Volume 40
Number 3 *Summer 2006*

*pp.*645-684

Summer 2006

Evading Miranda: How Seibert and Patane Failed To "Save" Miranda

Sandra Guerra Thompson

EVADING *MIRANDA*: HOW *SEIBERT* AND *PATANE* FAILED TO "SAVE" *MIRANDA*†

Sandra Guerra Thompson*

I. INTRODUCTION

The Supreme Court in *Miranda v. Arizona*[1] announced a remedy to counteract the effects of psychological tactics during custodial interrogations that can create a coercive atmosphere and overwhelm suspects of limited education or experience.[2] The Court proscribed a set of "warnings" that should be issued in order to dispel the coercion in the interrogation room. The warnings would give the suspect the information needed to make a "free choice" in deciding whether or not to speak to the police.[3] Forty years after the pronouncement of these goals—to dispel coercion and empower suspects to make better choices for themselves during interrogations—we can now clearly see that the *Miranda* experiment has been a "spectacular failure."[4]

---

† In 1998, Professor Charles D. Weisselberg made an eloquent plea for the Supreme Court to "save" *Miranda* by returning to the "original vision" of *Miranda* and "excluding from evidence, for all purposes, statements . . . taken in violation of *Miranda*." *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 112 (1998). Some scholars continue today to call on the Court to improve the way in which the *Miranda* rule operates in the interrogation room. *See, e.g.*, Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, MINN. L. REV. (forthcoming 2006). This Article takes the view that *Seibert* and *Patane* greatly diminish, if not extinguish, any hope that the Court will transform *Miranda* into an effective tool for curbing unduly coercive interrogation practices.

* UH Law Foundation Professor of Law and Director of the Criminal Justice Institute, University of Houston Law Center. The author wishes to thank Alfredo Garcia, Christopher Slobogin, and George C. Thomas, III, for their insightful comments on an earlier draft of this Article. The author also owes a debt of gratitude to Mon Yin Lung, Associate Director of the O'Quinn Law Library of the UH Law Center for her outstanding research assistance. She also gratefully acknowledges the UH Law Foundation for its generous support.

1 384 U.S. 436 (1966).

2 *Id.* at 445–56.

3 *See* George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*: "Embedded" in Our National Culture? in* CRIME AND JUSTICE: A REVIEW OF RESEARCH 203 (Univ. of Chicago Press 2002).

4 *See* George C. Thomas III, Miranda*'s Illusion: Telling Stories in the Police Interrogation Room* Miranda*'s Waning Protections,* 81 TEX. L. REV. 1091, 1092, 1094 n.16 (2003) (listing citations of other authors with similar views); *see also* Steven D. Clymer, *Are Police Free to Disregard Miranda,* 112 YALE L.J. 447, 452 (2002) (stating that "the future of the Miranda rules is both uncertain and bleak" because *Miranda*'s mild exclusionary sanction will lead to increased noncompliance); Christopher Slobogin, *Toward Taping,* 1 OHIO ST. J. CRIM. L. 309, 309 (2003) (stating that "*Miranda v. Arizona* is a hoax" in that it has had little effect on police behavior and may even cover for improper conduct).

Two cases decided last term—*Missouri v. Seibert*[5] and *United States v. Patane*[6]—bear on a growing practice of "going outside" *Miranda*, meaning intentionally violating *Miranda* in a number of different ways that can yield admissible statements or other evidence.[7] Ordinarily, if the police violate the rule in *Miranda,* statements directly obtained by that violation are inadmissible in the government's case in chief. However, the Supreme Court has created many exceptions to the exclusionary rule. These exceptions create incentives for the police intentionally to violate *Miranda* when the benefits are considered to outweigh the costs.[8]

Seibert involved one variant of the practice of intentionally violating *Miranda,* what is commonly dubbed "going outside" *Miranda*. In *Seibert*, the police used the "question-first" tactic in which an investigating officer interrogates a suspect without giving *Miranda* warnings and obtains incriminating statements, and then issues the warnings to obtain a second, and presumably admissible, version of the statement. The Court essentially teaches the police how to violate *Miranda* intentionally and then "cure" the violation so as to render the incriminating statements admissible.

The *Patane* case, on the other hand, allowed the Court to reconsider the admissibility of physical evidence discovered as a result of statements taken in violation of *Miranda*. In *Patane,* the Court simply turns a blind eye to the fact that exceptions to *Miranda* encourage intentional violations. The Court approves the use of physical evidence found as a direct result of *Miranda* violations. *Wisconsin v. Knapp*,[9] a case following *Patane,* makes clear that physical evidence discovered as a result of a *Miranda* violation is fully admissible even when the violation

---

5 542 U.S. 600 (2004).

6 542 U.S. 630 (2004).

7 Throughout this Article, I refer to "violations of *Miranda*" as a shorthand way to say that the police did not follow the warnings and waiver procedures set out in the *Miranda* decision, not to indicate that a suspect's Fifth Amendment rights have been violated. There is considerable disagreement among scholars, and among members of the Supreme Court, as to whether the Fifth Amendment applies in the interrogation room or whether the suspect's constitutional rights are not violated until the point that a court admits evidence taken "in violation" of *Miranda* at trial. *See generally* Clymer, *supra* note 4 (arguing that *Miranda* does not impose a constitutional duty on the police to issue warnings prior to custodial interrogation). This Article takes no position on this issue.

8 For a discussion of the practice of deliberately violating *Miranda* to gain other evidentiary advantages, see *infra* notes 154–59.

9 542 U.S. 952 (2004) (following *Patane* and vacating the lower court decision to exclude physical evidence obtained as a direct result of a *Miranda* violation that was an intentional attempt to prevent the suspect from exercising his Fifth Amendment rights).

is an intentional attempt to undermine a suspect's Fifth Amendment rights in order to discover the evidence.

With the *Seibert* and *Patane* decisions, the Court has reaffirmed the extremely limited usefulness of *Miranda* as a tool for protecting suspects from coercive police tactics. *Seibert* and *Patane* represent the coup de grace for the demise of *Miranda*. The Supreme Court's jurisprudence interpreting *Miranda*, viewed in its entirety, consists of a long series of decisions that have gradually chipped away the protection the *Miranda* warnings were intended to provide and has encouraged deliberate attempts to circumvent the warnings requirement.[10] For example, the Court's ruling allowing the government to use a person's post-arrest, pre-warning silence as evidence of guilt creates an incentive to deliberately delay issuing warnings.[11] If an arrested person remains silent, that silence can be used to impeach the person's exculpatory testimony at trial. If the person volunteers statements upon arrest, those statements may also be used because *Miranda* does not apply to statements that are not the product of "interrogation."[12]

Moreover, all the rules pertaining to the sufficiency of warnings, waiver, and invocation of rights tend to encourage the police to interrogate even when they may know that the suspect does not understand the rights, may not intend to waive them, or may be trying to assert them. The case law excuses police errors, readily finds suspects to have "voluntarily waived" their rights in cases that test credulity, and demands lawyer-like clarity in order for suspects to invoke their rights.[13] Then, too, even if a suspect does clearly invoke the right to silence, the Court allows the police to try again later to get the suspect to give up his or her rights.[14] Only when a suspect clearly invokes the right to counsel, protected by the Sixth Amendment, and not simply *Miranda*, has the

---

10 In the Court's own words, "[following *Miranda*], subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement." Dickerson v. United States, 530 U.S. 428, 443–44 (2000).

11 *See* Fletcher v. Weir, 455 U.S. 603 (1982). A person's pre-arrest silence may also be used. *See* Jenkins v. Anderson, 447 U.S. 231 (1980). The only limitation the Court has recognized is the use of pretrial silence after arrest and the delivery of *Miranda* warnings. *See* Doyle v. Ohio, 426 U.S. 610 (1976).

12 *See infra* notes 56–65 and accompanying text.

13 *See infra* notes 66–115 and accompanying text.

14 *See infra* notes 95–96 and accompanying text.

Court provided more solicitous treatment, but few suspects demand a lawyer with the clarity required by the Court.[15]

If, even with those advantages working it their favor, the police are still found to have violated a suspect's *Miranda* rights, the Court has never applied a stringent exclusionary rule as a remedy. Just six years after announcing the decision, the Supreme Court held that *Miranda*'s exclusionary rule does not apply to the "fruits," evidence derived from statements obtained in violation of *Miranda*.[16] The Court also has allowed the use of such statements for purposes other than to prove the government's case in chief, such as impeachment.[17] In other words, statements obtained by means of *Miranda* violations are freely admissible except for use in the government's case in chief. In addition, *Patane* now broadens the long-standing rule that physical evidence derived from *Miranda* violations is freely admissible even as part of the government's case in chief, clarifying that even intentional violations may yield admissible fruits.[18] The Court also recognized an exception for *Miranda* violations, presumably including intentional violations, that are necessary to protect public safety.[19] No one is likely to dispute the necessity of violating *Miranda* under such circumstances, and since the suspect likely created the danger to public safety that necessitates immediate interrogation, this may be the one instance in which an intentional violation of *Miranda* is rightly allowed.

Not surprisingly, the police increasingly ignore *Miranda*. This is not to say that they do not issue the warnings—they do. In the vast majority of cases, police issue *Miranda* warnings as required so as to make the resulting statements admissible as evidence in the prosecution's case in chief[20] and obtain waivers before proceeding to interrogate a suspect.[21] The warnings and waiver process is so easily manipulated that some observers have concluded that the police have "adapted" to *Miranda* and

---

15 If the right to counsel is invoked, police may not try again to get a waiver unless the suspect first re-initiates a generalized discussion of the investigation. *See infra* notes 98–103 and accompanying text.

16 Michigan v. Tucker, 417 U.S. 433, 451–52 (1974) (upholding admission of testimony of a witness discovered solely by means of statements obtained in good faith violation of *Miranda*).

17 Harris v. New York, 401 U.S. 222, 225 (1971).

18 *See* 542 U.S. 630 (2004).

19 New York v. Quarles, 467 U.S. 649, 655–56 (1984).

20 George C. Thomas III, *Stories About* Miranda, 102 MICH. L. REV. 1959, 1975 (2004) (finding compliance with the *Miranda* doctrine to be ninety-five percent and citing other similar findings).

21 *See* Thomas & Leo, *supra* note 3, at 247 (stating that seventy-eight to ninety-six percent of suspects are issued warnings and waive their rights).

now use it as just another psychological tool to extricate confessions from suspects.[22] The very fact that a person has given a waiver also bolsters the case that subsequent statements were voluntarily given.[23]

In other cases, suspects refuse to waive their rights and instead invoke their rights to silence and/or counsel. In these cases, observers have found a fairly high rate of *Miranda* violations by police officers who simply ignore the invocation of rights and continue the interrogation. Indeed, in some jurisdictions police were—and perhaps continue to be—trained to "go outside" *Miranda*.[24]

Thus, *Miranda* now serves police interests in one of two ways. First, in cases in which police obtain waivers, it insulates a stressful interrogation process from judicial scrutiny to determine whether the confession was voluntarily given.[25] Second, in cases in which the rights are invoked, the police may be able to ignore *Miranda*, perhaps deliberately, and elicit statements for impeachment use as well as uncovering other admissible derivative evidence.[26] Interrogations in which police officers deliberately ignore invocations of *Miranda*'s protections can greatly affect the "voluntariness" of a confession as well. Yet, the due process voluntariness test continues to prove as ineffectual today in curbing the psychologically coercive practices of custodial interrogation as it was perceived to be by the Supreme Court when *Miranda* was decided.[27] These concerns have led at least one

---

[22] *See generally* Richard A. Leo & Welsh S. White, *Adapting to* Miranda: *Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397 (1999) (urging that police have "adapted" to *Miranda* in order to use the requirements to their advantage).

