



## The New Miranda Warning

Michael D. Cicchini

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# THE NEW *MIRANDA* WARNING

*Michael D. Cicchini\**

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## I. INTRODUCTION

CRIMINAL defense attorneys raised *Miranda* warning issues since the Supreme Court decided the now-famous case of *Miranda v. Arizona* nearly fifty years ago.<sup>1</sup> Surprisingly, our nation's law enforcement officers (with the help of the courts) have created a great deal of chaos in what should be a simple task: advising in-custody suspects that they have the right to remain silent; that anything they say can be used against them; that they have the right to an attorney before and during questioning; that if they cannot afford an attorney one will be appointed for them; and that if they choose to speak, they can stop answering questions at any time.<sup>2</sup>

What is not surprising is that these decades of litigation have resulted in a great deal of scholarship on the *Miranda* warning. The bulk of this scholarship has focused not on the warning's language, but rather on *Miranda*'s long, perplexing, and often nonsensical history, the Fifth Amendment theory underlying the *Miranda* rights, the importance to society of fair play by the police, and even *Miranda*'s importance in protecting suspects against false confessions.

This Article, however, will not rehash these subjects, which other authors have covered more than adequately. Instead, this Article focuses on the *Miranda* warning itself. That is, instead of debating the proper scope or interpretation of the underlying *Miranda* rights, this Article asks whether the *Miranda* warning conveys those rights accurately, completely, and in a way that suspects can easily understand. Further, it explores whether a suspect who wishes to invoke one or more of the rights is actually able to do so—after all, a theoretical right that cannot be exercised is meaningless. Unfortunately, the answer to all of the above questions is a resounding no. Consequently, this Article proposes a new *Miranda* warning.

Part II of this Article examines the language of the current *Miranda* warning—something that is easier said than done, given that courts permit hundreds of variations from the original warning, often changing its substance in the process.<sup>3</sup> This leads to Part III, which demonstrates that these multiple iterations of the *Miranda* warning are utterly incomprehensible (even to judges), inaccurate, and incomplete when describing *Miranda*'s underlying rights.<sup>4</sup> Part III also demonstrates that, due to the so-called clear-statement rule, courts have made the right to silence and the right to an attorney nearly impossible for suspects to actually invoke; instead, the police easily circumvent these important rights.<sup>5</sup>

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1. 384 U.S. 436 (1966).

2. *Id.* at 444–45.

3. *See infra* Part II.

4. *See infra* Parts III.A.–III.C.

5. *See infra* Parts III.D.–III.E.

Part IV then concedes that given the repeated abuses of *Miranda* by the police and the courts' unwillingness to recognize our Fifth Amendment rights, the best solution would be to require the presence of defense counsel prior to any interrogation by the police.<sup>6</sup> However, given that this reform is unlikely to occur, Part V advocates for a more modest and realistic solution: rewriting the *Miranda* warning. Part V sets out the objectives for rewriting the warning—specifically, making the warning understandable, accurate, and complete, while simultaneously giving suspects a way to actually invoke the underlying rights.<sup>7</sup> Further, these objectives can only be accomplished by delivering the warning in a tiered format, accounting for the contingent nature and staggered timing of the underlying rights that the warning is designed to convey.<sup>8</sup> Part VI then presents the revamped *Miranda* warning, including a set of clear instructions for how the police must present it to criminal suspects.<sup>9</sup> Part VII raises other important *Miranda*-related issues to be considered in the context of the new warning.<sup>10</sup>

## II. THE *MIRANDA* WARNING—ANYTHING GOES

A prerequisite to criticizing (and then rewriting) the *Miranda* warning is examining the actual language of the warning as it currently exists. Before the police may interrogate an in-custody suspect—both interrogation and custody are necessary to even trigger the need for the warning—they must first inform the suspect that “he has the right to remain silent”;<sup>11</sup> that “anything said can and will be used against [him] in court;”<sup>12</sup> that he has the “right to consult with counsel prior to questioning” and “to have counsel present during any questioning”;<sup>13</sup> and that “if he is indigent a lawyer will be appointed to represent him.”<sup>14</sup>

The Court held that these individual warnings, collectively referred to as the *Miranda* warning, must be “clear and unequivocal.”<sup>15</sup> In the decades following the *Miranda* decision, however, the Court permitted law enforcement officers to change the warning to their liking.<sup>16</sup> Initially, this rule of deviation was one of substance over form; deviation from *Miranda*'s text would only be permitted so long as the warning “reasonably conveyed” the substance of the underlying rights.<sup>17</sup> As more time passed,

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6. See *infra* Part IV.

7. See *infra* Part V.B.

8. See *infra* Part V.C.

9. See *infra* Part VI.

10. See *infra* Part VII.

11. *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

12. *Id.* at 469.

13. *Id.* at 470.

14. *Id.* at 473.

15. *Id.* at 467–68.

16. David B. Altman, Note, *Fifth Amendment—Coercion and Clarity: The Supreme Court Approves Altered Miranda Warnings*, 80 J. CRIM. L. & CRIMINOLOGY 1086, 1091–92 (1990).

17. *Id.* at 1103 (discussing *Duckworth v. Eagan*, 492 U.S. 195 (1989)).

however, the rule of deviation morphed into what would more accurately be described as the rule of “anything goes.” In fact, we have now seen “an unconstrained proliferation of warnings.”<sup>18</sup> “One study found as many [as] 900 different variations of *Miranda* warnings in use.”<sup>19</sup>

These multiple variations of the warning—some of which are discussed in Part III—are not merely minor changes from the original; rather, “large differences exist in the nature of the warnings, their words, their length, their cognitive complexity and indeed their very subject matter.”<sup>20</sup> Despite the Court’s insistence that the substance of “[t]he four warnings *Miranda* requires [is] invariable,”<sup>21</sup> nothing could be further from the truth. The reality is that lower courts have created “countless exceptions and loopholes” to label nearly any imaginable version of the warning as legally adequate—even if it miserably fails to convey anything resembling *Miranda*’s substance.<sup>22</sup>

This anything-goes approach to *Miranda* has burdened the courts with an unimaginable amount of litigation. Trial and appellate judges are overwhelmed with deciding, on a case-by-case and fact-by-fact basis, whether law enforcement officials adequately conveyed suspects’ *Miranda* rights and, in the case of appellate judges, whether erroneously admitted statements require reversal of convictions.<sup>23</sup> This comes with a staggering price tag—both financial and nonfinancial—for our system of criminal justice. “The energy and expense expended in fighting and adjudicating these various iterations of *Miranda* texts and warnings is entirely unnecessary. Moreover, unclear or illegal warnings defeat the law enforcement goal of achieving legally effective interrogation and convicting the guilty. The entire matter seems easily curable and remarkably wasteful.”<sup>24</sup>

18. Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1590 (2008).

19. D. Christopher Dearborn, “*You Have the Right to an Attorney*,” but Not Right Now: *Combating Miranda’s Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights*, 44 SUFFOLK U. L. REV. 359, 374 (2011) (case name set in plain text in original).

20. William F. Jung, *Not Dead Yet: The Enduring Miranda Rule 25 Years After the Supreme Court’s October Term 1984*, 28 ST. LOUIS U. PUB. L. REV. 447, 457 (2009); see also Illan M. Romano, Note and Comment, *Is Miranda on the Verge of Extinction? The Supreme Court Loosens Miranda’s Grip in Favor of Law Enforcement*, 35 NOVA L. REV. 525, 543 (2011) (“Problems arising from *Miranda* stem from the complete lack of uniformity in procedures and enforcement across jurisdictions.” (case name set in plain text in original)).

21. *Florida v. Powell*, 130 S.Ct. 1195, 1204 (2010).

22. Romano, *supra* note 20, at 543.

23. Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1844 (1987) (discussing “the time-consuming appellate review of *Miranda* issues”); Adam S. Bazelon, Comment, *Adding (or Reaffirming) a Temporal Element to the Miranda Warning “You Have the Right to an Attorney”*, 90 MARQ. L. REV. 1009, 1040 (2007) (discussing the “fact-intensive inquiry” and its negative impact on “judicial economy”); Daniel J. Croxall, Comment, *Inferring Uniformity: Towards Deduction and Certainty in the Miranda Context*, 39 MCGEORGE L. REV. 1025, 1042 (2008) (“A uniform and specific *Miranda* warning could help alleviate some court congestion.” (case name set in plain text in original)).

24. Jung, *supra* note 20, at 457 (case name set in plain text in original).

Indeed, the current state of affairs *is* easily curable—that is the purpose of this Article—and courts even acknowledge this fact. Judges have conceded that using uniform language would dramatically curtail litigation; however, true to their practice of resisting consistency and clarity, courts will only “encourage” or “recommend[ ],” rather than require, such uniformity.<sup>25</sup>

Yet court-clogging litigation is the least of the problems. Far more significantly, our Fifth Amendment rights have been reduced to shambles. As Part III demonstrates, the various iterations of the *Miranda* warning are usually incomprehensible to most suspects, always factually false in at least one major respect, and woefully incomplete with regard to the important, underlying rights they purport to convey. Further, no version of the warning provides a means by which a suspect may actually invoke the underlying rights; rather, even minimally skilled police officers easily circumvent these rights—often with the help of prosecutors and judges later in the courtroom.

### III. THE PROBLEMS WITH THE WARNING

The goal of *Miranda* was to provide a warning that is comprehensible, accurate, complete, and meaningful, and that can actually be invoked by suspects who wish to do so. As explained below, the *Miranda* warning fails miserably in all respects.

#### A. INCOMPREHENSIBLE: MAKING HEADS OR TAILS OF IT ALL

The various iterations of *Miranda* “vary remarkably in their length, complexity, and comprehensibility” and range from sixty to three hundred words.<sup>26</sup> “Worst of all are the warnings that are long, complex, and obscure a suspect’s *Miranda* rights.”<sup>27</sup> In fact, even our Supreme Court Justices cannot agree on the meaning of many of the warnings.<sup>28</sup>

Take, for example, *Duckworth v. Eagan*, where the police advised the suspect, “You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.”<sup>29</sup> While this seems clear enough, the police then continued with their version of the warning and stated: “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.”<sup>30</sup>

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25. Croxall, *supra* note 23, at 1034 (citing *United States v. Tillman*, 963 F.2d 137, 141–42 (6th Cir. 1992); *United States v. Noti*, 731 F.2d 610, 615 (9th Cir. 1984)).

