



MIRANDA REVISITED

***“You have the right to remain silent.
Anything you say can and will be used
against you in a court of law.
You have the right to an attorney and to have
an attorney present during any questioning.
If you cannot afford a lawyer, one will be provided
for you at government expense.”***

BY EDWARD L. FIANDACH

Since it was handed down in 1966, *Miranda v. Arizona*,¹ has served as a lightning rod for constitutional and sociological debate. Seen by some as the height of judicial arrogance, others still praise the decision as the last surviving bastion of the enlightened liberality that characterized the criminal justice system in the 1960s. Requiring an advisement, acknowledgment and waiver of a custodial suspect's Fifth and Sixth Amendment rights, *Miranda* represents what is perhaps the most publicized flashpoint in the continuing debate over the level of constitutional protection to be afforded those who have been charged with criminal wrongdoing.

My purpose here is to analyze the context in which the United States Supreme Court decided *Miranda* as well as its textual validity. I will then examine the net result of the decision and make recommendations concerning its continued viability. In short, it will be argued that the *Miranda* decision not only fails to insure the protections of those interrogated by the police, but in fact eviscerates the constitutional protections promulgated by the Supreme Court up and until *Miranda*.

Background: Due Process Analysis

Three constitutional provisions regulate the receipt of admissions in a criminal trial, the Self-Incrimination Clause² and the Due Process Clauses found in both the Fifth³ and Fourteenth Amendments.⁴ Despite the seemingly obvious applicability of the Self-Incrimination Clause, such would not serve as the initial battleground in the dispute over just what circumstances would allow the receipt of admissions or confessions⁵ at trial. In large part, this was

undoubtedly due to the fact that the Self-Incrimination Clause of the Fifth Amendment⁶ was not binding upon the states until 1964.⁷ While this standard would have been available to invalidate confessions obtained in federal cases, to do so would have required the Supreme Court to utilize dramatically different standards and to depart from a rich vein created by the English common law⁸ that seemed to adequately respond to the most pressing need; the need to determine whether the statement had been coerced.⁹ Accordingly, in *Hopt v. Utah*,¹⁰ the Court extensively discussed the English precedents and concluded that the question to be answered was whether the actions of law enforcement were such that the presumption against falsely implicating one's self “ceases.”¹¹

Constitutional analysis of confessions first appears in *Bram v. United States*.¹² In *Bram*, a capital case involving a murder upon a seagoing American vessel, the United States Supreme Court, without rationale or elaboration, suddenly declared:

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution of the United States commanding that no person ‘shall be compelled in any criminal case to be a witness against himself.’¹³

That having been said, the Court immediately found ‘traditional’ voluntariness to be the applicable standard:

The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the text-books. * * * But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.¹⁴

Arguably, the juxtaposition of these two statements could have meant that the Court considered the voluntariness standard to fall under the Self-Incrimination Clause. This would not have been an implausible conclusion and could have meant that the Clause, which was derived from a maxim well-known to the Framers, “*nemo tenetur seipsum accusare*,”¹⁵ was being interpreted as embracing the long-standing concept of voluntariness. Such was not to be however, as the Court quickly retreated from the Self-Incrimination Clause and settled instead upon the newly minted Fourteenth Amendment and its Due Process Clause.^{16, 17}

Unchanged from the English precedents was the fundamental assumption that despite the inherent reliability of a statement made against the penal motives of the maker, reliability vanishes in those situations where the will of the declarant has been overborne by some form of duress. The quintessential question to be answered under the Due Process analysis is always the quantum of duress that must be shown to permit the court to hold that the will of the declarant has been overborne. As noted above, the *Bram* Court seemed to set a very low standard, observing that the confession “must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.”¹⁸ This, of course, would have led to a virtual *per se* rule of constitutional inadmissibility that never achieved credence with the Court. Nevertheless, the use of the adjective “any” would have the slow and incalculable effect of subtly shifting the debate from the circumstances of the interrogation to an examination of the effect those circumstances had upon the defendant.

At the outset, American voluntariness cases often dealt with horrific examples of brutality. In *Ziang Sung Wan v. United States*,¹⁹ the defendant,

who was suffering from a virulent gastrointestinal condition, was questioned continuously for 13 days without medical attention. A murder occurring in the District of Columbia, the case was decided under the voluntariness standard described in *Bram*.²⁰

The first instance in which the Supreme Court would overturn a state court conviction based upon the receipt of a confession was *Brown v. Mississippi*.²¹ *Brown* involved multiple whippings as well as threats and torture which forced the Court to declare that “the rack and the torture chamber may not be substituted for the witness stand.”²² It also presented a unique situation in that since the Fifth Amendment was not yet binding upon the states, *Bram* was not available and resort had to be to the Fourteenth Amendment. In the well known decision, the Court held that the process employed by the State of Mississippi in securing the confessions served to deny the defendants of any aspect of Due Process of Law.

