# "You Have the Right to an Attorney," but Not Right Now: Combating *Miranda*'s Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights

D. Christopher Dearborn[1]

## I. INTRODUCTION

Over forty years' worth of popular culture has led most Americans to believe that they have a "right to an attorney" upon arrest.[2] We have watched this familiar scene unfold in countless movies and television shows: the police close in on the lone (and undoubtedly guilty) suspect, pin him against a wall, slap on the cuffs, and triumphantly recite his "*Miranda* warnings," which apparently include the right to counsel. Technically, officers here are referring to a suspect's limited Fifth Amendment right, upon "clearly" and "unambiguously" invoking it,[3] to the presence of an attorney before custodial interrogation by the police.[4] This idea would probably strike most people as extremely sensible—that, upon arrest, you should have the opportunity to speak with a lawyer even if you cannot afford to hire one. However, the "right" guarantees neither access to a lawyer to explain the procedural complexities of a criminal case, nor unbiased, professional advice on whether it is prudent to waive any constitutional protections.[5] Rather, *Miranda* only guarantees the right, once affirmatively invoked, to not be asked questions by the police outside the presence of an attorney.[6] As a practical reality in Massachusetts,

1. Associate Clinical Professor of Law, Suffolk University Law School. I want to thank my colleagues Frank Rudy Cooper and Ragini Shah for their valuable insights. I would also like to thank my current student, Charu Verma, for her research assistance. Finally, special thanks to recent graduate Steve Vallarelli for his invaluable research assistance, editing skills, and his willingness to see the project through to its conclusion.

2. *See generally* Mandy DeFilippo, *You Have the Right to Better Safeguards: Looking Beyond* Miranda *in the New Millennium*, 34 J. MARSHALL L. REV. 637 (2001).

3. Davis v. United States, 512 U.S. 452, 459-462 (1994) (stating suspect must "unambiguously" invoke *Miranda* right to counsel); *see also* Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) (reciting *Davis*'s holding).

4. *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966). The familiar words provide a suspect the "right" to consult with an attorney before police interrogation and the "right" to the presence of an attorney during any interrogation to honor the right against compelled self-incrimination. *Id.*

5. *See id.* at 474 (declining to require presence of "station house lawyer[s]" in police stations to advise prisoners"); Commonwealth v. Beland, 764 N.E.2d 324, 336 (Mass. 2002) (refusing to create "limited right to the assistance of counsel" prior to criminal proceedings").

6. *Miranda*, 384 U.S. at 474 (holding interrogation must cease if individual indicates he will not speak

that opportunity rarely ripens until after an arrestee is transported to court and a lawyer is appointed to represent him.[7]

When police recite a suspect's *Miranda* warnings, they implant in him an expectation that is not legally cognizable.[8] The misleading reality is that an arrestee has the right to an attorney, *but not right then*.[9] In Massachusetts, this right may not actualize for the better part of four calendar days.[10] Accordingly, an indigent person under arrest might be confused and surprised to learn that his "right" to speak with an attorney, let alone have face-to-face access to an attorney, vests only after he is taken to court.[11] In the meantime, that individual is confronted with a highly trained interrogator whose initial goal is convince the suspect to cast away his constitutional protections by signing a "*Miranda* waiver."[12] The suspect may have the right to speak to an attorney, but unless

without attorney present); *see also* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (holding police must respect accused's decision to refrain from speaking without attorney present). "If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Miranda*, 384 U.S. at 474.

7. *See* Jenkins v. Chief Justice of Dist. Court Dep't, 619 N.E.2d 324, 327-28 (Mass. 1993) (noting possibility of suspect remaining in custody for up to four days prior to arraignment). *Compare* MASS. R. CRIM. P. 7(a) (requiring "[a] defendant who has been arrested shall be brought before a court if then in session, and if not, at its next session"), *with* Commonwealth v. Rosario, 661 N.E.2d 71, 76 (Mass. 1996) (holding admissible statement made within six hours of arrest not excludable due to arraignment delay).