26. Richard Rogers et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177, 189 (2007).

27. Brenda L. Rosales, Note, *The Impact of Berghuis v. Thompkins on the Eroding Miranda Warnings and Limited-English Proficient Individuals: You Must Speak Up to Remain Silent*, 9 HASTINGS RACE & POVERTY L.J. 109, 123 (2012) (case name set in plain text in original).

28. See, e.g., *Duckworth v. Eagan*, 492 U.S. 195 (1989).

29. *Id.* at 198.

30. *Id.*

These contradictory warnings would raise several questions from a suspect, including: Do I have the right to a lawyer before and during questioning, or not? If I do not have that right, why did you first tell me that I do? If I do have that right and decide to invoke it, but you cannot give me access to the lawyer, what happens then? Will the interrogation continue? You said “if” I go to court; who decides whether I will go to court and, if I do go, when will I go? If I will not be going to court, how long will I remain locked up? Can I get out of jail sooner if I decide to talk to you now? If I go to court and then get the lawyer, will you still want to talk to me after I am charged and represented?

Even the Court could not agree on the answers to these and other questions. The majority of Justices believed it was obvious that without the availability of a lawyer, the suspect’s invocation of the right to counsel would serve to put an end to the police interrogation, thereby effectively invoking his right to silence instead.<sup>31</sup> This is a curious conclusion, as the right to have an attorney present during questioning and the right to remain silent are two dramatically different rights. The four dissenting Justices believed that the self-contradictory warning left too many unanswered questions and created new ones in the process. The dissent speculated that:

[T]elling [the suspect] that appointed counsel could only be obtained if and when he went to court, could have led [him] to believe that he did not have the right to an attorney before interrogation if he could not afford to hire one on his own. [He] may have believed that he was not entitled to an attorney until he went to trial, or if he was not taken to court, that he would not be entitled to an attorney at all.<sup>32</sup>

Further, the dissent argued that:

[T]he majority ignored the fact that the warnings are most likely to be given to “frightened suspects unlettered in law, not legal experts schooled in interpreting legal or semantic nuance.” These people would be less likely to properly understand the warnings than would the Chief Justice of the Supreme Court or other people with extensive legal training and experience. Therefore, since the warnings in question can be easily misunderstood by laymen, they are defective.<sup>33</sup>

Indeed, the mere fact that the Supreme Court split 5–4 on the meaning of this internally inconsistent set of warnings necessarily proves the point: It is incomprehensible. And even internally *consistent* sets of warnings can be highly problematic for the non-Supreme Court jurists among us. “The evidence proves many warnings demand a ‘greater educational background than many suspects possess.’”<sup>34</sup> Often, the warnings that law

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31. *Id.* at 204.

32. Altman, *supra* note 16, at 1096 (footnotes omitted) (citing *Duckworth*, 492 U.S. at 285–93).

33. *Id.* (footnotes omitted) (quoting *Duckworth*, 492 U.S. at 216 (Marshall, J., dissenting)).

34. Dearborn, *supra* note 19, at 374 (quoting Weisselberg, *supra* note 18, at 1577).

enforcement employees “require at least a tenth-grade reading level,” while “one 2003 study found that seventy percent of inmates read at a sixth grade level or below.”<sup>35</sup> And even the most educated among us routinely fail to comprehend *Miranda*: “[S]ixty-four percent of college students displayed two or more fundamental errors in their understanding of the warnings.”<sup>36</sup>

Finally, there is also the problem that a large percentage of criminal suspects is comprised not of educated jurists, or of college students, or even of individuals with sixth-grade reading levels. Rather, many criminal suspects are mentally ill, speak a first language other than English, speak little or no English at all, or are juveniles.<sup>37</sup> It is, therefore, no wonder that after hearing these convoluted *Miranda* warnings, suspects typically misunderstand their rights.

#### B. INACCURATE: I THOUGHT YOU SAID I COULD REMAIN SILENT?

Perhaps the biggest problem with the *Miranda* warning is that, even when read verbatim from the Court’s *Miranda* decision, it grossly misstates the nature of a suspect’s right to remain silent. While this aspect of the warning was accurate at the time of the *Miranda* decision, times have changed—but the warning has not.

In its *Miranda* decision, the Court was not completely clear on what would constitute a waiver of the right to remain silent, but it was completely clear on what would not constitute a waiver:

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. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained . . . . “Presuming waiver from a silent record is impermissible.”<sup>38</sup>

Today, however, remaining silent is no longer an acceptable way to exercise the right to remain silent. In *Berghuis v. Thompkins*, the police read the suspect the *Miranda* warning, and then gave him “repeated invitations to tell his side of the story.”<sup>39</sup> Despite this, the suspect “refus[ed] to sign even an acknowledgment that he understood his *Miranda* rights”<sup>40</sup> and then “was silent for two hours and forty-five minutes” before finally

35. *Id.* at 374–75.

36. *Id.* at 375.

37. *Id.* (discussing the comprehension by “vulnerable populations, including juveniles, the disabled, and individuals for whom English is not their first language”); see also Sandra Guerra Thompson, *Evading Miranda: How Seibert and Patane Failed to “Save” Miranda*, 40 VAL. U. L. REV. 645, 660 (2006) (discussing comprehension by “persons with low intelligence or mental problems, juveniles, persons whose native language is not English, and deaf defendants”).

38. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (quoting *Carnley v. Cochran*, 369 U.S. 506, 516 (1962)).

39. 130 S. Ct. 2250, 2258–59 (2010).

40. *Id.* at 2270 (Sotomayor, J., dissenting).



answering a question.<sup>41</sup> The Court held that the suspect's answer was admissible against him at trial because he "did not say that he wanted to remain silent or that he did not want to talk with the police."<sup>42</sup> More to the point, he ironically waived the right to remain silent by remaining silent.<sup>43</sup>

It is true that *Berghuis* was wrongly decided—"What in the world must an individual do to exercise his constitutional right to remain silent beyond actually, in fact, remaining silent?"<sup>44</sup>—but that is not the point. Rather, the point is that telling a suspect that he has the right to remain silent is no longer accurate. Today, "a suspect who wishes to guard his right to remain silent against such a finding of 'waiver' must, counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police."<sup>45</sup> Therefore, "the current warnings are not up-to-date because they fail to adequately apprise suspects of all the applicable rights and prophylactic rules of custodial interrogation, some of which were not recognized until after the warnings were originally crafted."<sup>46</sup>

The warning is inaccurate in other important ways as well. For example, notwithstanding the example in Part III, most of the hundreds of iterations of the warning do clearly advise the suspect that he may consult with a lawyer before and have the lawyer present during any questioning.<sup>47</sup> The idea behind having a lawyer present during questioning is a good one, at least in theory:

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that . . . the statement is rightly reported by the prosecution at trial.<sup>48</sup>

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41. *Id.* at 2258 (majority opinion).

42. *Id.* at 2260.

43. Stephen Rushin, Comment, *Rethinking Miranda: The Post-Arrest Right to Silence*, 99 CALIF. L. REV. 151, 156 (2011) (asking how a court can "presume that a person waived his right to silence when he remained generally silent for multiple hours in the face of continuous questioning").

44. *Berghuis*, 130 S. Ct. at 2276 (Sotomayor, J., dissenting) (quoting *Soffar v. Cockrell*, 300 F.3d 588, 603 (5th Cir. 2002) (en banc) (DeMoss, J., dissenting)).

45. *Id.* at 2266 (Sotomayor, J., dissenting). While the clear-statement rule will be addressed later, it is sufficient to state here that the rule actually makes it quite difficult to invoke the underlying rights, such as the right to an attorney and, now, even the right to remain silent. For now, however, the world has changed, but the *Miranda* warning has not changed with it.

46. Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 817 (2006).

47. Ogletree, *supra* note 23, at 1826.

48. *Miranda v. Arizona*, 384 U.S. 436, 470 (1966).

However, unlike the warning about the right to remain silent—which at one time was true but became false as the underlying law changed—the warning about the right to an attorney before or during questioning was never true.<sup>49</sup> “In the vast majority of interrogations in which a suspect invokes her right to counsel, no attorney is provided.”<sup>50</sup> Moreover, “the ‘right’ guarantees neither access to a lawyer to explain the procedural complexities of a criminal case, nor unbiased, professional advice on whether it is prudent to waive any constitutional protections. Rather, *Miranda* only guarantees the right, once affirmatively invoked, to not be asked questions by the police . . . .”<sup>51</sup>

So, in reality, there is no on-call stationhouse defense lawyer, nor are the police obligated, despite the language of the warning, to rustle up a lawyer with whom the suspect may consult before deciding whether to speak to police. This inaccuracy stems not from changes in the law over time, but rather from the *Miranda* Court’s gross misunderstanding about how the warning “would operate in the real world.”<sup>52</sup>

*Miranda* warnings are often inaccurate in other ways as well, largely because courts tolerate so many deviations from the original warning. For example, law enforcement will often tell a suspect that his statement can be used “for or against him in a court of law,” rather than merely warning him that the statement can be used against him, as required by *Miranda*.<sup>53</sup> Obviously, informing a suspect that his statement might be used in his defense at trial provides a strong inducement to speak, especially when coupled with the reasonable assumption that the alternative—invoking the right to remain silent—is strong evidence of guilt.<sup>54</sup>

The problem, however, is that this version of the warning, although now court approved, is false. A defendant may not introduce his own statement as evidence at trial; the rule against hearsay would bar it.<sup>55</sup> Only the rarest of circumstances would permit the defendant to use his own statement, and even then such use would likely be contingent on other events.<sup>56</sup> While the state could introduce the defendant’s self-serving statement into evidence as a statement of a party-opponent,<sup>57</sup> it obviously has no interest in doing so. The prosecutor’s goal is to convict the defendant at trial, not to use exculpatory evidence to acquit him. But despite the blatant falsity of the warning, courts have upheld this con-

49. Dearborn, *supra* note 19, at 360.

50. Godsey, *supra* note 46, at 797.

51. Dearborn, *supra* note 19, at 359 (footnote omitted) (case name set in plain text in original).

52. Godsey, *supra* note 46, at 797.

53. McClellan v. State, 193 N.W.2d 711, 715 (Wis. 1972) (emphasis added).

54. See *infra* Part III.C.

55. See FED. R. EVID. 802.

56. See, e.g., State v. Lenarchick, 247 N.W.2d 80, 91 (Wis. 1976) (“Because the state submitted the police officer’s version of the confession . . . the defendant should have been permitted the opportunity to rebut with his version of the conversation . . .”).