With *Brown* establishing the outer parameter of what would commonly be known as the Due Process²³ voluntariness test, the next two decades would see the Court move closer to the rationale of *Bram*.²⁴ In so doing, the Court’s focus would inexorably shift from an examination of the statement’s truthfulness to the motivation to make the statement and whether the decision to testify against one’s self was “free and voluntary.”²⁵ In *Lisenda v. California*,²⁶ for example, the Court, although affirming the conviction and sentence of death, observed that the demeanor of the Petitioner “negat[ed] the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer.”²⁷

By 1949, the transition from the venerable English precedents was rendered complete. In *Watts v. Indiana*,²⁸ the Petitioner was interrogated in relays, deprived of food and kept in inhumane conditions. Even so, and unlike *Brown*, the Court did not pass on the improbable reliability of the statement. Instead, the Court chose to expand the position first seen in *Lisenda* and concluded that, as a result of the inhuman techniques, the Petitioner’s will and hence his opposition to confession had been broken:

A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered.

But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. * * * To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.²⁹

By the year 1953, the cleavage between what had been the common law principle, that which was based upon a deep mistrust of the truthfulness of the statement, and the newer Due Process approach, that which expressed a concern for the decision to confess, was complete. In *Stein v. New York*,³⁰ the Court declared, “[w]hen [physical violence] was present, there is no need to weigh or measure its effects on the will of the individual victim.” Thus when violence was found, the Court was bound to apply what was virtually a “*per se*” Due Process standard.³¹ When, on the other hand, the interrogation techniques fell short of physical violence, the Court would assess the situation under a “totality of the circumstances” Due Process analysis.³² When one recognizes that the fact pattern in *Watts* and numerous other cases was amenable to examination under either standard, the unworkability of the then current methodology becomes apparent. At this point, the clock begins to tick on the increasingly difficult task of categorizing all questions concerning interrogation techniques under a single Due Process label.

Decided in 1959, *Spano v. New York*,³³ is emblematic of the difficulties inherent in attempting to maintain dogmatic reliance upon the Due Process clause. In *Spano*, the authorities utilized a childhood friend turned police officer to play upon the suspect’s emotional instability and eventually obtained a confession. While the Court ultimately decided the case on the issue of voluntariness, equally compelling was that *Spano* was an indicted defendant who had surrendered himself with his retained attorney and thereafter was denied counsel. Nevertheless, the Court was three years and two votes from *Gideon v. Wainwright*.³⁴ With limited options at its disposal, the Court was forced to once again expand³⁵ its Due

Process analysis to hold the confession involuntary. Finding it unnecessary to reach the issue of counsel, in *Spano*, we see a complete abandonment of reliability as a basis for examination:

We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts in their post-indictment setting. Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. They were rather concerned primarily with securing a statement from defendant on which they could convict him.³⁶

Waiver

Seemingly lost within the immense and ever growing forest of Due Process cases was the stark fact that each of these cases involved some form of compulsion and its alter ego, waiver. The Fifth Amendment commands that no person shall "be compelled . . . to be a witness against himself." To compel means "to force or constrain to do something."³⁷ Categorically, none of the Due Process cases saw a defendant being literally compelled to give testimony against him or herself at trial. Nevertheless, each case bore the common thread of a confession, obtained by agents of the state in a custodial setting, being offered as evidence in a criminal trial. Despite the rather draconian factual situations presented in some of the petitions decided under the rubric of Due Process, in each case the proponent of the statement would have to assert that the privilege against self-incrimination had somehow been waived.

"The term *waiver* is one of those words of indefinite connotation in which our legal literature abounds; like a cloak, it covers a multitude of sins."³⁸ Nevertheless, when discussing waiver in the context of criminal admissions, we are not without guidance. In *Johnson v. Zerbst*,³⁹ the Petitioner was convicted of passing counterfeit money. He was tried and convicted in a proceeding at which he represented himself. The central issue in *Johnson* was whether the Petitioner waived the right to have counsel present at his trial. Commencing by recognizing that the presumption is against waiver and that a

waiver could not be presumed, Justice Black proceeded to define a "waiver" as "an intentional relinquishment or abandonment of a known right or privilege."⁴⁰ Further, the Court found that if on remand the District Court did not find that the Petitioner "competently and intelligently waive[d] his right to counsel, * * * the trial court did not have jurisdiction to proceed to judgment and conviction[.]"⁴¹

"Intentional relinquishment or abandonment of a known right or privilege" has become the standard for determining the waiver of a Constitutional right.⁴² For instance, in *Edwards v. Arizona*,⁴³ while speaking of the right to counsel, Justice White observed:

It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'⁴⁴

As an "intentional relinquishment or abandonment of a known right or privilege," waiver constitutes far more than mere voluntariness, a fact made abundantly clear by the Court in *Schneckloth v. Bustamonte*.⁴⁵ In *Schneckloth*, a vehicle in which the Respondent was riding was stopped for various equipment violations. When the driver could not produce a driver's license and only one of the five passengers had identification, backup was called and one of the officers eventually requested permission to search the vehicle. The driver responded, "sure go ahead," and a search of the vehicle turned up three checks which had been stolen from a local car wash. At no time was it alleged that the officers used force or other coercive means to secure permission to search. Convicted at trial, the Respondent brought a writ of *habeas corpus* which was denied at the district court level. On appeal however, the Ninth Circuit reversed, finding that the state had to demonstrate not only that consent was freely and voluntarily given, but that consent was voluntary in the sense that it had been given with an understanding that it could be freely and effectively withheld.⁴⁶

