. Containers like those in Walter and Jacobsen, because of the actual size of the container, are limited with regard to both the amount and type of information they can hold. Computers in comparison are not restricted by the size of the container, and can hold “various types of data in vast amounts.”174

When the private searchers opened the containers at issue in both Walter and Jacobsen, the private searchers arguably were able to see—as far as the naked

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167. See Jacobsen, 466 U.S. at 119.
168. See id. at 118-20.
169. Id. at 115.
170. Id. at 117.
171. Id. at 119 (citing United States v. Cereros, 440 U.S. 741, 750-751 (1979)).
172. Id. at 119-20.
173. United States v. Andrea, 648 F.3d 1, 9 (1st Cir. 2011) (emphasis added) (citing Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) (finding that “the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges”)).
174. See United States v. Lichtenberger, 786 F.3d 478, 488 (6th Cir. 2015) (citing Riley v. California, 134 S.Ct. 2473, 2489 (2014)).
eye could see - everything contained within each of the containers, or at least knew the contents of the containers because of the outside labeling.\textsuperscript{175} In notifying government agents, the private searchers in both \textit{Walter} and \textit{Jacobsen}, communicated to the government agents that they had discovered contraband, or what they suspected was contraband.\textsuperscript{176} Therefore, in order for the government to expand in any way on the initial private search, they would have to proceed with “virtual certainty” that they would find nothing else of significance that the private searchers had not already communicated.\textsuperscript{177} In other words, the government agents in \textit{Walter} and \textit{Jacobsen} had to proceed with “virtual certainty” that in conducting the subsequent government search they would find nothing but the contraband or suspected contraband.\textsuperscript{178} The Court, in \textit{Walter}, found that in using the projector to view the films the government could not proceed with “virtual certainty” that they would find nothing else of significance, which had not already been communicated by the private searchers.\textsuperscript{179} Even in this seemingly limited expansion of the initial private search, the Court in \textit{Walter} found that the government agents could not proceed with “virtual certainty” that they would not learn anything that the private searchers had not already communicated to them regarding the initial search.\textsuperscript{180} The Court in \textit{Jacobsen}, however, found that in physically examining the contents of the plastic bags containing the white powder, the government could proceed with “virtual certainty” that it would learn nothing else of significance.\textsuperscript{181} The government agents already knew from their communications with the private searchers that the plastic bags contained a white powder and, given the transparent nature of the bags, the agents could proceed with “virtual certainty” that they would learn nothing more than what had already been told to them by the private searchers.\textsuperscript{182}

Under the “physical device” approach, a private searcher who opens at least one file on a computer opens the entire contents of the computer for viewing and therefore frustrates any reasonable expectation of privacy one may have in the computer.\textsuperscript{183} However, unlike the opening of the containers at issue in \textit{Walter} and

\textsuperscript{175} See \textit{Jacobsen}, 466 U.S. at 119-20 (manual inspection of the tube and its contents would not tell anything more and removal of the plastic bags from the tube and the agent’s visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search; see also \textit{Walter} v. United States, 447 U.S. 649, 663 (1980) (Blackmun, J., dissenting) (drawings and labels on containers of films were “suggestive” and “explicit”).

\textsuperscript{176} \textit{Jacobsen}, 466 U.S. at 111 (employees of a private freight carrier observed a white powdery substance, originally concealed within eight layers of wrappings, and summoned a federal agent); see also \textit{Walter}, 447 U.S. at 651-52 (employees of company opened packages, finding individual boxes of film with explicit descriptions of the contents, and shortly thereafter called a Federal Bureau of Investigations agent).

\textsuperscript{177} \textit{Jacobsen}, 466 U.S. at 119.

\textsuperscript{178} See id.

\textsuperscript{179} \textit{Walter}, 447 U.S. at 657-59.

\textsuperscript{180} See id.

\textsuperscript{181} \textit{Jacobsen}, 466 U.S. at 119-20.

\textsuperscript{182} Id.