[23] *See* Missouri v. Seibert, 542 U.S. 600, 608–09 (2004) ("[G]iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility . . . ."); *see also* Thomas, *supra* note 4, at 1977 (stating that in seventy-five percent of cases involving waivers, voluntariness is not ever challenged, and in those cases challenging voluntariness of waiver or of answers given after waiver, government prevails in ninety-six percent of cases); Thomas & Leo, *supra* note 3, at 253.

[24] *See infra* notes 149–54 and accompanying text.

[25] *See Seibert*, 542 U.S. at 608–09 (2004).

[26] *See infra* notes 116–18, 129–37 and accompanying text.

[27] The *Miranda* decision is viewed as the Supreme Court's attempt to provide greater protection for suspects' rights than the Fourteenth Amendment's due process voluntariness test. *See* Miranda v. Arizona, 384 U.S. 436, 455–56 (1966) (noting that incommunicado interrogation of individuals in a "police-dominated atmosphere" and the use of tactics that "trade[] on the weakness of individuals" might not be involuntary under the traditional due process test). One measure of the effectiveness of the voluntariness test in ferreting out confessions given under unduly coercive circumstances is the rate of innocent people who confess falsely. *See generally* WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 139–89 (Univ. of Mich. Press 2001) (addressing the scope of the problem of police-induced false confessions and giving

commentator to conclude that *Miranda* could do more harm than good if deliberate violations of the rule become more pervasive.[28]

Seibert and *Patane* presented the perfect opportunities for the Court to put a stop to deliberate violations of *Miranda*, but the decisions do exactly the opposite. Thus, this Article concludes that the time has come for scholars likewise to ignore *Miranda* and focus instead on other protections against coercive interrogation tactics. *Miranda* was originally intended to provide a bright line rule that would protect suspects from coercive tactics that are inconsistent with the right against self-incrimination. It has failed to provide this protection, so the time has come to begin the search for alternative remedies.

Part II of this Article demonstrates how the Supreme Court's *Miranda* jurisprudence has gradually eroded the rule by creating incentives to interrogate even when the police may be aware that a suspect has not received or understood the warnings or when it is apparent that the suspect does not mean to waive his or her rights. Part III reviews the recent decisions in *Seibert* and *Patane*, both of which may encourage rather than curtail the growing practice of intentionally violating *Miranda*. The Article concludes with a plea for scholars and policy makers to look beyond *Miranda* and embrace new, bright line rules for custodial interrogations.

II. UNDERSTANDING THE CHOICE: WHY POLICE FOLLOW OR IGNORE *MIRANDA*

Miranda represents the Supreme Court's effort to provide affirmative protection to criminal suspects who may face grueling and psychologically manipulative interrogations while in police custody. Of course, constitutional law prohibits coerced, or involuntary, confessions,

---

examples); Richard J. Ofshe & Richard A. Leo, *Coerced Confessions: The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 983 (1997) (citing misuse of standard interrogation techniques as a major cause of false confessions); Innocence Project, False Confessions, www.innocenceproject.org/causes/falseconfessions.php (last visited Mar. 12, 2006); *see also* Rob Warden, *The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970* (2003), *available at* www.law.northwestern.edu/depts/clinic/wrongful/False/Confessions2.htm. *But cf.* Slobogin, *supra* note 4, at 313 (noting that research provides insights on types of tactics most likely to induce false confessions).

[28] *See* Weisselberg, *supra* note †, at 162 ("If [deliberate violations of *Miranda*] ever pervade[] our system, we inevitably will realize that half a Miranda rule is worse by far than no rule at all.").

such as those obtained through physical violence.[29] However, the Supreme Court has never prohibited all practices that create psychological or physical pressures to confess. How could it? Is continual questioning for eight hours so long that a suspect will be "compelled" to confess? Twelve hours? Fifteen hours? It may be impossible to say how long is too long because suspects' breaking points will vary according to the psychological or physical fortitude of the individual suspect. Similar questions are raised by other aspects of interrogations. How much food must be provided? How much sleep should a person be allowed? And so forth. Thus, it is especially problematic for a court to lay down bright line rules about any particular police practice as a matter of constitutional interpretation.[30] Except for practices such as the use or threatened use of violence, the Court has declined to provide much specific guidance on how the police should conduct interrogations.

Instead, the Court created what was originally perceived as a bright line rule in *Miranda*, requiring that suspects get information about their rights so that they can make the best decisions about whether or not to submit to questioning. *Miranda*'s goals might be summarized as follows: to dispel the coercive environment of the interrogation room by arming suspects with knowledge of their rights to silence and the assistance of counsel, and then empowering suspects to determine whether to waive or invoke those rights.[31] Achieving the original goals of dispelling the coercive atmosphere of the interrogation room through warnings and waiver—with the benefit of forty years of hindsight—seems to have been doomed to failure from the start.

For one thing, the *Miranda* Court did not even endeavor to fully and effectively protect a suspect's right to remain silent in the face of government questioning. We might imagine a suspect's rights during custodial interrogation as falling somewhere along a spectrum that measures the extent to which those rights are protected, and which negatively correlates with the government's likelihood of obtaining a

---

[29] *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 286 (1936) (stating that convictions resting solely upon confessions extorted by means of brutality and violence violate due process).

[30] The Court has found that extreme deprivations of sleep or food, or extended periods of isolation, have produced involuntary confessions in violation of due process. *See, e.g.*, Payne v. Arkansas, 356 U.S. 560 (1958) (finding that two sandwiches during a forty-hour detention and interrogation produced an involuntary confession); Fikes v. Alabama, 352 U.S. 191 (1957) (finding that isolation for more than a week also produced an involuntary confession); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (finding that an interrogation for thirty-six hours without allowing suspect to rest produced an involuntary confession).

[31] *Miranda*, 384 U.S. at 457–58.

confession. At one end of the spectrum is the complete deprivation of rights, such as the use of torture to obtain confessions. Early in the twentieth century, the Supreme Court declared that confessions obtained by means of brutality and violence run afoul of the Due Process Clause by violating our basic notions of decency and morality[32] and because they cannot be trusted as reliable evidence of guilt.[33] Physical or mental torture is a sure means of obtaining a confession, but that confession may well be false.[34]

At the other end of the spectrum is a system that would either ban interrogations altogether or automatically appoint an attorney to represent a suspect taken into custody prior to police questioning. Either approach would fully and effectively protect a person's right against self-incrimination. Just prior to the issuance of the *Miranda* decision, some commentators opined that the Supreme Court seemed inclined to require that attorneys be provided to all suspects during custodial interrogations.[35] Such a move was feared by the law enforcement establishment, who believed it would effectively eliminate interrogations and the ability to obtain confessions, not to mention other evidence discovered as a result of confessions. The fear, of course, was based on a belief that any defense attorney would advise his or her client to invoke the Fifth Amendment right to silence and refuse to answer any questions.

The Court did not go so far as to require the presence of counsel, apparently concluding that the Fifth Amendment did not require the government to take affirmative steps to ensure full and effective implementation of suspects' rights. The Court in *Miranda* opted for a compromise[36] position instead, providing a remedy that falls between the two ends of the rights spectrum: Suspects may not be tortured into confessing, but attorneys are not to be provided during interrogations. The rule requires only warnings and waiver. Even the original "vision" of *Miranda* does nothing at all to curb the psychological and physical

---

32 *Brown*, 297 U.S. at 286.

33 *Id.* ("And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence.").

34 Recent developments exonerating persons who have been wrongly convicted confirm that false confessions can be obtained from persons through a variety of means, including torture. *See* Innocence Project, *supra* note 27 (providing synopses of cases of false confessions in which a wrongly-convicted person was eventually exonerated and in which an actual perpetrator was eventually apprehended).

35 *See Miranda*, 384 U.S. at 440 (noting the "wealth of scholarly material" addressing the *Escobedo* decision).

36 *See* Clymer, *supra* note 4, at 483 n.154.

strain of interrogation strategies.[37] Indeed, the same manipulative tactics that concerned the *Miranda* Court continue to be promoted in police training manuals,[38] perhaps the clearest real-world evidence that *Miranda* has failed.

As the following Parts outline, the Supreme Court's *Miranda* case law, even before *Seibert* and *Patane*, had diminished any possibility that *Miranda* might play even a moderately effective role in reducing the coercive atmosphere in the interrogation room. Instead, the Court's decisions have had the perverse effect of permitting police interrogators to use *Miranda* to their advantage—and to the disadvantage of the suspects questioned. The Court has encouraged the police to circumvent *Miranda*'s intended protections in three ways: (1) by obtaining incriminating evidence either through a person's statements or through his or her silence before the issuance of warnings; (2) by proceeding as if the suspect comprehends the warnings when there is reason to believe the suspect does not; and (3) by interrogating a suspect when there is reason to believe the suspect does not mean to waive his or her rights and may even be trying to invoke them. In addition, the Court has shielded law enforcement from civil liability for *Miranda* violations, including intentional violations.

A. Obtaining Evidence Without Issuing Warnings

1. Using Post-Arrest, Pre-Warning Silence

One way in which the Court has encouraged the police to circumvent the intended purpose of *Miranda* is by creating an incentive to delay issuing the warnings in order to derive evidentiary benefits. In *Fletcher v. Weir*,[39] the Court allowed the use of post-arrest, pre-*Miranda* silence to impeach a defendant's credibility. At the time the defendant, Weir, was arrested, he did not try to justify his actions as self-defense. In his testimony at trial, however, he raised a self-defense claim. The purpose of mentioning his silence was to cast doubt on his credibility, presumably because one would expect a person in that situation to protest his innocence at the time of arrest.

---

37 *See* Weisselberg, *supra* note †, at 184–87 (arguing that *Miranda* was intended as a constitutional rule that should provide a complete rule of exclusion for objectively bad faith violations).

38 Indeed, the manual is now in its fourth edition. *See* FRED EDWARD INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS 498–518 (4th ed. 2004).

39 455 U.S. 603 (1982).