Schneckloth is clearly a Fourth Amendment case, and the Court held

that a search could be "voluntary" in the absence of a knowing consent. It discussed the fact that voluntary searches were a useful component of law enforcement not only for securing evidence where there would otherwise be no probable cause, but also for sparing the innocent the stigma of an arrest.⁴⁷

Its Fourth Amendment holding notwithstanding, the Court had legions to say about the concept of waiver as it impacts the Fifth and Sixth Amendments. Commencing from the position that *Johnson v. Zerbst*⁴⁸ was a Fifth Amendment case, the Court quickly withdrew any consideration that a lack of a knowing and intelligent waiver would be sufficient to forego a "trial right":

The requirement of a 'knowing' and 'intelligent' waiver was articulated in a case involving the validity of a defendant's decision to forego a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process. *Johnson v. Zerbst*, dealt with the denial of counsel in a federal criminal trial.⁴⁹

This having been said, the Court provided a litany in which it described the nearly unbroken line⁵⁰ of cases mandating a "knowing and intelligent" waiver of trial rights:

Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial. Hence, and hardly surprisingly in view of the facts of *Johnson* itself, the standard of a knowing and intelligent waiver has most often been applied to test the validity of a waiver of counsel, either at trial, or upon a guilty plea. And the Court has also applied the *Johnson* criteria to assess the effectiveness of a waiver of other trial rights such as the right to confrontation, to a jury trial, and to a speedy trial, and the right to be free from twice being placed in jeopardy.⁵¹

It is, therefore, clear beyond question, that abandonment of a constitutionally protected trial right must not only be "voluntary," but must be based

upon a knowing relinquishment of the right being waived.

The Incorporation Trilogy: *Gideon*, *Malloy* And *Escobedo*.

As noted above, by 1963 the Fourteenth Amendment Due Process analysis had been stretched to the breaking point. By and large, this was due to the fact that situations now confronting the Court commonly included Sixth Amendment right to counsel issues. Further, the inclusion in *Spano* of the denial of counsel as a factor in the Court's Due Process analysis additionally served to blur the virtually indiscernible boundary between voluntariness and the right to counsel. With the dawning of a new decade, it was only a matter of time before the Court would be forced to address the panoply of issues that the right to counsel entailed.

Gideon v. Wainwright

The first indication of change came in the rather unlikely form of a *pro se* petition for a writ of *certiorari*.⁵³ Clarence Earl Gideon was charged with breaking into a pool room with intent to commit a misdemeanor, a felony under Florida law. Before his trial, he requested counsel.⁵⁴ His request was denied. Representing himself *pro se* he was convicted and sentenced to five years in the state penitentiary.

The issue which the Court sought to dispose of in *Gideon v. Wainwright*⁵⁵ was two-fold. Initially, there was the issue of whether the Sixth Amendment's declaration that "[i]n all criminal prosecutions, the accused shall enjoy * * * the Assistance of Counsel for his defense," was binding upon the states through the operation of the Fourteenth Amendment. Assuming it was, the remaining question was whether, by the same authority, an indigent defendant in a state court criminal prosecution is entitled to the appointment of counsel. Previously, in *Betts v. Brady*,⁵⁶ the Court had refused to make the Sixth Amendment's right to counsel binding upon the states on the theory that such a right was not historically recognized as a fundamental right.

The *Gideon* Court, of course, overruled *Betts* and answered both questions in the affirmative. From March 18, 1963 onward, the right to appointed counsel would be a fundamental constitutional right binding upon the states, the waiver of which could be found only in a knowing and intelligent relinquishment.⁵⁷

Malloy v. Hogan

William Malloy was arrested during a gambling raid in 1959. He pleaded guilty to the crime of pool selling, a misdemeanor, and was sentenced to one year in jail and fined \$500. His sentence was suspended after 90 days, and he was placed on two years probation. About 16 months after his guilty plea, he was ordered to testify before a referee appointed by the Superior Court of Hartford County to conduct an inquiry into alleged gambling and other criminal activities in the county. He refused, was adjudged in contempt of court, and sentenced to prison until he was willing to answer the proffered questions. His petition for a writ of *habeas corpus* was denied by the Superior Court and the Connecticut Supreme Court of Errors affirmed.⁵⁸ *Certiorari* was granted and before the Supreme Court the issue was clear: Did the Fourteenth Amendment guarantee the Petitioner the protection of the Fifth Amendment's privilege against self-incrimination?