57. FED. R. EVID. 801(d)(2) & advisory committee’s note.

torted version of it and any subsequently induced waiver of rights as legally valid.<sup>58</sup>

C. INCOMPLETE: IT'S NOT WHAT YOU SAID; IT'S WHAT YOU DIDN'T SAY

One of the biggest problems with the *Miranda* warning is not the information it contains, but rather the information it omits. Although most versions of the warning clearly inform the suspect that any statement he makes can be used against him, no version of the warning tells the suspect whether his refusal to speak can be used against him.<sup>59</sup> Police interrogation training manuals take full advantage of the warning's incompleteness and sometimes encourage officers to thwart possible invocations of the right to remain silent by telling suspects the following:

[Y]ou have the right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, "I don't want to answer any of your questions." You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over.<sup>60</sup>

Even without this not-so-subtle form of persuasion by law enforcement, "many suspects naturally believe, albeit incorrectly, that remaining silent will make them 'look guilty' and will be used against them as evidence of guilt."<sup>61</sup> Of course, the opposite is true: post-*Miranda* silence is generally not admissible as evidence of guilt.<sup>62</sup> As a result, because of what the warning does not say, "suspects are only partially informed of the legal consequences of their choice to speak or remain silent."<sup>63</sup>

58. See *State v. Melvin*, 319 A.2d 450, 457 (N.J. 1974); *Quinn v. State*, 183 N.W.2d 64, 68 (Wis. 1971).

59. Godsey, *supra* note 46, at 802.

60. *Miranda v. Arizona*, 384 U.S. 436, 454 (1966) (citing FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 111 (1962)).

61. Godsey, *supra* note 46, at 793; see also Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 807–08 (2009) ([suspects] "are never told that if they do not talk, that failure to cooperate cannot be used against them. Thus, some individuals might be tentative in requesting their rights out of fear that this assertion will actually harm them or be construed in an adverse manner.").

62. See *Doyle v. Ohio*, 426 U.S. 610, 617–19 (1976). Of course, the courts have carved exceptions to the general rule so that prosecutors are able to use defendants' silence against them at trial. See Rushin, *supra* note 43, at 163–64 (discussing the use of a suspect's silence after he has initially waived his right to remain silent, but then attempts to invoke it); Thompson, *supra* note 37, at 647 (discussing police tactics of delaying issuance of *Miranda* in order to obtain pre-*Miranda* silence, which can be used at trial); Joshua I. Hammack, Note, *Turning Miranda Right Side Up: Post-Waiver Invocations and the Need to Update the Miranda Warnings*, 87 NOTRE DAME L. REV. 421, 440 (discussing the use of a suspect's silence after he has initially waived his right to remain silent, but then attempts to invoke it).

63. Godsey, *supra* note 46, at 802.

But if suspects are entitled to “know the consequences of speaking, then it is equally essential, if not more so, that they also know that no formal consequences will follow from their silence, and that they can exercise that right without penalty.”<sup>64</sup> Otherwise, it is impossible for suspects to make an informed decision about whether to waive or invoke the right. In this same vein, the warning also fails to inform a suspect whether his verbal request for an attorney—which, unlike silence, actually falls squarely within the category of “anything you say”—could later be used against him as evidence of guilt.<sup>65</sup> Once again, incomplete information leads to uninformed decisions.

Some other versions of the warning are incomplete because they fail to include information about another important right: Even if a suspect starts to answer questions, he may stop answering them at any time. This fundamental right, recognized and discussed in the *Miranda* decision itself,<sup>66</sup> is incredibly important in light of the bait-and-switch tactics often used by police. For example, the police may induce a suspect to waive his *Miranda* rights and talk about a pretextual matter that is completely unrelated to the alleged crime. But then, after the suspect begins talking, the police may switch the topic to the alleged crime, which is the real reason the police started interrogating the suspect in the first place.<sup>67</sup> Under these circumstances, understanding the right to stop answering questions midstream, even after the police initially induced a waiver of the right to remain silent, is critical.

Omitting this right—the right to stop answering questions at any time, even after the suspect starts to talk—is often justified based on the timing of when the right could be exercised: “The right to stop answering questions surfaces, not at the warnings stage of the *Miranda* safeguards, but rather subsequent thereto . . . .”<sup>68</sup> While this does not justify omitting this important right from the warning, it does make a legitimate observation about the timing of the various *Miranda* rights: A suspect cannot exercise the right to stop answering questions unless he first waives the right to remain silent. Part VI explores this basic concept in greater detail, as it is critical to rewriting the *Miranda* warning in an effective and workable manner.

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64. *Id.*

65. *Id.* at 794.

66. *Miranda v. Arizona*, 384 U.S. 436, 445 (1966) (“The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney . . . .”).

67. *Ogletree*, *supra* note 23, at 1841 (“[T]he police may question a suspect about a more serious crime after she waives her right to silence with regard to a different, lesser offense. . . .”); *Weisselberg*, *supra* note 18, at 1564 (“Police do not have to tell a suspect the subject matter of an investigation. . . .”).

68. *State v. Mitchell*, 482 N.W.2d 364, 372 (Wis. 1992).

D. DIFFICULT TO INVOKE: CAN I PLEASE HAVE  
THAT LAWYER NOW?

While the rights underlying *Miranda* are incredibly important, the Court's complete disdain for structure and clarity has made trying to invoke those rights an exercise in futility. Specifically, the warnings do not provide any guidance on how to actually invoke the rights they purport to convey.<sup>69</sup> Further, law enforcement officers have no incentive to provide such guidance, as doing so would be completely contrary to their own interests.<sup>70</sup>

To make matters worse, law enforcement will often provide only one option to suspects: to waive, rather than invoke, their rights.<sup>71</sup> For example, the Quincy, Massachusetts Police Department uses a written form that enumerates the *Miranda* warnings and then gives the suspect only one choice: “[D]o you now waive your Fifth Amendment Rights pursuant to *Miranda*, and desire to talk to me now concerning this or other matters of concern to us?”<sup>72</sup> The Kenosha, Wisconsin Sheriff and Police Departments have gone even further, leaving nothing at all to chance. Instead of asking whether the suspect wishes to waive his rights, the sole “option” on their written form is actually a firm directive to waive: “I fully understand that I have these rights, I hereby waive said rights and consent to voluntarily answer questions and make a statement about” the incident.<sup>73</sup>

In the rare case that an intimidated and overmatched suspect can muster the wherewithal to attempt to invoke one of his rights, “court decisions have made it extremely difficult . . . to do so. Judges have gone to extraordinary lengths to classify even seemingly clear invocations as ambiguous invocations which can be ignored by the police.”<sup>74</sup> Stated more diplomatically, “there remains uncertainty regarding the ‘magic words’ a criminal suspect must use to successfully assert” his rights.<sup>75</sup>

We now know that remaining silent—even when that silence lasts for hours on end—is no longer enough to actually invoke the right to remain silent. But thousands of other suspects have affirmatively tried to invoke

69. Hammack, *supra* note 62, at 435 (“Suspects are generally given no guidance on how to invoke their rights, and the required warnings certainly do not inform them that they must do so unambiguously.”); Jaime M. Rogers, Note, *You Have the Right to Remain Silent . . . Sort of: Berghuis v. Thompkins, the Social Costs of a Clear Statement Rule, and the Need for Amending the Miranda Warnings*, 16 ROGER WILLIAMS U. L. REV. 723, 746 (2011) (“Conspicuously absent from these warnings is any suggestion of the need to invoke, never mind unambiguously invoke, one’s right to remain silent in order to cut off questioning . . .”).

70. Hammack, *supra* note 62, at 434–38 (discussing several police tactics designed to prevent, and even ignore, suspects’ attempts to invoke their rights).

71. Dearborn, *supra* note 19, at 380.

72. *Id.* at 380 n.158 (case name in plain text in original).

73. Kenosha, Wis., Police Dep’t, *Miranda Waiver Form* (2012) (on file with author). The author’s viewing of multiple videotaped interrogations also reveals that this written directive is usually accompanied by the detective’s verbal order—which is often no more than a variation on: “sign here, so you can take this opportunity to help yourself and tell me your side of the story.”

74. Strauss, *supra* note 61, at 775.

75. Rushin, *supra* note 43, at 167.

the right to remain silent by speaking, as is now required, only to fail in their attempts.<sup>76</sup> For example, one suspect tried to invoke the right by stating, “I want to give ya’ll [sic] a statement but I don’t . . . I’d rather not be doing it. Another time if we could man.”<sup>77</sup> Unfortunately, the court found that to be an ambiguous and therefore failed attempt at invocation.<sup>78</sup> Similarly, another suspect responded to a request to talk with “Naw, I don’t think so.”<sup>79</sup> This polite but clear response did not meet the court’s standards either; the court deemed it insufficient to invoke the right to silence.<sup>80</sup>

Even when a suspect is firm, courts will find other disingenuous ways to label the attempted invocation as inadequate.<sup>81</sup> For example, consider this statement: “I’m not saying shit to you no more, man. You, nothing personal man, but I don’t like you. You’re scaring the living shit out of me . . . . That’s it. I shut up.”<sup>82</sup> In cases like this, a court can merely claim to read the suspect’s mind and assume that rather than intending to invoke the right to remain silent for the entire interrogation, he was merely expressing “momentary frustration.”<sup>83</sup> Even when a suspect says, “Get the f— out of my face. I don’t have nothing to say. I refuse to sign [the waiver form],”<sup>84</sup> he is still not properly invoking the right to remain silent.<sup>85</sup>

Similarly, consider this obviously clear invocation of the right to remain silent: “You . . . ain’t listening to what I’m telling you. You don’t want to hear what I’m saying. You want me to admit to something I didn’t . . . do . . . and I got nothin[g] more to say to you. I’m done. This is over.”<sup>86</sup> The problem with this statement, the court held, is that while it could be construed as an attempt to end the interrogation, “it was [also] reasonable for the detectives to conclude that his statement was merely a fencing mechanism to get a better deal.”<sup>87</sup> With this disingenuous and fabricated excuse, the attempted invocation was branded as “equivocal as a matter of law and [was] therefore insufficient to invoke the right to remain silent.”<sup>88</sup> Unfortunately, no does not mean no—at least not when the police are involved.

