

INTERROGATIONS AND CONFESSIONS

Did the police constitutionally obtain the defendant's confession to murder?

Dr. Jeffrey Metzner, a psychiatrist employed by the state hospital, testified that respondent was suffering from chronic schizophrenia and was in a psychotic state at least as of August 17, 1983, the day before he confessed. Metzner's interviews with respondent revealed that respondent was following the "voice of God." This voice instructed respondent to withdraw money from the bank, to buy an airplane ticket, and to fly from Boston to Denver. When respondent arrived from Boston, God's voice became stronger and told respondent either to confess to the killing or to commit suicide. Reluctantly following the command of the voices, respondent approached Officer [Patrick] Anderson and confessed.

Dr. Metzner testified that, in his expert opinion, respondent was experiencing "command hallucinations." This condition interfered with respondent's "volitional abilities; that is, his ability to make free and rational choices." (*Colorado v. Connelly*, 479 U.S. 157 [1986])

CHAPTER OUTLINE

Introduction
 Due Process
 The Right Against Self-Incrimination
Miranda v. Arizona
 Sixth Amendment Right to Counsel: Police Interrogations

Case Analysis
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TEST YOUR KNOWLEDGE

1. Do you know the role of confessions in the criminal investigation process, the potential challenges and problems presented by confessions, and the explanations for false confessions?
2. Are you able to discuss the protections provided by the Fifth Amendment right against self-incrimination and what is protected by the Fifth Amendment and what is not protected?
3. Can you explain how *Miranda v. Arizona* protects the Fifth Amendment rights of individuals in police custody?

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4. Do you know the factors to be considered in determining whether an individual is subjected to custodial interrogation?
5. Can you explain the public safety exception?
6. Can you explain how the *Miranda* rights are to be read and the requirements for invoking the *Miranda* rights?
7. Do you know the test for the waiver of the *Miranda* rights? Explain explicit and implicit waiver.
8. Can you define “question first and warn later”?
9. Do you know the legal tests for a waiver following invocation of the *Miranda* rights?
10. Can you describe the test for interrogation?
11. Do you know the Sixth Amendment protections provided to defendants in police custody?

■ INTRODUCTION

Interrogations

The writings of the late professor Fred Inbau of Northwestern University continue to have a significant influence on the tactics and strategy of police interrogations. Professor Inbau argued throughout his career that detective novels, films, and television had misled the public into believing that the police solve most crimes by relying on scientific evidence or eyewitness testimony. He pointed out that in a significant number of cases, this type of evidence is unavailable and that the police are forced to rely on **confessions**.

Professor Inbau illustrates the importance of confessions by pointing to the hypothetical example of discovering the dead body of a female who appears to have been the victim of a criminal assault. There is no indication of a forced entry into her home, and the police investigation fails to yield DNA, fingerprints, clothing fibers, or witnesses. Law enforcement officers question everyone who may have had a motive to kill the victim, including the victim’s angry former husband and her brother-in-law, who has accumulated large gambling debts and owes the victim money. The brother-in-law eventually tires under skillful police questioning and confesses. This example, according to Inbau, illustrates three important points concerning the importance of confessions (Inbau 1961):

- Many criminal cases can be solved only through confessions or through information obtained from other individuals.
- Suspects often will not admit their guilt unless subjected to lengthy interrogations by the police.
- Successful police questioning requires sophisticated interrogation techniques that may be considered trickery or manipulative in ordinary police interactions with the public.

Inbau’s argument is nicely echoed by Supreme Court Justice Antonin Scalia’s remark that “even if I were to concede that an honest confession is a foolish mistake, I would welcome rather than reject it; a rule that foolish mistakes do not count would leave most offenders not only unconvicted but undetected” (*Minnick v. Mississippi*, 498 U.S. 146, 166–167 [1990]). It often is overlooked that in addition to speeding the conviction and punishment of the guilty, confessions can help exonerate the innocent without subjecting these individuals to the time and expense of a lengthy criminal investigation and trial. There also is the practical consideration that the **admission** of criminal guilt is an important step in an offender’s acceptance of responsibility and commitment to rehabilitation.

There are no reliable data that clearly establish the percentage of cases in which interrogations play a central role in establishing a defendant’s guilt. We can only note that jurors credit confessions with a great deal of importance in the determination of a defendant’s guilt or innocence. In summary, confessions play an important role in the criminal justice process for several reasons:

- *Crime detection.* Confessions help the police solve crimes where there is an absence of scientific evidence and witnesses.
- *Accountability.* Acknowledging guilt is a significant step toward rehabilitation.
- *Efficiency.* Confessions facilitate both criminal convictions of the guilty and exoneration of the innocent.

Confessions also present potential challenges and problems for the criminal justice system:

- *Abuse.* The police may be tempted to employ physical abuse and psychological coercion to extract confessions. Abusive conduct is encouraged by the practice of incommunicado police interrogation—the carrying out of interrogations in police stations without the presence of defense lawyers or judicial supervision.
- *Fair procedures.* A reliance on pretrial confessions to establish a suspect's guilt is contrary to the principle that guilt is to be established beyond a reasonable doubt through the adversarial process in a courtroom.
- *Reliability.* There is the danger that a conviction will be based on a false confession.
- *Inequality.* Uneducated and disadvantaged suspects and individuals lacking self-confidence may be particularly vulnerable to manipulation and trickery. On the other hand, the wealthy and educated are more likely to possess the self-confidence and understanding to refuse to talk to the police and are more likely to be able to afford a lawyer.

The threat of **false confessions** and convictions has been of particular concern. This calls into question the adequacy of the protections that are made available to defendants in the criminal justice process and is pointed to by critics as illustrating the lack of fairness in the criminal justice process.

Three Constitutional Limitations on Police Interrogations

The judiciary has relied on three constitutional provisions to ensure that confessions are the product of fair procedures:

Fourteenth Amendment Due Process Clause. As we have seen, there is a danger that the pressures of the interrogation process may lead to false confessions. The poor, uneducated, and mentally challenged are particularly vulnerable to trickery and manipulation. Former Supreme Court justice Arthur Goldberg observed that history teaches that “a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation” (*Escobedo v. Illinois*, 378 U.S. 478, 488–489 [1964]).

In the 1930s, the Supreme Court began to rely on the Fourteenth Amendment Due Process Clause to ensure that confessions obtained by state law enforcement officials were voluntary and were not the product of psychological or physical abuse. The Due Process Clause provides that “[n]o state shall . . . deprive any person of life, liberty, or property without due process of law” and continues to be employed by courts to ensure that confessions are voluntary. An **involuntary confession** violates an individual's *liberty* to make a voluntary choice whether to confess and ultimately may lead to imprisonment and to a loss of liberty.

Fifth Amendment Self-Incrimination Clause. In the American *accusatorial system* of criminal procedure, the burden is on the prosecution to establish guilt beyond a reasonable doubt at trial, and the defendant may not be compelled to testify against himself or herself. This is distinguished from an *inquisitorial system* of criminal procedure in which the defendant does not enjoy the privilege against self-incrimination and must answer questions posed by the judge, who typically interrogates witnesses. The drafters of the U.S. Constitution were familiar with the English **Star Chamber**, a special court established by the English king in the fifteenth century that was charged with prosecuting and punishing political and religious dissidents. This inquisitorial tribunal employed torture and abuse to extract confessions and was authorized to hand out any punishment short of death. The reign of terror was effectively ended by Puritan John Lilburne who, in 1637, defied the chamber's order that he confess to spreading dissident religious views. Lilburne was fined, pilloried, whipped, and imprisoned in leg irons in solitary confinement. Parliament ordered his release in 1640, and the House of Lords subsequently vacated Lilburne's sentence, noting that it was “illegal . . . unjust . . . [and] against the liberty of the subject and law of the land” (Levy 1968: 272–291).

The right against self-incrimination was viewed as sufficiently important that eight of the original American states included provisions that no one may be “compelled to give witness against himself,” and the right against self-incrimination subsequently was included in the Fifth Amendment to the U.S. Constitution.

In 1966, in *Miranda v. Arizona*, the U.S. Supreme Court concluded that the inherently coercive environment of **incommunicado interrogation** overwhelmed individuals’ ability to assert their right against self-incrimination. The Supreme Court responded by interpreting the Self-Incrimination Clause requirement that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself” to require the police to read individuals the *Miranda* rights prior to police interrogation (*Miranda v. Arizona*, 384 U.S. 436 [1966]).

The Supreme Court later held that the Sixth Amendment right to counsel protects individuals subjected to interrogation following the “initiation of proceedings against them.”

Sixth Amendment right to counsel. The U.S. Supreme Court supplemented the *Miranda* judgment in a series of cases that held that once the government has taken formal steps to prosecute an individual, he or she possesses a Sixth Amendment right to counsel. At this point, it is clear that the government is determined to prosecute, and the Supreme Court ruled that the police are prohibited by the Sixth Amendment from circumventing the trial process and establishing a suspect’s guilt through extrajudicial interrogation. The Court explained that the right to an attorney cannot be limited to the trial itself because the denial of access to a lawyer at this early stage of the prosecutorial process may seal the defendant’s fate and reduce the trial into a “mere formality” (*Brewer v. Williams*, 430 U.S. 387, 398 [1977]).

Your goal in this chapter should be to learn the strengths and weaknesses and differences between the three constitutional approaches to interrogations. Pay attention to the judiciary’s effort to strike a balance between the need for confessions and the rights of suspects. Consider whether the pendulum has swung too far toward law enforcement or the protection of defendants or whether a proper balance has been struck. One final point: Keep three terms in mind as you read this chapter. The text, at times, uses these terms interchangeably, but they have distinct meanings:

Admission. An individual admits a fact that tends to establish guilt, such as his or her presence at the shooting scene. An admission when combined with other facts may lead to a criminal conviction.

Confession. An individual acknowledges the commission of a crime in response to police questioning or may voluntarily approach the police and admit to the crime.

Statement. In an oral or written declaration to the police, an individual may assert his or her innocence.

■ DUE PROCESS

The Voluntariness Test

Between 1936 and 1966, the U.S. Supreme Court held over thirty confessions obtained by state and local police unconstitutional and inadmissible at trial under the **Fourteenth Amendment due process voluntariness test**.

The *voluntariness test* can be traced to the English common law. Eighteenth-century English common law judges declared that confessions were inadmissible into evidence if they had been extracted through the threat or application of force, through a false promise not to prosecute, or through a promise of lenient treatment. Confessions obtained by a threat or promise of favorable treatment were thought to be unreliable and might result in the conviction of innocent individuals. There was no easy method to determine whether a confession was true or false, and English courts employed the shorthand test of asking whether the defendant’s **statement** was voluntary or involuntary (*Rex v. Warickshall*, 168 Eng. Rep. 234, 235 [K.B. 1783]).

Voluntariness

The Supreme Court has held that to be admissible into evidence, a confession must have been made freely, voluntarily, and without compulsion or inducement of any sort. A confession violates due process and is excluded from evidence that involves the following:

Coercion. The police or government officials subject the defendant to physical or psychological coercion.

Will to resist. The coercion overcomes the will of an individual to resist.

How do courts determine whether there was coercion and whether the coercion overcame a defendant's will to resist? The determination as to whether a confession is involuntary is based on the totality of the circumstances surrounding a confession (*Haynes v. Washington*, 373 U.S. 503, 533–534 [1963]). The prosecution bears the burden of establishing voluntariness by a “preponderance of the evidence” (*Lego v. Twomey*, 404 U.S. 477 [1972]). In evaluating the totality of the circumstances, courts consider a number of factors:

- **Physical abuse.** Physical abuse and threats of abuse by the police or angry crowds.
- **Psychological abuse and manipulation.** Threats, rewards, or trickery inducing a suspect to confess.
- **Interrogation.** The length, time, and place of questioning and the number of police officers involved.
- **Attorney.** A refusal to permit a suspect to consult with an attorney, friends, or family.
- **Defendant.** The age, education, and mental and emotional development of the defendant.
- **Procedural regularity.** A failure by the police to follow proper legal procedures, including the *Miranda* warning.
- **Necessity.** The police are provided greater flexibility in interrogation when attempting to solve a crime or exonerate a defendant than when they already possess evidence of a defendant's guilt.

Spano v. New York illustrates the totality-of-the-circumstances approach to determining whether a confession is voluntary or involuntary. In *Spano*, the U.S. Supreme Court held that the defendant's “will was overborne by official pressure, fatigue and sympathy falsely aroused.” The Court's conclusion was based on a number of factors (*Spano v. New York*, 360 U.S. 315, 323 [1959]):

- **Psychological abuse.** The police employed a childhood friend to play on the defendant's sympathy.
- **Interrogation.** The defendant was questioned for eight hours at night by fourteen officers, and his confession was written down by a skilled and aggressive prosecutor.
- **Attorney.** The police disregarded the defendant's refusal to speak on the advice of counsel and ignored his request to contact his lawyer.
- **Defendant.** The defendant was 25 years of age and never before had been subjected to custodial arrest or to police interrogation. He had not completed high school and had a psychological disability.
- **Procedural regularity.** The police failed to immediately bring the defendant before a judge and instead subjected him to interrogation.
- **Necessity.** The police already possessed eyewitnesses to the shooting and were engaged in securing the evidence required to convict the defendant rather than in identifying the individual responsible for the crime.

The Due Process Test Today

Keep in mind as you continue to read this chapter that an involuntary confession violates due process of law and is inadmissible into evidence, even in those instances in which a defendant may have been read his or her *Miranda* rights. Two recent cases illustrate the U.S. Supreme Court's continuing reliance on the due process voluntariness test:

Mincey v. Arizona. Rufus Mincey, while in intensive care in the hospital, was interrogated by a police detective who informed him that he was under arrest for murder. Mincey's requests for a lawyer were disregarded, and the detective continued the interrogation. The suspect was unable to talk because of a tube in his mouth and responded by writing down his answers. The Supreme Court determined that Mincey was “weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne” and that his confession had been obtained in violation of due process of law. The Court stressed that an involuntary confession may not be used at trial for any purpose whatsoever (*Mincey v. Arizona*, 437 U.S. 385, 401–402 [1978]).

Arizona v. Fulminante. Oreste Fulminante was incarcerated on federal firearms charges and established a friendship with Anthony Sarivola, a paid federal informant who was serving a sixty-day sentence for extortion and posing as an organized crime figure. Sarivola was instructed to obtain information regarding Fulminante's possible involvement in the murder of his young daughter. Sarivola offered to protect Fulminante from the other inmates who allegedly disliked "child killers" on the condition that Fulminante tell him what happened to his daughter. Fulminante admitted sexually assaulting and shooting his daughter in the head. Sarivola later testified at Fulminante's murder trial. The Supreme Court examined the totality of circumstances and concluded that the confession was involuntary. The Court reasoned that Fulminante was a child murderer whose fear of physical retaliation led him to confide in Sarivola. Fulminante, according to the Court, felt particularly susceptible to physical retaliation because he possessed a slight build and, while previously incarcerated, could not cope with the pressures of imprisonment and in the past had been admitted to a psychiatric institution (*Arizona v. Fulminante*, 499 U.S. 279 [1991]).

In *Colorado v. Connelly*, Francis Connelly approached a uniformed officer in downtown Denver and without prompting stated he had murdered someone and wanted to talk about the killing. Connelly was read his *Miranda* rights and stated he had been a patient in several mental hospitals and he wanted to talk to Officer Patrick Anderson because his conscience had been bothering him. The defendant was read his *Miranda* rights by a second officer and in response stated he had come all the way from Boston to confess to the murder of Mary Ann Junta, a young girl whom he had killed in Denver. A search of police records revealed that the body of a female had been discovered in the area where Connelly stated the killing occurred (*Colorado v. Connelly*, 479 U.S. 157 [1986]).