8. *See generally* Nancy Kolsti, *If You Are Arrested, Do You Know Your Rights? Psychologist Says Most People Don't*, UNIV. OF N. TEX. NEWS SERV., July 7, 2008, http://web3.unt.edu/news/story.cfm?story=11078 (reporting sixty-four percent of students who read *Miranda* warnings "displayed two or more fundamental errors in their understanding"). Often, the recitation of *Miranda* rights isolates the statement "you have the right to an attorney" from the other rights. An accurate formulation of the legal requirements of *Miranda* requires context for this assertion (e.g., "you have the right to the presence of an attorney before questioning"). This truncated statement—without context, understandably interpreted in a vacuum—contributes to the misleading expectations of detainees. *See generally* Commonwealth v. Johnston, 891 N.E.2d 717 (Mass. App. Ct. 2008) (unpublished table decision) (providing example of isolated and arguably legally incomplete right-to-counsel warning).

9. *See* Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (designating arraignment as first critical stage in criminal proceedings to which right to counsel attaches).

10. *See Jenkins*, 619 N.E.2d at 327-28. This unfortunate delay can occur if a suspect is arrested on a Friday afternoon preceding a Monday holiday. *See id*.

11. *See* United States v. Wade, 388 U.S. 218, 225 (1967) (holding indigent defendants entitled to counsel under Sixth Amendment at "critical stages" of criminal proceedings). *But see* Marea L. Beeman, Note, *Fulfilling the Promise of the Right to Counsel: How to Ensure that Counsel is Available to Indigent Defendants 1) Upon Questioning Following Arrest and 2) Following Probable Cause Determination and Awaiting Indictment*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 27, 28 (2001) (arguing many jurisdictions fail to provide suspects counsel "both after their right to counsel has attached . . . and during custodial interrogation at the police station").

12. *See* Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 37 (1992) [hereinafter Leo, *Police Interrogation*]; Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L & CRIMINOLOGY 621, 661 (1996) [hereinafter Leo, Miranda *Revisited*] (observing "defining feature of the [police] conditioning strategy is that the police structure the environment and the interaction in a way to facilitate a waiver without explicitly stating so"); Edward L. Fiandach, Miranda *Revisited*, CHAMPION, Nov. 2005, at 22, 28 ("Far from handcuffing the police, *Miranda* empowered them to secure the necessary waiver at a time when the suspect was most vulnerable, immediately after the trauma of an arrest and while in custody.").

he knows one to call, he must fend for himself until he is finally brought to court and formally charged.[13]

In the forty years since *Miranda* was decided, police have consistently employed coercive tactics and extracted false confessions[14] while the United States Supreme Court and the Massachusetts Supreme Judicial Court (SJC) have continued to insist in the vast majority of instances that the mere recitation of a suspect's rights is sufficient to protect him against determined law enforcement officers.[15] The protections embedded in these rights ostensibly exist because the Supreme Court and the SJC have recognized that lay people are ill-equipped to understand criminal procedure and to fully understand the rights they may be waiving.[16] Yet these crucial public policy concerns—that a suspect speak with an attorney to properly understand his rights and determine whether it is wise to speak with police—are typically not addressed until the court appoints a lawyer.[17] Both the Supreme Court and the SJC have

13. *See Kirby*, 406 U.S. at 689-90. *But cf.* MASS. GEN. LAWS ch. 276, § 33A (2010) (stating arrestee entitled to make phone call, at own expense, including "to engage the services of an attorney"). However, a violation of this statute is only subject to the exclusionary rule if the deprivation is intentional. *See* Commonwealth v. Jackson, 855 N.E.2d 1097, 1106 (Mass. 2006) (declining to decide when police must inform arrestee of telephone rights, before or during police interview); Commonwealth v. Alicea, 705 N.E.2d 233, 236 (Mass. 1999).