The Court had previously rejected the use of a suspect's post-arrest silence in a situation in which *Miranda* warnings *had* been issued in *Doyle v. Ohio*.[40] The decision found that "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights."[41] Thus, the Court concluded that it would be fundamentally unfair to impeach a person with his post-arrest, post-*Miranda* silence because silence in these circumstances is "insolubly ambiguous."[42] On the other hand, the issue in *Jenkins v. Anderson*[43] was whether the impeachment use of one's pre-arrest, pre-*Miranda*, silence violated either the Fifth or Fourteenth Amendments. In rejecting the defendant's due process argument, the Court stated that "no governmental action induced petitioner to remain silent before arrest," but that his "failure to speak occurred before [he] was taken into custody and given *Miranda* warnings."[44] Thus, the Court, applying the reasoning of *Doyle*, held that such use of the defendant's pre-arrest silence did not violate the Constitution.[45]

The facts in *Fletcher* presented a closer question. In *Fletcher*, the defendant had stabbed another man and then gone home. The police arrived at his home and arrested him but did not read him his *Miranda* rights.[46] Weir did not say anything to the police about the circumstances of the stabbing, but at trial he took the stand in his defense and claimed the killing was in self-defense. The Sixth Circuit found that the use of the defendant's post-arrest silence violated due process, rejecting the argument that the presence or absence of *Miranda* warnings should be determinative. The appeals court stated:

> We think that an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent. When one combines a suspect's fears and anxieties upon arrest with widespread knowledge of one's right to remain silent, the result is often just that—silence. Given these realities, we think it is fundamentally unfair to

---

40 426 U.S. 610 (1976).

41 *Id.* at 617.

42 *Id.*

43 447 U.S. 231 (1980).

44 *Id.* at 240.

45 The Court rejected the Fifth Amendment argument on the grounds that the government is only allowed to impeach the defendant after he chose to "cast aside his cloak of silence" by testifying and that impeachment "advances the truthfinding function of the criminal trial." *Id.* at 238.

46 Fletcher v. Weir, 455 U.S. 603, 603 (1982).

> allow impeachment through the use of any post-arrest silence.[47]

The court also noted that to allow post-arrest, pre-*Miranda* silence to be used for impeachment would "discourage the reading of *Miranda* warnings."[48] There is no requirement that Miranda rights be read immediately upon taking a suspect into custody, although most police departments have adopted such a policy.[49] The Sixth Circuit expressed concern that the benefits of prompt issuance of warnings could be lost if police were given an incentive to delay the reading of rights.[50]

The Supreme Court did not share the circuit court's concerns about losing the benefits of prompt warnings by creating an incentive deliberately to delay warnings. The Court ignored the lower court's arguments, and those of every other court that had considered the issue, that the mere fact of arrest can induce fear and anxiety that is often sufficient to induce silence and that the right to remain silent is widely known, even if the police do not issue warnings.[51] Instead, the Court found no due process violation in the impeachment use of Weir's post-arrest silence "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings . . . ."[52]

Delaying the issuance of warnings does not violate the terms of *Miranda,* as *Miranda* only requires that warnings be given prior to custodial interrogation.[53] So long as police refrain from interrogating a suspect who is taken into custody, *Miranda* is not violated. However, the *Fletcher* case means that the government always benefits from delaying the issuance of warnings. If the arrestee volunteers statements, any incriminating statements are fully admissible. If the arrestee remains silent, his or her silence can be used for impeachment should the person take the stand at trial. The *Miranda* decision portrayed the custodial setting as inherently coercive and envisioned that the warnings would

---

47 Weir v. Fletcher, 658 F.2d 1126, 1131 (6th Cir. 1981). The appeals court also noted that every other decision to date was consistent with this position. *Id.*

48 *Id.* at 1132.

49 *Id.* (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980), for the proposition that warnings are not required upon taking suspect into custody, but rather prior to interrogation).

50 Fletcher, 658 F.2d at 1132.

51 *Id.* at 1130–31.

52 Fletcher v. Weir, 455 U.S. 603, 607 (1982).

53 *See Innis*, 446 U.S. at 300 ("[T]he special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation.").

dispel that coercive atmosphere.[54] *Fletcher* encourages the practice of deliberately prolonging the coercion for as long as possible.

2. Limiting the Need to Issue Warnings

The *Miranda* rule requires the issuance of warnings for any person in "custody"[55] prior to "interrogation." In *Rhode Island v. Innis*,[56] the Court limited the reach of the *Miranda* rule by finding that police officers who had discussed a suspect's case with each other while in the suspect's presence were not "interrogating" the suspect. In so finding, the Court encouraged the police to try to obtain statements from suspects without first issuing warnings by holding conversations with each other that might cause a suspect to speak.

The facts involved a suspect, Innis, who was arrested for robbery, given the warnings, and immediately asserted his right to an attorney.[57] The officers proceeded to transport him to the police station and, during the course of a few minutes and less than a mile's drive, the officers conversed amongst themselves, knowing that Innis could hear their conversation.[58] The officers discussed the suspect's missing shotgun, and they talked about how many handicapped children at a nearby school played in the area and that they should search for the gun for the children's safety. One officer then stated that it would be too bad if a little girl picked up the gun and accidentally killed herself.[59] Innis then interrupted the conversation and offered to show them where the gun was located.

The case presented the issue of the definition of "interrogation" for purposes of the *Miranda* rule. The Court sensibly defined interrogation as "either express questioning or its functional equivalent" by which the Court meant "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[60] The definition also contemplates that if a practice is intended

---

54 Miranda v. Arizona, 384 U.S. 436, 448–52 (1966).

55 *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) ("[T]he ultimate inquiry [in defining custody] is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam))).

56 446 U.S. 291 (1980).

57 *Id.* at 294.

58 *Id.* at 294–95.

59 *Id.* at 295 ("He [Gleckman] said it would be too bad if the little—I believe he said a girl—would pick up the gun, maybe kill herself.").

60 *Id.* at 300–01.

to elicit a response, it will most likely also be one that they should have known was reasonably likely to elicit a response.[61]

It is the application of this definition to the facts of the case that narrows the reach of the *Miranda* rule. The Court found that the officers' conversation amounted to "no more than a few offhand remarks" and that the officers had no reason to know that Innis would be "peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children."[62] Moreover, the Court concluded that the facts do not suggest that the officers' comments were intended to elicit a response.[63] Justice Marshall, joined by Justice Brennan, dissented, stating that he was "utterly at a loss" to see how the majority could have concluded that no interrogation took place.[64] Justice Stevens' dissenting opinion viewed the Court's "stinted test" as "creat[ing] an incentive for police to ignore a suspect's invocation of his rights in order to make continued attempts to extract information from him."[65]

B. Transforming Miranda *From "Safeguards" for Suspects to an Interrogation Tool for Police – The Warning and Waiver Requirements*

If the *Miranda* rule is easy to apply and if it is easy to obtain a suspect's waiver of his or her rights, then it is that much easier for the police to proceed with interrogation and obtain fully admissible statements. Supreme Court decisions in these areas have indeed turned *Miranda*'s "safeguards"[66] into a minor formality that is not likely to impede the path to interrogation and may in fact be a useful interrogation tool.

The Court first signaled that it would not apply stringent rules regarding the issuance of warnings in its 1974 decision in *Michigan v. Tucker*.[67] In dicta, the Court commented on how courts should view good faith errors in the issuance of warnings: "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policeman investigating serious crimes make no

---

61 *Id.* at 308 n.7.

62 *Id.* at 302–03.

63 *Id.* at 303 n.9.

64 *Id.* at 305 (Marshall, J., dissenting).

65 *Id.* at 312, 313 (Stevens, J., dissenting).

66 Early in the post-*Miranda* case law, the Court began referring to *Miranda*'s warnings and waiver procedure as "safeguards" rather than "requirements," underscoring the view of the procedure as "prophylactic" and not in themselves constitutional rights. *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974).

67 *Id.* at 446.

errors whatsoever."[68] Thus, despite the fact that it would be a simple matter to expect police officers to read the warnings from a card so as to ensure accuracy, the Court instead chose to overlook sloppy recitations, even in situations in which the faulty warnings might mislead some suspects.

The Court's decision in *California v. Prysock*[69] made clear that police officers could issue warnings in varying forms without violating *Miranda.* The lower court had ruled that police should give the warnings using the precise language of the *Miranda* opinion,[70] and it considered it *Miranda*'s greatest strength that its precise requirements were so easily met.[71] The Supreme Court disagreed, stating that "[q]uite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures."[72]

This variation in language was challenged in *Duckworth v. Eagan*,[73] in which the police informed the suspect that an attorney would be appointed for him "'if and when you go to court.'"[74] Reiterating that the warnings are not in themselves constitutional rights but prophylactic safeguards, the Court concluded that the issue was "simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'"[75] Interestingly, the Court in *Prysock* had approved the warnings in that case because they "fully conveyed" the *Miranda* rights,[76] but in *Duckworth* the standard adopted was whether the rights were "reasonably conveyed." Finding that the warnings given in the case accurately reflected the state procedure for appointment of counsel, i.e., "in court," the majority concluded that the warnings did reasonably convey to the suspect his *Miranda* rights.[77]

Writing for the four dissenting members of the Court in *Duckworth*, Justice Marshall argued that the "if and when you go to court" caveat would be misunderstood by most suspects who would likely conclude that no attorney would be provided until trial.[78] Even worse, he believed

---

68 *Id.*
69 453 U.S. 355 (1981).
70 *Id.*
71 *Id.* at 359.
72 *Id.*
73 492 U.S. 197 (1989).
74 *Id.* at 197.
75 *Id.* at 203 (alterations in original).
76 *Prysock*, 453 U.S. at 361.
77 *Duckworth*, 492 U.S. at 203–04.
78 *Id.* at 217 (Marshall, J., dissenting).

that the average suspect would assume that he faced indefinite deferral of interrogation until such time as he might obtain the assistance of counsel "if and when" he goes to court. Given the choice of trying to clear himself of suspicion immediately without the assistance of counsel or waiting until such time when counsel might be appointed, a suspect might choose to proceed without the assistance of counsel, a choice that the dissenters found to be fraught with coercion.[79]

In a similar vein, the Supreme Court has eased the burden on the prosecution to prove that a suspect made a voluntary waiver and encourages police officers to begin questioning even in situations in which they may feel the suspect does not actually intend to waive his rights or may not have the capacity to understand his rights. The suspect agreed to talk to FBI agents, refused to sign the waiver at the bottom of an "Advice of Rights" form, and did not explicitly waive his right to counsel in *North Carolina v. Butler*.[80] Ignoring any possible significance of his refusal to sign the waiver form, the Court assumed that Butler had explicitly waived his right to silence by stating that he would talk to the agents. The only issue then was whether he had also implicitly waived his right to counsel. The Court concluded that "[a]n express written or oral statement of waiver of the right to remain silent or of the right to counsel is . . . not inevitably either necessary or sufficient to establish waiver."[81] "[S]ilence, coupled with an understanding of his rights and a course of conduct indicating waiver" may be sufficient to prove waiver.[82] While maintaining that the courts should presume that a suspect has not waived his rights and that "the prosecution's burden is great," the Court nonetheless concluded that "in

---

79 *Id.* at 217–18.

80 441 U.S. 369, 370–71 (1979).

81 *Id.* at 373. The Court has found waivers in other situations in which the suspect's conduct betrays an erroneous understanding of the warning that "anything you say can be used against you." Many suspects apparently believe that only written statements can be offered into evidence. For example, in *Connecticut v. Barrett*, the suspect refused to make a written statement without the presence of counsel, but the suspect was willing to make an oral statement. 479 U.S. 523, 525–26 (1987). The Court held that the suspect had invoked his right to counsel for the limited purpose of making a written statement, but that he had validly waived his rights for purposes of offering oral statements. *Id.* at 529.