The defendant, after being incarcerated, became increasingly disoriented, began giving confused answers, and stated "voices" directed him to come to Denver and that he had followed the voices in confessing. A psychiatric examination determined that Connelly was a chronic schizophrenic and was in a psychotic state at the time he confessed. After Connelly arrived in Boston, the voices became stronger and told him to confess to the killing or commit suicide. The defendant was suffering from command hallucinations that interfered with his ability to make free and rational choices.

The Colorado Supreme Court excluded Connelly's confession on the grounds that it was involuntary. The U.S. Supreme Court reversed the Colorado court on the grounds that Connelly had failed to demonstrate that his confession was the product of government coercion.

The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other. . . . The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause. . . . The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. . . . A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum.

Legal Equation

Due process voluntariness test	=	Confession is made freely, voluntarily, and without compulsion or inducement.
Confession is inadmissible	=	Police or government officials subject an individual to physical or psychological coercion
	+	Coercion overcomes the will of an individual to resist as determined by a totality of the circumstances.

■ THE RIGHT AGAINST SELF-INCRIMINATION

The Self-Incrimination Clause of the Fifth Amendment to the U.S. Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This constitutional right was extended to the states in *Malloy v. Hogan* in which the U.S. Supreme Court held that the Fifth Amendment's prohibition on compulsory self-incrimination is incorporated into the Fourteenth Amendment and is applicable against the states. Justice William Brennan observed that the state and federal governments are "constitutionally compelled to establish

guilt by evidence independently and freely secured, and may not, by coercion prove a charge against an accused out of his own mouth” (*Malloy v. Hogan*, 378 U.S. 1, 6 [1964]).

In other words, *you do not have to answer questions that may tend to incriminate you, and your failure to respond cannot be used against you in a criminal proceeding*. Why do we have a right that works to the advantage of guilty individuals by allowing them to withhold evidence from prosecuting authorities? This right was a reaction to procedures in religious courts and in the politically repressive Star Chamber in sixteenth-century England. These tribunals placed the burden on individuals to answer questions and to prove that they were not heretics or political dissidents. Justice Arthur Goldberg provided several reasons for the right against self-incrimination, a right that he stated “reflects many of our fundamental values and most noble aspirations” (*Murphy v. Waterfront Commission*, 378 U.S. 52, 55 [1964]). In considering these points, ask yourself whether we should have a right against self-incrimination:

- *Cruel trilemma*. Individuals should not be compelled to choose between “self-accusation, perjury or contempt.” The law, in other words, should not place an individual in the position of making the unhappy choice of admitting guilt, denying guilt and facing a perjury charge for false testimony, or refusing to speak and being held in contempt of court for failing to cooperate with the judicial process.
- *Coercion*. There is a fear that coercion and force will be used to compel individuals to incriminate themselves.
- *Adversarial system*. We have an *adversarial* rather than *inquisitorial* legal system. The accused is not required to establish his or her innocence; the state has the burden of proving guilt beyond a reasonable doubt.
- *Privacy*. An individual should not be forced to disclose information to the government.

Information is *incriminating* if there is a “substantial” and “real” threat that the information may lead to a criminal charge or establish a link in the chain of evidence that may result in a criminal prosecution. The U.S. Supreme Court recently dismissed a defendant’s challenge to a “stop-and-identify” statute on the grounds that the defendant did not possess “any articulated real and appreciable fear that his name would be used to incriminate him, or that it ‘would furnish a link in the chain of evidence needed to prosecute’ him. . . . Answer[ing] a request to disclose a name is likely to be so insignificant . . . as to be incriminating only in unusual circumstances” (*Hiibel v. Sixth Judicial Court*, 542 U.S. 177 [2004]).

The second point to remember is that the privilege against self-incrimination is violated when the incriminating information is used against an individual in a legal proceeding. In *Chavez v. Martinez*, the defendant was shot by a police officer and was questioned by the officer while he was in intense pain in a hospital. Ben Chavez admitted during the interrogation that he had taken the officer’s pistol from his holster and pointed the weapon at him. Chavez filed a civil action for damages against the officer for violating his right against self-incrimination. The Supreme Court ruled that Oliverio Martinez was never made a “witness” against himself because his statements were never admitted as testimony against him in a criminal case. Nor was he ever placed under oath and exposed to “the cruel trilemma of self-accusation, perjury or contempt” (*Chavez v. Martinez*, 538 U.S. 760 [2003]).

The third point is that the requirement that you may not be *compelled* to be a witness against yourself is satisfied when you are *required* to answer questions asked by the government. In *Hoffman v. United States*, the Supreme Court upheld the right of an organized crime figure to refuse to answer questions regarding his employment and associates before a grand jury investigating frauds perpetrated against the government. The Supreme Court observed that the “immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime” (*Hoffman v. United States*, 341 U.S. 479, 485 [1951]). On the other hand, there is no compulsion when a driver arrested for drunk driving is *offered the choice* of either submitting to a simple and relatively painless blood alcohol test or having his or her refusal to do so used against him or her in court (*South Dakota v. Neville*, 459 U.S. 553 [1983]).

Finally, the prohibition against being compelled to be a witness against oneself is limited to testimonial evidence, or evidence that is communicative in character. What does this mean? The Supreme Court explained the testimonial or communicative requirement in *Doe v. United States*. The Court stated that the government is prohibited from compelling you to make a factual statement, forcing you to disclose information that connects you to a criminal offense, or requiring you to share your private thoughts or beliefs with the government.

The Supreme Court has noted that the privilege against self-incrimination encompasses trial testimony, oral confessions to the police, and personal documents. On the other hand, there is no privilege against self-incrimination where the government compels you to provide **nontestimonial evidence**. Judges have held that nontestimonial evidence includes voice and handwriting exemplars, fingerprints, participation in a lineup, the police requiring you to try on clothes or to walk in a straight line, hair and urine samples, the withdrawing of blood, the examination of scars and tattoos, and the taking of photos. This evidence may be used against you in a criminal proceeding, and your failure to cooperate in these procedures may be introduced at trial to establish your guilt. You also will be held in contempt of court if you refuse to provide this type of physical or nontestimonial evidence (*Doe v. United States*, 487 U.S. 201 [1988]).

In the case of *Schmerber v. California*, Armando Schmerber was convicted of driving an automobile while under the influence of alcohol. At the direction of the police, a blood sample was withdrawn from Schmerber's body by a physician at the hospital. The chemical analysis of this sample revealed "a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication, and the report of this analysis was admitted in evidence at the trial" (*Schmerber v. California*, 384 U.S. 757 [1966]).

Both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements; to write or speak for identification; to appear in court; to stand; to assume a stance; to walk; or to make a particular gesture. The distinction that has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

You no doubt have a puzzled look on your face because the line between testimonial or communicative and nontestimonial or physical evidence does not appear to be crystal clear. You are correct. Consider *Pennsylvania v. Muniz*. Inocencio Muniz was arrested for driving while intoxicated. He was taken to a "booking center," and his subsequent interrogation by the police was recorded. Muniz was first asked his name, address, height, weight, eye color, date of birth, and current age. His response was slow and slurred. These questions asked for routine information and were not incriminating. The police officer then asked Muniz whether he knew the date of his sixth birthday. Muniz replied, "No, I don't."

Was Muniz's answer to the sixth-birthday question admissible in evidence? The Supreme Court held in a 5-4 ruling that this question called for a *testimonial response* that violated Muniz's right against self-incrimination and that his response was inadmissible in evidence. The question confronted Muniz with the unhappy situation of choosing either self-incrimination or perjury. Muniz, according to Justice Brennan, either could admit that he did not know the date of his sixth birthday or could answer untruthfully and report a date of birth that he knew was inaccurate. His answer in either case would indicate that Muniz's mental state was impaired by alcohol. The Supreme Court majority reasoned that either alternative would be the equivalent of Muniz's admitting that he was too intoxicated to answer the question accurately.

Eight justices also held for different reasons that Muniz's slurred speech in answering the booking questions was admissible to establish that he was inebriated. Four of these justices explained that Muniz's slurred speech was nontestimonial and demonstrated Muniz's lack of "muscular coordination" in forming his words and that this related to Muniz's physical act of speaking rather than to the words that he was speaking. As a result, the slurred speech was nontestimonial rather than testimonial evidence, did not violate Muniz's right against self-incrimination, and was properly introduced into evidence. Is this distinction persuasive? (*Pennsylvania v. Muniz*, 496 U.S. 582 [1990]).

Legal Equation

Privilege against self-incrimination	=	Compulsion
	+	Criminal case
	+	Witness against yourself
	+	Reveal testimonial evidence.

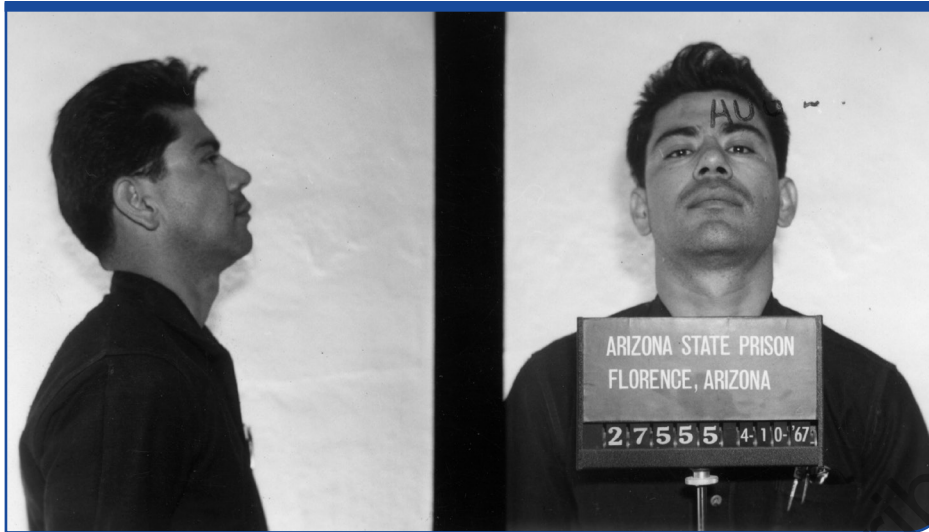


PHOTO 16.1

Ernest Miranda was the principal defendant in the famous case of *Miranda v. Arizona* that established the *Miranda* rule for interrogation.

■ MIRANDA V. ARIZONA

In 1966, in *Miranda v. Arizona*, a five-judge majority of the U.S. Supreme Court held that the prosecution may not use statements stemming from the custodial interrogation absent procedural safeguards to protect a defendant's Fifth Amendment privilege against self-incrimination. The Court majority concluded that absent a three-part *Miranda* warning, the “inherently coercive” pressures of police interrogation had been proven to overwhelm individuals' capacity to exercise their right against self-incrimination, and no confession given under these conditions “can truly be the product of a suspect's free choice” (*Miranda v. Arizona*, 384 U.S. 436 [1966]).

What were these coercive pressures? According to the Court, individuals held in detention were isolated from friends, family, and lawyers in unfamiliar surroundings and were subject to sophisticated psychological tactics, manipulation, and trickery designed to wear down their resistance. The Court pointed to police manuals instructing officers to engage in tactics such as displaying confidence in a suspect's guilt, minimizing the seriousness of the offense, wearing down individuals through continuous interrogation, and using the “Mutt and Jeff” strategy in which one officer berates a suspect and the other gains the suspect's trust by playing the part of his or her protector. The “false lineup” involves placing a suspect in a lineup and using fictitious witnesses to identify the suspect as the perpetrator. In another scenario, fictitious witnesses identify the defendant as the perpetrator of a previously undisclosed serious crime, and the defendant panics and confesses to the offense under investigation.

Miranda extended the Fifth Amendment privilege against self-incrimination to police-orchestrated interrogations committed prior to trial. The Court held that if a person in custody is to be subjected to interrogation, he or she must be informed in clear and unequivocal terms of each of the following rights:

Silence. He or she has the right to remain silent. The government may not use an individual's decision to remain silent against him or her.

Consequences of waiver. The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court.

Counsel. Because the circumstances surrounding in-custody interrogation can operate very quickly to overhear the will of an individual made aware of his or her privilege by interrogators, the warning that the individual has the right to consult with a lawyer prior to interrogation and to have counsel present during questioning is indispensable to the protection of the Fifth Amendment privilege.

Appointed counsel. The individual should be warned not only that he or she has the right to consult with an attorney, but also that if he or she is indigent, a lawyer will be appointed to represent him or her. Without this additional warning, the warning of the right to consult with counsel would often be understood as meaning only that he or she can consult with a lawyer if he or she has one or has the funds to obtain one.

The warnings are a prerequisite to the interrogation of a suspect. An individual may not be interrogated if the suspect indicates he or she wants to invoke his or her right to silence or right to consult with an attorney. A heavy burden rests on the government to demonstrate that a suspect knowingly, voluntarily, and intelligently waived his or her rights. There is no requirement that the police stop an individual who enters a police station and states that he or she wishes to confess voluntarily to a crime.



16.1 YOU DECIDE

Robert L. Brown was charged in a Louisiana court with unlawful possession of heroin. He was convicted and sentenced to ten years in prison. Brown was apprehended when he unsuccessfully attempted to flee from a police raid of a drug house. He was advised that he had a right to speak or remain silent, that anything he said might be used against him, and that he had a right to counsel. During the reading of the *Miranda* warnings, Brown proclaimed, "I know all that." Brown then confessed that he used narcotics and, in fact, had injected earlier in the day.

A federal district court pointed out that Brown was not told that he had the right to have an attorney present if he decided to make a statement and that he was not told that a lawyer would be appointed to represent him in the event that he lacked funds. One of the arresting officers also testified that he did not afford the defendant "any opportunity to procure a lawyer." Did Brown's statement that "I know all that" constitute a waiver of Brown's right to receive the full *Miranda* warnings? Cite language from the *Miranda* decision in support of your answer. See *Brown v. Heyd* (277 F. Supp. 899 [D.C.E.D. La. 1967]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.

Legal Equation

- Fifth Amendment privilege against self-incrimination and police interrogation
- = The prosecution may not use inculpatory or exculpatory statements stemming from custodial interrogation of the defendant unless it demonstrates use of procedural safeguards effective to secure privilege against self-incrimination
 - + Custodial interrogation is questioning initiated by law enforcement officers after an individual has been taken into custody or deprived of his or her freedom of action in a significant way
 - + Prior to any questions, the suspect must be clearly and unequivocally informed that he or she has the right to remain silent, that any statement he or she makes may be used as evidence against him or her, and that he or she has the right to the presence of an attorney, appointed or retained
 - + The *Miranda* decision also provides that the defendant may voluntarily, knowingly, and intelligently waive any or all of these rights; the fact that a defendant answers some questions does not prohibit a defendant from invoking his or her right to silence or to a lawyer
 - + A heavy burden rests on the prosecution to prove that a defendant waived his or her right against self-incrimination and/or the right to a lawyer; silence does not constitute a waiver, and a defendant who invokes his or her right to silence is not subject to additional interrogation
 - + A defendant who invokes his or her right to a lawyer may not be questioned outside the presence of the attorney
 - + A prosecutor may not penalize a defendant's invocation of his or her right against self-incrimination by commenting on the invocation of this right at trial
 - + Statements in violation of *Miranda* may not be introduced into evidence.

Miranda and the Constitution

Miranda, as we have seen, supplemented the due process voluntariness test by requiring that the police read suspects subjected to custodial interrogation the *Miranda* warnings. The decision in *Miranda* sparked a wave of criticism, and in 1968, the U.S. Congress took the aggressive step of passing legislation that required federal judges to apply the voluntariness test. The Omnibus Crime Control and Safe Streets Act provided that a confession shall be admissible as evidence in federal court if it is “voluntarily given.” The act listed a number of factors that judges were to consider in determining whether a confession was voluntary.