14. *See infra* Part II and note 53 (describing coercive tactics used by police).

15. *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2261 (2010) (noting uncoerced statements obtained after *Miranda* warning not necessarily waiver of *Miranda* rights); Grace F. Ashikawa, Note, R. v. Brydges*: The Inadequacy of* Miranda *and a Proposal to Adopt Canada's Rule Calling for the Right to Immediate Free Counsel*, 3 SW. J.L. & TRADE AM. 245, 254 (1996) (advocating providing detainees access to legal counsel "without delay"). As Ashikawa notes:

> Miranda warnings have not succeeded in ensuring that detainees fully understand either their right to remain silent or the consequences of their statements to police, nor have the warnings worked as a prophylactic measure to deter trickery or deception during police interrogation. The problem is threefold: many arrestees misunderstand or are ignorant of their rights and how to exercise them; the police are well-versed in the wide parameters in which the law allows them to tread before a confession will be considered coerced; and much deterioration has occurred in the nearly thirty years since the ruling was made by state and federal courts increasingly restricting *Miranda*'s scope.

Ashikawa, *supra*, at 254.

16. *See* Escobedo v. Illinois, 378 U.S. 478-88 (1964) (recognizing "the most illustrious counsel" is of little use unless present at pre-trial examinations); Johnson v. Zerbst, 304 U.S. 458, 462-463 (1938) (discussing Sixth Amendment). The Court in *Johnson* stated that the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." 304 U.S. at 462-63.

17. *See* Beeman, *supra* note 11, at 34 (discussing *Miranda*'s shortcomings). As Beeman notes:

> [T]here is no Constitutionally-mandated mechanism to provide counsel to indigent suspects during interrogation, even though *Miranda* resembles a right to counsel case. If counsel is not provided, then a suspect must wait until a formal adversarial proceeding commences, such as an arraignment or the filing of an indictment, for the right of counsel to attach. In the meantime, he or she can choose either to remain silent and await eventual appointment of counsel by the court, or talk to police without assistance of counsel.

determined that the right to counsel in the constitutional sense is only triggered by "formal adversarial proceedings."[18] Only then, courts have found, does a suspect face the full force of the government (and not just the persuasive skills of a highly trained police interrogator); only then does a suspect graduate from a mere "suspect" to an "accused."[19] Indeed, many have criticized the involvement of a lawyer prior to this critical stage as an impediment to police investigation, thereby undercutting the ability to obtain a confession.[20]

The current point where the right to counsel attaches under both federal and Massachusetts jurisprudence runs directly counter to the SJC's expressed vision to "actualize" the rights afforded citizens under the Massachusetts Constitution.[21] The same policy justifications courts have relied on in requiring the advice of counsel at the earliest adversarial proceeding are equally pressing at the time of arrest.[22] Put another way, the police bat leadoff for the government, and, as soon as a suspect is placed in custody and facing possible interrogation, the game begins and that suspect is unequivocally playing for the other team.[23]

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*Id.*

18. *See* Commonwealth v. Smallwood, 401 N.E.2d 802, 806 (Mass. 1980) (citing Kirby v. Illinois, 406 U.S. 682, 689 (1972)) (holding right to counsel does not attach at issuance of complaint and arrest warrant). The Supreme Court in *Kirby* stated that the right to counsel attaches at all "involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S. at 689.

19. *Compare Kirby*, 406 U.S. at 688, *with* United States v. Gouveia, 467 U.S. 180, 187-89 (1984). The Court in *Gouveia* recognized an accused's right to pre-trial counsel where "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." 467 U.S. at 189 (alteration in original) (quoting United States v. Ash, 413 U.S. 300, 310 (1973)). These are proceedings in which, the Court noted, "the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.'" *Id.* (quoting United States v. Wade, 388 U.S. 218, 224 (1938)).