Holding that the guarantee was binding upon the states, the Court attempted to set a deep historical basis for its decision, noting that incorporation had begun as early as 1897.⁵⁹ It also took the unusual step of pointing out

that ten justices of the Court had favored complete incorporation of the first eight amendments.⁶⁰ In essence, the decision melded together the Due Process considerations discussed above with the Court's recent decision in *Mapp v. Ohio*⁶¹ and rejected the long standing position that the Fourth, Fifth and Sixth Amendments were federal evidentiary considerations available to the states only in a "watered down" fashion.⁶²

While the case sparked scathing dissents from Justices Harlan, Clark, White and Stewart, time would render their opinions little more than historical footnotes. From June 15, 1964 onward, the Fifth Amendment's protection against self-incrimination would be a fundamental constitutional right binding upon the states, the waiver of which could only be found in a knowing and intelligent relinquishment.⁶³

Escobedo v. Illinois

Thus far the Court had protected indigents and the right against self-incrimination. The final member of the incorporation trilogy was the right to counsel and that also came to be during that amazing spring of 1964. In *Escobedo v. Illinois*,⁶⁴ Benedict DiGerlando, a wit-

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LAW OFFICE OF MARCIA G. SHEIN

2392 North Decatur Rd., Decatur, GA 30033

Phone: 404-633-3797

Fax: 404-633-7980

Author/Editor of

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END WITH A PERIOD

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ness who was already in custody, told the police that the Danny Escobedo had fired the fatal shots in a homicide. That evening, the police arrested Escobedo and his sister and brought them to the police station for questioning. When he was told by the police that they had a good case against him, Escobedo, a 22-year-old Mexican-American, said he wanted a lawyer. Shortly after Escobedo reached the police station, his retained lawyer arrived and requested permission to see his client. Told by the homicide detective that he could not, he eventually went to the chief of police and even filed a complaint with the police commissioner, all to no avail.

Despite the fact that Escobedo continued in his requests to speak to his lawyer, who he had actually seen at the police station, he remained without counsel. After being informed by a Spanish speaking officer, who grew up in Escobedo's neighborhood, that if he implicated DiGerlando in the killing, he and his sister could go home, the police arranged a meeting of Escobedo and DiGerlando. During the confrontation, Escobedo stated: "I didn't shoot Manuel, you did it." Based upon this initial inculpatory statement, the detectives continued questioning Escobedo who later made additional statements implicating him in the murder for which he was ultimately convicted.

The issue in *Escobedo*, as framed by the Court, was:

[W]hether . . . the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment.⁶⁵

Framed in this fashion, *Escobedo* seems unnecessary, almost superfluous inasmuch as *Gideon v. Wainwright*⁶⁶ had previously determined that in all criminal prosecutions the accused shall enjoy the right to counsel. The crucial difference between *Gideon* and *Escobedo*, however, lies in the facts. *Gideon* requested counsel *for his trial*. Escobedo, on the other hand, requested counsel *while in custody*. Viewed in this light, a better rendition of the issue in *Escobedo v. Illinois* is:

Does the Sixth Amendment's guarantee of the right to coun-

sel in all criminal prosecutions as made binding upon the States through the Fourteenth Amendment apply to pre-trial custodial interrogations?

Irrespective of how the issue is framed, the Court emphasized an inherent truism. Unless a suspect's right to counsel is protected in whatever pre-trial examinations are sought by the state, "the most illustrious counsel"⁶⁷ would be of little use. As articulated by Justice Goldberg:

In *Gideon v. Wainwright*, we held that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pre-trial examination.'⁶⁸

Accordingly the Court held that such interrogations do fall within the grasp of the newly strengthened and incorporated Sixth Amendment. In so doing, the Court leaped beyond the mere incorporation seen in *Malloy* and *Gideon* and foreshadowed the eventual holding of *Miranda v. Arizona*.⁶⁹ Along with extending the Sixth Amendment to custodial interrogation, the Court called for an advisement of the right to remain silent:

[w]here, * * * the suspect has requested and been denied an opportunity to consult with his lawyer, *and the police have not effectively warned him of his absolute constitutional right to remain silent*, the accused has been denied 'The Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.⁷⁰

While waiver sees only brief discussion by the majority in a footnote to the opinion,⁷¹ on the first day of summer in 1964, it was clear that waiver of counsel in a custodial setting had joined waiver

of counsel at trial and an abandonment of the Fifth Amendment's protection against self-incrimination in requiring a "knowing and intelligent relinquishment."⁷²

Miranda v. Arizona

While most lay persons, many experienced criminal defense counsel and even the Supreme Court, casually speak of "Miranda rights,"⁷³ as applied to substantive rights, the term is a misnomer. *Miranda v. Arizona*⁷⁴ created no substantive rights. If *Miranda* can be said to have created any rights at all, it created the procedural right whereby a custodial suspect is advised of his or her Fifth and Sixth Amendment rights as previously announced by the Court in *Malloy*, *Gideon* and *Escobedo*.

Another common misconception of *Miranda* is that the Petitioners were beaten or otherwise abused. The simple fact is that neither Ernesto Miranda, Michael Vignara, Carl Calvin Westover nor Roy Allen Stewart, were abused in the classic sense, a fact the Court readily acknowledged.⁷⁵

Miranda v. Arizona commenced with an examination of the techniques presently being taught and used by law enforcement personnel.⁷⁶ The Court, with some disdain, then noted:

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.⁷⁷

After a review of *Malloy* and *Escobedo*, the Court proceeded to set forth its now famous requirement that suspects in a custodial setting be advised of their right to remain silent,⁷⁸ be administered a warning describing the possible consequences of failing to remain silent,⁷⁹ be informed that he or she is entitled to counsel not only at a trial but during the interrogation phase,⁸⁰ and be informed of the right to appointed or assigned counsel.⁸¹ Finally, the Court discussed the "heavy burden" that would be borne by the prosecution when maintaining that the suspect had knowingly and voluntarily waived the rights as described by the Court.⁸² Of interest is that in setting forth this burden, the Court harkened back to *Johnson v. Zerbst*⁸³ and specifically "reassert[ed] these standards