\textsuperscript{183} See sources cited supra note 11.
Jacobsen, a private searcher who opens a computer is not able to see everything contained within the computer, but can only see the file or files he or she chooses to open. Consequently, a private searcher can only communicate to the government what he or she has seen regarding the files opened, but can say nothing as to the contents of the files on the computer in which he or she did not open. Differently than the minimal government expansions of the private searches in Walter and Jacobsen, a subsequent government search of the entire contents of a computer—when the private searcher only viewed one file or a limited number of files during the initial private search—is significant. Upon a private searcher communicating to a government agent that he or she has found contraband within one or more files on a computer, it is difficult to imagine a scenario in which a government agent could proceed with “virtual certainty” that he or she would find nothing else of significance in searching the entire contents of a computer, and thereby avoid infringing on one’s Fourth Amendment rights.

In short, using the “physical device” approach to apply the private search doctrine to computers is extremely problematic. A government search of the entire computer—following on the heels of a private search in which the private searcher viewed only one file or a limited number of files—expands on the initial private search to a much greater extent than the expanded searches in either Walter or Jacobsen. Although a subsequent government search that expands on the initial private search is not dispositive, establishing that a government agent has “virtual certainty” that he will learn nothing else of significance in searching the entire contents of the computer where the private party viewed a limited number of files is a near impossibility. Due to the varied types of data in enormous amounts that computers can hold, the likelihood that a government agent will learn something else of significance—i.e. a private fact in which a reasonable expectation of privacy remains—in searching the entire contents of a computer is considerable.

B. Problems With The Data Or File Approach

In Lichtenberger, the Sixth Circuit Court of Appeals found that the appropriate measuring unit when applying the private search doctrine to computers is the data or file.184 Although preferable to the “physical device” approach, the data or file approach presents the same problems as the “physical device” approach as well as a problem all its own. Under the data or file approach, a private search of one file would allow a government agent to perform a subsequent warrantless search of the same file, and conceivably all of data contained within—the Sixth Circuit in Lichtenberger does not address the distinction between data and file—before having to obtain a warrant to search further.185

184. See United States v. Lichtenberger, 786 U.S. 478, 485 (6th Cir. 2015).
185. See id.
Under the private search doctrine, a government agent may perform a subsequent search of a container, without first obtaining a warrant, provided that the government search does not exceed the scope of the earlier private search.\textsuperscript{186} A private search frustrates the reasonable expectation of privacy only to the extent the private party has searched the container, and where a reasonable expectation of privacy remains, in whole or in part, the Fourth Amendment affords protection against government searches.\textsuperscript{187} Under the data or file approach, the file, or the data contained within the file, is its own container.\textsuperscript{188} In opening a file and viewing data contained within the file on a computer, the private searcher frustrates any reasonable expectation of privacy to the extent the private party has searched the file and viewed any data contained within that particular file.\textsuperscript{189} However, a reasonable expectation of privacy remains with regards to the files and any other information or data contained within the computer the private searcher has not viewed.\textsuperscript{190}

In \textit{Lichtenberger}, each file that the defendant’s girlfriend opened up on the defendant’s laptop contained exactly one image of child pornography.\textsuperscript{191} The defendant’s girlfriend, in opening each file, simultaneously frustrated any expectation of privacy the defendant had with regard to each file and any data contained within.\textsuperscript{192} To make certain he did not exceed the scope of the earlier private search, the officer in \textit{Lichtenberger} could only view the same files that the defendant’s girlfriend had viewed.\textsuperscript{193} In viewing files the defendant’s girlfriend did not view, the officer in \textit{Lichtenberger} exceeded the scope of the girlfriend’s initial search because the defendant still had a reasonable expectation of privacy with regard to each file his girlfriend did not open.\textsuperscript{194} Under the data or file approach, as applied in \textit{Lichtenberger}, a government search inevitably exceeds the scope of the initial private search when the government agent opens more files than the private searcher.\textsuperscript{195}

In rejecting the “physical device” approach, however, the Sixth Circuit in \textit{Lichtenberger} did not address whether the “proper zone [is] the virtual file or the exposed data.”\textsuperscript{196} Courts tend to ignore this distinction because current cases “mostly involve possession of digital images of child pornography in which the