Likewise, trying to invoke the right to counsel can be an uphill battle. Questions such as “Do you think I need a lawyer?” will most certainly fail

76. See Strauss, *supra* note 61, at 787–802.

77. *Id.* at 789 (quoting *State v. Reed*, 809 So. 2d 1261, 1273 (La. Ct. App. 2002)).

78. *Reed*, 809 So. 2d at 1274.

79. *People v. Patterson*, No. A103263, 2005 WL 2716538, at \*9 (Cal. Ct. App. Oct. 21, 2005).

80. *Id.* at \*12.

81. Weisselberg, *supra* note 18, at 1580.

82. *People v. Jennings*, 760 P.2d 475, 482 (Cal. 1988).

83. *Id.* at 483; see also Strauss, *supra* note 61, at 795.

84. *United States v. Banks*, 78 F.3d 1190, 1196 n.6 (7th Cir. 1996), *vacated by Mills v. United States*, 519 U.S. 990 (1996).

85. *United States v. Mills*, 122 F.3d 346, 351 (7th Cir. 1997).

86. *State v. Saeger*, 2010 WI App 135U, ¶ 3, 329 Wis. 2d 711, 790 N.W.2d 543.

87. *Id.* ¶ 11.

88. *Id.*

to invoke the right.<sup>89</sup> Courts have even held that a direct request, such as “I can’t afford a lawyer but is there anyway [sic] I can get one?” is insufficient to convey to the police that the suspect would like a lawyer.<sup>90</sup> Interestingly, taking this request for a lawyer out of the interrogation context demonstrates that the request is, quite obviously, an attempt to invoke the right to counsel. The following insightful analogy exposes the court’s intellectual dishonesty in holding otherwise:

[I]n everyday parlance, using a question to make a request is commonplace. For example, a school child might raise her hand and ask, “Can I go to the bathroom?” While it is possible that that child does not really want to go to the bathroom, and may be simply assessing if it is possible, virtually all would assume that a “yes” answer would cause the child to leave the room. In other words, it would appear clear to most that the child is saying, “I want to go to the bathroom—is that ok?”<sup>91</sup>

Further, expressions of thought, such as “I think I would like to talk to a lawyer,” will not invoke the right to counsel either.<sup>92</sup> The word “think” turned this sentence from a successful invocation into merely a failed attempt.<sup>93</sup> But if that did not doom the suspect’s efforts to get a lawyer, the word “would” may have done so, as it tends to imply a temporal element; that is, the suspect is not making clear when he would like to talk to a lawyer.<sup>94</sup>

Even the direct request “Could I get a lawyer?” is insufficient—even though the suspect is in custody and would have no way of actually obtaining access to the nameless, faceless lawyer the interrogator just promised him without first asking the interrogator.<sup>95</sup> Consider yet another suspect’s statement to police: “I called a lawyer. He wants—the lawyer wants to be here before I say anything.”<sup>96</sup> This attempted invocation also fell short. Unfortunately, in the court’s eyes, it was not a clear invocation because it expressed the attorney’s desires and not the suspect’s.<sup>97</sup> This ignores the fact that the attorney is the suspect’s agent and speaks for him, just as the police officer is the agent of the state.

Finally, even when a suspect uses the precisely correct set of words—whatever that might be—courts will find an attempted invocation ambiguous based on the *manner* in which the suspect uttered the words. “Courts have even gone so far as to hold that a soft-speaking suspect should know that when an officer speaks in ‘a louder voice over him,’ his statement has not been ‘clearly conveyed’ because the officer could not

89. See *Diaz v. Senkowski*, 76 F.3d 61, 63–65 (2d Cir. 1996).

90. See *Lord v. Duckworth*, 29 F.3d 1216, 1218–21 (7th Cir. 1994).

91. Strauss, *supra* note 61, at 788.

92. *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

93. *Id.* at 1070.

94. See Strauss, *supra* note 61, at 794–95 (discussing “temporally vague comments”).

95. *United States v. Wesela*, 223 F.3d 656, 661–62 (7th Cir. 2000).

96. *State v. Baker*, 2005-Ohio-46, No. 2004 CA 19, 2005 WL 37868, at ¶ 35 (Ohio Ct. App.).

97. *Id.*

hear it, thus rendering the statement ambiguous.”<sup>98</sup> Holdings of this nature should be an embarrassment, “as suspects’ inability to invoke their constitutional rights because of the intimidating interrogation environment is exactly what the *Miranda* Court sought to prevent.”<sup>99</sup>

However, rather than being embarrassed, courts continually permit the police to use these tactics to “render virtually any invocation ambiguous by ignoring it.”<sup>100</sup> More specifically, when the police continually ignore multiple attempts at invocation, the suspect will eventually talk to the police upon realizing that he has no choice.<sup>101</sup> Then, the mere fact that the suspect eventually talked will cast “retrospective doubt” on the validity of the earlier invocations.<sup>102</sup> The earlier invocations will be declared ambiguous, thus rendering the suspect’s statement admissible.<sup>103</sup>

*Miranda* jurisprudence, as it turns out, would be an excellent tool for teaching this basic principle of quantum mechanics: “It’s a rudimentary concept that reality is shaped, even created, by our perception.”<sup>104</sup> In the *Miranda* context, the interrogating police officer perceives—or, more accurately, claims to perceive—the attempted invocation as ambiguous. Based on this perception, the court then labels it as such. Perception has become reality.

#### E. EASY TO CIRCUMVENT: WHERE THERE’S A WILL THERE’S A WAY

Even though very few suspects can ever successfully invoke their *Miranda* rights, often despite their best efforts to do so,<sup>105</sup> the potential for invocation is still a small risk that the police would rather avoid completely. The reason is that interrogations are a guilt-presumptive process.<sup>106</sup> Many law enforcement officers feel that they have the ability to *know* that the suspect is guilty, and then they labor under this presumption—some might say delusion—often ignoring contrary evidence and doing whatever possible to secure a confession consistent with their pre-existing views.<sup>107</sup> And “doing whatever possible” includes, but is by no means limited to, circumventing *Miranda*. The police “have little interest

98. Hammack, *supra* note 62, at 433 (quoting *United States v. Clark*, 746 F. Supp. 2d 176, 186 (D. Me. 2010)).

99. *Id.* at 439 (case name in plain text in original).

100. Strauss, *supra* note 61, at 801.

101. *Id.* at 814–15.

102. *Id.* at 801.

103. *Id.*

104. James Lawler, *Between Heavens and Hells: The Multidimensional Universe in Kant and Buffy the Vampire Slayer*, reprinted in *Buffy the Vampire Slayer and Philosophy: Fear and Trembling in Sunnydale 105* (James B. South ed., Open Court Publishing 2003) (internal quotation marks omitted).

105. Strauss, *supra* note 61, at 822 (“[T]he rules for asserting either the right to counsel or the right to remain silent have become so difficult that almost no one is able to do it.”).

106. *Miranda v. Arizona*, 384 U.S. 436, 450 (1966) (“The guilt of the subject is to be posited as a fact.”).

107. Interestingly, if the evidence against a suspect were so strong as to justify the interrogator’s “knowledge” of the suspect’s guilt, then there would be little need for the interrogator to obtain a confession. In *Miranda*-related litigation, however, there is often no evidence (or little evidence) against the suspect, other than an illegally obtained (and



in protecting the suspect's right to a knowing and intelligent waiver. Their objective is to obtain a confession, and therefore it is unlikely that they will fully inform the suspect of her right[s] . . . or dispel misconceptions about those rights."<sup>108</sup>

While the bulk of this Article has addressed the flaws with the warning that permit the police to circumvent the underlying rights, the simplest way for them to circumvent the rights is simply to avoid giving the warning in the first place. The police accomplish this in numerous ways, most commonly by interrogating first and arresting second.<sup>109</sup> This allows them to take advantage of the inherently coercive nature of the police station without reading the *Miranda* warning.<sup>110</sup> Since both interrogation and arrest must occur before the police are required to read the warning:

[O]fficers can bring suspects to the police station for interrogation, intending to place the suspects under formal arrest later and knowing that the suspects actually believe they are in custody. If police interrogate without warnings, the resulting statements will be admitted if courts—conducting ex post inquiries—conclude that hypothetical reasonable persons (though not these unreasonable suspects) would have felt free to leave.<sup>111</sup>

Another way that the police can avoid giving the warning in the first place is to arrest, but technically not question, the suspect. This can take many forms, beginning with the relatively benign practice of arresting first and hoping that the suspect “volunteers statements upon arrest,”<sup>112</sup> or the craftier practice of arresting first and then “discuss[ing] a crime within earshot of a suspect and then us[ing] any incriminating statements she makes in response.”<sup>113</sup>

If neither of these tactics work, the police can rely on the judge later, in the courtroom, to legitimize a technique that clearly violates *Miranda*. For example, consider *McClellan v. State*, in which the defendant, who was accused of forgery and issuing worthless checks, challenged the admissibility of his statement.<sup>114</sup> All parties agreed that the defendant was in custody at the time of the statement; the issue was whether he was being interrogated or questioned.<sup>115</sup> While sitting with the arrested defendant, a detective decided to engage him “in general shop talk about”—what else?—“worthless checks and forgeries,” the very crimes

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sometimes coerced) confession. It is then that this confession, rather than other, objective evidence, leads to a conviction.