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as applied to in custody interrogation.”⁸⁴

Viewed from the relative calm of 40 years, it is now apparent that *Miranda* withdrew far more than it added to the constitutional rights of the accused. On the eve of that famous decision, the Fifth Amendment clearly encompassed custodial interrogation. Likewise recognized was the Sixth Amendment’s assistance of counsel including the appointment of counsel for those who were unable to meet the financial burden that hiring counsel would entail. A knowing and intelligent relinquishment was thus already mandated by the fact that each of the foregoing were deemed fundamental trial rights. *Miranda*, therefore, simply reiterated the requirement of advisement and waiver while adding nothing at all. While *Miranda* immediately and permanently became an anathema for all aspects of law enforcement and was seen by large segments of the public as “handcuffing” the police, this is a conclusion that is at best questionable in terms of post-*Miranda* experience.⁸⁵

The key aspect of *Miranda*, apparently overlooked by all, is that if *Miranda* had never been decided, the prosecution would still have to demonstrate, prior to offering a purported confession at trial, that the defendant made a knowing and intelligent waiver of his or her Fifth and Sixth Amendment rights. Under principles firmly established since *Johnson v. Zerbst*, this would require proof that the suspect was made aware of his or her rights and that he or she voluntarily chose to waive the same. Far from handcuffing the police, *Miranda* empowered them to secure the necessary waiver at a time when the suspect was most vulnerable, immediately after the trauma of an arrest and while in custody. The strangest irony contained in the majority opinion is that the Court seemingly decided as it did in order to defuse the advanced psychological techniques which it conceded fell short of even the most liberal due process definition.⁸⁶ However, when one closely examines this aspect of the Court’s rationale, it becomes readily apparent that the majority obviously missed ‘the elephant in the room’; the very techniques which the Court abhorred in obtaining confessions were equally capable of being used to obtain a waiver.

The failure to recognize this crucial element ultimately led to reimposition by the Court of the “totality of the circumstances” test with disastrous consequences. In *Moran v. Burbine*,⁸⁷ the defendant and two others were arrested for burglary. A tipster had provided

information that the defendant may have been responsible for a murder which occurred several months earlier. He was then arrested, the investigating detective informed him of his ‘*Miranda* rights’ and he refused to execute a written waiver. Thereafter, the co-defendants in the robbery were questioned concerning the murder and gave statements implicating the defendant.

Meanwhile, family members had successfully made contact with the local public defender’s office and an assistant public defender phoned the police department where the defendant was being held and informed the detectives that she would be representing him in the event of a lineup or questioning. Less than one hour later, the defendant was brought to an interview room. Despite his earlier refusal, on three separate occasions the defendant signed a written form acknowledging that he understood his right to the presence of an attorney and explicitly indicated that he “‘[did] not want an attorney called or appointed for [him] before he gave a statement.’”⁸⁸

Following a conviction for murder, the case worked its way through the state and federal appeals process and ultimately reached the High Court. In upholding the waiver and in refusing to find that it was tainted by the failure to inform the defendant that he had counsel, the Court, per Justice O’Connor, resorted to a rationale intellectually indistinguishable from that seen nearly thirty years earlier in *Spano v. New York*.⁸⁹ The six to three decision analyzed the confession and waiver by means of the “totality of the circumstances test.”⁹⁰ As in *Spano*, the availability⁹¹ of counsel was viewed as a circumstance to be evaluated in assessing the overall picture. The upshot of *Burbine* is that *Miranda* is no longer employed as the shield envisaged by the Court in 1966, but as a sword with which to validate a suspect’s waiver and subsequent confession:

Echoing the standard first articulated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), *Miranda* holds that ‘[t]he defendant may waive effectuation’ of the rights conveyed in the warnings ‘provided the waiver is made voluntarily, knowingly and intelligently.’ The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the prod-

uct of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.⁹²

Thus, the greatest virtues to be bestowed by *Miranda* no longer run to suspects vulnerable in a custodial setting, but to law enforcement. By permitting an irrevocable waiver⁹³ at the station house, crucial decisions concerning the future conduct of the defense are placed squarely in the hands of the suspect. Most ironic is that a defendant is permitted to waive the presence of counsel without legal advice as to the advisability of such a decision. When one becomes cognizant of the fact that after *Gideon*, *Malloy* and *Escobedo* some form of notification and waiver is necessary, the much maligned *Miranda* decision represents the safest and least destructive course of conduct from the vantage point of those most interested in securing a confession.