\textsuperscript{188} See sources cited supra note 11.
\textsuperscript{189} See Walter, 447 U.S. at 659.
\textsuperscript{190} See id.
\textsuperscript{191} United States v. Lichtenberger, 786 U.S. 478, 480 (6th Cir. 2015).
\textsuperscript{192} See id. at 488.
\textsuperscript{193} Id. at 489.
\textsuperscript{194} See id.
\textsuperscript{195} See id.
\textsuperscript{196} See Kerr, Sixth Circuit Creates Circuit Split on Private Search Doctrine for Computers, supra note 11, at 556.
contraband image is both the file contents and the exposed data.\textsuperscript{197} The difference between files and data however could prove to be extremely significant in other contexts.\textsuperscript{198} Consider for example, a file that contains a five hundred-page document detailing illegal gambling activities in which the private searcher only viewed the first ten pages before contacting police. Does a subsequent government search in which the government agent views more pages than the private searcher exceed the scope of the search, and thereby violate the Fourth Amendment by infringing on one’s reasonable expectation of privacy?\textsuperscript{199} Arguably, “[a government agent] who takes a mouse, clicks, and pulls down the file to see parts of the file previously not exposed has done nothing different from [a government agent] who double clicks on a file to open it.”\textsuperscript{200} In both instances, the government agents are exposing more information than the private searcher exposed during the initial search.\textsuperscript{201}

Although an after-occurring government search in which the government agent expands on the initial private search is not necessarily dispositive of whether an infringement of a legitimate expectation of privacy has occurred, the government agent must be able to proceed with “virtual certainty” that he will learn nothing more of significance than what the private searcher has told him concerning the initial search.\textsuperscript{202} Therefore, in using the data or file as the proper measuring unit to apply the private search doctrine to computers a government agent may open more files like those at issue in \textit{Lichtenberger}, or view more pages of a document, if there is “virtual certainty” the government agent will learn nothing else of significance. The subsequent government search in \textit{Jacobsen} where the government agent expanded on the initial private search by removing the plastic bags from the tube and physically examining their contents is, however, different than a government agent who expands on the initial private search by opening more files or viewing more pages of document contained within a file. In examining the plastic bags containing the white powder, which the private searchers in \textit{Jacobsen} had seen during their initial search, the government agent could proceed with “virtual certainty” that he would not learn anything else of significance.\textsuperscript{203} However, a government agent who opens more files—or views more pages of a document contained within a file—that the private searcher did not view during the initial search of the computer cannot proceed with “virtual certainty” that he will learn nothing else of significance. In \textit{Lichtenberger}, for example, although each of the files the officer opened were images of child pornography, the Sixth Circuit found the officer did not have the

\begin{footnotes}
\footnotetext[197]{Id.}
\footnotetext[198]{Id.}
\footnotetext[199]{See Id.}
\footnotetext[200]{Id.}
\footnotetext[201]{Id.}
\footnotetext[203]{See id. at 118-20.}
\end{footnotes}
required “virtual certainty” that this would be the case. In opening files that the defendant’s girlfriend had not opened during her initial search of defendant’s laptop, the officer in Lichtenberger “could have discovered something...private, legal, and unrelated to the allegations prompting the search—precisely the sort of discovery the Jacobsen Court sought to avoid...” Considering the various types of data in vast amounts that files contained within computers can hold, the likelihood that a government agent will learn something else of significance that the private searcher did not learn during the initial search is highly probable.

In using the “physical device” approach to apply the private search doctrine to computers, the scope of the search is not dependent on what the private searcher actually viewed but on what the private searcher could have viewed. Under the “physical device” approach, a private searcher only needs to have viewed one file on a computer before the government can search the whole computer in a subsequent search. Conversely, in using the data or file approach to apply the private search doctrine to computers, the scope of the search is highly dependent on what the private searcher actually viewed. Under the data or file approach, a government agent who performs a subsequent search of a computer without knowing exactly which files the private searcher opened during the initial search will not be able to establish he had “virtual certainty” he would learn nothing else of significance.