In 2000, in *Dickerson v. United States*, Chief Justice William Rehnquist, who himself had been a constant critic of *Miranda*, held that *Miranda* was a “constitutional decision” that is required by the Fifth Amendment to ensure that detainees are able to exercise their right against self-incrimination in the inherently coercive atmosphere of custodial interrogation. This is an important statement because laws passed by Congress are required to conform to the U.S. Constitution, in this instance, the Fifth Amendment. Congress accordingly lacked authority to instruct the judiciary to disregard the requirements of *Miranda* and to rely solely on the voluntariness test. Justice Rehnquist also stressed that *Miranda* has become “embedded in routine police practice to the point where the warnings have become part of our national culture” (*Dickerson v. United States*, 530 U.S. 428 [2000]). We now examine the central elements of the *Miranda* rule:

- Custodial interrogation
- The public safety exception
- The *Miranda* warnings
- Invoking the *Miranda* rights
- Waiver
- Interrogation

The chapter concludes by discussing the Sixth Amendment right to counsel.

In reading this chapter, you will see that although the Supreme Court affirmed the constitutional status of the *Miranda* decision, the requirements of *Miranda* are constantly being adjusted in an effort to balance *Miranda*'s protection of suspects against society's interest in obtaining confessions. As you progress through the chapter, ask yourself whether the *Miranda* warnings provide adequate protection for defendants. In the alternative, does *Miranda* handcuff the police? In addition, consider whether the *Miranda* rules are too complex to be easily absorbed by police, lawyers, and judges. We start by examining custodial interrogation.

CRIMINAL EVIDENCE AND PUBLIC POLICY

Individuals isolated in interrogation rooms have been known to make false confessions, even in instances in which the police did not pressure or manipulate suspects and treated suspects in a balanced and respectful fashion.

On April 19, 1989, a 28-year-old jogger was viciously attacked and raped in Central Park in New York City. Five African American and Latino teenagers ranging in age from 14 to 16 who had been arrested for muggings in the park that night confessed and the following year were convicted in two separate trials. Four of the five made videotaped statements with parents or relatives present. Typical was one young man's description that “Raymond had her arms, and Steve had her legs. He spread it out. And Antron got on top, took her panties off.” A second confessed that “I grabbed one arm, some other kid grabbed one arm, and we grabbed her legs and stuff. Then we all turns getting on her, getting on top of her.” One suspect went so far as to reenact how he pulled off her running pants.

The young men claimed in court that they had been pressured into the confessions. The jurors at the two trials nevertheless convicted the defendants. The massive publicity surrounding the case may have influenced the jurors to overlook the inconsistencies in the defendants' accounts and to disregard the fact that only a few hairs on one of the defendants linked the juveniles to the rape. In 2002, Matias Reyes, who was serving over thirty years for murder and four rapes, confessed to the Central Park rape, and his DNA was found to match that of the perpetrator. On December 19, 2002, the convictions of the five men were overturned.

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How is this possible? A number of factors in the Central Park jogger case combined to create the danger of a false confession:

- **Police bias.** The police were under intense pressure to solve the crime and quickly concluded that the suspects must be guilty and focused on obtaining confessions.
- **Age and intelligence.** Several of the young suspects may have been tricked into confessing. Two had IQs below 90 and may have failed to understand the meaning of a confession.
- **Misleading remarks and false evidence.** Some of the young men claimed that they had been told that they would be permitted to go home if they confessed. One suspect reportedly was told that his fingerprints had been found at the crime scene, another was informed that the others had implicated him, and others were told that hairs linked one of the young men to the crime.
- **Lengthy interrogations.** The young men confessed after being interrogated for more than twenty-eight hours.

How frequent are false confessions? Professors Steve Drizen and Richard Leo (2004) documented 125 proven false confessions between 1971 and 2002. The good news is that the criminal justice system responded by detecting two-thirds of these confessions prior to trial. On the other hand, forty-four of the defendants were sentenced to at least ten years in prison, and nine of these defendants were sentenced to death. This is not an overwhelming number of false convictions, but even a small number of false convictions are “too many.” Psychologists tell us that there are three types of false confessors:

- **Voluntary false confessors.** Suspects provide false confessions out of a desire for publicity or because they feel guilty about a past crime or are mentally challenged.
- **Compliant false confessors.** Suspects confess in order to obtain a benefit such as the avoidance of abuse or mistreatment or to receive favorable consideration at sentencing. This might range from a lighter sentence to imprisonment in an institution nearby to an offender’s family.
- **Internalized false confessors.** Suspects accept the police version of the facts or fail a lie detector test and come to believe that they actually committed the crime.

False confessions are a small percentage of all confessions obtained by the police. These confessions, however, may result in conviction of the innocent and undermine respect for the entire criminal justice system. Many legal scholars advocate the taping of interrogations to provide a record of what transpired in the interrogation room and to guard against psychologically and physically coercive interrogations. The FBI and various states, by statute or court decision, require taping of at least some serious felony cases. This has been required by the supreme courts of Alaska, Minnesota, and New Jersey and for certain offenses by the state legislatures of Illinois, Maine, New Mexico, Texas, and Wisconsin and by the District of Columbia. In 2004, the American Bar Association also endorsed the audio or video recording of interrogations. Australia, Canada, and England provide for the taping of confessions. At last count, 450 local police departments also require the videotaping of interrogations.

Custodial Interrogation

The *Miranda* warnings are triggered when an individual is in custody and interrogated. The *Miranda* decision defines **custodial interrogation** as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way.” In *Beckwith v. United States*, the Supreme Court clarified that a *focus* by law enforcement on an individual is not sufficient to require the reading of the *Miranda* rights. In *Beckwith*, two Internal Revenue Service (IRS) agents interviewed the defendant for three hours in a private home; the conversation was described by one of the agents as “friendly” and “relaxed.” The Supreme Court held that being the focus of an investigation does not involve the inherently coercive pressures that *Miranda* described as inherent in incommunicado custodial interrogation (*Beckwith v. United States*, 425 U.S. 341 [1976]).

What, then, is meant by custodial interrogation? *Miranda* stated that it is not considered custody and the *Miranda* warnings are not required when the police engage in general questioning at a crime scene or other general investigative questioning of potential witnesses. The *Miranda* warnings also need not be given to an individual who voluntarily enters a police station and wishes to confess to a crime or to a person who voluntarily calls the police to offer a confession or another statement. On the other hand, the *Miranda* warnings are required when an individual is subjected to a custodial arrest and to interrogation. At this point, an individual is under the control of the police and likely will be subjected to incommunicado interrogation in an isolated and unfamiliar environment.

The challenge is to determine at what point, short of being informed that he or she is under custodial arrest, an individual is exposed to pressures that are the “functional equivalent of custodial arrest” and the *Miranda* rights must be read. What if you are walking home and are stopped by the police late at night and they ask what you are doing in the neighborhood? This has important consequences for law enforcement. Requiring *Miranda* warnings whenever an officer comes in contact with a citizen would impede questioning. This might make sense because every citizen interaction with an officer is somewhat intimidating and coercive. On the other hand, requiring a clearly coercive environment before the *Miranda* warnings are required would limit the *Miranda* warnings to a narrow set of circumstances. How does the Supreme Court resolve these considerations? At what point short of a custodial arrest are the *Miranda* warnings required?

The Supreme Court adopted an “objective test” for custodial interrogation that requires judges to evaluate the totality of the circumstances. In *Stansbury v. California*, the Supreme Court held that “the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned” (*Stansbury v. California*, 511 U.S. 318, 323 [1994]).

Custodial interrogation is not based solely on the seriousness of the crime for which you have been stopped and questioned or based simply on the location of the interrogation. Custody is based on whether, in the totality of the circumstances, a reasonable person would believe that he or she is subjected to formal arrest or to police custody to a degree associated with a formal arrest (i.e., the functional equivalent of formal arrest).

Courts typically *ask whether a reasonable person would feel free to leave*. In evaluating the totality of circumstances, judges consider a number of factors. Remember, no single factor is crucial in determining whether a reasonable person would believe that he or she is subject to custodial interrogation (not free to leave). The factors to be considered include the following:

- The number of police officers
- Whether the officer tells the individual that he or she is free to leave or not free to leave
- The length and intensity of the questioning
- Whether the officer employs physical force to restrain the individual
- Whether the stop is in public or in private
- The location of the interrogation
- Whether a reasonable person would believe that the stop would be brief or whether the stop would result in a custodial arrest
- Whether the individual is in familiar or unfamiliar surroundings
- Whether the suspect is permitted to leave following the interrogation

The totality-of-the-circumstances test means that custody is determined on a case-by-case basis. Consider the Supreme Court decisions in the following cases:

Home. In *Orozco v. Texas*, the Supreme Court held that the defendant was subjected to custodial interrogation when four police officers entered his bedroom at 4:00 A.M. to interrogate him regarding a shooting (*Orozco v. Texas*, 394 U.S. 324 [1969]).

Parole interview. Marshall Murphy, a probationer, agreed to meet his probation officer regarding his “treatment plan” and, during the meeting, admitted that he had committed a rape and murder. The Supreme Court found that Murphy was familiar both with the surroundings and with his probation officer and that he was not physically restrained and could have left at any time. The possibility that terminating the meeting would lead to revocation of probation, in the view of the Court, was not comparable to the pressure on a criminal suspect who is not free to walk away from interrogation by the police (*Minnesota v. Murphy*, 465 U.S. 420 [1984]).

Police station. In *Oregon v. Mathiason*, Carl Mathiason, a parolee, voluntarily appeared at the police station at the request of an officer. Mathiason confessed after the officer stated that he believed that the suspect was involved in a recent burglary, falsely told Mathiason that his fingerprints had been discovered at the scene of the crime, and

explained that truthfulness would possibly be considered in mitigation at sentencing. The Supreme Court determined that there was no custodial interrogation because the defendant voluntarily came to the station house, was informed that he was not under arrest, and left following the interview (*Oregon v. Mathiason*, 429 U.S. 492 [1977]).

Prison. In *Howes v. Fields*, the Supreme Court held that whether the questioning of an inmate who is “removed from the general prison population” and interrogated about “events that occurred outside the prison” is custodial depends on the totality of circumstances. The Court stressed that there was no “categorical rule” that the interrogation of an inmate “always” is custodial. The objective circumstances of the interrogation were consistent with an interrogation environment in which a reasonable person would “have felt free to terminate the interview and leave.” Randall Lee Fields was escorted by a corrections officer to a conference room where he was questioned for between five and seven hours by two sheriff’s deputies about his alleged sexual molestation of a 12-year-old boy. Fields was informed that he could leave and return to his cell at any time, was not physically restrained or threatened, and was interrogated in a well-lit conference room and offered food and water, and the door was occasionally left open. An inmate does not suffer the fear and anxiety of an individual who is arrested and feels isolated and alone in an alien environment, will not be persuaded to confess to obtain his or her release, and is aware that his interrogators do not have the authority to prolong his or her detention (*Howes v. Fields*, 565 U.S. ____ [2012]).

Traffic stop. In *Berkemer v. McCarty*, McCarty was stopped by Highway Patrol Officer Williams who observed McCarty weaving in and out of a lane. Williams observed that McCarty experienced difficulty with his balance when he exited the vehicle and concluded that he would charge him with a traffic arrest and take him into custody. McCarty was unable to successfully complete a field sobriety test and in response to questions admitted that he had consumed several beers and marijuana. McCarty was taken into custody without being read his *Miranda* rights and made several additional incriminating statements. McCarty was subsequently convicted of the first-degree misdemeanor of operating a motor vehicle while under the influence of drugs or alcohol. McCarty appealed and argued that he was in custody when pulled over by Officer Williams and should have been read his *Miranda* rights.

The Supreme Court rejected the argument that the *Miranda* warnings are required only for felonies. The Court nonetheless ruled that McCarty was not in custody when initially required to pull over, ruling that a traffic stop normally does not exert pressures that significantly impair an individual’s exercise of his or her Fifth Amendment right against self-incrimination. Traffic stops presumably are brief and public and typically are not police dominated. The Supreme Court also held that between the initial stop and the custodial arrest, McCarty was not subject to constraints “comparable” to formal arrest. During this relatively short period, Williams did not communicate his intent to arrest McCarty, and his unarticulated plan was considered to have little relevance to the question of custody. The relevant inquiry in determining whether an individual is in custody is how a reasonable person in the suspect’s situation would understand his or her situation. Would a reasonable person feel free to leave (not in custody), or would a reasonable person feel that his or her freedom of movement was restricted (custody)? In this case, a single police officer asked a limited number of questions and requested that McCarty perform a field sobriety test. The Supreme Court held that McCarty was not subjected to the “functional equivalent of formal arrest” (*Berkemer v. McCarty*, 468 U.S. 420 [1984]).

In *Yarborough v. Alvarado*, Michael Alvarado’s parents responded to a police request to bring their 18-year-old son to the police station. Alvarado’s parents waited in the lobby while he was interviewed by Officer Cheryl Comstock. Comstock assured Alvarado’s parents that the interview was not going to be “long.” Comstock did not give Alvarado the *Miranda* warnings, and Alvarado when interrogated admitted helping Paul Soto steal a truck and stated that he had helped conceal the murder weapon following Soto’s killing of the driver. Comstock throughout the two-hour interview focused on Soto’s crimes rather than on Alvarado’s role in the killing, and Alvarado was not threatened with arrest or prosecution. At the end of the interview, Comstock twice asked Alvarado if he needed to take a bathroom break. Following the interview, Alvarado was released to return home with his parents.

The Supreme Court recognized that although this was a “close case” the state court had acted reasonably in deciding that Alvarado had not been subjected to custodial interrogation. The Court held that whether Alvarado “would have felt that he was at liberty to terminate the interrogation and leave” was to be evaluated based on an objective test and that an individual’s age and inexperience was not to be considered. In dissent, Justice Stephen Breyer and three other justices argued that Alvarado’s age was “relevant” to determining whether a “reasonable

person in Alvarado's position [would] have felt free to get up and walk out of the . . . station house." According to the dissenting judges, it was not persuasive to evaluate Alvarado on the same standard as a "middle-aged gentleman, well-versed in police practices" (*Yarborough v. Alvarado*, 541 U.S. 652 [2004]).

In 2011, in *J.D.B. v. North Carolina*, the U.S. Supreme Court reversed course and held that the age of a juvenile subjected to police questioning is "relevant to the custody analysis" of *Miranda v. Arizona*. The Court stressed that "it is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave." The Court held that 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 the test for custodial interrogation (*J.D.B. v. North Carolina*, ___ U.S. ___ [2011]).

In *Illinois v. Perkins*, the Supreme Court held that an individual interrogated by an inmate working as an informant does not constitute custodial interrogation and that as a result the *Miranda* rights need not be read to the inmate. The reason is that the inmate is not confronted with the coercion of police interrogation (*Illinois v. Perkins*, 496 U.S. 292 [1990]).

Legal Equation

Custody	=	Custodial arrest or functional equivalent of custodial arrest.
Functional equivalent of custodial arrest	=	A reasonable person
	+	Considering the totality of the circumstances
	+	Would believe that he or she is in police custody to a degree associated with a formal arrest (is not free to leave).



16.2 YOU DECIDE

In early 2007, agents from the Department of Homeland Security Immigration and Customs Enforcement (ICE) discovered that an individual in Illinois was using the username "neodmoney" to send and receive images of child pornography. Upon further investigation, they learned that the username was associated with an address in Hanover Park where Richard Ahrens, Dale Ahrens (Richard's brother), Daniel Littledale, and Cynthia Littledale resided.