108. Ogletree, *supra* note 23, at 1828.

109. Weisselberg, *supra* note 18, at 1540; *see, e.g.*, *California v. Beheler*, 463 U.S. 1121, 1122 (1983).

110. *See* Weisselberg, *supra* note 18, at 1537–38 (discussing the effects of environment on a suspect's perception of their choices).

111. *Id.* at 1546.

112. Thompson, *supra* note 37, at 647.

113. Ogletree, *supra* note 23, at 1839–40.

114. 193 N.W.2d 711, 726–27 (Wis. 1972).

115. *Id.* at 728. For the definition of interrogation, *see Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980) (defining the test as “either express questioning or its functional equivalent”).

with which the defendant was being charged.<sup>116</sup> During the course of this “shop talk,” the detective called the defendant “an amateur,” and further questioned him about his alleged crimes, including asking, “[H]ow did you do it?”<sup>117</sup>

Amazingly, the majority of the court held that the defendant’s responses were admissible because the detective really was not questioning him, so *Miranda* was not triggered.<sup>118</sup> Instead, the discussion that the detective instigated was “shop talk,” and the defendant’s responses to the detective’s (non)questions were “the result of the defendant’s ‘braggadocio.’”<sup>119</sup> Of course, the reality, as the court recognized, is that the detective “not only goaded the defendant into a response, but specifically asked him . . . ‘how did you do it?’”<sup>120</sup> The detective’s supposed “shop talk” was “calculated to elicit an inculpatory response” and was “successful.”<sup>121</sup> This “constituted a clear violation of the defendant’s rights laid down in *Miranda*.”<sup>122</sup>

Even when police do read the *Miranda* warning, “[t]he warnings and waiver process is so easily manipulated” that *Miranda* is little more than a speed bump on their way to obtaining a confession that conforms to their preconceived version of the case.<sup>123</sup> This was demonstrated earlier, where the police would simply ignore invocations—for example, a suspect’s request for a lawyer or a suspect’s nearly three-hour attempt to remain silent—only to have judges later declare that the attempted invocations were ambiguous.

In cases where the police do read suspects the *Miranda* warning, the manner in which they read it can help them reach their goal of obtaining a quick and easy waiver of those rights. For example, “[o]fficers may use pre-*Miranda* conversation to build rapport, which is important to obtaining a *Miranda* waiver and—eventually—a statement. Officers may also downplay the significance of the warning or portray it as a bureaucratic step to be satisfied before a conversation may occur.”<sup>124</sup> This “implies that the warnings do not warrant the suspect’s attention.”<sup>125</sup>

After this rapport building and carefully designed minimization of the importance of the rights, suspects frequently waive those rights. In fact, after the *Miranda* decision in 1966, there was no substantial reduction in the number of suspects who made post-arrest statements.<sup>126</sup> Further, suspects-turned-defendants are typically “surprised to learn thereafter that

116. *McClellan*, 193 N.W.2d at 715.

117. *Id.* at 715–16.

118. *Id.* at 717 (“The majority concludes, however, that the statements were volunteered and were not the result of custodial interrogation.”).

119. *Id.* at 716.

120. *Id.*

121. *Id.* at 717.

122. *Id.* (case name in plain text in original).

123. Thompson, *supra* note 37, at 648.

124. Weisselberg, *supra* note 18, at 1562 (case name in plain text in original).

125. Bazelon, *supra* note 23, at 1034.

126. Ogletree, *supra* note 23, at 1827.

they had a constitutional right to remain silent or to have an attorney present during questioning.”<sup>127</sup> This demonstrates just how effective rapport building and minimization are at hiding *Miranda*’s message from the suspects it was intended to protect.

A similar interrogation tactic is to simply contradict the warning’s message to induce a waiver, rather than an invocation, of the underlying rights. In an earlier example, the police informed a suspect of his right to have an attorney present but then immediately told him that there was no possible way to actually get the attorney.<sup>128</sup> In that case, the police incorporated the contradiction into the warning itself, thus making it internally inconsistent and incomprehensible—yet still, somehow, legally valid.<sup>129</sup>

The police also have other, more subtle ways to contradict the warning. For example, if a suspect does not immediately waive his rights after hearing the warning that “anything said can and will be used against [him] in court,”<sup>130</sup> the police can reverse the warning’s cautionary impact by telling the suspect just the opposite: “that by waiving his rights he will have a valuable opportunity to tell his version of the story.”<sup>131</sup>

The problem with telling the suspect that waiving his rights might help him, however, is that it is false, just as when the police tell a suspect that his statement may be used “for or against him in a court of law,” they are lying. A suspect’s own statement cannot, except in the rarest of circumstances, be used in his own defense at trial.<sup>132</sup> Even assuming that the police are speaking generally, rather than specifically about trial, they are still lying. Despite the popular misconception to the contrary, a suspect derives no plea-bargaining advantage from confessing.<sup>133</sup> Often, the police use the inducement that if the defendant cooperates by confessing, then “the prosecutor will look upon the case differently.”<sup>134</sup> In fact, the opposite is true: Defendants who confess are more likely to be charged, convicted, and punished more harshly than their non-confessing counterparts.<sup>135</sup>

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127. *Id.*

128. *Duckworth v. Eagan*, 492 U.S. 195, 198 (1989).

129. *Id.* at 203–04.

130. *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

131. *Bazelon*, *supra* note 23, at 1035; *see also* Thompson, *supra* note 37, at 661 (“[T]he police may offer suspects benefits in exchange for waivers.”). Courts have gone to great lengths to parse words to rubber-stamp *Miranda* waivers as free and voluntary. For example, in *State v. Deets*, the court made the following, self-contradictory holding: “An officer telling a defendant that his cooperation would be *to his benefit* is not coercive conduct, at least so long as *leniency* is not promised.” 523 N.W.2d 180, 183 (Wis. Ct. App. 1994) (emphasis added).

132. *See supra* Part III.B.

133. *Dearborn*, *supra* note 19, at 384.

134. *Deets*, 523 N.W.2d at 183.

135. *Dearborn*, *supra* note 19, at 384. In my own experience as a defense lawyer, prosecutors do “look upon a case differently” where the defendant (then suspect) confessed. When recently trying to obtain a favorable plea offer for a client, I informed the prosecutor that, before I had been retained, the client had fully cooperated with the police and gave an immediate confession—something that should now be rewarded in plea bargaining. The prosecutor’s response: “Well, that was stupid of him.” Conversely, and anecdotally,

#### IV. THE BEST SOLUTION (AND WHY IT WON'T WORK)

In light of these glaring deficiencies in the warning and the ways in which police purposely bypass *Miranda's* protections, there have been many recommendations for reform. On one end of the spectrum, many suggestions are nothing more than academic wonderment and fence-sitting; they are merely scholarly invitations for more debate. This type of approach to the problem, however, has caused our current chaotic state of affairs. The courts' failure to take the reins and impose some structure and clarity has led to today's inadequate *Miranda* warning. We must avoid this meandering, impractical approach if we wish to implement true reform.

On the other end of the spectrum are proposals that are bold and noble but would require too much fundamental reform of our underlying rights—something for which our slow-moving legal system is ill-equipped. Nonetheless, one of these proposals is worth discussing. Several commentators, including former public defender Charles Ogletree and clinical professor of law Christopher Dearborn, have recommended.

a per se rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney. If, after conferring with counsel, a suspect desires to make a statement, it may be used against her. Any statements made without the assistance of counsel, however, would be inadmissible.<sup>136</sup>

This proposed rule should be taken even further to require the assignment of counsel not only before any in-custody interrogations, which can occur both inside and outside of the police station, but also before all interrogations that occur at the police station, regardless of whether the police claim that the suspect was in custody at the time. Without this additional step, the admissibility of statements will hinge exclusively on the judge's determination of whether a reasonable person in the suspect's shoes would have felt free to leave the police station, allowing the same type of judicial abuses that exist today to persist.<sup>137</sup> In other words,

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my clients who do not cooperate with police often enjoy a much more favorable posture for plea bargaining and, of course, for trial. Therefore, in my experience, prosecutors mock rather than reward suspects-turned-defendants who were "stupid" enough to cooperate with the police.

136. Ogletree, *supra* note 23, at 1830; *see also* Dearborn, *supra* note 19, at 363.

137. One of the more ridiculous court findings with regard to whether a defendant was in custody can be found in *State v. Farias-Mendoza*, 2006 WI App 134, 720 N.W.2d 489. There, the trial court admitted that the defendant was "held in a locked interview room in the station for as long as five hours and twenty minutes." *Id.* ¶ 18. Normally, of course, actual custody should be enough to find that the suspect was, in fact, in custody. However, this trial court stated that the nearly six-hour detention in a locked room "was the only factor that weighed in favor of a conclusion that [the defendant] was under arrest." *Id.* The trial court concluded that, other than being locked away for nearly six hours, there was nothing that "the defendant might have misperceived as an effort by the State to restrain him. I think a reasonable person in the defendant's position . . . would have thought that the police were being impolite but not that he was under arrest." *Id.* at 495. This, unfortunately, is the type of shameful, results-oriented nonsense that often poses as reasoning at the trial court level. In many cases, appellate courts will rubber-stamp the trial court's

slightly expanding this proposal would eliminate the police tactic of interrogating first and arresting second, which would prevent the police from bypassing this proposed, earlier-attaching right to counsel by claiming that the suspect was not in custody.