In *Fare v. Michael C.*, the Court held that the government could satisfy its burden to prove a valid waiver if, viewing the totality of the circumstances, the waiver appears to have been validly given, and the Court determined that the totality of the circumstances test is adequate, even in a case involving a juvenile. 442 U.S. 707, 725 (1979).

82 *Butler*, 441 U.S. at 373.

at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."[83]

It is especially telling that the Court chose a case in which the suspect had not even graduated from high school, might not have been literate,[84] and refused to sign the waiver form. The record also suggests that he had not been read his rights just prior to questioning, although he had been advised of his rights sometime earlier upon arrest. The facts of the case thus present a weak case for finding that the suspect understood his rights and clearly intended to waive them. Yet the Supreme Court chose this case in which to rule that police can infer a valid waiver from a person's words and conduct in combination with their silence.

Studies confirm that groups, such as persons with low intelligence or mental problems, juveniles, persons whose native language is not English, and deaf defendants, tend not to comprehend the *Miranda* rights and do not appreciate the significance of waiving them.[85] Nonetheless, the Supreme Court has rejected the argument that a suspect's inability to fully comprehend his *Miranda* rights and give a meaningful waiver should render any resulting confession inadmissible. The suspect in *Colorado v. Connelly*[86] suffered from chronic schizophrenia and was in a psychotic state when he confessed.[87] The Court rejected the Colorado Supreme Court's finding that Connelly was incapable of giving a voluntary waiver of his rights due to his mental impairment. The Court determined that the sole concern of the Fifth Amendment is "governmental coercion" and the "voluntariness of a waiver of this [Fifth Amendment] privilege has always depended on the absence of police overreaching."[88] It did not matter that the suspect felt compelled to waive his rights and confess by the "voice of God"; unless the police acted inappropriately in obtaining the waiver, it would be considered voluntary.

The voluntariness of a waiver is also not affected by the fact that a suspect is unaware that an attorney has been retained to represent him

---

83 *Id.*

84 The majority states that the agents had determined that he was literate. *Id.* at 370. However, the dissenting opinion points out that there was a dispute in the record on this issue. *Id.* at 378 (Brennan, J., dissenting).

85 *See* LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 77–87 (Univ. of Chicago Press 2005).

86 479 U.S. 157 (1986).

87 *Id.* at 161.

88 *Id.* at 170.

and is at the police station seeking to consult with the suspect.[89] Nor does it make a difference that the suspect is unaware of the seriousness of the charges for which he is being questioned.[90]

In addition, Professors Leo and White have suggested that the police have learned to use the issuance of *Miranda* warnings in one of three ways, two of which can induce waivers.[91] First, they may issue them in a simple, neutral way, without trying to induce a waiver in any way,[92] which is probably the method most consistent with the Supreme Court's original intention. Second, they may try to de-emphasize the significance of the warnings, treating them as a mere formality, as a way of disarming a suspect and setting the person at ease, making it easier to obtain a waiver.[93] Finally, the police may offer suspects benefits in exchange for waivers.[94]

In sum, the warnings need not be given with much precision and may even be given in a misleading way and still be considered adequate. In obtaining waivers, a suspect may engage in equivocal behavior, such as refusing to sign a waiver form, and not explicitly waive the right to counsel, but a court could still find that a valid waiver occurred. Even if a suspect does not actually understand the rights or the significance of waiving them, e.g., due to mental impairment, the waiver will be considered voluntary unless the police act improperly. Considering all of these factors, issuing warnings and obtaining waivers could not be easier.

C. Increasing Suspects' Burden to Invoke Miranda *Rights*

The Court has found a valid waiver of rights in cases in which the facts suggest that was not the suspect's intent, but the same has been true for invocations of the rights. Even though suspects may try to invoke their rights—and even if the police understand that this is the suspect's intent—the Court has imposed a high degree of clarity which means that police can ignore unclear invocations. An officer can continue with the interrogation unless the invocation is clearly asserted. Moreover, even a suspect who manages to speak precisely in asserting the right to silence will not necessarily be spared from later attempts to obtain a waiver of that right. Under certain circumstances, the police can try again to get a

89 Moran v. Burbine, 475 U.S. 412, 422–23 (1986).
90 Colorado v. Spring, 479 U.S. 564, 576–77 (1987).
91 *See* Leo & White, *supra* note 22, at 431–47.
92 *Id.* at 432–33.
93 *Id.* at 433–39.
94 *Id.* at 440–47.

waiver from a suspect who has affirmatively invoked his right to silence, although not when a suspect invokes the right to an attorney.

If a suspect clearly invokes the right to silence, the police must immediately cease the interrogation. However, the Court's decision in *Michigan v. Mosley*[95] stands for the proposition that *Miranda* is not violated if the police wait for a significant period of time, i.e., more than two hours, issue warnings for a second time and attempt again to obtain a waiver, this time to discuss a different offense.[96] The Supreme Court held that the police had "'scrupulously honored'" Mosley's "'right to cut off questioning.'"[97]

In contrast, the Court in *Edwards v. Arizona*[98] held that once a suspect has invoked the right to counsel, unless the suspect re-initiates a discussion of the pending charges, the police may not initiate a second interrogation by again issuing warnings and trying again to obtain a waiver until counsel has been made available to the suspect.[99] The outcome in *Edwards* was predictable, given the directive in the *Miranda* opinion that clearly states that if a suspect requests an attorney "'the interrogation must cease until an attorney is present.'"[100] The rule requires not only that the suspect be allowed to consult with an attorney, but that no further interrogation may proceed without the presence of

---

95 423 U.S. 96 (1975).

96 *Id.* In *Mosley,* the suspect was arrested in connection with certain robberies. The detective issued *Miranda* warnings, whereupon Mosley invoked his right to silence. At that point, the detective ceased the interrogation. More than two hours later, a different detective took the suspect to a different location in the building and also issued *Miranda* warnings. This detective questioned Mosley solely about an unrelated murder. *Id.* at 104–05. The fact that a different detective, in a different location, and about a different crime, had questioned Mosley did not appear determinative. The Court distinguishes a companion case of *Miranda*, *Westover v. United States*, 384 U.S. 436 (1966), by noting that in *Mosley*, in contrast to *Westover*, "the police gave full '*Miranda* warnings' to Mosley at the very outset of each interrogation, subjected him to only a brief period of initial questioning, and suspended questioning entirely for a significant period before beginning the interrogation that led to his incriminating statement." 423 U.S. at 106–07. This was in contrast to "[t]he cardinal fact" of *Westover*, which was the failure of the police to give warnings at all. *Id.* at 107.

97 *Mosely*, 423 U.S. at 104.

98 451 U.S. 477 (1981).

99 *Id.* at 484–85; *see also* Smith v. Illinois, 469 U.S. 91 (1984) (per curiam) (following an unambiguous request for counsel, a suspect may not be interrogated and post-request responses to further interrogation may not be used to cast doubt on the clarity of an initial request for counsel). The rule in *Edwards* was extended to cases in which a suspect's Sixth Amendment right to counsel has attached as well. *See* Michigan v. Jackson, 475 U.S. 625 (1986).

100 *Edwards,* 451 U.S. at 485 (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)).

counsel.[101] The Court reaffirmed this rule in a case in which the police had properly ceased interrogating a suspect upon his request for counsel, but several days later a different officer, unaware of the invocation of the right to counsel, initiated a second interrogation by issuing warnings, obtaining a waiver, and questioning the suspect on a separate investigation of a different crime.[102] The opinion distinguished *Mosley,* noting that "a suspect's decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer's advice."[103]

The right to counsel protection in *Edwards* is severely limited by a decision making it much less likely that many suspects will be found to have actually requested counsel, even if that may be their intent. Namely, in *Davis v. United States*,[104] the suspect, who had been interrogated for an hour and a half stated: "'Maybe I should talk to a lawyer.'" [105] The agents interrogating him then paused to inquire whether he meant to request a lawyer to which the suspect clearly answered that he did not want a lawyer.[106] The majority rejected a rule requiring police to cease interrogating to arrange for the appointment of counsel upon an ambiguous or equivocal reference to an attorney. Unless a suspect unambiguously requests counsel, the interrogation may proceed uninterrupted.[107] The Court would not even go so far as to require that the officers ask clarifying questions, as was actually done in the *Davis* case. Oddly, the majority gave two important reasons why asking clarifying questions *should be* required: "Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel."[108] However, in the very next sentence the Court flatly rejected adopting such a rule.[109]

---

101 *See* Minnick v. Mississippi, 498 U.S. 146 (1990).
102 Arizona v. Roberson, 486 U.S. 675 (1988).
103 *Id.* at 683.
104 512 U.S. 452 (1994).
105 *Id.* at 455.
106 *Id.*
107 *Id.* at 459; *see also* Fare v. Michael C., 442 U.S. 707, 724 (1979) (holding that the juvenile who requested assistance of a juvenile probation officer upon being asked whether he wanted to give up his right to have an attorney present did not implicitly invoke his right to counsel or his right to silence).
108 *Davis*, 512 U.S. at 461.
109 *Id.* at 461–62.

In *Davis,* the Court candidly engaged in a balancing of interests. On one side of the scale is the interest in protecting the rights of suspects who are disadvantaged by "fear, intimidation, lack of linguistic skills, or a variety of other reasons" who "will not clearly articulate their right to counsel although they actually want to have a lawyer present." [110] On the other side is "the need for effective law enforcement."[111]

The Court was right to recognize that certain groups would be more disadvantaged by this ruling than others. Professors Solan and Tiersna addressed the common practice of speaking indirectly and politely ("Do you think I might need a lawyer?") and hedging or "softening" a statement ("Maybe I need a lawyer.").[112] They discuss the findings of research linguists that associate this type of indirect speech style with "powerless" groups, such as the less educated or those of lower socioeconomic status.[113] They show that "[i]n contrast, better-educated and more affluent people, who probably have a clearer understanding of their rights, will be inclined to assert them more directly."[114]

The rule in *Davis* reflects the Court's apparent view that the interests of law enforcement were better served by denying the right to counsel to those groups of people who are disadvantaged by a rule requiring an unequivocal invocation. The Court feared that a rule requiring clarifying questions would force police officers to make "difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so . . . ."[115] It is curious that the Court would think that requiring clarifying questions would necessitate that officers make "difficult judgment calls" because the whole point of asking for clarification, e.g., "Are you saying you want a lawyer?" is that the suspect is then forced to answer the question more definitively. It is hard to avoid the conclusion that the Court opted for a regime that would allow the police deliberately to ignore a suspect's attempts to invoke the *Miranda* rights, a

---

110 *Id.* at 460.

111 *Id.* at 461.

112 *See* SOLAN & TIERSMA, *supra* note 85, at 54–62.

113 *Id.* at 60–61 (citing WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 64–71 (Academic Press 1982), and an updated discussion in JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE AND POWER 65–66 (Univ. of Chicago Press 1998)); *see also* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993) (arguing that Supreme Court doctrine disadvantages people who use indirect speech patterns, as is typical of powerless groups, especially women).

114 SOLAN & TIERSMA, *supra* note 85, at 60.

115 *Davis,* 512 U.S. at 461.

practice that in and of itself can increase the coercive atmosphere *Miranda* was intended to dispel.