Agents Demetrius Flowers and Timothy Morris were met by campus police officers when they arrived at the College of DuPage. The officers were in uniform and carried holstered weapons, and the agents wore blue jeans and T-shirts, one of which read "Special Agent."

A uniformed officer asked Littledale to leave his classroom. The federal agents met with Littledale in the hallway and asked if he would agree to talk to them in a private office at the campus police station. Littledale consented. During the walk to the police station, the agents did not draw weapons or handcuff or physically restrain Littledale or search his backpack.

The agents reportedly spoke in a monotone and testified that Littledale appeared calm.

The private office contained a desk, a computer, and other personal items; it was not an interrogation room or an interview room. The police officers waited in the hallway during the interrogation.

Agent Flowers informed Littledale that he was not under arrest and that he was not in any trouble and told Littledale that ICE agents were executing a search warrant at his home. Littledale agreed to speak to the agents. "Approximately twenty-five minutes later, Littledale admitted that he had viewed child pornography on the computer, that he had been sending and receiving child pornography for about five or six years, and that his username was 'neodmoney' and his password was 'blackrose.'" Agent Flowers then read Littledale his *Miranda* rights and prepared a statement that Littledale signed. Littledale then confessed once again, adding that his mother had caught him looking at child pornography in the past. See *United States v. Littledale* (652 F.3d 698 [7th Cir. 2011]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.

The Public Safety Exception

In *New York v. Quarles*, the U.S. Supreme Court recognized a **public safety exception** to *Miranda*. This exception permits the police to ask questions reasonably prompted by a concern with public safety without first advising a suspect of his or her *Miranda* rights. The Supreme Court explained that a reasonable concern with the safety of the police or the public outweighs the interest in protecting a suspect's right against self-incrimination. This "narrow exception" requires that questions be directed at public safety rather than guilt or innocence. Coerced and involuntary statements are not admissible under the public safety rule. Reliance on the public safety exception requires that the following steps be satisfied (*New York v. Quarles*, 467 U.S. 649 [1984]):

- **Reasonableness.** There must be a reasonable need to protect the police or the public. The exception does not depend on the officer's subjective motivation.
- **Threat.** There must be a reasonable belief that the threat is immediate.
- **Questions.** Questions must be prompted by a reasonable concern for public safety and must be directed at public safety rather than guilt or innocence.
- **Coercion.** The statements may not be the product of police compulsion that overcomes the suspect's will to resist.

New York v. Quarles broadly defines public safety and offers no clear guidance to lower court judges and the police. A police officer who concludes that there is a threat to public safety and who fails to administer the *Miranda* warnings may find that the trial judge disagrees and orders the confession excluded from evidence. The lack of a clear definition of public safety also runs the risk that courts will broadly interpret the public safety exception. In *United States v. Reyes*, the police arrested a narcotics dealer who an informant reported might be armed. Ramon Reyes, when asked by the arresting officer whether he had "anything in his pocket that could harm the officer," responded that he had a gun. The officer removed the firearm and repeated the question. Reyes stated that there were drugs in his car. The federal court of appeals ruled that the officer's question was directed at public safety and that the drugs were properly admitted into evidence at Reyes's trial, but the court warned of the "inherent risk that the public safety exception might be distorted into a general rule" that individuals arrested on narcotics charges could be questioned in every instance prior to reading the *Miranda* rights (*United States v. Reyes*, 353 F.3d 148, 155 [2d Cir. 2003]).

Legal Equation

- Public safety exception = A reasonable need to protect the police or the public
+ A reasonable belief that the threat is immediate
+ Questions must be prompted by a reasonable concern for public safety and directed at public safety rather than guilt or innocence
+ The statements may not be the product of police compulsion that overcomes the suspect's will to resist.



16.3 YOU DECIDE

Richard Carrillo was arrested for selling narcotics and was transported to a detention facility. Before beginning to search Carrillo and prior to reading Carrillo his *Miranda* rights, Officer Weeks asked Carrillo "if he had any drugs or needles on his

person." Carrillo responded, "No, I don't use drugs, I sell them." Weeks asked no additional questions. Is Carrillo's response admissible under the public safety exception? See *United States v. Carrillo* (16 F.3d 1046 [9th Cir. 1994]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.



16.4 YOU DECIDE

John Wayne Dean and his wife kidnapped Ellen Slater, the daughter of a wealthy family, and demanded a ransom. Throughout the negotiation, there was no indication whether the young woman was dead or alive or how she was being treated. Four days following the abduction, FBI agents staked out the “drop location.” Agent Krahlung spotted Dean in the woods, armed with a pistol. Krahlung pointed a shotgun at Dean and ordered him to

throw down his gun. He then drew his pistol and ordered Dean to lie on the ground. Krahlung proceeded to handcuff Dean and holstered his service revolver. In response to a question from Krahlung, Dean then revealed where Ellen was being held, and she subsequently was rescued. Does the public safety exception extend to the protection of a single member of the public? See *People v. Dean* (114 Cal. Rptr. 555 [Cal. App. 1974]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippman>.

The Miranda Warnings

The three-part *Miranda* warnings inform suspects of their Fifth Amendment rights and the consequences of waiving these rights. These warnings require that the police inform individuals of the right to remain silent, that anything they say may be used against them, and of their right to an attorney, retained or appointed. The *Miranda* judgment specifies that the rights are to be recited in “clear and unequivocal terms” and that a suspect should be “clearly informed” of his or her rights. At this point, you might want to review the Supreme Court’s explanation as to why the police are required to read *Miranda* rights to suspects.

These rights may be communicated to a suspect verbally, or a suspect may be asked to read the rights for himself or herself. In practice, the police typically employ both approaches. How should the rights be read to a suspect? As a judge, you might take the position that the rights must be read as set forth in the *Miranda* decision. On the other hand, you might take the position that a suspect’s rights can be effectively communicated without using the precise language of the *Miranda* judgment. This would be a practical recognition that an officer in the field may not have access to a *Miranda* card or may inadvertently depart from the required warnings. What are the costs and benefits of these alternative approaches?

The Supreme Court has provided broad guidance to the police on how to recite the *Miranda* warnings. *Miranda* is a flexible formula. The test is whether the warnings viewed in their totality convey the essential information to the suspect.

In 1981, in *California v. Prysock*, Police Sergeant Byrd told the suspect, Randall Prysock, that he had “the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning.” Prysock then was informed that as a juvenile, he had the right to have his “parents present, which they are.” Sergeant Byrd completed the warnings on Randall’s right to a lawyer by advising Randall that “you have the right to have a lawyer appointed to represent you at no cost to yourself.” Mrs. Prysock stated that she “didn’t understand,” inquired if her son “could still have an attorney at a later time if he gave a statement now without one,” and agreed that Randall would talk to the sergeant (*California v. Prysock*, 453 U.S. 355, 356, 357 [1981]).

The outcome of this case centered on the meaning of the term *represent*. Does this mean that a lawyer would be appointed to represent Randall at trial while Randall would have to pay for an attorney before that time? Did Sergeant Byrd contribute to the confusion by giving two separate warnings regarding the right to a lawyer and using the term *represent* rather than the term *consult*, which is the term used in the *Miranda* decision? The U.S. Supreme Court majority ruled that the “rigidity” of *Miranda* does not extend to the precise formulation of the warnings given a criminal defendant. The judges noted that the *Miranda* judgment indicates that “no talismanic incantation” was required to satisfy its strictures. Three dissenting judges argued that Sergeant Byrd’s warnings did not adequately inform Randall of his rights and that “a lawyer appointed to represent you” could reasonably have been understood by Mrs. Prysock to refer to a lawyer at trial.

If *Miranda* is not a *talismanic incantation*, how much flexibility is permitted? At what point are the rights so inadequately and incoherently read that a suspect is not fully and effectively informed of his or her rights? In

Duckworth v. Eagan, the defendant was arrested for an attempted murder and was informed that he had the right to the advice and presence of a lawyer, “even if you cannot afford to hire one.” Gary Eagan then was told that “we have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.” The police officer then stated that Eagan had the right to answer or not to answer questions and that he had “the right to stop answering at any time until you’ve talked to a lawyer.” The Supreme Court pointed out that the “if and when language” merely provided the defendant with the additional information that in Indiana, lawyers are appointed at the defendant’s initial appearance in court and that, if he requested an appointed attorney, the police would not question him until a lawyer was present (*Duckworth v. Eagan*, 492 U.S. 195 [1989]).

The Supreme Court stressed that the warnings in their totality satisfied *Miranda* and, most important, that Eagan was informed of his immediate right to a lawyer and right to refuse to answer questions until a lawyer was present. The test was whether the warnings *reasonably conveyed the Miranda rights*. The Supreme Court majority stressed that judges should not closely examine every word of the *Miranda* warnings as if “construing a will or defining the terms of an easement.” The four dissenting judges observed that the “if and when you go to court” language would reasonably lead a suspect to believe that a lawyer would not be appointed until “some indeterminate time in the future after questioning.” Justice John Marshall noted that an unsophisticated suspect might be understandably confused and decide to talk to the police in an “effort to extricate himself from his predicament.”

In both *Prysock* and *Duckworth*, the warnings in their totality were held to satisfy the requirements of *Miranda*. On the other hand, warnings that judges have considered to fail to provide the essential information required by the *Miranda* rights or which judges have concluded are misleading have been held to be inadequate.

In 2010, in *Florida v. Powell*, the Supreme Court revisited the question whether a *Miranda* warning “clearly informed” a suspect of his or her rights. Kevin Powell was arrested in connection with a robbery. The Tampa, Florida, police before asking Powell any questions informed him that “[i]f you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.” Powell waived his rights and admitted that as a felon he was in unlawful possession of a firearm when arrested. He contended that the *Miranda* warning was deficient because he was not explicitly informed of the right to the presence of a lawyer throughout his interrogation. The warning instead indicated that Powell only could consult with a lawyer before the interrogation (*Florida v. Powell*, 559 U.S. 50 [2010]).

The Court held that “although the warnings were not the clearest possible formulation of [the] right to counsel advisement, they were sufficiently comprehensive and comprehensible when given a common sense reading.” Powell was informed that he could consult with a lawyer before the interrogation started and that he could exercise the right to consult with a lawyer at “any time . . . during the interview.”

The Supreme Court noted that while “no precise formulation” of the *Miranda* warnings was required, the standard FBI warnings were “admirably informative.” The FBI warnings inform suspects that they have the right to talk to a lawyer before questioning and also inform suspects of the right to have a lawyer present during questioning.

Justices Stevens and Breyer in their dissent argued that the warnings in *Powell* “entirely failed” to inform Powell of the right to have a lawyer present during questioning. According to the dissenters, the case marked “the first time the Court has approved a warning which, if given its natural reading, entirely omitted an essential element of a suspect’s rights.”

The Supreme Court also has been reluctant to require the police to expand the *Miranda* warnings beyond the three-part warning required in the *Miranda* judgment. In *Colorado v. Spring*, John Leroy Spring waived his rights, presumably thinking that he would be interrogated by federal agents on an illegal gun charge, and then was surprised with a question regarding a homicide. The Supreme Court held that Spring’s admission that he had “shot [a] guy once” was admissible. The Court explained that Spring had been read his *Miranda* rights and that it was neither trickery nor deception for the police to fail to inform him of the topic of interrogation (*Colorado v. Spring*, 479 U.S. 546 [1987]). Another case, *Moran v. Burbine*, asks whether the police are required to go beyond the warnings required in the *Miranda* judgment and inform a suspect of the availability of an attorney.

In *Moran v. Burbine*, Brian Burbine was arrested for a burglary. The police had received a tip from a confidential informant about the identity of an individual responsible for a murder and discovered the address and nickname of the alleged murderer fit Burbine.

A public defender called the police headquarters and was told that the police would not be interrogating Burbine or putting him in a lineup and that they were through with Burbine for the night, and she was not told that he was a

suspect in a murder. Roughly an hour later, Burbine was interrogated on three occasions and in each instance waived his rights after receiving the *Miranda* warning and confessed to the murder.

Burbine appealed on the grounds that he should have been told that a lawyer was available to assist him. The Supreme Court held that “how the police treat an attorney” has “no relevance” to “the degree of compulsion experienced by the defendant during interrogation.” In addition, the Court held that it was not prepared to “adopt a rule requiring that the police inform a suspect of an attorney’s efforts to reach him. . . . A rule requiring the police to inform the suspect of an attorney’s efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally if at all” (*Moran v. Burbine*, 476 U.S. 412 [1986]). Several state supreme courts have rejected the Supreme Court’s reasoning in *Burbine* and have held that their state constitutions require the police to inform a defendant of an attorney’s immediate availability (*People v. McCauley*, 163 Ill.2d 414 [1994]).

Legal Equation

Three-part *Miranda* warnings = Reasonably convey rights
+ *Miranda* is a flexible formula. The test is whether the warnings viewed in their totality convey the essential information to the suspect. The *Miranda* warnings are not a talismanic incantation.

Invoking the Miranda Rights

Following the reading of the *Miranda* rights, a defendant may assert his or her right to a lawyer or right to silence or may waive both of these rights. Is it sufficient that a defendant indicates that he or she “might” want a lawyer or “probably” should remain silent? Are the police required to ask the defendant to clarify his or her intent?

In *Davis v. United States*, Davis, a member of the Navy, was suspected of murdering another sailor and, when interviewed by the Naval Criminal Investigative Service, initially waived his *Miranda* rights. An hour and a half into the interview, Davis blurted out that “maybe I should talk to a lawyer.” One of the agents later testified at trial that they made it clear that they “weren’t going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer.” Davis replied, “No, I’m not asking for a lawyer,” and then added, “No, I don’t want a lawyer.” Following a break in the interrogation, the investigators again read Davis his *Miranda* rights, and the interview continued for an additional hour. At this point, Davis asserted, “I think I want a lawyer before I say anything,” and the investigators stopped their interrogation (*Davis v. United States*, 512 U.S. 452 [1994]).

Did Davis invoke his right to an attorney when he remarked that “maybe” he should talk to a lawyer? Was he then impermissibly persuaded to continue the interrogation as a result of the investigators’ request for clarification? The U.S. Supreme Court held that an individual intending to assert his or her right to have counsel present must articulate this “sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” A rule that required the police to cease questioning following an ambiguous statement by the accused would transform *Miranda* into a “wholly irrational obstacle to interrogations.”

In other words, the investigators were free to continue interrogating Davis following his ambiguous statement as to whether he “should talk to a lawyer.” They were not required to clarify his intent. In fact, in an effort to clarify a suspect’s statement, the police might be accused of influencing the suspect to waive his or her right to an attorney. For example, in *Hart v. A.G.*, a police officer was asked by the suspect about the pros and cons of hiring a lawyer. The Eleventh Circuit Court of Appeals ruled that an officer had discouraged the suspect from invoking his right to an attorney when the officer stated that “I’m going to want to ask you questions and he’s [the lawyer] going to tell you can’t answer me,” but I am telling you that “honesty wouldn’t hurt” (*Hart v. A.G.*, 323 F.3d 884 [11th Cir. 2003]).

Justice David Souter, writing on behalf of four concurring judges in *Davis*, observed that the Court’s ruling in *Davis* would impose a special hardship on the poor and uneducated and on women and minorities. These individuals were particularly likely to feel overwhelmed by the interrogation process and would find it difficult to assert themselves. Justice Souter accordingly favored requiring the police to clarify ambiguous statements that might “reasonably be understood” as expressing a desire for the protection of a lawyer.