One nagging question remains. Why was *Miranda* even decided? The question presented in *Miranda*’s brief certainly did not seek relief outside that afforded in *Malloy*,⁹⁴ a fact echoed in briefs filed by Vignara, Westover and Stewart. Indeed, the first question presented in Vignara’s brief⁹⁵ could easily have been disposed of under both *Spano* or *Malloy*.⁹⁶

While it is only speculation, two theories come to mind to explain the Court’s decision. Initially, the Court may have grown frustrated with the steady stream of voluntariness cases which confronted it term after term. *Miranda* may reflect profound judicial disappointment in the failed hope that the steady march toward voluntariness would collectively “clean up” police procedure. Indeed, the majority opinion hints at as much:

The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat,

kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party.⁹⁷

When the desired effect did not occur, the Court may have issued the *Miranda* decision with the somewhat naive hope that defendants would thereafter request counsel and the voluntariness issue, by and large, would evaporate.

The other theory is that the Court *had* to decide *Miranda* in the fashion it did. Following incorporation of the Fifth Amendment in a manner that extended the right to counsel, retained or appointed, to all defendants in a custodial setting, it was only a matter of time before the Court was faced with an explicit request, framed in the language of the Fifth Amendment, for a judicially approved waiver. Imposing a likely end to all extrajudicial questioning, this would have proved a political nightmare for a Court that was already under siege as a result of *Gideon*,⁹⁸ *Malloy*,⁹⁹ *Escobedo*¹⁰⁰ as well as school desegregation,¹⁰¹ school prayers¹⁰² and contraception.¹⁰³ Thus by anticipating the issue, the Court successfully moved waiver, as a practical and political matter, from the court house to the station house, thereby sparing itself from the wrath that would have invariably followed a requirement for a judicial waiver procedure.

Do custodial abuses still occur? Unfortunately they do. In *Mincey v. Arizona*,¹⁰⁴ the defendant confessed after he was subjected to four hours of interrogation while incapacitated and sedated in an intensive care unit. In *United States vs. Rullo*,¹⁰⁵ the evidence was that while he was at the police station, the officers threw the Defendant to the ground, punched and continued kicking him until he confessed. Perhaps the saddest commentary one can make is to point out that in the first 123 exonerations by the Innocence Project, 33 or nearly 27 percent, involved individuals who allegedly confessed.¹⁰⁶ Of the first 70 exonerations, 38 or 54 percent, involved police misconduct.^{107 108}

By now it should be apparent that *Miranda* should be overturned or modified to include the need for judicial approval of all waivers. This would return matters to the position enjoyed immediately post-*Escobedo*. While waivers could still be secured in a custodial setting, for a confession to be admissible, a valid waiver of the right to remain silent and the right to counsel at

the time of the original interrogation would have to be reaffirmed within a judicial setting. While this could take several forms, the most efficacious method would be a reaffirmation of the waiver before the trial judge. At that time, the Court would inform the suspect turned defendant of his or her Fifth and Sixth Amendment rights and conduct an inquiry as to whether he or she wished to waive the same.¹⁰⁹

While the likely effect of such a procedure will be to abolish admissions in all but plea situations, it is submitted that the net affect upon the criminal justice system will be positive. The most immediate affect will be to end judicially approved coercion of those who are, by and large, most vulnerable.¹¹⁰

Secondly, it will work to once and for all free law enforcement from its chronic addiction to confessions.^{111 112}

Third, such a decision will benefit the public by forcing law enforcement to reorganize so as to end archaic interdepartmental rivalries. One need only look at the sad chronicle of events that preceded the September 11 terrorist attacks to realize just how much information is lost between agencies.

Fourth, the virtual elimination of confessions will force law enforcement to utilize all of the technological tools at

its disposal of which DNA testing is but the tip of the iceberg. Increased use of technology by police agencies will result in swifter, more accurate law enforcement.

Finally, such a decision would be constitutionally honest. It would breathe new life into the Founder's expression of the basic human principle that "no person * * * shall be compelled in any criminal case to be a witness against himself" and will serve to rediscover the fundamental brilliance of *Bram*.

Notes

1. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2. U.S. Const. amend. V, cl. 3.

3. U.S. Const. amend. V, cl. 4.

4. U.S. Const. amend. XIV, §1.

5. While the terms "admission" and "confession" share many common attributes, the most obvious being the fact that they are utterances against the penal interest of the defendant, they are not the same. For our purposes, admissions are statements, generally oral, in which a criminal defendant describes activity constituting at least one element of a criminal act. Confessions are likewise admissions to the extent that they describe criminal activity of the defendant, but acknowledge or admit every element of the crime charged.

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Given that the primary focus of custodial interrogation is to derive inculpatory statements constituting both admissions and confessions, the convention employed in balance of this article will be to use the narrower term, "confessions."

6. U.S. Const. amend. V, cl. 3.

7. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

8. See, e.g., *Regina v. Baldry*, 2 Denison, 430; *Regina v. Moore*, 169 Eng.Rep. 608, 2 Den.C.C. 522 (Ct.Crim.App.1852); *Regina v. Garner*, 169 Eng.Rep. 267, 1 Den.C.C. 329 (Ct.Crim.App.1848); *Cass' Case* (1784) 1 Leach, 293; *Rex v. Thompson* (1783) 1 Leach (4th Ed.) 291; *Rex v. Griffin* (1809) Russ. & R. 151; *Reg. v. Cheverton* (1862) 2 Falc. & F. 833; *Reg. v. Thompson* [1893] 2 Q. B. 12; [citations collected in *Hopt v. Utah*, 110 U.S. 574, 584 (1884)].