D. Minimizing the Consequences for Deliberately Violating Miranda

1. A Weak Exclusionary Rule

The final way in which the Supreme Court weakened the impact of *Miranda* was by circumscribing the reach of the exclusionary rule. The first case that allows the use of statements taken in violation of *Miranda* was *Harris v. New York*.[116] In *Harris*, the Court approved the use of statements taken in violation of *Miranda* for purposes of impeaching the defendant's testimony at trial.[117] The *Miranda* violation in this case stemmed from defective warnings that did not apprise the suspect of his right to counsel.[118] This case marks the Court's first articulation of a deterrence rationale for determining the scope of *Miranda*'s exclusionary rule as well as the prediction that "sufficient deterrence [of *Miranda* violations by the police] flows when the evidence in question is made unavailable to the prosecution in its case in chief."[119] The prediction that police would be deterred sufficiently by the exclusion of *Miranda*-violative statements from the government's case in chief would become a central theme in the Court's *Miranda* exclusionary rule cases.[120] This deterrence rationale, by the Court's own terms, should be limited to unintentional or "good faith" violations of *Miranda*.[121]

---

116 401 U.S. 222 (1971).

117 *Id.* at 226 ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.").

118 *Id.* at 224.

119 *Id.* at 225.

120 *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 723 (1975) (stating that *Harris* struck a balance between the need for evidence and the deterrence of law enforcement and that "we are not disposed to change it now"); *see also* Michigan v. Harvey, 494 U.S. 344, 351–52 (1990). Police violated the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), prohibiting police from initiating questioning of a suspect who invokes Sixth Amendment right to counsel. The Court permitted the use of statements taken in violation of *Jackson*, finding that "the 'search for truth in a criminal case' outweighs the 'speculative possibility' that exclusion of evidence might deter future violations . . . ." *Id.*

121 The Court rejected the need to deter police violations of *Miranda* in *Michigan v. Tucker*, 417 U.S. 433, 447 (1974). The majority wrote: "Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Id.* In other words, the inverse must also be true: Where the official action was pursued in complete *bad* faith, the deterrence rationale gains much of its force. *See also* Oregon v. Elstad, 470 U.S. 298, 308 (1985) ("[T]he absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader [exclusionary] rule.").

Even more than *Harris*, *Oregon v. Hass*[122] created an incentive for police to disregard a suspect's invocation of the *Miranda* rights.[123] In *Hass*, the suspect had invoked his right to counsel. Under *Edwards*, questioning should have ceased until the suspect had been provided with counsel.[124] Instead, the officer proceeded to take the suspect to the location where stolen property might be found and, presumably, asked the suspect to point to the place where the property was located.[125] Thus, the officer violated the clear mandate in *Edwards* to cease questioning a suspect once he has invoked his right to counsel, whereas in *Harris* the violation involved the issuance of inadvertently defective warnings. Without commenting on whether the violation in *Hass* was intentional or not, the Court simply concluded: "We see no valid distinction to be made in the application of the principles of *Harris* to that case and to Hass' case. . . . [T]here is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief."[126] The *Hass* opinion concedes that under these facts "the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material," but, calling this a "speculative possibility," concludes that the proper balance was struck in *Harris*.[127] Thus, faced with what may have been an intentional violation of *Miranda* and recognizing the incentives to violate *Miranda*, the Court nonetheless found the possibility that officers will intentionally violate *Miranda* to obtain impeachment material "speculative."[128]

Two other cases further reduced the reach of the exclusionary rule—*Michigan v. Tucker*[129] and *Oregon v. Elstad*.[130] In *Tucker,* the Court determined that the *Miranda* exclusionary rule should not apply to the "fruits" of *Miranda* violations, in this case, the name of a witness.[131] In

---

122 420 U.S. 714 (1975).

123 *See* Clymer, *supra* note 4, at 506.

124 *See supra* notes 98–103 and accompanying text.

125 *Hass,* 420 U.S. at 715–16.

126 *Id.* at 722.

127 *Id.* at 723.

128 The impeachment exception to the exclusionary rule was extended to situations in which the police initiate questioning after a suspect has invoked his Sixth Amendment right to counsel. *See supra* note 120 (discussing Michigan v. Harvey, 494 U.S. 344 (1990)). In both *Harvey* and *Hass,* the Court found that it was possible for a suspect to give a voluntary statement for purposes of the Due Process Clause requirement, even if taken in violation of the *Miranda* rule. *See Harvey,* 494 U.S. at 353; *Hass*, 420 U.S. at 722–23.

129 417 U.S. 433 (1974).

130 470 U.S. 298 (1985).

131 *Tucker*, 417 U.S. at 450–51. The violation consisted of issuing defective warnings that did not apprise the suspect that counsel would be provided free of charge if he could not afford to hire one. *Id.* at 436. *Tucker* involved derivative evidence that consisted of witness

Elstad, the Court concluded that an initial failure to issue warnings prior to obtaining admissions through custodial interrogation does not necessarily "taint" a subsequent confession made after properly following the warning and waiver procedure.[132] In both decisions, the Court explicitly stated its view that a confession obtained in violation of *Miranda* is not necessarily coerced, and thus, is not necessarily a violation of a person's Fifth Amendment rights.[133] The Court found that in both of these cases the police did not violate the suspects' constitutional rights, so the decisions were based instead on a balancing of the need for trustworthy evidence and the need to deter improper police conduct. An important aspect of both decisions was the Court's assessment that the violations were committed inadvertently or in "good faith."[134] Language in both decisions seems to suggest that the exceptions to the exclusionary rule only apply in cases in which the *Miranda* violations are inadvertent.[135]

However, ultimately, the admissibility of the evidence obtained following a *Miranda* violation turned not on whether the violation was intentional or inadvertent, but whether the resulting statements were voluntary or coerced so as to violate the suspect's constitutional rights.[136] Predictably, both cases further encouraged police officers to violate *Miranda* intentionally.[137] *Tucker* offers the use of derivative evidence that may be discovered by means of statements obtained by continuing to

---

testimony. Because the Court treats witness testimony differently than other types of evidence such as weapons or other tangible items, *Tucker* should be construed narrowly. Witnesses will not be prevented from testifying due to a violation of *Miranda,* or even due to a Fourth Amendment violation for that matter. *See* United States v. Ceccolini, 435 U.S. 268, 277 (1978) (noting that the name of a potential witness is of no evidentiary significance *per se* as compared to inanimate evidentiary objects and finding the proffer of the witness's testimony to be so attenuated from the Fourth Amendment violation so as to be admissible under the attenuation exception to the exclusionary rule).

132 *Elstad*, 470 U.S. at 307–08.

133 *Id*. at 308–09; *Tucker,* 417 U.S. at 444–45; *see also* New York v. Quarles, 467 U.S. 649, 654 (1984) (referring to *Miranda* warnings as "'not themselves rights protected by the Constitution'" and finding that suspect's statement was not "actually compelled").

134 *Elstad*, 470 U.S. at 308 (noting that the case did not involve coercion or improper tactics); *Tucker,* 417 U.S. at 445, 447.

135 *Elstad*, 470 U.S. at 308 ("As in *Tucker*, the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader [exclusionary] rule."); *Tucker*, 417 U.S. at 447 ("Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.").

136 *Elstad*, 470 U.S. at 318 ("We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled . . . ."); *Tucker*, 417 U.S. at 448–49 (distinguishing facts in this case from cases in which involuntary statements were obtained through severe pressure or third-degree torture).

137 *See infra* notes 149–54 and accompanying text.

interrogate a suspect who has invoked his rights, just as *Harris* offers the use of those statements for impeachment. *Elstad*, on the other hand, permitted officers to refrain from giving warnings, obtaining a statement, and then later following the warnings and waiver procedure to obtain a statement that will be admissible for all purposes including the government's case in chief.[138]

2. No Civil Liability for Deliberate Violations of *Miranda*

Civil liability for intentional violations of constitutional rights under § 1983 provides a potential deterrent against police misconduct. Intentional violations of *Miranda* might have been deterred by the threat of civil liability. However, the Court rejected the claim of a suspect who had established that a police officer had interrogated him without issuing *Miranda* rights in *Chavez v. Martinez*.[139] In the plurality decision of a badly split Court, the *Chavez* opinion concludes that a failure to follow *Miranda*'s warning and waiver procedure prior to custodial interrogation does not of itself constitute a constitutional violation, and thus, there is no civil liability for the omission.[140] The Court interpreted its prior holdings as demonstrating that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness."[141] Thus, a police officer who failed to follow the dictates of *Miranda* does not violate a constitutional rule. The Constitution would have been violated had a court admitted the statements produced by the interrogation against the individual at trial.[142] Because courts do not admit statements taken in

---

138 *See infra* notes 167–83 and accompanying text.

139 538 U.S. 760, 764 (2003).

140 *Id.* at 772. The Court reiterated its position that the *Miranda* warnings are a prophylactic measure to safeguard against a violation of the Fifth Amendment, but the failure to issue *Miranda* warnings does not violate the Constitution. *Id.* The subsequent interrogation took place under conditions that may have actually coerced the incriminating statements. The officer had persisted in questioning him despite his objections and even though he was in the midst of receiving medical treatment for injuries that left him permanently blind and paralyzed. *Id.* at 764. The Court remanded the case for the lower court to rule on the suspect's claim of liability based on the violation of his substantive due process rights protected by the Fourteenth Amendment. *Id.* at 779–80.

141 *Id.* at 769.

142 *Id.* at 772–73. Interestingly, assuming the constitutional violation does not occur until such time as the statement is admitted in court against the suspect, there still would be no civil remedy available. Of course, most courts will exclude statements taken in violation of *Miranda* from the government's case in chief. However, if a court should erroneously admit such a statement, the court's intervening act of admitting the statement probably would be considered to break the causal link between the police officer's violation of the *Miranda* requirements and transformation of that act into a constitutional violation. Thus, the police officer would not be civilly liable. Trial judges would have absolute immunity

violation of *Miranda* in the government's case in chief, the result is that no police officer will ever face civil liability for intentionally violating *Miranda*.

In sum, the Court's decisions over the years, with the exception of the *Edwards* decision, which was clearly dictated by the language of the *Miranda* opinion itself, every other case can be counted as a victory for the government.[143] Even the landmark case of *Dickerson v. United States*,[144] reaffirming the constitutional basis for the *Miranda* rule, can be considered a win for the government. By the time *Dickerson* was decided, *Miranda* had become a minimal obstacle to obtaining confessions,[145] and more often than not, it served to protect confessions from claims of involuntariness.[146]

III. *SEIBERT* AND *PATANE* FAIL TO HALT THE INSTITUTIONALIZATION OF "GOING OUTSIDE" *MIRANDA*

The Supreme Court has had documentation of the practice of flagrantly violating or "going outside" *Miranda* as well as abundant evidence of the *institutionalization* of this practice for some time. In the recent cases of *Missouri v. Seibert*[147] and *United States v. Patane*,[148] the Court failed to make a clear statement denouncing the practice of intentionally evading *Miranda*'s protocols. The combined effect of the decisions is to legitimize the practice of "going outside" *Miranda* when the police perceive the benefits of doing so to outweigh the costs. In short, *Miranda* is effectively dead, and only its ghost remains in the empty ritual played out in interrogation rooms across the country.