In another important ruling, the Supreme Court held in *Fare v. Michael C.* that the right to a lawyer did not encompass a juvenile’s request to talk to his probation officer and that the juvenile’s confession was properly admitted

at his murder trial. The Supreme Court explained that lawyers, rather than probation officers, clergy, or friends, are trained and equipped to protect a suspect's right against self-incrimination (*Fare v. Michael C.*, 442 U.S. 707 [1979]).

In 2010, in *Berghuis v. Thompkins*, the U.S. Supreme Court clarified the standard for invoking the right to counsel. The Court held that an accused who wants to invoke his or her right to silence is required "to do so unambiguously." The justices reasoned that the police should not be required to "read a suspect's mind" and guess as to whether a suspect is invoking his or her right to silence. Van Chester Thompkins was largely silent for two hours and forty-five minutes before making incriminating statements. The Court held that his statement was admissible because he "did not say that he wanted to remain silent or that he did not want to talk with the police." Had he made either of these . . . statements, he would have invoked his "right to cut off questioning." Should the Court have required the police to try to clarify a suspect's intent? See *Berghuis v. Thompkins* (560 U.S. 370 [2010]).

In 2013, in *Salinas v. Texas*, Genovevo Salinas was asked to come to the police station to clear himself as a suspect in a murder case. The defendant when he arrived at the police station was not in custody and was free to leave. He was asked and answered a number of questions. He then was asked whether the shotgun in his home would match the shells recovered at the murder scene. He did not answer and instead "looked down at the floor, shuffled his feet, bit his bottom lip, and clenched his hands in his lap." After a few moments of silence, he answered other questions.

The prosecutor in his closing argument at trial used the defendant's silence when asked about the shotgun as evidence of Salinas's guilt. The Court held that it would have been a "simple matter" for Salinas to say that "he was not answering the officer's question on Fifth Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment" (*Salinas v. Texas*, ___ U.S. ___ [2013]).

Legal Equation

Invocation of *Miranda* rights = Sufficiently clear that a reasonable police officer would understand that the suspect is asserting a right to a lawyer or to silence.

Waiver

A suspect, of course, may choose to waive his or her *Miranda* right to silence or right to an attorney. The Supreme Court stressed in *Miranda* that the government is required to meet a "heavy burden" in demonstrating that a suspect voluntarily, knowingly, and intelligently waived his or her rights. The *Miranda* judgment stated that a waiver requires an express statement and may not be presumed from the fact that an accused remains silent following the warnings.

What do we mean by a **voluntary, knowing, and intelligent waiver**? In *Moran v. Burbine*, the Supreme Court explained that a waiver inquiry involves a three-step process (475 U.S. 412, 421 [1985]).

Voluntary. The right must be voluntarily relinquished, it must be the product of a free and deliberate choice, and it may not be caused by intimidation, coercion, or deception. *I am doing this because I want to; the police did not make me waive my rights.*

Knowing and intelligent. The waiver must be made with a full awareness both of the nature of the right being abandoned and of the consequences of the decision to abandon the right. A suspect must possess sufficient mental competence to understand the rights and the significance of a waiver. *I know what the Miranda rights mean and what may happen to me if I talk.*

Totality of the circumstances. The determination whether the waiver is voluntary, knowing, and intelligent is based on the totality of the circumstances surrounding the interrogation. *We cannot read your mind, but we can see from the entire situation that the police did not pressure you into waiving your rights, and you seemed to know what you were doing.*

The prosecution is required to establish a *knowing, voluntary, and intelligent waiver* by a *preponderance of the evidence* (51 percent). The Supreme Court explained in *Colorado v. Connelly* that holding the prosecution to this relatively modest burden of proof is sufficient to deter illegal behavior on the part of the police (*Colorado v. Connelly*, 479 U.S. 157, 169 [1986]).

Voluntary

The *Miranda* decision noted that evidence that an accused was threatened, tricked, or cajoled (pressured) into a waiver is sufficient to establish that a suspect did not voluntarily waive his or her rights. A waiver also will not be recognized if obtained under coercive circumstances, such as a lengthy interrogation or a lengthy incarceration prior to the confession.

The Supreme Court has equated the test for voluntariness under *Miranda* with the due process voluntariness (“but for”) test. In *Oregon v. Elstad*, the Supreme Court dismissed the defendant’s claim that his confession was involuntary and explained that the defendant had not alleged “coercion of a confession by physical violence or other deliberate means calculated to break the suspect’s will” (*Oregon v. Elstad*, 470 U.S. 298, 312 [1985]).

As you recall, in *Colorado v. Connelly*, the Supreme Court ruled that a defendant’s confession that was the product of a mental disability was not involuntary for the purposes of *Miranda*. An involuntary confession requires an “essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant on the other.” In determining whether a confession is involuntary, a court will evaluate the impact of the police interrogation techniques in light of the totality of the circumstances. The factors to be considered include the following:

- *Offender*. The age, education, background, and other characteristics of the accused.
- *Conditions of interrogation*. The length of the interrogation or the length of the suspect’s detention prior to the reading of the *Miranda* rights.
- *Interrogation techniques*. Whether there was the threat or use of coercion, duress, or violence.
- *Motivation*. Whether the suspect had a reason to confess such as a desire for a reduced sentence that was not related to the actions of the police.

The question always is whether the totality of circumstances caused the defendant to involuntarily confess. Was his or her will overborne by the totality of the circumstances? See *Colorado v. Connelly* (479 U.S. 157, 166 [1986]).

Knowing and Intelligent

We have seen that a suspect is required to understand the meaning of the *Miranda* rights as well as the consequences of a waiver. Once having read the *Miranda* warnings, may an officer assume that a suspect fully comprehends his or her rights? What if an individual clearly does not understand the rights?

In *Tague v. Louisiana*, the arresting officer testified that he read Tague the *Miranda* warnings, but the officer “could not presently remember what those rights were . . . could not recall whether he asked [Tague] whether he understood the rights as read to him, and ‘couldn’t say yes or no’ whether he rendered any tests to determine whether [Tague] was literate or otherwise capable of understanding his rights.” The U.S. Supreme Court concluded that Louisiana had failed to satisfy the heavy burden of establishing that Tague knowingly and intelligently waived his rights before confessing. In other words, a police officer may not automatically assume that an individual knowingly and intelligently waived his or her rights (*Tague v. Louisiana*, 444 U.S. 469 [1980]).

What factors are relevant in determining whether a suspect’s waiver of *Miranda* is knowing and intelligent? In *Fare v. Michael C.*, introduced earlier in the chapter, the Supreme Court indicated that this is based on the *totality of the circumstances*. Michael was 16 and a half years of age and the Supreme Court indicated that the proper approach is to inquire into a “juvenile’s age, experience, education, background, and intelligence and into whether he [or she] has the capacity to understand the warnings given him [or her], the nature of his [or her] Fifth Amendment rights, and the consequences of waiving those rights.” The Court stressed that the police were careful to ensure that Michael C. understood his rights and that he clearly indicated a desire to waive them. In addition, there was nothing in Michael’s background to indicate that he lacked the capacity to understand his rights. He was a 16-and-a-half-year-old juvenile who had significant experience in the criminal justice system, including a history of multiple arrests, internment in a youth camp, and having been on probation for several years. There also was no indication that he lacked the intelligence to understand the *Miranda* rights (*Fare v. Michael C.*, 442 U.S. 707, 725–727 [1979]). Judges also examine a defendant’s behavior during interrogation. In *United States v. Gaddy*, the Eleventh Circuit Court of Appeals noted that despite the defendant’s addiction to drugs and his mental illness, he was of above-average

intelligence, had been involved with the criminal justice system on several occasions in the past, and did not exhibit “scattered” thinking, ‘panicky’ behavior,” severe depression, or anxiety during his interrogation and that his waiver was knowing and voluntary (*United States v. Gaddy*, 894 F.2d 1307, 1312 [11th Cir. 1990]).

We have already seen in *Colorado v. Spring* and in *Moran v. Burbine* that the Supreme Court has resisted requiring the police to incorporate additional information into the *Miranda* warnings, such as informing defendants of the topic of interrogation or of the availability of an attorney. The Court has stressed that the U.S. Constitution does not require that an individual be informed of all information that might prove useful in arriving at his or her decision, such as the strength of the prosecution’s case. The Supreme Court also has recognized that absent this information, a decision to talk might be voluntary but not necessarily the best course to follow (*Colorado v. Spring*, 479 U.S. 564, 577 [1987]). In other words, a voluntary, knowing, and intelligent waiver is not necessarily a wise waiver.

Express and Implied Waiver

A waiver, as we have seen, must be voluntary, knowing, and intelligent. *Miranda* indicated that an “express statement” that the individual is willing to make a statement and does not want an attorney followed closely by a statement constitutes a waiver and that a waiver will not be presumed from silence or “from the fact that a confession was in fact eventually obtained.” Have courts continued to require a clear and affirmative statement? Must a defendant sign a waiver form?

A mentally competent defendant who affirmatively waives his or her rights clearly meets the **express waiver** standard. However, the issue of waiver is not always this clear. Consider *North Carolina v. Butler*. William Thomas Butler was convicted of kidnapping, armed robbery, and felonious assault stemming from the robbery of a service station and the shooting of the attendant. He was arrested and fully advised of his rights. Butler thereafter was taken to the FBI office, and after determining that he had an eleventh-grade education and was able to read, he was given a written *Miranda* warning form to review. Butler stated that he understood his rights and refused to sign the waiver of his right to silence and right to a lawyer at the bottom of the page. The FBI agents assured him that he was not required to speak or to sign the form and asked whether Butler was willing to talk to them. He replied that he would talk to the agents but would not sign the rights waiver form and then proceeded to make incriminating statements. An FBI agent testified at trial that Butler had said “nothing” when advised of his rights and attempted neither to request an attorney nor to halt the interrogation (*North Carolina v. Butler*, 441 U.S. 369 [1979]).

The U.S. Supreme Court ruled that the prosecution’s burden is “great, but that . . . in some cases, a waiver can be clearly inferred from the actions and words of the person interrogated.” In these instances, the prosecution is required to establish that although there was no affirmative waiver, the suspect nevertheless understood his or her rights and engaged in a “course of conduct indicating waiver.” This is an **implied waiver**. Do you believe that Butler fully understood that he was waiving his *Miranda* rights? A similar issue arose in *Connecticut v. Barrett*. William Barrett was arrested for sexual assault and indicated that he would not provide a written statement without his lawyer but that he was happy to talk to the police. Was Barrett’s confession admissible?

Berghuis v. Thompkins (discussed above) is the latest case discussing an implicit waiver of the *Miranda* rights. Thompkins was suspected of involvement in a shooting. At the beginning of the interrogation, Detective Christopher Helgert presented Thompkins with a form containing the *Miranda* rights. Helgert asked Thompkins to read the fifth warning out loud to determine whether he could read. The right read as follows:

You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.

Thompkins then read the *Miranda* warnings on the form aloud and refused to sign the form. Helgert and another officer then began the interrogation, and at no point during the questioning did Thompkins express that he wanted to “remain silent, that he did not want to talk with the police, or that he wanted an attorney,” and he was “[l]argely” silent during the interrogation, which lasted three hours.” Thompkins gave a few limited verbal responses such as “yeah,” “no,” and “I don’t know” and in some instances nodded his head. He declined an offer of a peppermint and complained that the small chair was “hard.”

Roughly two hours and forty-five minutes into the interrogation, Helgert asked, “Do you believe in God?” Thompkins looked at Helgert and responded “Yes,” and his eyes “well[ed] up with tears.” Helgert then asked,

“[D]o you pray to [G]od to forgive you for shooting that boy down?” Thompkins stated “Yes” and turned his head away. Thompkins refused to make a written confession, and the interrogation ended roughly fifteen minutes later.

Thompkins claimed that he did not knowingly and voluntarily waive his *Miranda* rights. The Supreme Court affirmed that a waiver may be either explicit or implicit. An implicit waiver is established where the prosecution “shows that a *Miranda* warning was given and that it was understood by the accused and [in such circumstances] an accused’s uncoerced statement establishes an implicit waiver of the right to remain silent.”

The Court concluded that Thompkins knowingly and voluntarily waived his right to silence.

Received and read his rights. Thompkins read his rights, and there is no evidence indicating that he did not understand his rights.

Course of conduct. Thompkins’s answer to the question about praying to God for forgiveness was “sufficient to show a course of conduct indicating waiver.”

Uncoerced. There is no evidence indicating Thompkins’s statement was coerced by threats or sleep or food deprivation, or that an interrogation of this length is “inherently coercive.”

The *Berghuis* decision seemingly lessens the “heavy burden” on the prosecution to establish a defendant’s waiver of his or her *Miranda* rights. A defendant is not required to explicitly waive his or her rights. A waiver will be “presumed” when an individual acts in a “manner inconsistent” with the invocation of his or her rights.

Legal Equation

Waiver	=	Voluntary, knowing, and intelligent
	+	An affirmative statement (express waiver) or totality of the circumstances (implied waiver).

Waiver: Question First and Warn Later

In *Oregon v. Elstad*, introduced above, the police visited the home of 18-year-old Michael James Elstad, briefly and casually interrogated him regarding a burglary, and obtained a voluntary incriminating statement. The officers then arrested Elstad and, at police headquarters, read Elstad his *Miranda* rights and obtained a detailed confession. The U.S. Supreme Court had no difficulty in ruling that the first confession was inadmissible because the officers had failed to read Elstad his *Miranda* rights. What of the second confession? Elstad clearly must have believed that there was little reason not to continue talking to the police after having already “let the cat out of the bag” concerning his guilt. It would seem only fair to require the police to inform Elstad that in considering whether to invoke his *Miranda* rights, he should be aware that his first confession was inadmissible.

The U.S. Supreme Court held that the unlawful character of Elstad’s first voluntary confession did not automatically taint his second voluntary confession and ruled that a “suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.” The Supreme Court found that the *Miranda* warnings cured the taint of the initial confession and that warning a suspect that his or her first confession was inadmissible was neither “practicable nor constitutionally necessary.” The police, according to the majority, were sufficiently deterred from failing to give the *Miranda* warning by excluding the first confession. Justices Brennan and Marshall in dissent criticized what they viewed as the Supreme Court’s growing impatience with constitutional rights and condemned their fellow justices for increasingly viewing civil liberties as impediments to combating crimes (*Oregon v. Elstad*, 470 U.S. 298, 312 [1985]).

Following *Elstad*, a number of police departments adopted a policy of interrogating suspects in “successive, unwarned and warned phases.” The Supreme Court reacted to this tactic in *Missouri v. Seibert* by reconsidering the judgment in *Elstad*. Patrice Seibert’s 12-year-old son, Jonathan, had cerebral palsy and died in his sleep. Fearing charges of neglect because of the bedsores on Jonathan’s body, Seibert entered into a plan with her sons and some of their friends to incinerate Jonathan’s body in the family’s mobile home. They intentionally left Donald Rector, a

mentally challenged teenager who lived with the Seiberts, in the home to give the impression that he was looking after Jonathan at the time of the fire.

Five days later, Seibert was arrested at the hospital where Donald was being treated for burns. She was taken to the police station and left alone in the interrogation room for fifteen to twenty minutes. Officer Richard Hanrahan then followed orders and neglected to give Seibert the *Miranda* warnings prior to the thirty- to forty-minute interrogation. Seibert ultimately confessed to her crime and was given a twenty-minute break. Officer Hanrahan then turned on the tape recorder, indicated that they should continue their conversation, and gave Seibert the *Miranda* warnings, and Seibert waived her rights. Hanrahan initiated the questioning by confronting Seibert with her prewarning statements, and she immediately admitted that the plan was for Donald “to die in his sleep” (*Missouri v. Seibert*, 542 U.S. 600 [2004]).