This proposed reform is unquestionably reasonable and would be a well-deserved outcome for the police, prosecutors, and judges who have abused, and all but obliterated, *Miranda*'s protections over the past forty-plus years. After all, how much misconduct can we citizens tolerate before we take steps to limit the overly broad power and discretion that we have vested in these government agents? The irony of this reform would be that the police, with the help of judges, would have brought the change on themselves. Much like the aristocracy in the French Revolution, they would have "dug their own graves."<sup>138</sup>

In addition to being reasonable and logical, this proposed reform also finds support in the Constitution. Courts should "rely on the Sixth Amendment and conclude that the right to counsel should attach as soon as practicable following arrest, but no later than prior to any custodial interrogation."<sup>139</sup> In the context of this framework, the term "custodial interrogation" should be defined to include all interrogations at the police station, regardless of the interrogator's or judge's opinion about whether the suspect was actually in custody. "In other words, the only way to truly actualize the limited right to counsel in the Fifth Amendment context is for the Sixth Amendment right to counsel to attach the moment *Miranda* warnings are required."<sup>140</sup> This reasoning is sound, given that the Sixth Amendment's purpose is "'protecting the unaided layman at critical confrontations with his adversary,' by giving him 'the right to rely on counsel as a "medium" between him and the State.'"<sup>141</sup>

Unfortunately, although well-rooted in logic and the theory and policy of the Sixth Amendment, such reform is unlikely, as it would require swimming upstream against long-standing, substantive law. This reform is well ahead of its time and is still too revolutionary, just as it was when Charles Ogletree proposed it in 1987. In short, it would require more substantive change than our entrenched and snail-paced system of justice can currently accommodate.

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decision. Here, however, the trial court's ruling was so disingenuous that the appellate court was forced to conclude that actual custody was sufficient to establish that the defendant was, in fact, in custody. *Id.* at 491. However, our U.S. Supreme Court is not as reasonable and has held that even when a suspect is locked up and serving a jail sentence, there is not "custody" for *Miranda* purposes unless there is "custody within custody." *Howes v. Fields*, 132 S.Ct. 1181, 1194 (2012) (Ginsburg, J., dissenting).

138. Paul Campos, *The Revolution Will Not Be Cite Checked*, INSIDE THE LAW SCHOOL SCAM BLOG (May 18, 2012, 8:19 AM), <http://insidethelawschoolscam.blogspot.com/search?q=this+revolution+will+not+be+cite+checked> (arguing, in a different context, that today's law school faculties, much like the pre-revolution French aristocracy, will have brought their coming troubles on themselves through years of excess and abuse).

139. Dearborn, *supra* note 19, at 363.

140. *Id.* (case name in plain text in original).

141. *Id.* at 389 (footnote omitted) (quoting *Michigan v. Jackson*, 475 U.S. 625, 631–32 (1986)).

This Article, therefore, advocates for a more moderate reform: rewriting the *Miranda* warning to more accurately and clearly express the existing, underlying *Miranda* rights. This proposed reform requires an easily implemented change only in the warning, and not in the substantive, underlying constitutional protections.

## V. REWRITING THE WARNING

### A. MEANS OF REFORM

The means by which the *Miranda* warning can be revamped are numerous. While the substantive, underlying rights are a matter for the Supreme Court—or for the individual state supreme courts, if they decide to give their citizens greater protection under their state constitutions—the warning itself can be changed in at least three different procedural ways. First, the Supreme Court—or, again, the individual state supreme courts—can mandate a specific warning.<sup>142</sup> Second, the state “legislatures could codify new warnings to replace the current ones.”<sup>143</sup> And third, individual law enforcement agencies can require (and in some cases have required) a specific warning.<sup>144</sup>

The only constitutional requirement is that the warning is at least as informative as the weakest version currently approved by the Supreme Court.<sup>145</sup> However, as this Article demonstrates, complying with the Supreme Court’s bare minimum standard is an easy task. The Court poses virtually no hurdle, as it will rubber-stamp virtually any imaginable cobbled-together collection of words.<sup>146</sup>

### B. OBJECTIVES OF REFORM

The objectives of the new *Miranda* warning mirror the problems with the existing warning that were discussed in Part III. First, the new warn-

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142. Hammack, *supra* note 62, at 443. However, given the Supreme Court’s and the lower courts’ historical aversion to any level of form, structure, and consistency, it is unlikely that any meaningful reform will be implemented at this level of government. See Weisselberg, *supra* note 18, at 1593 (“I do not see any appetite on the Court for engaging in a wholesale revision of the *Miranda* doctrine[.]” (case name in plain text in original)).

143. Austin Steelman, Note, *Miranda’s Great Mirage: How Protections Against Widespread Findings of Implied Waiver Have Been Lost on the Horizon*, 80 UMKC L. REV. 239, 253 (2011). Even the *Miranda* Court anticipated legislative action. *Miranda v. Arizona*, 384 U.S. 436, 490 (1966) (“Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.”).

144. Rogers, *supra* note 69, at 749 (“[P]olice departments could promulgate rules incorporating the proposed amendment.”). Although it seems unlikely that law enforcement agencies would do anything to cure the defective warnings from which they so greatly benefit, it is still possible. See *Miranda*, 384 U.S. at 483 (discussing the FBI’s “exemplary record of effective law enforcement while advising any suspect or arrested person” of his Fifth Amendment rights, even before being required to do so under *Miranda*).

145. *Miranda*, 384 U.S. at 490 (permitting lower courts, legislatures, and even law enforcement agencies to develop their own *Miranda* warnings, provided they are at least “as effective as those described” by the Court).

146. See *supra* Part II.

ing must be easily understood. This means that it must be written in plain English and must be internally consistent, rather than self-contradictory.<sup>147</sup> For example, the warning must not inform a suspect: (1) that he is going to be interrogated; (2) that he has the right to an attorney before being interrogated; but then (3) that there is no way that he can actually get the attorney before being interrogated.<sup>148</sup> As demonstrated earlier, the Court's attempt to interpret this self-contradictory warning produced a 5–4 split among the Justices—surely it would be incomprehensible to the typical criminal suspect.<sup>149</sup>

Second, the new *Miranda* warning must be accurate; that is, it should not misstate the nature of the rights it is designed to convey.<sup>150</sup> For example, the new warning should not inform a suspect that he has the literal right to remain silent because, under existing law, he must now affirmatively speak to invoke this right.<sup>151</sup> As another example, the new warning should not imply that the suspect can immediately consult with an attorney because he clearly does not have that right either.<sup>152</sup> Rather, his only immediate right is the right to affirmatively state that he does not wish to answer questions about the incident<sup>153</sup>—a right that is not the equivalent of remaining silent and, further, is the opposite of consulting with an attorney and then answering questions.

Third, the new *Miranda* warning should be complete. It should not omit material information that would be important for a suspect to make an informed decision about whether to exercise his rights.<sup>154</sup> For example, while law enforcement officials currently tell suspects that anything they say can be used against them in court (which, actually, is false, as the post-*Miranda* request for an attorney is generally not admissible), they should also be told that their refusal to answer questions *cannot* be used against them in court.<sup>155</sup> Providing suspects with complete and relevant information about the consequences of their choices is a necessity.<sup>156</sup>

Fourth, the new *Miranda* warning must include instructions on how to actually invoke the underlying rights.<sup>157</sup> The importance of this is best demonstrated in the context of the right to silence. We now know that, counterintuitively, a suspect cannot invoke the right to silence by simply remaining silent.<sup>158</sup> Additionally, when suspects try to affirmatively invoke the right to silence, the police repeatedly “play dumb” by refusing

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147. See *supra* Part III.A.

148. See *Duckworth v. Eagan*, 492 U.S. 195, 198 (1989).

149. See *id.* at 196.

150. See *supra* Part III.B.

151. See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

152. See *Dearborn*, *supra* note 19, at 359.

153. See *id.*

154. See *supra* Part III.C.

155. See *Rushin*, *supra* note 43, at 153.

156. See *id.*

157. See *supra* Part III.D.

158. See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

to accept clear invocations such as “I’m not saying shit to you”<sup>159</sup> or “This is over.”<sup>160</sup> Then, when defendants later challenge the admissibility of their subsequent statements, the courts will label their earlier invocations as mere attempted invocations.<sup>161</sup> But if the courts are going to be this hypertechnical about how a suspect can actually invoke the right to silence, then, at the very least, the police must tell the suspect upfront exactly how he must invoke the right.<sup>162</sup>

Finally, the new *Miranda* warning must be designed so that the police are required to read, rather than evade, the warning and are further prevented from ignoring suspects’ invocations of their underlying rights.<sup>163</sup> The police must also be prevented from minimizing the warnings<sup>164</sup> or contradicting the warnings<sup>165</sup> in order to induce a waiver of rights.

### C. TIERED STRUCTURE: TIMING IS EVERYTHING

Regarding the incomprehensibility of many of the current iterations of *Miranda*: “Worst of all are the warnings that are long, complex, and obscure a suspect’s *Miranda* rights.”<sup>166</sup> Therefore, the new *Miranda* warning must be easily understood, which probably requires that it be the opposite of long and complex, which is short and simple. On the other hand, the new warning must also be complete; it must convey all of the relevant rights.

While these two objectives appear incompatible, they are actually easily reconciled. The solution to the problem is found in a case discussed earlier, where the court held that a suspect need not be informed of his right to stop answering questions if he first decides to speak.<sup>167</sup> The court’s reasoning was that “[t]he right to stop answering questions surfaces, not at the warnings stage of the *Miranda* safeguards, but rather subsequent thereto.”<sup>168</sup>

Although the court’s ultimate holding was wrong because a right surfacing mid-interrogation rather than pre-interrogation cannot justify excluding it from the warnings, its observation is correct: Different rights are relevant at different stages of the suspect–police encounter.<sup>169</sup> Further, some rights are even contingent on the exercise or waiver of other rights. In this particular case, the right to stop answering questions once questioning has begun cannot possibly become an issue until the suspect has decided to waive his right to silence in the first place. As another

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159. *People v. Jennings*, 760 P.2d 475, 482 (Cal. 1988).

160. *State v. Saeger*, 2010 WI App 135U, ¶ 3, 329 Wis. 2d 711, 790 N.W.2d 543.

161. Strauss, *supra* note 61, at 775.

162. See Rushin, *supra* note 43, at 170.

163. See *supra* Part III.E.

164. See Weisselberg, *supra* note 18, at 1562.

165. See Bazelon, *supra* note 23, at 1035.

166. Rosales, *supra* note 27, at 123 (case name in plain text in original).

167. *State v. Mitchell*, 482 N.W.2d 364, 371 (Wis. 1992).

168. *Id.* at 372.