In Lichtenberger, the Sixth Circuit found the uncertainty as to whether the officer viewed the same files as the defendant’s girlfriend enough to establish the officer had exceeded the scope of the initial search. A government agent who searches a file or files on the heels of a prior private search without knowing the exact file or files will in all likelihood—given the various types of data in vast amounts that computers and can hold—exceed the scope of the initial search. Even supposing that the government agent does in fact search the same exact files as the private searcher, the uncertainty as to whether the government agent has viewed an item in which the reasonable expectation of privacy had not been frustrated is disconcerting. In searching containers like those in Walter and Jacobsen, private searchers and government agents do not have to confront—at least not to the same degree—this issue of uncertainty regarding what exactly the private party searched during the initial search. This is in large part due to the

204. United States v. Lichtenberger, 786 U.S. 478, 489 (6th Cir. 2015).
205. Id. at 488-89.
206. See United States v. Wicks, 73 M.J. 93, 100 (C.A.A.F. 2014) (citing Kerr, Searches and Seizures in the Digital World, supra note 11); See also all other sources cited supra note 11.
207. See sources cited supra note 11.
208. Wicks, 73 M.J. at 100 (citing Kerr, Searches and Seizures in the Digital World, supra note 11); See also all other sources cited supra note 11.
209. United States v. Lichtenberger, 786 U.S. 478, 488-89 (6th Cir. 2015) (citing U.S. v. Runyan 275 F.3d 449, 464 (5th Cir. 2001)).
210. Id. at 491.
211. Id. at 482 (citing United States v. Jacobsen, 466 U.S. 109, 115 (1984)).
distinct differences between a physical container and a file contained within a computer capable of holding enormous amounts of information. It seems, therefore, that under the data or file approach, the private searcher must communicate to the government agent the exact file or files opened—within the computer—during the initial search before the government agent can conduct a subsequent search with the confidence that the government agent will not exceed the scope of the initial search.

To sum up, while arguably preferable to the “physical device” approach, using the data or file approach to apply the private search doctrine to computers is not without problem. A government search in which the government agent opens more files—or exposes more data within a file—contained within a computer expands on the initial private search to a greater extent than the expanded searches in either Walter or Jacobsen—albeit to lesser extent than the expanded searches that occur under the “physical device” approach. Even though an expanded government search is not dispositive of whether an infringement of a legitimate expectation of privacy has occurred, a government agent who opens more files or views more data than a private searcher will have difficulty establishing it was virtually certain he would learn nothing else of any significance other than what the private searcher had already communicated to him regarding the initial private search. Because of the varied types of data in enormous amounts that files contained within computers can hold, there is a strong possibility that a government agent will learn something else of significance. Also, unlike the “physical device” approach, in using the data or file approach to apply the private search doctrine to computers it is imperative that the private searcher be able to communicate to the government agent exactly what she viewed during the initial search. A government agent who performs a subsequent search without knowing exactly what files or the exact amount of data viewed within those files cannot proceed with “virtual certainty” that he will not learn anything else of significance.

IV. CONTAINING THE PRIVATE SEARCH DOCTRINE

The Supreme Court, in California v. Riley, points out that there are inherent dangers when “lawyers and judges cavalierly [apply] established legal theories to new technologies, without carefully exploring the factual differences between such technologies and the objects traditionally found appropriate for those theories’ application.” The problems inherent in applying the private search doctrine to computers is not without problem. A government search in which the government agent opens more files—or exposes more data within a file—contained within a computer expands on the initial private search to a greater extent than the expanded searches in either Walter or Jacobsen—albeit to lesser extent than the expanded searches that occur under the “physical device” approach. Even though an expanded government search is not dispositive of whether an infringement of a legitimate expectation of privacy has occurred, a government agent who opens more files or views more data than a private searcher will have difficulty establishing it was virtually certain he would learn nothing else of any significance other than what the private searcher had already communicated to him regarding the initial private search. Because of the varied types of data in enormous amounts that files contained within computers can hold, there is a strong possibility that a government agent will learn something else of significance. Also, unlike the “physical device” approach, in using the data or file approach to apply the private search doctrine to computers it is imperative that the private searcher be able to communicate to the government agent exactly what she viewed during the initial search. A government agent who performs a subsequent search without knowing exactly what files or the exact amount of data viewed within those files cannot proceed with “virtual certainty” that he will not learn anything else of significance.