The Supreme Court stated that the issue when the police **question first and warn later** is whether “it would be reasonable to find that in these circumstances the warnings could function ‘effectively’” to advise the suspect that he or she “had a real choice about giving an admissible statement.” In other words, when a suspect is warned that “anything you say may be used against you,” will he or she understand that the first confession is inadmissible and cannot be introduced into evidence to establish his or her guilt and that the defendant may find that it is in his or her self-interest to invoke the right to silence or the right to an attorney?

The Supreme Court pointed out that in *Elstad* one of the arresting officers likely was confused as to whether the suspect was in custodial interrogation and committed the “oversight” of casually remarking that he believed that Elstad was involved in the burglary. Elstad then confirmed that he was at the crime scene. The living-room conversation in *Elstad* was corrected at the police station when another officer read Elstad the *Miranda* warnings before undertaking a systematic interrogation. The Supreme Court noted that a reasonable person would view the stationhouse interrogation by a separate police officer as “a markedly different experience from the short conversation at home.”

In *Seibert*, the plurality of the Supreme Court concluded that the facts challenge the “efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect’s shoes would not have understood them to convey a message that she retained a choice about continuing to talk.” In contrast to the casual, inadvertent, and brief questioning in *Elstad*, the facts in *Seibert* reveal a police strategy intended to undermine the *Miranda* warnings. Both the unwarned interrogation and the warned interrogation took place in the stationhouse and were conducted by the same officer. The first interrogation was systematic and exhaustive and conducted with psychological skill, and the officer did nothing to inform Seibert that the first confession could not be used against her. Officer Hanrahan gave the impression that the second interrogation was a continuation of the earlier questioning when he noted that he had been talking to Seibert about “what happened.”

Legal Equation

Confession resulting from a “question first and warn later” interrogation = Reasonable to find that in these circumstances, the warnings could function effectively to advise the suspect that he or she had a real choice about giving an admissible statement
+ Relevant facts and circumstances of the interrogation.



16.5 YOU DECIDE

Alexander Texidor was arrested by federal authorities for the unlawful purchase of firearms and agreed to provide the FBI with information concerning other individuals involved in the illicit trade in firearms. This led to the arrest of

Luis Gonzalez-Lauzan Sr. on January 8, 2002. On January 28, 2002, Texidor was murdered, and Gonzalez-Lauzan Sr. and his son, Luis Gonzalez-Lauzan Jr., and two other individuals were indicted for the murder in September 2002. Gonzalez-Lauzan Jr.

was in prison on unrelated charges prior to the indictment when he was questioned by state and federal authorities in the interview room of the courthouse regarding Texidor's murder. The three officers made a decision not to administer the *Miranda* warnings and spent between two and a half and three hours talking to Gonzalez-Lauzan Jr. The officers explained that they were working on a murder investigation and believed that Gonzalez-Lauzan Jr. was involved. The officers instructed Gonzalez-Lauzan Jr. that "we are not asking you any questions. We don't want you to say anything. We just have something to say to you and we ask that you listen to it so that you can understand where we are coming from." The officers described

the evidence linking Gonzalez-Lauzan Jr. to the killing in detail and instructed him several times merely to listen when he occasionally interjected and denied involvement. After roughly two and a half hours, Gonzalez-Lauzan Jr. interrupted and exclaimed that "okay, you got me." Gonzalez-Lauzan Jr. was then immediately read his *Miranda* rights and signed a form agreeing to waive his rights. He admitted that he instructed the co-conspirators to teach Texidor a lesson, that he had provided the murder weapon, and that he had been present at the killing. Is Gonzalez-Lauzan Jr.'s confession admissible? See *United States v. Gonzalez-Lauzan Jr.* (437 F.3d 1128 [11th Cir. 2006]). See also *Hairston v. United States* (905 A.2d 765 [D.C. 2006]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.

Waiver Following Invocation of the Miranda Rights

Once an individual invokes his or her *Miranda* rights, are the police prohibited from questioning him or her again? On one hand, the police clearly are obligated to respect a suspect's desire to invoke his or her *Miranda* rights. On the other hand, the police may desire to confront a suspect with new evidence or to question a suspect concerning an unrelated offense. How does the Supreme Court balance these competing interests?

The Supreme Court has established one legal test in those instances in which a defendant invokes his or her right to silence and another legal test in those instances in which a defendant invokes his or her right to an attorney. In this section, we describe the two legal tests and explain the reason for the Court's reliance on separate tests. We first turn to the approach employed when a suspect invokes his or her right to silence.

In *Michigan v. Mosley*, Richard Bert Mosley was arrested in connection with two robberies. He was read his *Miranda* rights and invoked his right to silence, and the robbery detective ceased questioning. The detective then took Mosley to the cell block. Two hours later, Mosley was moved to the homicide bureau for questioning about "an unrelated holdup murder." He once again was advised of his rights and this time waived them and made an incriminating statement. Mosley later appealed that his second interrogation for murder was unlawful and pointed out that *Miranda* clearly stated that if an individual indicates at any time that he wishes to remain silent, the interrogation must cease. Did this mean that the police interrogation of Mosley for the homicide was a violation of his right against self-incrimination? See *Michigan v. Mosley* (423 U.S. 96 [1975]).

The U.S. Supreme Court ruled that the Detroit police acted in lawful fashion. The legal test for whether a statement obtained after a person in custody decides to remain silent depends on whether his or her right to silence was **scrupulously honored**. What does this mean?

- The police immediately ceased questioning.
- The police suspended interrogation for a significant period.
- The police provided a fresh set of *Miranda* warnings.
- The second interrogation focused on a crime different in *time, nature, and place*.

The Supreme Court stressed that the critical consideration is whether the police respected Mosley's "right to cut off questioning." This was not a situation in which the police failed to honor a decision to terminate questioning by refusing to discontinue the interrogation or by engaging in repeated efforts to wear down Mosley's resistance and pressure him to change his mind.

The dissent pointed out that Mosley initially did not want to talk about the robberies and argued that the police had taken advantage of the coercive environment of Mosley's incommunicado detention to extract a confession to an unrelated criminal offense.

The scrupulously honored test is subject to several criticisms. Clearly, the police were aware when they arrested Mosley that he possibly was involved in a killing, and the Court's holding invites the police to subject a defendant to a series of interrogations when they have evidence of the defendant's involvement in multiple crimes. What did the Supreme Court mean when it required that the second interrogation address a crime different in time, nature, and place? What about a bank robber who flees in a car and hits a pedestrian? Are the bank robbery and auto accident different in time, nature, and place?

An example of the application of *Mosley* is *United States v. Tyler*. Willie Tyler was arrested for the murder of a government informant and, after being read his *Miranda* rights, invoked his right to silence. He was taken to a small room in the police barracks in which a timeline of the murder investigation and crime scene photographs were pasted to the wall. After several hours, Detective Ronald Egolf entered the room and engaged Tyler in a general discussion on his family, education, and hunting and, after roughly an hour, directed Tyler to "tell the truth." Tyler allegedly started to cry, Egolf again warned him of his *Miranda* rights, and Tyler confessed to involvement in the murder. The Third Circuit Court of Appeals held that Tyler's interrogation was inconsistent with "scrupulously honoring Tyler's assertion of silence." Can you explain the court's decision? See *United States v. Tyler* (164 F.3d 150, 155 [3d Cir. 1998]).

The Supreme Court, in *Edwards v. Arizona*, established a separate **initiation** test for determining whether a defendant who invokes his or her right to an attorney may be once again interrogated. Under what circumstances would a waiver and subsequent confession be considered voluntary, knowing, and intelligent? The facts in *Edwards* are remarkably similar to the facts in *Mosley*. Robert Edwards was arrested for burglary, robbery, and murder and then waived his rights, agreed to talk, and later asserted his right to counsel. The next morning, two detectives approached Edwards and again read him his *Miranda* rights. Edwards agreed to talk to the police and confessed.

The confession obtained by the detectives to a crime to which Edwards earlier had invoked his right to counsel clearly would be inadmissible under the *Mosley* test. The U.S. Supreme Court, however, explained that a new test was required because an individual who invokes his or her right to counsel clearly lacks confidence in his or her ability to withstand the pressures of interrogation and desires the help of a lawyer. The Court held that Edwards "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." A confession obtained in the absence of counsel is presumed to be involuntary (*Edwards v. Arizona*, 451 U.S. 477, 484–485 [1981]).

In *Arizona v. Roberson*, the Supreme Court extended *Edwards*, which prohibits reinterrogation about the same crime, to prohibit the police from reinterrogating a suspect about a *different crime*. Justice John Paul Stevens explained that a suspect who requests a lawyer clearly believes that he or she is in need of legal assistance regardless of whether interrogated about the same offense or a different offense. Stevens reasoned that such a suspect who is again approached by the police will find it difficult to overcome the pressures of custodial interrogation and again assert his or her right to a lawyer. Justice Anthony Kennedy, in dissent, pointed out that the *Edwards-Roberson* rule will prevent the police from interrogating suspects based on newly discovered evidence or offenses (*Arizona v. Roberson*, 486 U.S. 675 [1988]).

Some of the difficulties with the initiation test are illustrated by *United States v. Green*. In *Green*, a defendant was arrested on a drug charge, was read his *Miranda* rights, invoked his right to an attorney, and pled guilty. Three months later, the police obtained an arrest warrant charging the defendant with an unrelated homicide that had taken place six months before he had been arrested on the drug charge. The defendant subsequently was interrogated on the homicide and, after being advised of his *Miranda* rights, confessed. Despite the fact that five months had passed between the time that the defendant invoked his right to counsel and the time that he confessed to the murder, the District of Columbia Court of Appeals ruled that a strict interpretation of the *Edwards* rule dictated that the confession should be suppressed (*United States v. Green*, 592 A.2d 985 [D.C. App. 1991]). The U.S. Supreme Court was in the process of considering this case when the defendant died, and as a result, no ruling was issued. How would you resolve the dilemma confronting the judge in *Green*?

In 2010, the Supreme Court addressed the prohibition on interrogation of a suspect who has invoked his or her right to counsel in *Maryland v. Shatzer*. In August 2003, Michael Blaine Shatzer was incarcerated in Maryland for child sexual abuse. A detective interviewed Shatzer in 2003 about another allegation of child abuse against his son, and Shatzer invoked his right to a lawyer and the investigation was dropped (*Maryland v. Shatzer*, 559 U.S. 98 [2010]).

Thirty months later, additional information developed that supported the allegation of child abuse. In March 2006, a second detective, Paul Hoover, interviewed Shatzer in a second correctional institution to which he had been transferred. Hoover explained that he wanted to question Shatzer about the alleged abuse of his son and read Shatzer the *Miranda* rights and obtained a written waiver. Shatzer admitted to masturbating in front of his son from a distance of less than three feet. He agreed to take a polygraph examination, and after being read the *Miranda* rights, Shatzer failed the test. He was visibly upset, started to cry, and incriminated himself by saying that “I didn’t force him. I didn’t force him.” Shatzer requested an attorney, and Hoover ended the interrogation.

Edwards protects a suspect who has invoked the right to a lawyer from being coerced or badgered into waiving his or her right to a lawyer, and Shatzer’s confession would have been thrown out under the *Edwards* rule. The Supreme Court, however, avoided this harsh result by establishing a **break in custody rule** that regulates police interrogation of suspects who have invoked their right to counsel under *Edwards*. The Court noted that when a suspect is released from pretrial custody and “has returned to his normal life for some time . . . there is little reason to think that his change of heart regarding interrogation without counsel has been coerced.” The suspect is no longer isolated and has been able to seek advice from a lawyer, family, and friends. His or her change of heart likely is a result of a calculation of his or her self-interest rather than a result of police coercion.

The Supreme Court held that where a suspect has been released from custody for fourteen days the police may once again approach a suspect. This provides time for the suspect to consult with friends and lawyers. The fourteen-day waiting period insulates a suspect against police continually attempting to interrogate and to wear a suspect down. Shatzer, though incarcerated, was not under pressure to talk to the police. He was in medium-security institutions and had access to a law library, exercise, and adult education, and was able to send and receive letters and to receive visitors.

The next issue confronting the U.S. Supreme Court was clarifying what the Court meant in *Edwards* when it wrote that a suspect is not subject to interrogation until a lawyer has been “made available to him.” In *Minnick v. Mississippi*, Mississippi argued that once a defendant requests and meets with an attorney, “counsel has been made available to him.” Following this meeting, Mississippi argued that the police are free to interrogate a suspect without a lawyer being present. The Supreme Court, however, held that a “fair reading of *Edwards* . . . demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. . . . When counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney” (*Minnick v. Mississippi*, 498 U.S. 146, 150 [1990]).

In summary, keep three points in mind when it comes to a suspect’s invocation of the *Miranda* rights and waiver of the *Miranda* rights:

- *Invocation of counsel.* We saw in *Davis* and in *Thompkins* that the invocation of a right to counsel and the right to silence requires a *clear and unambiguous* statement.
- *Scrupulously honored.* *Mosley* taught us that the waiver of the right to silence following the assertion of this right is considered voluntary in those instances in which the police *scrupulously honored* the suspect’s rights.
- *Initiation.* A waiver of the invocation of the right to an attorney following the assertion of this right is considered voluntary in those instances in which the defendant *initiates* contact with the police.

What do we mean by *initiation*? Must there be a clear and affirmative statement of waiver? The U.S. Supreme Court provided an answer to this question in *Oregon v. Bradshaw*. In considering *Bradshaw*, pay attention to the legal test for waiver of the right to a lawyer. The Supreme Court ruled that James Edward Bradshaw’s question to a police officer, “Well, what is going to happen to me now?” constituted initiation and a waiver of Bradshaw’s previous request for a lawyer. The Court reasoned that “[a]lthough ambiguous, the respondent’s question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship.” Did Bradshaw intend to waive his right to an attorney? Ask yourself whether the law has made it difficult or easy for the police to obtain a waiver from an individual who has previously invoked his or her right to an attorney.

Legal Equation

Waiver following invocation of right to silence	= (Scrupulously honor rights) Immediately cease interrogation	+ Suspend questioning for a significant period of time
	+ Fresh set of <i>Miranda</i> warnings	+ Interrogation on crime different in time, nature, and place.
Waiver following invocation of right to an attorney	= Initiate contact with the police.	



16.6 YOU DECIDE

Defendant Wayne Montgomery was convicted of possession of a sawed-off shotgun and three firearms. Montgomery asserted his right to an attorney. The federal agents then proceeded to photograph and fingerprint Montgomery. The following conversation then occurred.

Montgomery: Am I being charged with each gun?

Agent Sherman: You will probably be charged with two counts.

Montgomery: Did all of the guns fire?

Agent Sherman: Yes. Why do you want to know?

Montgomery: The sawed-off was in pieces [in a duffel bag].

Agent Sherman: That is right, but it only took a minute to put together.

Montgomery: Ya, but it was missing a spring.

Agent Sherman: Well, the State Police fired the gun and it worked. Did you have any problem firing the gun?

Montgomery: I could not get it to work.

Montgomery then indicated that he did not want to talk anymore about the firearms, and the conversation ended. His attorney unsuccessfully sought to suppress this statement, and it was introduced into evidence at trial as evidence that the defendant knowingly possessed the firearms. Did Montgomery initiate the conversation with Agent Sherman and waive his right to an attorney? See *United States v. Montgomery* (714 F.2d 201 [1st Cir. 1983]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.

CRIMINAL EVIDENCE IN THE NEWS

In 2006, the United Nations Committee against Torture called for an impartial national investigation of alleged “police brutality and torture in Chicago, about which nothing has been done for a long time.” The report was issued by ten independent international experts charged with monitoring compliance with the international Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

This echoed a 1990 report by the international human rights organization Amnesty International that called for an investigation into ongoing allegations of torture of individuals subjected to police interrogation in Chicago.