9. See, *King v. Warickshall*, 1 Leach, 263 (1783) ["A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."]

See also have had a statutory basis for examination. See, *HAWKINS' PLEAS OF THE CROWN* (6th Ed., by Leach, published in 1787, bk. 2, c. 31, § 2):

And where a person upon his arraignment actually confesses he is guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony where it doth, yet the judges, upon probable circumstances, that such confession may proceed from fear, menace, or duress, or from weakness or ignorance, may refuse to record such confession, and suffer the party to plead not guilty.

10. *Hopt v. Utah*, 110 U.S. 574, 584 (1884).

11. *Id.* at 585.

12. 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

13. 168 U.S. at 543.

14. 168 U.S. at 542 - 543, quoting, 3 *RUSS. CRIMES* (6th Ed.) 478.

15. "No man is bound to accuse himself."

16. See, *Ziang Sung Wan v. United States*, 266 U.S. 1, 45 S.Ct. 1, 69 L.Ed. 131 (1924).

Surprising as it may seem, the source

of voluntariness in federal cases remained in controversy as late as 1951 when, in *United States v. Corrigan*, 342 U.S. 36, 72 S.Ct. 97, 96 L.Ed. 48 (1951), the Court questioned whether receipt of an admission was to be governed under the Fifth Amendment's Self Incrimination Clause or a generic rule, presumably under Due Process, that coerced confessions are untrustworthy (342 U.S. at 41).

17. This occurrence was probably inevitable. The self-incrimination clause would not be binding upon the states until the decision of the Court in *Malloy v. Hogan* in 1963. Hence, utilization of this clause in Federal cases to determine voluntariness would have mandated the need for two parallel means of analysis founded upon two distinctly different constitutional amendments.

18. *Bram*, at 542-543, [emphasis supplied herein].

19. 266 U.S. 1, 45 S.Ct. 1, 69 L.Ed. 131 (1924).

20. *Id.* at 4.

21. 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936).

22. 297 U.S. 278, at 286.

23. Any doubt as to whether the voluntariness test employed by the Court in *Brown* and later cases was rooted in the Due Process Clause of the 14th Amendment was firmly erased by the Court in *Chambers v. Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed.2d 716 (1940). Likewise, when the Court cataloged its Due Process holdings in *Watts v. Indiana*, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949) it described *Brown* as a "[c]onfession ... found to be procured under circumstances violative of the Due Process Clause[.]"

24. The majority of these decisions would deal with state matters as the passage of Rule 5(a) of the Federal Rules of Criminal Procedure, and the Court's effectuation of that Rule in *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943) would largely obviate federal Fifth Amendment concerns (see, *Miranda v. Arizona*, at 464).

25. Compare, *Brown v. Mississippi*, *supra*, *Chambers v. Florida*, *supra*, and *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961) [Confession set aside "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system."].

26. *Lisenba v. California*, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941).

27. 314 U.S. at 241

28. *Supra*.

29. *Watts*, at p. 53 - 54.

30. 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953), *ovrld* by *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

31. *Id.*

32. See, *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1964).

33. 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959).

34. 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, (1963).

35. The Court explicitly disputed that *Spano* somehow expanded its previous Due Process holdings by citing *Malinski v. New York*, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945) for the proposition that it had "reversed a conviction on facts less compelling than these." Whether *Malinski* was "less compelling" is debatable. In any event, it seems that the Court in *Spano*, like Shakespeare's lady, "doth protest too much, me thinks" (*Hamlet*, Act 3, scene 3).

36. *Spano*, at 323 - 324 [internal citations omitted].

37. WEBSTER'S NEW WORLD COLLEGE DICTIONARY, 4th Ed., 2000.

38. William R. Anson, *PRINCIPLES OF THE LAW OF CONTRACT* 419 (Arthur L. Corbin ed., 3d Am. ed. 1919).

39. 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

40. *Id.*, at 465.

41. *Id.*, at 469.

42. See, *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), n.3; *Colorado v. Connelly*, 479 U.S. 157, 187 - 188, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) [dissent per Brennan and Marshall].

43. 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

44. *Id.* at 482.

45. 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

46. *Bustamonte v. Schneckloth*, 448 F.2d 699 (C.A. 9, 1971).

47. 412 U.S. at 228.

48. 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

49. *Schneckloth*, at 236.

50. One exception set out by the Court was *Marchetti v. United States*, 390 U.S. 39, 51—52, 88 S.Ct. 697, 704, 705, 19 L.Ed.2d 889 (1968) [15th Amendment self-incrimination does not apply to payment of a wagering tax.].

51. *Schneckloth*, at 237 - 238 [internal citations omitted].

52. See, e.g., *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).

53. *Gideon v. Cochran*, 370 U.S. 908, 82

S.Ct.1259, 8 L.Ed.2d 403 (1962).

54. Despite his lack of legal training, Gideon's request could not have been better framed:

THE DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel.

372 U.S. 335, 336, 83 S.Ct. 792, 795, 9 L.Ed.2d 799 (1963).

55. 372 U.S. 335, 83 S.Ct. 792, 795, 9 L.Ed.2d 799 (1963).