212. Id. at 488-89.
213. Id.
214. Id. (noting that although the government agent only opened files containing images of child pornography during the subsequent government search, it was just as likely he would open a file containing bank statements or personal communications).
doctrine to computers stem from a fundamental flaw that computers are analogous to the containers at issue in Jacobsen and Walter.\textsuperscript{216} Since computers are “likely to contain a greater quantity and variety of information than any previous storage method, . . . relying on analogies to closed containers . . . may lead courts to ‘oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage.’”\textsuperscript{217} In realizing the distinct differences between cell phones and the physical containers generally at issue in search-incident-to-arrest cases, the Court in Riley found the search-incident-to-arrest exception inapplicable to cell phones.\textsuperscript{218} The Court in Riley held that a warrantless search of a cell phone incident-to-arrest—given the vast quantities of personal information that modern day cell phones or “minicomputers” potentially contain—is generally unreasonable absent some other exception to the warrant requirement.\textsuperscript{219} The search of a computer “implicates at least the same privacy concerns as those implicated by the search of a cell phone [and] there is no reason to think conventional computers—which people heavily rely on for both personal and business use—can any more reasonably be characterized as containers than cellphones.”\textsuperscript{220}

Therefore, if for no other reason than the simple fact that computers—containers capable of holding diverse types of data in vast amounts and corresponding to a long period of time—are so completely dissimilar from the containers at issue in Walter and Jacobsen, courts should find the private search doctrine inapplicable to computers. However, although it may be impractical for courts to apply the private search doctrine to computers because of the dissimilarities between typical containers, the main reason courts should not apply the private search doctrine to computers and storage devices is significantly more substantive. As a consequence of the kinds of information people store on their computers, the privacy issues at stake are extensive.\textsuperscript{221} Among the information stored on computers, which is in implicit in the Court’s analysis in Riley, one can find vast amounts of private information that before the advent of computers and cell phones would normally have only been contained within the home or business.\textsuperscript{222}

Illustrative of the fact courts should not apply the private search doctrine to computers and storage devices is that—in light of the privacy interests at stake—

\textsuperscript{216} See id. at 276.
\textsuperscript{217} See id. at 277 (quoting United States v. Carey, 175 F.3d 1268, 1275 (10th Cir. 1999)).
\textsuperscript{218} Riley v. California, 134 S.Ct. 2473, 2494 (2014).
\textsuperscript{219} Id. at 2493-94.
\textsuperscript{220} Michael E., 230 Cal.App.4th at 277 (citing United States v. Mitchell, 556 F.3d 1347, 1351-52 (11th Cir. 2009) (observing that individuals store various items of a nature in electronic form on computer hard drives)).
\textsuperscript{221} United States v. Lichtenberger, 786 F.3d 478, 489, 491 (6th Cir. 2015).
\textsuperscript{222} Riley, 134 S.Ct at 2491 (pointing out that a “cell phone would typically expose to the government far more than the most exhaustive search of a house: [a] phone not only contains in digital form many sensitive records previously found in a home; it also contains a broad array of private information never found in a home in any form”).
the majority of courts have refused to apply the private search doctrine to the home, and those courts that have applied the private search doctrine to the home have only done so in limited circumstances.223 Because of the vast amounts of personal information computers are likely to contain, applying the private search doctrine to computers is more comparable to applying the private search doctrine to homes than to containers like those at issue in Walter and Jacobsen. Computers, “with all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’”224 Similar to a home, computers can hold books, videos, calendars, family photographs, private diaries, phone books, maps, and much more.225 Moreover, computers—because of their immense storage capacity—potentially hold a much greater amount of private information than what is typically found within the home.226