It is alleged that between 1973 and 1991, at least sixty-six individuals were tortured by Chicago Police Commander Jon Burge and by the officers under his supervision in the Area 2 police headquarters in Chicago. Burge and his fellow officers are accused of beating suspects, shocking them with electric wires and cattle prods, suffocating them using plastic bags, and jamming guns against their heads or in their mouths in order to extract confessions. The credibility of this charge is bolstered by a report by the Chicago Police Department’s Office of Professional Standards (OPS), which, in 1990, listed the names of fifty alleged victims of police torture. The report determined that physical abuse “did occur and . . . it was systematic. . . . [T]he type of abuse . . . was not limited to the

usual beatings, but went into such areas as psychological techniques and planned torture.” The OPS investigation also concluded that members of the police command were aware of the “systematic abuse” and either participated in the activity or failed to intervene to bring it to an end.

The case that first brought these charges to public attention involved Andrew Wilson, convicted of killing two police officers. Wilson ultimately won a civil judgment against the City of Chicago, which admitted that Wilson had been tortured and that Burge and others had acted in an “outrageous manner and utilized methods far beyond those . . . permitted and expected by the Police Department.” Lawyers for the city also conceded that Burge and others had tortured another suspect nine days earlier. This led to Burge’s termination in 1993 and to the suspension of two detectives. It later was revealed that Chicago had spent more than \$30 million in legal fees defending Burge and the police under his command against charges of torture.

There is no question that some of the individuals who were apparently tortured by Burge and his men, in fact, were guilty. Some innocent individuals, however, were convicted. In January 2003, Illinois Governor George Ryan granted four death row inmates pardons after concluding that their confessions had been obtained by Burge and his unit through torture.

The claims of torture have received support from a number of state and federal courts. In 1999, Federal District Court Judge Milton Shadur wrote that it is “now common knowledge that . . . Jon Burge and . . . officers working under him regularly engaged in the physical abuse and torture of prisoners to extract confessions . . . beatings and other means of torture occurred as an established practice, not just on an isolated basis” (*United States ex rel. Maxwell v. Gilmore*, 37 F.2d 1078 [N.D. Ill. 1999] [Memorandum and order]).

Federal District Court Judge Diane Wood, in *Hinton v. Uchtman* (2005), wrote that the defendant’s torture allegations were “reminiscent of the news reports of 2004 concerning the notorious Abu Ghraib facility in Iraq.” She observed that this type of conduct “imposes a huge cost on society: it creates distrust of the police generally, despite the fact that most police officers would abhor such tactics, and it creates a cloud over even the valid convictions in which the problem officers played a role” (*Hinton v. Uchtman*, 395 F.3d 810, 833 [7th Cir. 2005]).

There is no doubt that the systematic use of torture has called into question the credibility of criminal convictions in Chicago. In 2006, two special prosecutors issued a three-hundred-page report discussing 148 cases of alleged torture in Chicago. The report concluded that Burge and a dozen police officers abused suspects and that at least three former prosecutors failed to inquire into the condition of suspects. The same pattern of indifference was displayed by high-level police and prosecutorial officials in Chicago. The prosecution of individuals accused of torture, according to the report, likely is barred by the statute of limitations.

United States prosecutor Patrick Fitzgerald charged Burge with perjury and with obstruction of justice for having allegedly committed perjury by denying torture in a civil case in federal court. He was convicted in June 2011 and sentenced to four and a half years in prison. The key witness was former Chicago Police Department detective Michael McDermott, who corroborated the testimony of five individuals who claimed to have been tortured by Burge and his “Midnight Gang.” Fitzgerald following the verdict stated that it was “important to send a message that this sort of thing” will not be tolerated in the criminal justice system.

Interrogation

You should have it firmly fixed in your mind that a defendant may not be interrogated by the police prior to the reading of the *Miranda* warnings. Following the reading of the *Miranda* rights, there also are firm limits on police **interrogation**. As we have seen, once a suspect invokes either the right to silence or the right to an attorney, he or she is not subject to interrogation. The police must *scrupulously honor* the right to silence and may interrogate a suspect only about a crime different in time, nature, and place after suspending interrogation for a period of time and issuing a fresh set of *Miranda* warnings. A suspect who invokes his or her right to an attorney may be interrogated only in the event that the suspect initiates contact with the police.

What is the definition of *police interrogation*? Does this mean that the police are prohibited from conversing with the suspect? Can the police let a suspect know that they found several hundred pounds of cocaine in his or her house or inform the suspect of the progress of the investigation or of the fact that a co-conspirator confessed?

In *Rhode Island v. Innis*, the U.S. Supreme Court defined *interrogation*. The Court explained that interrogation involves either **express questioning** or the **functional equivalent of express questioning**:

- *Express questioning*. Questions directed to a suspect by the police.
- *Functional equivalent*. Words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Express questioning entails a direct question. The test for the functional equivalent of questioning is whether the police should know that a practice is likely to elicit an incriminating statement from a suspect. The police are required to put themselves in the shoes of the suspect and ask themselves whether a statement or practice is likely to lead the suspect to incriminate himself or herself. For example, the police should anticipate that an appeal to religion may lead a suspect who is a member of the clergy to incriminate himself or herself.

In *Innis*, Thomas J. Innis was taken into custody as a suspect in the murder of a taxicab driver. Two police officers carried on a conversation in the squad car in Innis's presence about their fear that a physically challenged child at a nearby school would find the shotgun used in the murder and hurt him- or herself. Innis immediately waived his right to an attorney and directed the officers to the location of the shotgun. The Supreme Court held that there is nothing in the trial court record to suggest that the officers "should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent." The officers were unaware that Innis "was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest" (*Rhode Island v. Innis*, 446 U.S. 291 [1980]).



16.7 YOU DECIDE

Leeander Jerome Blake and Terrance Tolbert robbed and killed Staughan Lee Griffin and carjacked his automobile. Tolbert was arrested and implicated Blake. Blake was arrested and read his *Miranda* rights and invoked his right to an attorney and was jailed.

Thirty-five minutes later, Detective William Johns returned to Blake's cell to give Blake a statement of the charges. Maryland law requires that defendants receive a statement of the charges against them. Johns was accompanied by Officer Curtis Reese. Johns told Blake, "[I]t's very serious, this is your copy, you need to read it over." The statement contained a description of each charge as well as the maximum penalty for each offense. The maximum penalty listed for the first-degree murder charge was "DEATH." The death penalty is indeed the maximum penalty that can be imposed in Maryland for first-degree murder although Blake himself could not have received the death penalty because he was 17 years old on the night of the murder. The factual summary on which the charges were based included an accusation by Tolbert that Blake was the one who shot Griffin and drove Griffin's vehicle from the scene.

As Johns began to leave, Reese said in a loud and confrontational voice, "I bet you want to talk now, huh?"

Detective Johns loudly stated to Reese, "[N]o he doesn't want to talk to us, you can't say anything to him, he asked for a lawyer."

Roughly one half-hour after Johns had spoken to Blake, Johns returned to the cell block to deliver Blake some clothing that had been delivered for him. Blake asked, "I can still talk to you?" Johns replied, "Are you saying you want to talk to me now?" Blake said "[Y]es," and Johns told him he would have to reread Blake his *Miranda* rights before they could talk. Blake walked back to the interview room, where he was re-Mirandized. Blake provided a full account of the robbery, murder, and carjacking.

At the end of the interview, Detective Johns asked if Blake would agree to a polygraph exam, and Blake said he would. The polygraph administrator told Blake that he appeared to have been deceptive, and Blake then admitted that on the day of the murder, he knew Tolbert had a gun. He also admitted that they were looking for someone to carjack, and that Blake initially noticed Griffin and pointed him out to Tolbert. Was Blake improperly interrogated by the Annapolis, Maryland, police officers under *Rhode Island v. Innis*? In the alternative, did Blake initiate the contact with the police under *Bradshaw*? See *United States v. Blake* (571 F.3d 331 [4th Cir. 2009]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.

■ SIXTH AMENDMENT RIGHT TO COUNSEL: POLICE INTERROGATIONS

The Sixth Amendment provides for the right to a speedy and public trial before an impartial jury with the right to obtain witnesses and to confront your accusers. The amendment further guarantees that an individual shall "have the assistance of counsel for his defense." The right to an attorney is crucial; without the skill and expertise of a lawyer, an individual may find himself or herself unable to meaningfully contest his or her guilt at trial. The U.S. Supreme Court, in a series of cases, extended the Sixth Amendment right to counsel beyond the criminal trial to

provide protections to individuals subjected to interrogation in the post-indictment phases of the criminal justice process. Keep two points in mind as we explore the Sixth Amendment right to counsel.

The Sixth Amendment right supplements the due process voluntariness and Fifth Amendment *Miranda* protections. The Sixth Amendment automatically attaches following the initiation of criminal proceedings. At this point, guilt or innocence is to be determined in a court of law.

The Sixth Amendment protection ensures that the criminal justice process functions in a fair fashion. In contrast, the due process voluntariness test protects individuals against involuntary confessions, and *Miranda* is intended to safeguard the right against self-incrimination.

In 2008, in *Rothgery v. Gillespie County*, the U.S. Supreme Court clarified that the Sixth Amendment right attaches at a criminal defendant's "initial appearance before a judicial officer," where he or she learns the charge against him, a probable cause determination is made, and bail is set restricting the defendant's liberty (*Rothgery v. Gillespie County*, 554 U.S. 191 [2008]). At this point, an individual's status has shifted from that of a criminal suspect to that of a criminally accused. As the Supreme Court observed in *Moran v. Burbine*, the Sixth Amendment's "intended function is not to wrap a protective cloak around the attorney–client relationship for its own sake. . . . [By] its very terms, [the Sixth Amendment] becomes applicable only when the government's role shifts from investigation to accusation. . . . [I]t is only then that the assistance of one versed in the intricacies of law is needed to assure the prosecution's case encounters the 'crucible of meaningful adversarial testing'" (*Moran v. Burbine*, 475 U.S. 412, 430 [1986]).

The philosophy underlying the Sixth Amendment protection from involuntary interrogation is that individuals against whom criminal proceedings have been initiated are entitled to have their guilt or innocence determined in a court of law before a judge and jury and that this process should not be short-circuited by permitting the police to elicit incriminating information from an individual in the absence of his or her lawyer.

Massiah v. United States provided the foundation for the development of the Sixth Amendment right to counsel. Winston Massiah was indicted for federal narcotics violations, retained a lawyer, pled guilty, and was released on bail. Massiah's co-defendant, Jesse Colson, agreed to cooperate with the government and engaged Massiah in a conversation in Colson's car, which was equipped with a radio transmitter. A government agent overheard Massiah make several incriminating remarks. The Supreme Court ruled that although Massiah had made a voluntary admission, his statement was obtained in violation of Massiah's Sixth Amendment right to counsel. Justice Stewart explained that at a time when Massiah was entitled to have his guilt adjudicated in a courtroom presided over by a judge, Massiah had been subjected to police-orchestrated extrajudicial interrogation in the absence of counsel. This denied Massiah a range of rights, including the opportunity to cross-examine the witnesses against him. In summary, Massiah had been denied his right to counsel "where there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel" (*Massiah v. United States*, 377 U.S. 201, 204 [1964]).

The Supreme Court did not return to the **Sixth Amendment protection against the deliberate eliciting of a confession** until *Brewer v. Williams* in 1977. Robert Williams had been arraigned for the murder of a 10-year-old child and was being transported to Des Moines, Iowa. The deeply religious, former mental patient confessed after one of the officers gave an emotional speech on the importance of providing the young woman with a "Christian burial." The Supreme Court concluded that Detective Cletus Leaming "deliberately and designedly set out to elicit information from Williams just as surely as and perhaps more effectively than if he had formally interrogated him." Detective Leaming was fully aware that Williams was represented by an attorney, and the Supreme Court stressed that in such circumstances, a heavy burden rests on the government to establish that Williams intentionally relinquished or abandoned his Sixth Amendment right to counsel. The Supreme Court concluded that Williams's Sixth Amendment rights had been violated and held that his confession had been improperly admitted into evidence. *Brewer* is important for extending the Sixth Amendment and Fourteenth Amendment right to a lawyer by holding that a person is "entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information or arraignment'" (*Brewer v. Williams*, 430 U.S. 398 [1977]).

The main importance of the Sixth Amendment is in providing defendants protection against interrogation by government informants. In 1980, in *United States v. Henry*, the Supreme Court held that the Sixth Amendment provided protections to prison inmates facing trial against unknowing interrogations by undercover government agents. The Court held that the government had contravened Henry's Sixth Amendment right when the FBI instructed Nichols, a paid government informant, to gather information on Henry's involvement in a bank robbery. Nichols was directed to engage Henry in discussions but not to

directly question Henry about the crime. The Supreme Court nevertheless concluded that the informant was not a passive listener. He had engaged Henry in conversation and succeeded in eliciting a confession. Justice Warren Burger noted that even if the government officials did not intend for the informant to take active steps to obtain a confession, the government must have anticipated that it had created a situation that was likely to “induce Henry to make incriminating statements without the assistance of counsel.” Consider how the decision in *Henry* differs from the U.S. Supreme Court decision in the *Miranda* case of *Illinois v. Perkins (United States v. Henry)*, 447 U.S. 264, 272–273 [1980].

Six years later, in *Kuhlmann v. Wilson*, the Supreme Court seemingly reversed course and ruled that the government did not violate Wilson’s Sixth Amendment rights. An informant was instructed not to ask questions concerning Wilson’s pending murder and robbery prosecution and was advised to “keep his ears open” and to pay attention to any unsolicited admissions of guilt. The informant reportedly listened to Wilson’s spontaneous statements of guilt and testified against Wilson at trial. The Supreme Court stressed that the Sixth Amendment is not violated when the government through “luck or happenstance” obtains incriminating statements from the accused after the right to counsel has attached. The defendant must demonstrate that the police and the informant did not merely listen but took some action that was “designed deliberately to elicit incriminating remarks” (*Kuhlmann v. Wilson*, 477 U.S. 436, 459 [1986]).

In summary, the Sixth Amendment right to counsel applies under certain conditions:

- *Judicial proceedings.* The Sixth Amendment applies to both federal and state government agents at or after the time that judicial proceedings have been initiated against an accused—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.
- *Deliberately elicited.* The government may not intentionally elicit information. This prohibits the use of informants to directly interrogate suspects as well as the creation of a situation likely to induce a defendant to make incriminating statements concerning a pending charge without the assistance of counsel.
- *Waiver.* The police may initiate contact with an individual whose Sixth Amendment right to counsel has attached following a preliminary hearing, and the individual is free to talk to the police. The suspect must voluntarily, knowingly, and intelligently relinquish his or her right to counsel prior to his or her interrogation.

You likely are fairly confused at this point. The important point is that once proceedings have been initiated against a suspect and the suspect has requested or retained a lawyer, the police are prohibited from interrogating the suspect outside the presence of a lawyer. This is intended to ensure that innocence or guilt is established at trial rather than through police questioning. Now that you understand the Sixth Amendment right to counsel, you might ask yourself why we need this protection. Why is *Miranda* not sufficient?

Legal Equation

Sixth Amendment right to counsel at interrogation	=	The Sixth Amendment applies at the time that judicial proceedings have been initiated against an accused—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment
	+	The accused must have requested or arranged for legal representation
	+	The government may not deliberately elicit information absent a waiver
	+	The suspect must voluntarily, knowingly, and intelligently relinquish his or her right to an attorney.

■ CASE ANALYSIS

In *Moran v. Burbine*, the U.S. Supreme Court decided whether the police under *Miranda* were required to inform a suspect that a lawyer informed the police that he or she was available to assist the defendant.