---

for what they do in their judicial capacity. *See* Stump v. Sparkman, 435 U.S. 349 (1978). In the end, no one is civilly liable for a *Miranda* violation.

143 *See supra* notes 98–103 and accompanying text. Some might also consider *Doyle v. Ohio* a victory for suspects invoking their rights under *Miranda*. *See* Dickerson v. United States, 530 U.S. 428, 441 (2000) (stating that the Court has broadened the application of the *Miranda* doctrine in *Doyle*). However, the *Doyle* decision found a Fifth Amendment violation in the government's inducement of a person's silence by the reading of *Miranda* warnings and then using that silence against a person at trial. Doyle v. Ohio, 426 U.S. 610, 617 (1976). It was not a case involving a violation of the warnings and waiver protocol itself. *See supra* notes 40–42 and accompanying text.

144 530 U.S. 428 (2000).

145 *See id.* at 443. ("If anything, our subsequent cases [interpreting *Miranda*] have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling . . . .").

146 *See supra* note 27 and accompanying text.

147 542 U.S. 600 (2004).

148 542 U.S. 630 (2004).

The following section addresses the jurisprudential shift that allows the Court to proclaim that *Miranda* is a constitutionally based rule while at the same time treating a violation of *Miranda* as something less than the violation of a constitutional right. The subsequent sections demonstrate how the Court has finally killed *Miranda*, first by failing to provide an effective remedy for intentional violations and then by refusing to eliminate the incentives to violate *Miranda*.

A. Encouraging the Practice of "Going Outside" Miranda

The cumulative effect of the Court's jurisprudence has been to free interrogators to obey or disobey *Miranda*'s strictures depending on the balance of advantages and disadvantages.[149] In some cases, following the letter of the *Miranda* rule may make it easier to produce an admissible confession. In others, it may be perceived as advantageous to disregard the dictates of *Miranda*, even if doing so will render a possible confession inadmissible in the government's case in chief. Have some police departments made a practice of "going outside" *Miranda* when doing so is advantageous? Clearly, the answer is *yes*.

Exact numbers are not available, but evidence suggests the practice has been spreading. Charles Weisselberg's 1998 article cites police training manuals from California that promoted this "new vision of *Miranda*" and encouraged officers to ignore invocations of *Miranda*.[150] He notes that these training manuals were distributed statewide and that deliberate violations of *Miranda* were reported in counties all across the state.[151] In addition, he finds evidence of deliberate violations of *Miranda* in at least two other states, Colorado and Arizona, as well as the District of Columbia.[152] The *Seibert* case, a Missouri case, brings the count to four states and the District of Columbia. More importantly, the Court in *Seibert* cites a national police-training program that had instructed officers of the advantages of intentionally failing to issue the *Miranda* warnings in some situations.[153] The Court also cites cases from four federal Courts of Appeal in which the officers did not issue *Miranda*

---

149 Clymer assesses the advantages and disadvantages of giving as well as withholding *Miranda* warnings, and of honoring as well as ignoring requests to terminate questioning. *See* Clymer, *supra* note 4, at 512–25.

150 Weisselberg, *supra* note †, at 132–37.

151 *Id.* at 136. He also reports that "two LAPD interrogation forms even have a box for officers to check if they questioned 'outside *Miranda*.'" *Id.* at 137; *see also* Clymer, *supra* note 4, at 523–25 (addressing practice of going outside *Miranda*); Leo & White, *supra* note 21, at 460–63 (describing strategies employed by interrogators questioning "outside *Miranda*").

152 Weisselberg, *supra* note †, at 137–38.

153 *See infra* note 196 and accompanying text.

warnings before obtaining incriminating statements followed by the issuance of warnings and the making of a second statement.[154] The next section discusses the issue raised in *Seibert* and the Court's plurality decision.

B. Seibert*: The Court Fails to Denounce Intentional Violations*

Missouri v. Seibert represents the first time the Supreme Court has considered an admittedly intentional violation of *Miranda.* It is also the first acknowledgment that police departments have received training that promotes the practice of violating the dictates of *Miranda* in certain situations. The first sentence of the judgment of the Court, penned by Justice Souter, describes the case as testing "a police protocol."[155] The protocol, which he dubs the "question first" approach, "calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession."[156] This first statement would clearly be inadmissible because it was taken in violation of *Miranda*. However, the question-first approach calls on the officer to follow up the first confession with the issuance of *Miranda* warnings and then elicit the same confession from the suspect a second time. The *Seibert* case addressed the admissibility of this second statement. While the "test" proposed in the judgment for the Court would have curtailed the "question first" practice, the actual holding of the case is the position taken by Justice Kennedy, who concurred in the judgment on the narrowest grounds,[157] and that rule does little to curb the practice.

The facts of the *Seibert* case are appalling. As reported by the Court:

> Patrice Seibert's 12-year-old son Jonathan had cerebral palsy, and when he died in his sleep she feared charges of neglect because of bedsores on his body. In her presence, two of her teenage sons and two of their friends devised a plan to conceal the facts surrounding Jonathan's death by incinerating his body in the course

---

154 The Court granted certiorari to resolve a split among the four circuit courts of appeal. *See* Missouri v. Seibert, 542 U.S. 600, 607 (2004) (citing United States v. Orso, 266 F.3d 1030 (9th Cir. 2001); United States v. Esquilin, 208 F.3d 315 (1st Cir. 2000); United States v. Gale, 952 F.2d 1412 (D.C. Cir. 1992); United States v. Carter, 884 F.2d 368 (8th Cir. 1989)).

155 *Seibert*, 542 U.S. at 604.

156 *Id.* at 601.

157 *See* Marks v. United States, 430 U.S. 188, 193 (1976) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))); *see also* Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

> of burning the family's mobile home, in which they planned to leave Donald Rector, a mentally ill teenager living with the family, to avoid the appearance that Jonathan had been unattended. Seibert's son Darian and a friend set the fire, and Donald died.[158]

The investigation apparently turned to Seibert within a few days. At 3 a.m., five days after the fire, police officers awakened Seibert at the hospital where her son, Darian, was receiving treatment, and arrested her. The arresting officer, Officer Kevin Clinton, stated that he had followed the instructions of another officer, Officer Richard Hanrahan, to refrain from issuing *Miranda* warnings.[159] Upon arriving at the police station, Seibert was left alone in an interview room for fifteen to twenty minutes. Thereafter, Officer Hanrahan questioned her for thirty to forty minutes without first issuing *Miranda* warnings. At one point, he squeezed her arm and repeated, "'Donald was also to die in his sleep.'"[160] Seibert finally admitted that she knew Donald was meant to die in the fire by answering simply, "yes." She was then given a twenty-minute coffee and cigarette break. Following the break, Officer Hanrahan turned on a tape recorder, gave Seibert the *Miranda* warnings for the first time, and obtained a signed waiver of rights from her. He resumed the questioning: "'Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?'" Then he confronted her with her earlier statements taken before the issuance of warnings.[161] By reminding her of her earlier statement, he was able to get her to agree that they had intended Donald to die in his sleep.

At a suppression hearing, Officer Hanrahan candidly testified that he made a "conscious decision" to withhold *Miranda* warnings as part of the question-first "interrogation technique" that he had been taught.[162] He also stated that the technique was promoted not only by the officer's department in Rolla, Missouri, but by a national police training organization and other departments in which he had worked.[163] The Court also cited written statements by the Police Law Institute, published in the Illinois Police Law Manual, endorsing the question-first tactic and noted similar statements from police law manuals in New

158 *Seibert*, 542 U.S. at 604.
159 *Id.*
160 *Id.* at 605.
161 *Id.*
162 *Id.* at 605–06.
163 *Id.* at 609.

York and California as well as a police law treatise.[164] However, the Court acknowledged that not all law enforcement educators advocated the violation of *Miranda*'s protocol.[165]

The trial court suppressed the first incriminating statement as taken in violation of *Miranda* but admitted the second disputed statement in which Seibert again admitted her role in killing Donald. The Supreme Court of Missouri reversed. Notably, the court held that the second confession was involuntary because the interrogation tactic was "intended to deprive Seibert of the opportunity to knowingly and intelligently waive her *Miranda* rights" in that "[b]oth stages of the interview formed a nearly continuous interrogation . . . ."[166] The state high court also distinguished *Oregon v. Elstad*,[167] upholding the admission of a second, warned statement following a first, unwarned statement, on the basis that *Elstad* involved an unintentional *Miranda* violation, unlike the intentional violation in this case.[168] The Court granted certiorari to resolve a split in the Courts of Appeal on this issue.[169]

1. *Elstad* and *Bayer*: Of "Cats in Bags" and "Fruits of Poisonous Trees"

The *Seibert* decision relies heavily on two prior cases that had presented variants of the question-first issue. In *Oregon v. Elstad*, the initial failure to issue *Miranda* warnings was not intentional. In *United States v. Bayer*,[170] which pre-dates *Miranda,* the initial confession was actually coerced while the second was given several months later under favorable conditions.[171] Both decisions called upon the Court to address the reach of exclusionary rules—*Miranda*'s exclusionary rule in *Elstad* and the Fourteenth Amendment due process exclusionary rule for involuntary confessions in *Bayer*.

In *Elstad*, the officers went to the home of a teenage suspect to execute an arrest warrant for him. Not realizing that questioning a suspect in his home would constitute "custody" for *Miranda* purposes, they interviewed him in his living room, and after asking his mother to step into the kitchen and without issuing *Miranda* warnings, they

164 *Id.* at 611 n.2.
165 *Id.*
166 State v. Seibert, 93 S.W.3d 700, 706 (2002).
167 470 U.S. 298 (1985).
168 *Seibert,* 93 S.W.3d at 706.
169 *Seibert,* 542 U.S. at 607.
170 331 U.S. 532 (1947).
171 *Id.* at 535.

obtained a confession. They then drove him to the police station. One hour later, they issued *Miranda* warnings and obtained a second confession.[172]

The Supreme Court held that the second confession was properly admitted and did not violate the rule in *Miranda*.[173] The Court rejected the application of the "fruit of the poisonous tree" doctrine, explaining that its application would assume that, in violating the *Miranda* rule, there has been a constitutional violation.[174] The Court characterized the omission of warnings in the first instance as "technically in violation of *Miranda*,"[175] meaning that it was an "uncoercive" *Miranda* violation.[176] The majority explained that the Fifth Amendment prohibits the use of *compelled* testimony only, namely, involuntary statements or those not taken in compliance with *Miranda*.

The *Miranda* presumption of compulsion does not require, however, that the fruits of such violations be discarded as inherently tainted.[177] Because the unwarned statement did not actually infringe on his constitutional rights, there are no "fruits" to suppress in any case.[178] The Court reasoned that suppression would disable the police from obtaining confessions, even when there is no coercion.