169. See *id.*; see also Rogers, *supra* note 69, at 729–30 (discussing the various *Miranda* rights as superordinate and subordinate).



example, the right to have an attorney present during questioning is a moot point if the suspect decides to invoke his right to silence.<sup>170</sup>

With all of these different rights, some of which become relevant at different points in time and may even be contingent on the exercise or waiver of other rights, it is very unlikely that a suspect will be able to absorb, process, and make informed decisions about whether to invoke some or all of these rights. This is especially true given the specifically designed, psychologically intimidating setting of the interrogation room.<sup>171</sup> Therefore, the solution is to tier the presentation of the new *Miranda* warning so that it conveys the various rights in a layered format. This way, the rights are presented to the suspect when they are relevant, rather than all at once.

## VI. THE NEW *MIRANDA* WARNING

The new *Miranda* warning (below) is written in clear and simple language and is delivered in a three-part, tiered fashion.

To defeat the various police tactics and judicial abuses discussed in this Article, the warning must be delivered whenever the suspect is arrested, regardless of where that arrest takes place or whether the police intend to “question” the suspect, engage the suspect in “shop talk,” or otherwise “communicate” with the suspect in any way. This should prevent the police from escaping *Miranda* by labeling their questions as “shop talk” or some other benign-sounding phrase.<sup>172</sup>

Also, to defeat the “question first and arrest second” tactic, the warning must be delivered whenever the suspect is questioned at the police station or in a police vehicle, even if the police claim the suspect was there voluntarily and was not in police custody.<sup>173</sup>

Here is the new *Miranda* warning, in its three-part, tiered format:

### A. PART ONE

[Because the rights are contingent in nature, the reading of the rights might well stop after this first form, depending on whether the suspect decides to invoke the right to remain silent.]

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170. Rogers, *supra* note 69, at 729–30.

171. *Miranda v. Arizona*, 384 U.S. 436, 448–50 (1966) (discussing interrogation manuals that instruct police to use multiple psychological tactics, including interrogating the suspect away from his familiar surroundings so that he is not “confident” and is less “keenly aware of his rights”).

172. See *McClellan v. State*, 193 N.W.2d 711, 715 (Wis. 1972); see also Ogletree, *supra* note 23, at 1839–40 (discussing the police tactic of discussing “a crime within earshot of a suspect” in hopes of receiving an incriminating response without first asking formal questions).

173. Weisselberg, *supra* note 18, at 1541 (describing how courts construe the test for custody very narrowly, thus permitting “stationhouse interrogations without *Miranda* warnings in a police-dominated atmosphere” (case name set in plain text in original)).

*Miranda Warning—Form 1*

You have been arrested for [*name of alleged crime*]. You will be held in jail until you are brought before a judge on [*date and time*]. The judge will decide whether to set your bail or release you without setting bail.

I would like to ask you questions about [*describe allegation*]. Before I ask you questions, however, I need to inform you of some very important rights that you have.

First, you have the right to remain silent.

If you decide to talk to me, anything you say can be used against you in court.

However, if you decide to remain silent, your silence *cannot* be used against you in any way.

If you know that you want to remain silent, I will stop the interrogation now. But if you want to talk to me or if you are not sure whether you want to talk to me, I will tell you about some additional rights that you have before you make your decision.

*Suspect should check only one box:*

I want to remain silent, and I understand that my silence *cannot* be used against me in any way.

OR

I might want to talk to you and answer your questions. Please tell me more information about my other rights before I decide.

*Instructions to interrogator:*

If the suspect checked the first box and elected to remain silent, end the interrogation now. If the suspect checked the second box, proceed to the next form to explain additional *Miranda* rights.

The first part of this first form—advising a suspect that he is in custody, telling him when he will be brought to court, and informing him that the judge will decide whether to set bail or release him without bail—is critical.<sup>174</sup> As commentators and the dissenters on the Court have observed, if these questions are left unanswered, suspects may reasonably think that their decision to talk somehow favorably affects their release date or bail amount.<sup>175</sup> It is also important to tell suspects upfront the topic of discus-

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174. This portion of the *Miranda* warning does not precisely fit the *rare* situation where the police “invite” a suspect to the police station to give a statement but *truly* have no intention of arresting him. They may, for example, intend to obtain the incriminating statement so the prosecutor’s office can charge the suspect via summons and complaint at a later date. However, this does *not* change the inherently intimidating nature of the police station, the long history of law enforcement’s abuse of *Miranda*, the possibility of the interrogator changing his mind and arresting the suspect after hearing what he says, or the need for this warning. *The police must still read the warning*, and, if the suspect chooses to make a statement, the police could simply release him afterwards, despite their earlier warning that he was under arrest.

175. Altman, *supra* note 16, at 1101 (arguing that without such a warning, “suspects might feel compelled to answer questions in order to avoid this imprisonment”).

sion, which will prevent the police from using their highly effective bait-and-switch tactics.<sup>176</sup>

Telling the suspect that the rights are “very important” will alert him that these are not mere bureaucratic formalities, but instead are worthy of his full attention.<sup>177</sup> For this same reason, it is critical to require the police to present the form in writing<sup>178</sup> and to read it verbatim.<sup>179</sup> As demonstrated earlier, any “supplementing” of the form with additional (mis)information could easily defeat *Miranda*’s purpose. Further, taking away the creative liberties of the police by requiring a verbatim reading is not overly burdensome. In fact, many police officers already read from pre-printed forms and have easy access to them, especially at the police station where nearly all in-custody interrogations take place. While refraining from additional, often contradictory, commentary is a bit more challenging for the police, they are capable of such restraint—especially with the threat of suppression looming over their heads.

The heart of this form then advises the suspect of his right to remain silent<sup>180</sup> and that anything he says can be used against him—not for him—in court.<sup>181</sup> Just as importantly, however, it also advises the suspect that his silence cannot be used against him in any way.<sup>182</sup> This provides full information about the consequences of the suspect’s decision and thwarts any implication that talking can somehow be to the suspect’s ben-

176. Ogletree, *supra* note 23, at 1841 (discussing police tactic of obtaining waiver for one matter, and then questioning suspect about a more serious matter); Weisselberg, *supra* note 18, at 1564 (“Police do not have to tell a suspect the subject matter of an investigation . . .”).

177. Godsey, *supra* note 46, at 813 (arguing for the adoption of a *Miranda* warning that begins with the statement: “You have a number of important constitutional rights that protect you when law enforcement officers ask questions of you.”); Weisselberg, *supra* note 18, at 1562 (discussing the police tactic of minimizing the importance of the warning to induce waiver).

178. Godsey, *supra* note 46, at 807 (arguing for requirement of a written waiver before questioning).

179. Bazelon, *supra* note 23, at 1039 (arguing that “all criminal suspects across the country [should] receive the same warnings”); Croxall, *supra* note 23, at 1026 (arguing for a “uniform specific warning”); Strauss, *supra* note 61, at 823 (“[A] police officer should be required to have a set script and would not be able to use the opportunity to editorialize on the benefits of talking to the police.”).

180. *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

181. *Id.* at 469.

182. Godsey, *supra* note 46, at 783–84 (arguing for a warning stating that “[i]f you choose to remain silent, your silence will not be used against you as evidence to suggest that you committed a crime simply because you refused to speak” (internal quotation marks omitted)); Hammack, *supra* note 62, at 451 (discussing the invocation of the right to silence both immediately and after first speaking and arguing that “a statement explaining when silence can and cannot be used against a suspect at trial could be added to the current warnings”); Rogers, *supra* note 69, at 748 (arguing for a warning stating that “if you say you do not want to speak with us . . . we will not be able to use that against you in court”); Strauss, *supra* note 61, at 823 (arguing for a warning stating that “[i]f you decide to ask for an attorney or to stay quiet, that choice will not be used against you in any way” (internal quotation marks omitted)).

efit or that not talking can be to his detriment.<sup>183</sup>

This form also tells the suspect what will happen if he chooses to remain silent: The interrogation will end.<sup>184</sup> It then instructs him precisely how to affirmatively invoke the right: Check the box.<sup>185</sup> Importantly, this form provides the suspect with a true choice, unlike many police forms that provide only a directive to sign and waive the rights with no alternative.<sup>186</sup> Instructing the suspect on exactly how to invoke the right accomplishes three additional things: (1) it informs the suspect that he cannot just remain silent, but rather must communicate that choice;<sup>187</sup> (2) it prevents the police from deterring the suspect's invocation by yelling at or talking over him;<sup>188</sup> and (3) it prevents the police from claiming that the suspect's attempted invocation was ambiguous.<sup>189</sup>

Part One of the new *Miranda* warning focuses on, and stops with, the first of the *Miranda* rights. This tiered structure puts the spotlight squarely on the only relevant topic at this point in the suspect-police encounter: the right to remain silent. If the suspect chooses to invoke this right, then the other rights do not apply. There is no reason to inform him of his right to stop answering questions because he has just elected not to start answering questions. He will be informed of his right to an attorney, and may even be appointed an attorney, when he is brought to court, and there is no need to inform him of his right to have an attorney present at an interrogation in which he just declined to partake. Further, by ignoring these presently irrelevant rights, we avoid using a warning "that [is] long, complex, and obscure[s]" the right to remain silent.<sup>190</sup>

## B. PART TWO

If after the interrogator reads the first form the suspect either wants to answer questions or is unsure whether he wants to do so, then the interrogator can proceed and must read the next form.

### *Miranda Warning—Form 2*

I will now inform you about additional rights that you have.

You have the right to an attorney.

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183. Godsey, *supra* note 46, at 802 ("[I]f it is essential that suspects know the consequences of speaking, then it is equally essential, if not more so, that they also know that no formal consequences will follow from their silence . . .").

184. Rogers, *supra* note 69, at 748 (arguing for a warning stating that "if you say that you do not want to speak with us, we will stop questioning you").

185. Hammack, *supra* note 62, at 435 ("Suspects are generally given no guidance on how to invoke their rights . . .").

186. See, e.g., Kenosha, Wis., Police Dep't, *Miranda Waiver Form* (2012) (stating "I fully understand that I have these rights, I hereby waive said rights and consent to voluntarily answer questions and make a statement about" the incident) (on file with author).

187. See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

188. See Hammack, *supra* note 62, at 433 (discussing police tactic of yelling over the suspect to prevent suspect from invoking rights).