56. 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), *ovrld* by Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

57. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

58. Malloy v. Hogan, 150 Conn. 220, 187 A.2d 744 (1963). Ironically, the court noted that Malloy had not properly invoked the privilege against self incrimination that was available to him under the Connecticut constitution.

59. Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979, which held that the Due Process Clause requires the States to pay just compensation for private property taken for public use.

60. Malloy, at n.2.

61. 367 U.S. 643, 81 S.Ct. 1684 (1961).

62. Malloy, at 10.

63. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

64. 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

65. 378 U.S. at 479.

66. 372 U.S. 335, 342, 83 S.Ct. 792, 795, 9 L.Ed.2d 799 (1963).

67. 378 U.S. at 488.

68. 378 U.S. at 487, quoting, *In re Groban*, 352 U.S. 330, 344, 77 S.Ct. 510, 519, 1 L.Ed.2d 376 (Black J., dissenting).

69. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

70. 378 U.S. at 490 - 491 (*emphasis* supplied herein).

71. 378 U.S. at 490, n.14.

72. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

73. See, e.g., Yarborough v. Alvarado, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

74. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

75. 384 U.S. at 457.

76. 384 U.S. at 449 n.9.

77. 384 U.S. at 457.

78. 384 U.S. at 467 - 468.

79. 384 U.S. at 489.

80. 384 U.S. at 471.

81. 384 U.S. at 473.

82. 384 U.S. at 475.

83. 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

84. 384 U.S. at 475.

85. See, Schulhofer, *Miranda's Practical Effect: Substantive Benefits and Vanishing Small Social Costs*, 90 N.W.U.L.REV. 556-60 (1996); *but see*, Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 N.W.U.L.REV. 387, 486-97 (1996).

86. See, n.76, *supra*.

87. 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

88. 475 U.S. at 417 - 418, quoting App. to Pet. for Cert. 94, 103, 107.

89. 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959).

90. 475 U.S. at 421.

91. Electronically, of course.

92. 475 U.S. at 421 [*emphasis* supplied herein].

93. Although a suspect may clearly rescind his or her waiver during the course of interrogation, that recession will only be prospective in nature. A defendant, when able to calmly reflect upon the effect of his or her decision will not be able to rescind statements previously made.

94. "Whether the confession of a poorly educated, mentally abnormal, indigent defendant, not told of his right to counsel, taken while he is in police custody and without the assistance of counsel, which was not requested, can be admitted into evidence over specific objection based on the absence of counsel?" *Miranda v. Arizona*, brief for Petitioner at p.6.

95. Whether a confession, elicited from a suspect prior to arraignment by an assistant district attorney and recorded by a stenographer when the suspect has been detained by the police for approximately twelve hours, has become the focus of investigation, and has not been advised of his right to counsel or of his right to remain silent, is rendered constitutionally admissible against him in a state criminal trial by his failure to request counsel (*Vignara v. New York*, brief for petitioner).

96. Westover's brief seems to have come closest to the mark in that it questioned whether *Escobedo* required actual consultation with counsel.

97. 384 U.S. at 446 citing, *People v. Portelli*, 15 N.Y.2d 235, 257 N.Y.S.2d 931, 205 N.E.2d 857 (1965).

98. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, (1963).

99. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

100. *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

101. *Brown v. Board of Education of Topeka Kansas*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.873 (1954).

102. *Engel vs. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

103. *Griswold v. Connecticut*, 381 U.S.

479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

104. 437 U.S. 385 (1978).

105. 748 Supp. 36 [D. Mass. 1990].

106. Source: Innocence Project Web site [www.innocenceproject.org/case/index/php].

107. Source: Innocence Project Web site [www.innocenceproject.org/causes/index.php].

108. While dates are not given at the web site, it is highly unlikely that any of these cases predate *Miranda*.

109. For an analog of the proposed statute, see, N.Y. C.P.L. § 320.10(2).

110. While the Innocence Project calls for police videotaping of confessions as a means of eliminating abuse, it is submitted herein that such will have little or no effect upon the decision to waive in the absence of counsel.

111. See, *Escobedo v. Illinois*, 378 U.S. 478, 488 - 489, 84 S.Ct. 1758, 12 L.Ed.2d 977 [1963]). "We have learned the lesson of history, ancient and modern, 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."

112. Since this process will nonetheless permit a preliminary waiver to occur at the police station, the police will not lose the benefit of the defendant's admissions in solving related crimes. ■

About the Author

Edward L. Fiandach is a criminal defense lawyer in Rochester, New York. He is the author of two texts (NEW YORK DRIVING WHILE INTOXICATED, 1st and 2nd, (West 1991 and 2004) and HANDLING DRUNK DRIVING CASES 2d (West 1995 and 2005). He writes, edits and publishes the NEW YORK DWI BULLETIN (MTC Publications, Rochester, NY). He is Dean of the National College for DUI Defense and is also an adjunct professor of Political Science at the University of Rochester where he teaches a course entitled "Constitutional Law and Criminal Procedure."

Edward L. Fiandach

Fiandach and Fiandach
100 Allens Creek Road
Rochester, NY 14618
585-244-8910

Fax 585-244-4863

E-MAIL fiandach@msn.com