In *Elstad*, the Court also downplayed the significance of a suspect's letting "the cat out of the bag" during the initial interrogation. The Court considered the psychological impact of the first confession to be irrelevant if no official coercion was used. The majority also questioned whether the initial disclosure has any psychological effect at all, stating that "the causal connection between any psychological disadvantage created by his [initial] admission and his ultimate decision to cooperate is speculative and attenuated at best."[179] Therefore, the Court ruled that there should be no exclusion of the second statement unless it was determined to have been given involuntarily.[180]

The *Elstad* decision cites the Court's pre-*Miranda* decision in *Bayer* for the proposition that even if one confesses after letting the "cat out of the

---

172 *Elstad*, 470 U.S. at 301.
173 *Id.* at 317–18.
174 *Id.* at 305–06.
175 *Id.* at 318.
176 *Id.*
177 *Id.* at 307.
178 *Id.* at 308 (citing Michigan v. Tucker, 417 U.S. 433 (1974)).
179 *Id.* at 313–14.
180 *Id.* at 318.

bag," a second confession may still be admissible if the taint of the earlier confession has been removed.[181] In *Bayer,* the Court addressed a situation in which a presumably involuntary confession was obtained first,[182] followed by a six-month lapse after which the suspect made an essentially identical second confession. This time the defendant's liberty was not severely limited, and he was given "fair warning" prior to being questioned.[183]

In *Bayer*, the Court articulated the "cat out of the bag" theory in which an initial involuntary confession can create psychological pressures on an accused to give a second confession, even if the second interrogation occurs in a non-coercive atmosphere:

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.[184]

The Court did not lay down a rule automatically excluding a second confession that is the "fruit" of an earlier involuntary confession. As the *Elstad* majority notes, the *Bayer* decision states: "But this Court has never gone so far as to hold that making a confession under circumstances

---

181 *Id.* at 311 (quoting United States v. Bayer, 331 U.S. 532, 540–41 (1947)).

182 According to the decision:

> After service of distinction in Burma, Radovich then 24 years of age, was ordered to report to Mitchel Field. Upon arrival on August 9, 1944, he was placed under arrest and confined in the psychopathic ward in the station hospital. Here, for some time, he was denied callers, communication, comforts and facilities which it is needless to detail. Charges for court-martial were not promptly served on him as said to be required by the 70th Article of War . . . nor was he taken before a magistrate for arraignment on any charges preferred by civil authorities. Military charges were finally served on May 30, 1945.

Bayer, 331 U.S. at 539.

183 *Id.* at 541.

184 *Bayer*, 331 U.S. at 540. The Court also endorsed the "cat-out-of-the-bag" approach in *Brown v. Illinois* as well, although the illegal act in this case violated the Fourth Amendment, not *Miranda*. In *Brown*, the suspect had been illegally arrested and then had given incriminating statements on two occasions. The Court held that the first statements were clearly admissible as a product of the illegal arrest. *Id*. at 604. The second statement was also ruled inadmissible as a "result and the fruit of the first." *Id*. at 605. It was significant that "Brown's first statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever." *See* Brown v. Illinois, 422 U.S. 590, 604–05 (1975).

which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."[185] However, what the *Elstad* decision fails to mention is that *Bayer* does not simply admit a second confession upon proof that it was voluntarily given. Rather, *Bayer* provides that the "cat out of the bag" scenario creates a presumption that an involuntary confession taints the later confession, thus placing on the government the burden of showing that the taint of the first interrogation has dissipated.[186] This may be proved by considering the passage of time, the nature of the restraint on the suspect's liberty, whether the suspect was warned of the consequences of confessing, and other relevant factors.[187] If the taint has in fact been removed, then the second confession is considered voluntary and may be admitted, which is what the Court actually decided in *Bayer*.

This rule is a far cry from the rule in *Elstad* that requires the defendant to bear the burden of proving that the second confession was involuntarily given. For one thing, the Supreme Court minimized the psychological disadvantage of having made an initial unwarned confession as "speculative and attenuated at best."[188] Thus, lower courts are, in effect, instructed not to put much weight on this factor. In contrast, the Court signaled to the lower courts that they should consider it highly probative "that a suspect chooses to speak after being informed of his rights."[189]

In neither *Bayer* nor *Elstad* did the inquiry turn on whether the officers had acted in good or bad faith in eliciting the first confession improperly and then eliciting a later second confession following the proper procedures. It is fair to say that the Court in *Bayer* suspected that the initial confession was intentionally coerced from the suspect, while the police omission in *Elstad* was most likely considered a good-faith

---

185 *Bayer*, 331 U.S. at 540–41 (quoted in Oregon v. Elstad, 470 U.S. 298, 311 (1985)).

186 The *Bayer* opinion does not actually speak to the issue of burdens of proof. However, the Court has subsequently made clear that the government should bear the burden of proving by a preponderance of the evidence that the fruits of an illegally obtained confession would inevitably have been discovered. *See* Nix v. Williams, 467 U.S. 431, 444 n.5 (1984). This is the same burden of proof applied in suppression hearings to determine the admissibility of evidence derived from violations of the Fourth Amendment. *Id.*

187 In *Bayer,* the Court took into account the fact that the second confession was given six months after the first, that the only restraint on the suspect's freedom was that he could not leave the military base without permission, and that he was given "fair warning" prior to the second interrogation. 331 U.S. at 541.

188 *Elstad,* 470 U.S. at 313–14.

189 *Id.* at 318.

mistake.[190] The *Seibert* case squarely presented the question of a bad-faith failure to follow *Miranda.*

2. *Seibert* Charts a New Course for Intentional Evasions of *Miranda*

The *Seibert* and *Patane* cases reflect deep divisions among the members of the Court. Only four Justices are represented in the opinioin delivering the judgment of the Court in *Seibert*. Justice Souter, who authored the opinion, was joined by Justices Stevens, Ginsburg, and Breyer. The concurring opinion, issued by Justice Kennedy, announced a narrower rule than that of Justice Souter's opinion. Thus, Justice Kennedy's rule becomes the applicable standard. The differences between the two opinions are striking.

The first line of Justice Souter's opinion frames the question as testing "a police protocol," recognizing the institutionalization of the question-first tactic for evading *Miranda.* He also acknowledged that training programs have encouraged officers to ignore invocations of the *Miranda* rights in order to reap the benefits of the impeachment exception of *Harris*.[191] It is thus not surprising that the plurality opinion, while professing to abide by the rule in *Elstad*, comes closer to applying a rule like that in *Bayer.* As in both *Elstad* and *Bayer*, Justice Souter would allow for the possibility that a second, Mirandized statement could be admissible. *Elstad* cleared the second statement for admission if it met the standards for "voluntariness," whereas *Bayer* required also that the "taint" of letting the cat out of the bag had dissipated, in that case by the passage of time and the provision of more favorable conditions.[192] The plurality set forth an objective rule that turns simply on "whether it would be reasonable to find that in [a question first, warn later situation] the warnings could function 'effectively' as *Miranda* requires."[193] This rule resembles that in *Bayer*, in that the determination of effectiveness of the warnings in the *Seibert* plurality is determined by examining the same types of factors as the determination of whether the taint has dissipated in *Bayer.* Justice Souter listed the following factors to

---

190 In *Bayer,* the Court notes that the military officials failed to permit the suspect to communicate with the outside world and denied him "comforts" and "facilities." Moreover, they failed to follow their own procedures for charging and arraigning a person. *Bayer,* 331 U.S. at 539. Thus, one can fairly conclude that the maltreatment of the suspect was intended to coerce a confession. On the other hand, "it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake." Missouri v. Seibert, 542 U.S. 600, 615 (2004).

191 542 U.S. at 611; *see also supra* notes 116–18 and accompanying text.

192 *See supra* notes 173–78, 187–88 and accompanying text.

193 *Seibert*, 542 U.S. at 611–12.

determine the effectiveness of the Miranda warnings preceding the second interrogation:

> [T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.[194]

Similarly, in *Bayer*, the Court took into account the passage of time between the first and second interrogations and the fact that the suspect had been warned about the consequences of confessing to determine that the taint of the first confession had dissipated.[195]

Thus, while claiming to abide by *Elstad*'s refusal to apply a "tainted fruits" approach to second, Mirandized confessions, the plurality opted for an objective test that appears to call for a determination of the connectedness of the two interrogations, a test remarkably similar to a "taint" test under *Bayer.* The opinion might be consistent with *Elstad* if it applied only to intentional violations of *Miranda*, whereas the violation in *Elstad* was clearly inadvertent; however, Justice Souter explicitly rejects a test that turns on the intent of the officer.[196]

Applying the plurality's objective rule to the facts in *Seibert*, Justice Souter gave both an institutional and an individual reason in finding Seibert's second confession inadmissible. Exclusion of the statement serves the institutional purpose of furthering the objectives of *Miranda* "[b]ecause the question-first tactic effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted."[197] Moreover, exclusion of the statement is warranted "because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose."[198]

---

194 *Id.* at 615.

195 *See supra* notes 182–83 and accompanying text.

196 The plurality rejects a test that turns on proof of the intent of the officer: "Because the intent of the officer will rarely be as candidly admitted as it was here . . . the focus is on facts apart from intent that show the question-first tactic at work." *Seibert*, 542 U.S. at 616 n.6.

197 *Id.* at 617.

198 *Id.*

In contrast to the judgment of the Court, Justice Kennedy's concurring opinion set forth a narrower rule that limits the application of the plurality's test for "*Miranda* effectiveness" to cases in which the initial failure to issue warnings is deliberate.[199] By virtue of providing narrower grounds for exclusion of the evidence, his opinion now provides the new rule in constitutional adjudication of such claims. The plurality eschewed a subjective intent rule on the grounds that the inquiry should turn instead on the effect of the police conduct on the suspect.[200] At least one commentator called the test a "terrible idea" and argued that the test will be impossible for defendants to prove in most cases.[201] Applying a "bad faith" test to question-first situations may not even curb training programs from instructing officers to employ the "deliberate, two-step strategy," as Justice Kennedy calls it.[202] As officers cannot be sued even for intentionally failing to follow the *Miranda* warnings and waiver protocols, training programs can be expected to continue to apprise officers of the costs and benefits of issuing warnings before questioning.

Justice Kennedy's rule also does more than simply limit the "*Miranda* effectiveness" test to intentional question-first cases, it also provides for additional avenues to admit statements taken in violation of this narrower rule. He provides an exception to the narrowly constrained exclusionary rule for situations in which officers take "[c]urative measures" to render the warnings effective.[203] In contrast to the plurality's rule that considers a number of factors relating to the connectedness of the two questioning sessions and the statements given,[204] Justice Kennedy considers a "substantial break in time and

---

[199] *Id.* at 622 (Kennedy, J., concurring). Justice Breyer also issued a concurring opinion in which he agrees with this part of Justice Kennedy's opinion. He would apply a "fruits" test to intentional violations and create an exception for "good faith" violations. *Id.* at 617–18 (Breyer, J., concurring). He would also apply the fruits doctrine to physical evidence. *Id.* Thus, there are actually two Justices who subscribe to rules turning on the subjective intent of the officers.

[200] *See supra* note 196.

[201] Joelle Anne Moreno, *Faith-Based* Miranda*?: Why the New* Missouri v. Seibert *"Bad Faith" Police Test Is a Terrible Idea*, 47 ARIZ. L. REV. 395, 410–16 (2005) (arguing that the bad faith test is irrelevant, impossible to prove, and contrary to Supreme Court precedent).