Was Burbine adequately informed of his right to access to a lawyer?

Moran v. Burbine, 475 U.S. 412 (1986), O'Connor, J.

On the morning of March 3, 1977, Mary Jo Hickey was found unconscious in a factory parking lot in Providence, Rhode Island. Suffering from injuries to her skull apparently inflicted by a metal pipe found at the scene, she was rushed to a nearby hospital. Three weeks later, she died from her wounds.

Several months after her death, the Cranston, Rhode Island, police arrested respondent and two others in connection with a local burglary. Shortly before the arrest, Detective Ferranti of the Cranston police force had learned from a confidential informant that the man responsible for Ms. Hickey's death lived at a certain address and went by the name of "Butch." Upon discovering that respondent lived at that address and was known by that name, Detective Ferranti informed respondent of his *Miranda* rights. When respondent refused to execute a written waiver, Detective Ferranti spoke separately with the two other suspects arrested on the breaking and entering charge and obtained statements further implicating respondent in Ms. Hickey's murder. At approximately 6 P.M., Detective Ferranti telephoned the police in Providence to convey the information he had uncovered. An hour later, three officers from that department arrived at the Cranston headquarters for the purpose of questioning respondent about the murder.

That same evening, at about 7:45 P.M., respondent's sister telephoned the public defender's office to obtain legal assistance for her brother. Her sole concern was the breaking and entering charge, as she was unaware that respondent was then under suspicion for murder. She asked for Richard Casparian, who had been scheduled to meet with respondent earlier that afternoon to discuss another charge unrelated to either the break-in or the murder. As soon as the conversation ended, the attorney who took the call attempted to reach Mr. Casparian. When those efforts were unsuccessful, she telephoned Allegra Munson, another assistant public defender, and told her about respondent's arrest and his sister's subsequent request that the office represent him.

At 8:15 P.M., Ms. Munson telephoned the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word "Detectives." Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect

in Mary's murder. At all relevant times, respondent was unaware of his sister's efforts to retain counsel and of the fact and contents of Ms. Munson's telephone conversation.

Less than an hour later, the police brought respondent to an interrogation room and conducted the first of a series of interviews concerning the murder. Prior to each session, respondent was informed of his *Miranda* rights, and on three separate occasions, he signed a written form acknowledging that he understood his right to the presence of an attorney and explicitly indicating that he "[did] not want an attorney called or appointed for [him]" before he gave a statement. Uncontradicted evidence at the suppression hearing indicated that at least twice during the course of the evening, respondent was left in a room where he had access to a telephone, which he apparently declined to use. Eventually, respondent signed three written statements fully admitting to the murder.

Prior to trial, respondent moved to suppress the statements. The court denied the motion, finding that respondent had received the *Miranda* warnings and had "knowingly, intelligently, and voluntarily waived his privilege against self-incrimination [and] his right to counsel." The jury found respondent guilty of murder in the first degree, and he appealed to the Supreme Court of Rhode Island. A divided court rejected his contention that the Fifth and Fourteenth Amendments to the Constitution required the suppression of the inculpatory statements and affirmed the conviction.

The record amply supports the state-court findings that the police administered the required warnings, sought to assure that respondent understood his rights, and obtained an express written waiver prior to eliciting each of the three statements. Nor does respondent contest the Rhode Island courts' determination that he at no point requested the presence of a lawyer. He contends instead that the confessions must be suppressed because the police's failure to inform him of the attorney's telephone call deprived him of information essential to his ability to knowingly waive his Fifth Amendment rights. In the alternative, he suggests that to fully protect the Fifth Amendment values served by *Miranda*, we should extend that decision to condemn the conduct of the Providence police. . . .

The purpose of the *Miranda* warnings . . . is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights. Clearly, a rule that focuses on how the police treat an attorney—conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation—would ignore both *Miranda*'s mission and its only source of legitimacy.

Nor are we prepared to adopt a rule requiring that the police inform a suspect of an attorney's efforts to reach him. While such a rule might add marginally to *Miranda's* goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations counsel against its adoption. As we have stressed on numerous occasions, "[one] of the principal advantages" of *Miranda* is the ease and clarity of its application. . . .

We have little doubt that the approach urged by respondent . . . would have the inevitable consequence of muddying *Miranda's* otherwise relatively clear waters. The legal questions it would spawn are legion: To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter? . . .

The position urged by respondent would upset this carefully drawn approach in a manner that is both unnecessary for the protection of the Fifth Amendment privilege and injurious to legitimate law enforcement. Because, as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process, a rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt. Indeed, the very premise of the court of appeals was not that awareness of Ms. Munson's phone call would have dissipated the coercion of the interrogation room, but that it might have convinced respondent not to speak at all. Because neither the letter nor purposes of *Miranda* require this additional handicap on otherwise permissible investigatory efforts, we are unwilling to expand the *Miranda* rules to require the police to keep the suspect abreast of the status of his legal representation. . . .

CHAPTER SUMMARY

Confessions are essential in the investigation and detection of crime. The procedural standards governing confessions are based on the following:

- *Due Process Clause* of the Fourteenth Amendment
- *Fifth Amendment* right against self-incrimination
- *Sixth Amendment* right to counsel

The three constitutional approaches to confessions are summarized below:

Due process. The due process voluntariness test requires that a confession be the result of a free and voluntary choice and not be the product of compulsion. Courts decide whether a confession is voluntary by analyzing the totality of the circumstances. This test is criticized for failing to provide law enforcement officials with clear standards to guide their decisions and is difficult for courts to apply.

Miranda. The Fifth Amendment provided the basis for *Miranda v. Arizona* (1966). *Miranda* established that individuals subjected to custodial interrogation are to be informed that anything they say may be used against them and that they have the right to silence and the right to an attorney, appointed or retained. The *Miranda* warning is intended to provide individuals with the necessary information to resist the inherent pressures of custodial interrogation. There are a number of central components of the *Miranda* rule.

Custodial interrogation. *Miranda* is triggered by *custodial interrogation*. This is the *threshold determination* and occurs when there is a custodial arrest or the functional equivalent of a custodial arrest. In determining whether there is the functional equivalent of custodial interrogation, judges ask whether a reasonable person, based on the totality of the circumstances, would believe that the individual is in police custody to a degree associated with a formal arrest. Courts typically ask whether a reasonable person would feel free to leave. In *J.D.B. v. North Carolina*, the Supreme Court held that a juvenile's age should be considered in determining whether he or she was subjected to custodial interrogation.

Public safety. In *New York v. Quarles*, the U.S. Supreme Court recognized a *public safety exception* to *Miranda*. This exception permits the police to ask questions reasonably prompted by a reasonable concern with public safety without first advising a suspect of his or her *Miranda* rights. The Supreme Court concluded that a reasonable concern with the safety of the police or the public outweighs the interest in protecting the suspect's right against self-incrimination.

Miranda warning. The *three-part Miranda warning* is essential for informing suspects of their rights and of the consequences of waiving their rights. The *Miranda* judgment states that the warnings are to be recited in "clear and unequivocal terms" and that a suspect is to be "clearly informed" of his or her rights. The Supreme Court has provided broad guidance to the police on how to recite the *Miranda* rights. *Miranda* is a flexible formula. The test is whether the warnings viewed in their totality convey the essential information to the suspect.

Invocation of rights. Following the reading of the *Miranda* rights, a defendant has the opportunity to *assert his or her right to a lawyer or right to silence or to waive these rights*. In *Davis v. United States* (1994), the Supreme Court held that an individual is required to "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." The Court reasoned that a rule that required the police to cease questioning following an ambiguous statement by the accused would transform *Miranda* into a "wholly irrational obstacle to interrogations." In *Berghuis v. Thompkins*, the Supreme Court held that a defendant is required to invoke the right to silence in an unambiguous fashion.

Voluntary waiver. The Supreme Court stressed in *Miranda* that the government is required to meet a "heavy burden" in demonstrating that a suspect voluntarily, knowingly, and intelligently waived his or her rights. The *Miranda* decision noted that any evidence that an accused was threatened, tricked, or cajoled into a waiver is sufficient to demonstrate that a suspect did not *voluntarily waive* his or her rights. A waiver also will not be upheld if obtained under coercive circumstances such as a lengthy interrogation or a lengthy incarceration prior to a confession.

Knowing and intelligent waiver. We have seen that an individual must understand the *Miranda* rights as well as the consequences of waiving them. *Tague v. Louisiana* held that a police officer may not automatically conclude that an individual *knowingly and intelligently* waived his or her rights. What factors are relevant in determining whether a waiver of *Miranda* is knowing and intelligent? In *Fare v. Michael C.*, the Supreme Court indicated that the question whether a waiver is knowing and intelligent is determined on a case-by-case basis by the totality of the circumstances. In *Fare*, this analysis considered the "juvenile's age, experience, education, background, and intelligence and whether he has the capacity to understand the warnings given him . . . and the consequences of waiving those rights." Courts also will examine whether the defendant acted in a calm and rational fashion or in an emotional and incoherent manner. The Supreme Court stressed that the Constitution does not require that an individual should be informed of all the information that might prove useful in arriving at a decision whether to waive his or her rights, such as the strength of the prosecution's case.

Express and implied waiver. A waiver, as we have seen, must be voluntary, knowing, and intelligent. *Miranda* indicated that an "express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." A waiver will not be presumed from an accused's silence. The Supreme Court has recognized implied as well as explicit waivers and ruled that "in some cases, a waiver can be clearly inferred from the actions and words of the person interrogated." In these instances, the prosecution is required to establish that although there was no affirmative waiver, the suspect engaged in a "course of conduct indicating waiver."

Question first and warn later. The U.S. Supreme Court was next asked to address whether a waiver is valid that is obtained through a *question first and warn later* tactic. In *Missouri v. Seibert*, the Supreme Court stated that the issue when the police question first and warn later is whether "it would be reasonable to find that in these circumstances the warnings could function 'effectively' to advise the suspect that he or she had a real choice about giving an admissible statement." In other words, when a suspect is warned that "anything you say may be used against you," will he or she understand that despite the initial confession, he or she need not speak to the police? The Supreme Court suggested in a footnote that this might require that the police inform a suspect that the first confession is inadmissible in evidence.

Interrogation following invocation of the Miranda rights. Once individuals invoke their *Miranda* rights, the Supreme Court has recognized that they still may be subjected to interrogations. The Court ruled that the admissibility of statements obtained after a person in custody had decided to remain silent depends on whether his or her right to silence had been *scrupulously honored*. The Court, in *Edwards v. Arizona*, established a separate *initiation test* for determining whether a defendant who invokes his or her right to an attorney may be once again interrogated. Initiation does not require a direct waiver of an individual's right to a lawyer. *Maryland v. Shatzer* limited *Edwards* by permitting the interrogation of a suspect who has invoked his or her right to counsel after having been released from custody for fourteen days. In *Oregon v. Bradshaw*, the Supreme Court held that the initiation standard is satisfied by a generalized discussion regarding the criminal investigation.

Interrogation. In *Rhode Island v. Innis*, the Supreme Court defined *interrogation*. The Court explained that interrogation entails *express questioning* or the *functional equivalent of direct questioning*. The test for the functional equivalent of direct questioning is whether the police should know that their words or actions are likely to elicit an incriminating statement from a suspect.

Sixth Amendment. In 1966, in *Massiah v. United States*, the U.S. Supreme Court proclaimed that following the initiation of criminal proceedings, individuals enjoy a *Sixth Amendment right to counsel* that protects them from the government's deliberately eliciting incriminating statements. The Sixth Amendment was not again applied to protect individuals from interrogation in the pretrial phase of the criminal justice process until 1977 when the Supreme Court applied the Sixth Amendment in *Brewer v. Williams*. *Brewer* was followed by a number of decisions that further defined the Sixth Amendment right to counsel.

As noted above, the Sixth Amendment provides protections to individuals *confronting formal criminal proceedings*. At this point, an individual's status has shifted from that of a criminal suspect to a criminally accused. The philosophy underlying the Sixth Amendment protection is that an individual against whom criminal proceedings have been initiated is entitled to have his or her guilt or innocence determined in a court of law before a judge and jury and that this process should not be short-circuited by permitting the police to elicit incriminating information from a defendant in the absence of his or her attorney or a waiver of the defendant's Sixth Amendment right.

In reviewing this chapter, be certain that you understand the three constitutional approaches to interrogations and the points in the criminal justice process in which each applies:

- *Fourteenth Amendment due process voluntariness test* prohibits involuntary confessions and applies at all stages of the criminal justice process. You always have this protection.
- *Fifth Amendment Miranda rights* provide protections during custodial interrogation. You only have this protection during custodial interrogation.
- *Sixth Amendment right to counsel* applies after the initiation of formal proceedings against an accused following a request or hiring of a lawyer. You have this protection once your status shifts from criminal suspect to criminal defendant.

CHAPTER REVIEW QUESTIONS

1. Why are confessions important tools in criminal investigation?
2. What are some of the dangers of relying on confessions to obtain criminal convictions?
3. Can you identify some of the reasons that suspects make false confessions?
4. Write a one-page response to the following quote. Supreme Court Justice Felix Frankfurter famously remarked, in regard to the due process test, that it is "impossible . . . to . . . precisely . . . delimit the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test . . . has . . . evolved" (*Culombe v. Connecticut*, 367 U.S. 568, 601–602 [1961]).
5. Summarize the holding in *Escobedo v. Illinois*. How did this set the stage for the Supreme Court's decision in *Miranda v. Arizona*?

6. Why was the right against self-incrimination included in the U.S. Constitution? Distinguish between testimonial and nontestimonial evidence.
7. What is the holding of the U.S. Supreme Court in *Miranda v. Arizona*? Explain how this decision is intended to counter the pressures inherent in incommunicado interrogation.
8. What is the test for custodial interrogation? Discuss the public safety exception.
9. How should the *Miranda* rights be read to a suspect?
10. Give an example of a statement that satisfies the legal test for invoking the right to a lawyer under *Miranda*. Provide an example of a statement that would not satisfy the standard for invoking the right to a lawyer under *Miranda*.
11. Distinguish between a voluntary and an involuntary waiver. What factors does a court consider in determining whether a waiver is knowing and intelligent? What is the difference between an express and an implied waiver?
12. Why is it important whether an individual is considered to be subject to custodial interrogation? List the factors that a court evaluates in determining whether a suspect is subjected to custodial interrogation.
13. What is the legal test for determining whether the police can interrogate a suspect who has invoked his or her right to silence? What is the legal test for determining whether the police can interrogate a suspect who has invoked his or her right to a lawyer?
14. What is the legal test determining whether an individual has initiated contact with the police?
15. Define *interrogation* as articulated by the U.S. Supreme Court. Distinguish between direct questioning and the functional equivalent of direct questioning. Why would it be helpful for the police to understand the concept of interrogation under *Miranda*?
16. How does the Sixth Amendment right to counsel protect individuals from interrogation by the police?
17. Does *Miranda* handcuff the ability of the police to rely on confessions, or does it favor the police?
18. Write a brief essay illustrating how the U.S. Supreme Court's decisions on police interrogation have balanced the interests of the suspect and the interests of society.

LEGAL TERMINOLOGY

break in the custody rule	functional equivalent of express questioning	public safety exception
confessions	implied waiver	question first and warn later
custodial interrogation	incommunicado interrogation	scrupulously honor
express questioning	initiation	Sixth Amendment protection against the deliberate eliciting of a confession
express waiver	interrogation	Star Chamber
false confession	involuntary confessions	statements
Fourteenth Amendment due process	<i>Miranda</i> warnings	voluntary, knowing, and intelligent waiver
voluntariness test	nontestimonial evidence	

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