189. See Strauss, *supra* note 61, at 801–02.

190. Rosales, *supra* note 27, at 123.

If you cannot afford an attorney, the judge will give you one for free when you go to court on [date and time].

You have the right to consult with your attorney before you decide whether you want to talk to me.

If you consult with your attorney and decide to talk to me, you have the right to have your attorney with you when you talk to me.

*Suspect should check only one box:*

Knowing these additional rights, I want to remain silent, and I understand that my silence *cannot* be used against me in any way.

OR

I understand these additional rights, but I want to talk to you and answer your questions now, without an attorney.

*Instructions to interrogator:*

If the suspect checked the first box and elected to remain silent, end the interrogation now. If the suspect checked the second box, proceed to the next form.

Because the suspect did not invoke the right to silence after reading the first form, the information in Form Two becomes relevant. It informs the suspect of all aspects of the right to counsel—the right to counsel itself, the right to court-appointed counsel for the indigent, and the right to consult with counsel before and during any statements to police<sup>191</sup>—and then gives the suspect the actual option of remaining silent or talking to the police, rather than a directive to waive the right and speak.<sup>192</sup>

Importantly, this form does not state, or even imply, that this is the suspect's last chance to talk to police or, conversely, that if he chooses to talk to the police an attorney will be made available on the spot. The police have no way of providing counsel prior to or during the interrogation, nor are they obligated to do so.<sup>193</sup> This form is therefore both complete and accurate with regard to the underlying rights and procedure.

### C. PART THREE

If after the interrogator reads the second form the suspect decides to talk to law enforcement and answer questions, the interrogator would then proceed to the next form, which includes a written waiver of rights.

*Miranda Warning—Form 3*

You have told me that you want to give up certain rights and talk to me. I will need you to sign and fill in the information below before we get started.

The rights that you are giving up by talking to me are:

191. *Miranda v. Arizona*, 384 U.S. 436, 469–70 (1966).

192. See Kenosha, Wis., Police Dep't, *Miranda Waiver Form* (2012) (on file with author) (providing only an option to waive, but not to invoke, the *Miranda* rights).

193. Godsey, *supra* note 46, at 803 (arguing for the elimination of the current right to counsel warnings in their entirety because, contrary to the warnings' promises, suspects are *not* provided with counsel before or during interrogation; instead, "[t]he right to counsel warnings act in practice as a restatement of the right to remain silent in a different form").

The right to remain silent. Again, if you decide to remain silent, that *cannot* be used against you.

The right to consult with an attorney *before* and *during* questioning.

*Waiver of Rights:*

I have decided to talk to you about [*describe allegation*].

I understand that anything I say can be used against me in court.

Finally, I also understand that I can change my mind and stop this interrogation at any time by telling you “*I want to stop answering questions.*”

[*Sign, date, and time here*]

This form recaps the rights the suspect is giving up, reminds him that anything he says can be used against him, and documents the waiver in writing.<sup>194</sup> Most significantly, it informs the suspect of the last of the *Miranda* warnings: the right to stop talking at any time.<sup>195</sup> Finally, it also provides the exact phrasing necessary to do so.

## VII. JUST THE BEGINNING: OTHER MIRANDA-RELATED ISSUES

To avoid becoming a treatise on *Miranda*, this Article is limited to the *Miranda* warning rather than *Miranda*'s substantive, underlying rights. Additionally, this Article has (thus far) ignored several other *Miranda*-related issues, some of which would have to be addressed along with re-writing the warning if reform is to be meaningful.

First, virtually nothing in this Article will be of any value if the police are not required to video record the *Miranda* reading and, if the rights are waived, the subsequent interrogation.<sup>196</sup> Without a video recording, the police could simply defeat the new *Miranda* warning by contradicting it and promising leniency to suspects in exchange for their waiver of rights. Fortunately, widely available, low-cost technology permits easy video recording by any law enforcement agency, and several states now even require video recording.<sup>197</sup>

Second, unless there is adequate incentive for police to actually deliver the new *Miranda* warning and honor any subsequent invocation of rights, nothing in this Article will alter the status quo. Currently, the police have no incentive to comply with even the Court's existing, anemic *Miranda*

194. *Id.* at 807 (arguing for requirement of a written waiver before questioning).

195. Hammack, *supra* note 62, at 449–50 (arguing that an instruction “regarding how a suspect may invoke his right to remain silent post-waiver could be added to inform him that he must clearly state his desire to rely on his rights”).

196. Jung, *supra* note 20, at 457 (arguing that “a recordation requirement” would “pose only a mild inconvenience and would vastly increase confidence in the interrogation result”); Romano, *supra* note 20, at 542 (arguing that “*Miranda* rights are violated constantly during interrogation, and the defense can seldom win the argument when going against a police officer’s word” (case name in plain text in original)).

197. Godsey, *supra* note 46, at 809 (“[S]everal states have adopted this requirement through legislation or court decision, and many more states are currently considering bills mandating taped interrogations.” (footnote omitted)).

safeguards. If the police cannot quickly induce a legitimate waiver of the rights, they are always better off coercing a waiver than honoring the *Miranda* invocation. The reason is that even if a court finds the statement was obtained in violation of *Miranda*—a very rare occurrence indeed—the statement is still admissible as rebuttal evidence.<sup>198</sup> Further, the statement may lead to additional physical evidence, which can also be admissible.<sup>199</sup>

In other words, the police are always better off if they obtain a statement in violation of *Miranda*, rather than honoring the *Miranda* invocation and obtaining no statement. Until this changes and proper deterrents are put in place—for example, suppression of the statement and derivative evidence for all purposes, if not dismissal of the case—then no *Miranda* warning, no matter how well drafted, will completely protect a suspect's Fifth Amendment rights in every situation.

Finally, some other relevant issues beyond the scope of this Article include the development of: (1) special procedures for the interrogation of juveniles, mentally impaired suspects, and suspects who speak little or no English; (2) meaningful safeguards ensuring the suppression of involuntary statements, even when the initial *Miranda* waiver was voluntary; and (3) rational rules for the treatment of pre-*Miranda* silence. Indeed, although adopting the new *Miranda* warning would be tremendous progress in and of itself, if reform is to be complete it must by necessity extend beyond rewriting the warning.

## VIII. CONCLUSION

*Miranda* already has one foot in the grave. Not only have *Miranda*'s underlying rights been decimated—for example, a suspect now waives his right to remain silent by remaining silent—but the *Miranda* warning is an unmitigated disaster.

First, there is no standardization, as courts have rubber-stamped nearly every set of words cobbled together by law enforcement, no matter how defective they are in conveying *Miranda*'s message.<sup>200</sup> The least of the problems associated with this lack of standardization is that the ensuing chaos has led to a mind-boggling amount of costly, court-clogging litigation.<sup>201</sup>

Second, and more significantly, even the best versions of the *Miranda* warning are incomprehensible, fail to accurately and completely convey *Miranda*'s underlying rights, and offer no way of actually invoking those

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198. See Thompson, *supra* note 37, at 646 (discussing multiple exceptions to the exclusionary rule).

199. See *United States v. Patane*, 542 U.S. 630, 643–44 (2004) (holding, in a plurality decision, that a failure to give *Miranda* warnings does not require suppression of the “physical fruit” of the suspect's statements). *But see State v. Knapp*, 2005 WI 127, ¶¶ 81–83, 285 Wis. 2d 86, 700 N.W.2d 899, 921 (providing greater protection under the Wisconsin Constitution and suppressing physical evidence obtained as a result of a *Miranda* violation).

200. See *supra* Part II.

201. See *supra* Part II.

rights.<sup>202</sup> And, as an initial matter, the warnings themselves allow for incredibly easy circumvention by the police.<sup>203</sup>

The best solution to this state of affairs would be to require the appointment of defense counsel prior to any interrogation, which would be just deserts for the police and courts that have decimated *Miranda* over the past forty-plus years.<sup>204</sup> However, such a solution is too impractical and defendant-oriented for the courts to implement.<sup>205</sup> Instead, the most practical reform is to rewrite the *Miranda* warning so that it is standardized, easily understood by suspects, and accurately and completely conveys *Miranda's* underlying rights.<sup>206</sup> Further, it must provide a means by which a suspect can actually invoke the underlying rights, and it simply cannot allow for easy circumvention by the police.<sup>207</sup>

Because drafting a *Miranda* warning that is complete could result in a lengthy warning that is incomprehensible; the only way to accomplish these potentially conflicting objectives is to tier the delivery of the warning.<sup>208</sup> This is done by recognizing the contingent nature of the rights—for example, the right to stop answering questions is only relevant if the suspect chooses to waive his right to remain silent and start answering questions in the first place—and then explaining the rights accordingly.<sup>209</sup>

In light of the contingent and staggered nature of the *Miranda* rights, the first portion of the *Miranda* warning must advise the suspect of the right to remain silent and the consequences of speaking, and must also inform the suspect that if he chooses to remain silent, his choice cannot be used against him in any way.<sup>210</sup> Only if the suspect is interested in waiving the right to remain silent do the other rights become relevant. Therefore, the second portion of the warning, if needed, advises the suspect of all aspects of the right to counsel.<sup>211</sup> Finally, if the suspect chooses to waive all rights and make a statement, he must then be informed of the remaining right: the right to stop answering questions at any time.<sup>212</sup> At each stage of the *Miranda* warning presentation, the police must give the suspect a real choice between waiving and invoking the various rights and must record that choice in writing.<sup>213</sup>

Rewriting the *Miranda* warning so that it clearly, accurately, and completely conveys *Miranda's* underlying rights, while giving the suspect a meaningful choice and clear means to invoke those rights, is a critical first step in keeping *Miranda* alive.

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202. See *supra* Parts III.A.–III.D.

203. See *supra* Part III.E.

204. See *supra* Part IV.

205. See *supra* Part IV.

206. See *supra* Part V.B.

207. See *supra* Part V.B.

208. See *supra* Part V.C.

209. See *supra* Part V.C.

210. See *supra* Part VI.A.

211. See *supra* Part VI.B.

212. See *supra* Part VI.C.

213. See *supra* Parts VI.A.–VI.B.