Like the cell phones or “minicomputers” at issue in Riley, computers are “such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they are an important feature of human anatomy.”227 However, unlike a cell phone—which is typically only used by one person—multiple persons often share the same computer. Ostensibly, a government search of a cell phone will only provide a glimpse into the private life of an individual whereas a government search of a computer could provide a glimpse into the private life of a family whose members share the computer. A government agent cannot walk up to outside window of a home and peek inside to catch a quick glimpse absent an exception to the warrant requirement. Nor should a government agent be able to conduct a warrantless search of a computer—undoubtedly catching more than just a quick glimpse - absent an exception to the warrant requirement. The Court in Riley, realizing the extensive privacy issues at

223. Compare United States v. Allen, 106 F.3d 695, 699 (6th Cir. 1997) (unwilling to extend the holding in Jacobsen to cases involving private searches of residences) and United States v. Williams, 354 F.3d 497, 510 (6th Cir. 2003) (noting that there is a real distinction between a Federal Express package and a home) and United States v. Young, 573 F.3d 711, 721 (9th Cir. 2009) (pointing out that unlike the container in Jacobsen, the defendant’s hotel room contained more than just contraband) and State v. Wright, 221 N.J. 456, 477 (N.J. 2015) (declining to extend the private search doctrine to homes, noting that “[i]f [its] hold otherwise would result in a sizeable exception to the warrant requirement and expand the private search doctrine beyond the minimal intrusion it originally sanctioned”) with United States v. Paige, 136 F.3d 1012, 1020 n.11 (5th Cir. 1998) (extending Jacobsen to subsequent government searches of private dwellings in instances where the initial private search of the residence is “reasonably foreseeable [due to the] activities of the home’s occupants or the circumstances within the home at the time of the private search”) and United States v. Miller, 152 F.3d 813, 816 (8th Cir. 1998) (declining to adopt or reject the “reasonable foreseeability test”); See also Lance J. Rogers, ‘Private Search’ Rule Doesn’t Apply To Warrantless Intrusions Into Homes, 97 CLR 203 (Issue No. 09, 05/27/15).
224. Riley, 134 S.Ct. at 2495 (quoting Boyd v. United States, 116 U.S. 616, 625 (1886)).
225. Id. at 2489.
226. Cf. United States v. Wicks, 73 M.J. 93, 100 (C.A.A.F. 2014) (noting “[m]odern cell phones can serve as an electronic repository of a vast amount of data akin to the sorts of personal ‘papers and effects’ the Fourth Amendment was and is intended to protect” and that both digital and physical papers both reflect our most private thoughts and activities).
227. Riley, 134 S.Ct. at 2484.
stake, held that government agents must obtain a warrant prior to searching the cell phone of an arrestee absent an exception to the warrant requirement. However, the Sixth Circuit in *Lichtenberger*—while noting that there are privacy concerns involved with searches of computers—did not go far enough. The Sixth Circuit does not preclude the application of the private search doctrine despite the privacy interests at stake when government agents perform subsequent searches of computers. Due to the extensive privacy interests at stake, courts should find the private search doctrine inapplicable to subsequent government searches of computers.

V. CONCLUSION

As Chief Justice Roberts notes in *Riley*, the notion that searching all of the data on a cell phone is “materially indistinguishable” to searches of physical containers—like a wallet or a cigarette pack—“is like saying a ride on horseback is materially indistinguishable from a flight to the moon.” Comparably, the assertion that a subsequent government search of all of the data on computer—which undoubtedly can store more data than the cell phone or “minicomputer” at issue in *Riley*—is “materially indistinguishable” from a subsequent government search of packages like those at issue in *Walter* and *Jacobsen* would be like saying a ride on horseback is materially indistinguishable from a flight to Mars. Due to the extensive privacy interests at stake, and the impracticability of applying the private search doctrine to computers—under either the physical device approach or the data or file approach—courts should preclude the government’s use of the private search doctrine when the “container” involved is a computer. Admittedly, prohibiting government agents from using the private search doctrine as a means to perform a more thorough search of a computer “will have an impact on the ability of law enforcement to combat crime [but] [p]rivacy comes at a cost.” However, “[t]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.”

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228. *Id.* at 2493-94.
229. See United States v. Lichtenberger, 786 F.3d 478, 490-91 (6th Cir. 2015).
231. *Id.* at 2493.