[202] *Seibert*, 542 U.S. at 621 (Kennedy, J., concurring).

[203] *Id.* at 622.

[204] The Court lists: "[T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 615 (majority opinion).

circumstances," presumably without more, to "suffice in most cases" as a curative measure.

He also approved the totally new curative measure of having the officer issue "an additional warning that explains the likely inadmissibility of the prewarning custodial statement."[205] Given the apparent ineffectiveness of the original, simple *Miranda* warnings, even when properly issued,[206] it is hard to imagine how Justice Kennedy's highly technical and legalistic warning about the inadmissibility of an earlier statement but admissibility of any subsequent statements will be effective; the utter confusion of suspects is more likely.[207] As it turns out, such curative warnings are not to be found in subsequent case law. Instead, cases decided after *Seibert* confirm that Justice Kennedy's concurring opinion has resulted in almost all statements that are produced by "two-step" interrogations being admitted based on a variety of factors leading courts to distinguish *Seibert* and find the cases more like *Elstad*.[208]

---

[205] *Id.* at 622 (Kennedy, J., concurring).

[206] *See supra* Part II.

[207] Interestingly, the plurality opinion might be read to view an additional warning as appropriate, but it also seems to recognize the confusion inherent in mid-course issuance of warnings during a question-first interrogation process. *See Seibert*, 542 U.S. at 613 ("[T]elling a suspect that 'anything you say can and will be used against you,' without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail.").

[208] The Courts find *Seibert* inapplicable if some of the following factors apply: there is a break in time between the two interrogations, a change in location, a change in interrogating officers, a lack of continuity between the first and second statements, a lack of evidence of intent to undermine *Miranda*, or if the initial questioning was brief. For a representative sampling of the numerous decisions applying *Seibert*, see *United States v. Gonzalez-Lauzan*, 437 F.3d 1128, 1138-39 (11th Cir. 2006) (finding that officers did not question defendant because they merely recited the evidence against him, and concluding that "it remained objectively reasonable for him to make [subsequent] incriminating statements"); *United States v. Kiam*, 432 F.3d 524, 532 (3d Cir. 2006) (finding that subsequent questioning was not part of deliberate choice to flout *Miranda*); *United States v. Fellers*, 397 U.S. 1090, 1097–98 (8th Cir. 2005) (assessing a situation concerning a one-hour break, change in location, no use of first statement during second questioning, and a brief first conversation); *United States v. Briones*, 390 U.S. 610, 614 n.3 (8th Cir. 2004) (addressing questioning with more than one-day break, different settings, officers represented different agencies, and no significant overlap or continuity); *United States v. Hernandez-Hernandez*, 384 F.3d 562, 566 (8th Cir. 2004) (considering questioning with a five-day break, different officer, not continuous questioning, and an unintentional first confession); and *United States v. Yamba*, 407 F. Supp. 2d 703, 718 (W.D. Pa. 2006) (finding that subsequent questioning was not a deliberate attempt to circumvent *Miranda*). A small minority of cases with facts remarkably like those in *Seibert* find *Seibert* to require exclusion of a second statement. *See, e.g.*, United States v. Aguilar, 384 F.3d 520, 525 (8th Cir. 2004); United States v. Renker, No. 02CR 1099, 2004 U.S. Dist. LEXIS 17107 (N.D. Ill. Aug. 25, 2004).

Justice O'Connor, who wrote the majority opinion in *Elstad*, wrote the dissenting opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined. She took issue with the plurality's treatment of *Elstad*, accusing it of "disfigure[ing]" it by essentially adopting a "'fruits' analysis."[209] She reiterated the oft-stated view that "there is simply is no place for a robust deterrence doctrine with regard to violations of *Miranda v. Arizona*," and thus there is no need to exclude the "fruits" of a *Miranda* violation.[210] She restated the rule in *Elstad* that would admit a second, warned confession so long as it was voluntary.[211] However, she agreed with the plurality in rejecting an intent-based test.[212]

Thus, the plurality decision initially gives the impression that the Supreme Court has taken a more stringent approach in evaluating tactics that threaten to drain the substance out of *Miranda*, but the actual rule of the case authored by Justice Kennedy will probably not diminish "question-first" practices in the long run. Proving an officer's subjective intent can be nearly impossible if the officer professes not to have acted deliberately in violating *Miranda.* Training programs will most likely continue to stress the costs and benefits of violating *Miranda* intentionally. However, now the training will also include explanations about the "[c]urative measures" that must be taken if an officer engages in the deliberate "question-first" tactic during an interrogation. It will be a simple matter to teach officers that they should wait a substantial amount of time before proceeding to issue warnings and obtain a second confession, or the officers should issue the new additional warning about the legal consequences of having previously confessed. In short, *Seibert* does very little, if anything, to curb the practice that threatens to completely undermine *Miranda*'s safeguards.

C. Patane*: Physical Fruits of* Miranda *Violations Still Admissible*

United States v. Patane presented the issue of whether the Fifth Amendment requires the exclusion at trial of the physical fruits of a *Miranda* violation. The issue would not have been a novel one prior to *Dickerson*.[213] However, after *Dickerson* the Tenth Circuit took the position that *Dickerson* instructed courts to treat *Miranda* as a constitutional rule,

---

209 *Id.* at 622–24 (O'Connor, J., dissenting) (alteration in original).

210 *Id.* at 623.

211 *Id.* at 627–28.

212 *Id.* at 625.

213 530 U.S. 428, 432 (2000) (holding that *Miranda* is a constitutional rule and may not be overruled by Congress, and refusing to overrule it).

and thus the "fruit of the poisonous tree" doctrine should apply. Other courts of appeal disagreed, applying *Elstad* and *Tucker* as usual.[214]

Unlike the facts in the *Seibert* case, the facts in *Patane* did not involve a deliberate violation of *Miranda*.[215] In *Patane*, the arresting officers took Patane into custody at a residence and attempted to advise him of his *Miranda* rights. Patane interrupted the detective, asserting that he already knew his rights. Neither of the two officers attempted to complete the warning prior to asking him questions about a gun.[216] Thus, the facts presented did not give the Court the opportunity to consider a situation in which an officer's deliberate violation of the *Miranda* protocols might produce physical evidence.

Another plurality decision maintains the status quo prior to *Dickinson,* with five Justices agreeing that the exclusionary rule should not be extended to reach nontestimonial physical fruits.[217] In reaching this outcome, the lineups of Justices are inverted. Justice Thomas was joined by Chief Justice Rehnquist and Justice Scalia in announcing the judgment of the Court and reiterating their views that even an intentional failure to issue *Miranda* warnings does not violate the Constitution; thus, there is "nothing to deter."[218] However, this time Justice Kennedy, joined by Justice O'Connor, sided with the *Seibert* dissenters in concurring with the plurality. Justice Kennedy took the view in *Patane* that the "[a]dmission of nontestimonial physical fruits . . . even more so than the postwarning statements to the police in *Elstad* and *Michigan v. Tucker,* does not run the risk of admitting into trial an accused's coerced incriminating statements against himself."[219] Moreover, he concluded that, on balance, "the important probative value of reliable physical evidence" outweighs the benefits of a "deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation."[220] Apparently, the fact that physical evidence discovered by means of statements taken in violation of *Miranda* appeared to be so attenuated to Justice Kennedy that he would admit the evidence without concern about encouraging future deliberate violations. His lack of concern about deliberate violations in this case seems somewhat inconsistent with his position in *Seibert* in

214 United States v. Patane, 542 U.S. 630, 634–38 (2004).
215 *Id.* at 635.
216 *Id.*
217 *Id.* at 645 (Kennedy, J., concurring).
218 *Id.* at 642.
219 *Id.* at 645 (Kennedy, J., dissenting) (citations omitted).
220 *Id.*

which he concurred in the decision to exclude the post-warning statement because it was part of a "deliberate, two-step strategy."[221]

The plurality members in *Seibert*, Justices Souter, Breyer, Stevens, and Ginsburg, wrote dissenting opinions in *Patane*. The dissenters accused the plurality of "closing their eyes to the consequences of giving an evidentiary advantage to those who ignore *Miranda*" and "add[ing] an important inducement for interrogators to ignore the rule in that case."[222] The dissenters lamented that *Patane* creates an incentive for police to violate *Miranda*, which they believe is "an odd one, coming from the Court on the same day it decides *Missouri v. Seibert*."[223] In fact, although the Justices are split on their views on *Miranda*, in the end, a majority of them concluded that even intentional "violations" of the rule in *Miranda* should rarely, if ever, result in the exclusion of anything more than the statements directly obtained by that violation. The Court's subsequent decision in *Wisconsin v. Knapp*[224] made it clear that *Patane* should be read to approve the admissibility of physical fruits of intentional *Miranda* violations.

IV. CONCLUSION

Seibert and *Patane* have finally done it: Even *deliberate* violations of *Miranda* can yield admissible statements and admissible physical fruits of such statements due to the question-first strategy and the approved curative measures. Thus, there is truly nothing left of *Miranda*. After the *Chavez* case, police officers understood that they need not fear being sued for intentional violations of *Miranda*. Now it is also clear that they need not fear losing evidence because of their failures to issue warnings prior to interrogation. *Miranda* is a rule of no consequence.

At the same time as these unfortunate developments in *Miranda* jurisprudence, evidence of the dangers of coercive interrogation tactics, especially when used against minors, the mentally retarded, or other vulnerable people, continues to grow.[225] Scholars and policy makers are increasingly calling for alternative measures to counteract the coercive

---

221 *See supra* note 202 and accompanying text.

222 *Patane*, 542 U.S. at 646 (Souter, J., dissenting). They conclude on a similar note: "There is no way to read this case except as an unjustifiable invitation to law enforcement officers to flout *Miranda* when there may be physical evidence to be gained." *Id.* at 647.

223 *Id.*

224 542 U.S. 952 (2004) (considering a case in which Wisconsin Supreme Court excluded physical evidence that was a result of a clearly intentional violation of *Miranda*, and vacating and remanding the lower court's decision for reconsideration in light of *Patane*).

225 *See supra* note 27.

forces at work during custodial interrogations. Videotaping interrogations is lauded by some as an effective alternative measure,[226] but other alternatives should also be considered. It is time for the next chapter in the history of our regulation of custodial interrogations to be written. The *Miranda* chapter has effectively come to a close.

[226] *See* WHITE, *supra* note 27, at 190–95 (making the reliability argument for taping); Innocence Project, *supra* note 27 (noting that taping is required by law in Alaska, Minnesota, and the United Kingdom; calling for videotaping throughout the United States; and providing a link to the report of Illinois "Governor Ryan's Death Penalty Commission," which concludes that videotaping is good law enforcement policy); Moreno, *supra* note 202, at 417–18 (arguing that videotaping will be more important to counteract effects of *Seibert*'s bad faith test); Slobogin, *supra* note 4 (making policy and legal arguments for taping). *But see* Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, or Is It Irrelevant*, 10 ST. THOMAS L. REV. 461, 496 (1998) (arguing that taping is has practical limitations that militate against it as a foolproof alternative).