20. *See* Miranda v. Arizona, 384 U.S. 436, 440-41 (1966) (reiterating concerns over scope and ramifications of prophylactic measures). In its decision, the *Miranda* Court quoted from a statement made by the Los Angeles Police Chief:

> If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances . . . can a defendant intelligently waive these rights . . . . Allegations that modern criminal investigation can compensate for the lack of a confession of admission in every criminal case is totally absurd!

*Id.* at 441 n.3 (alterations in original) (quoting W.H. Parker, *A Lawman's Lament*, 40 L.A. B. BULL. 603, 607, 642 (1965)).

21. *See infra* notes 289-291 and accompanying text (describing SJC's desire to "actualize" abstract *Miranda* rights).

22. *See infra* notes 289-291 and accompanying text (describing SJC's desire to "actualize" abstract *Miranda* rights).

23. *See Miranda*, 384 U.S. at 477 (noting special principles related to custodial police interrogations). "It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries." *Id.*

The dilemma of just when this right "actualizes"–or, in constitutional parlance, "attaches"–implicates both the right to counsel under the Sixth Amendment and the limited right to counsel embedded in the Fifth Amendment's protection against compelled self-incrimination.[24] Despite this overlap, the interplay between arrest and the right to counsel has been viewed primarily as a Fifth Amendment issue.[25] Yet analyzing this issue under the self-incrimination clauses alone muddies the water because the limited right to an attorney in that context is part of a "prophylactic" rule derived from constitutional principles rather than the text of the Fifth Amendment.[26] A simpler, cleaner solution would be to rely on the Sixth Amendment and conclude that the right to counsel should attach as soon as practicable following arrest, but no later than prior to any custodial interrogation.[27] In other words, the only way to truly actualize the limited right to counsel in the Fifth Amendment context is for the Sixth Amendment right to counsel to attach the moment *Miranda* warnings are required.[28] In Massachusetts, the SJC could accomplish this goal by doing what it has done before: interpreting article XII of the Massachusetts Declaration of Rights (encompassing rights guaranteed by

24. *See* Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1839-42 (1987) (noting recent narrowing of *Miranda* and proposing new bright-line rule for application). "Although the Supreme Court has consistently interpreted the sixth amendment right to counsel as applying only after initiation of adversarial judicial proceedings, it is precisely before and during interrogation that counsel is most needed to protect a suspect's fifth amendment rights." *Id.* at 1842.

25. *See* Maryland v. Shatzer, 130 S. Ct. 1213, 1222-25 (2010) (limiting *Edwards* rule if significant break in custody); Montejo v. Louisiana, 129 S. Ct. 2079, 2090 (2009) (comparing when right to counsel triggered under Fifth and Sixth Amendments); Edwards v. Arizona, 451 U.S. 477 (1981) (discussing differences between Fifth Amendment right to counsel in *Miranda* context and Sixth Amendment right to counsel); Fiandach, *supra* note 12, at 29 (advocating replacement of *Miranda* warnings with "judicial approval of all waivers").

26. *Cf.* Bidish J. Sarma et al., *Interrogations and the Guiding Hand of Counsel:* Montejo*,* Ventris*, and the Sixth Amendment's Continued Vitality*, 103 NW. U. L. REV. COLLOQUY 456, 461 (2009) (distinguishing Fifth and Sixth Amendment right to counsel issues). As Sarma and his colleagues argue:

> Instrumentally, the distinct purposes of counsel across the Fifth and Sixth Amendments is best illustrated by framing the Fifth Amendment right as the right to "counsel as protector," and the Sixth Amendment right as the right to "counsel as strategist." In the Fifth Amendment context, the right to counsel gives the suspect an opportunity to defend against attempts by the state to bully and badger the suspect into confessing. In the Sixth Amendment context, however, counsel must weigh the costs and benefits of each move the defendant makes–at every critical stage-and she must strategically manage the flow of information between the state and the accused.

*Id.*

27. *See infra* Part II (exploring *Miranda*'s unfairness). Some scholars explicitly or at least implicitly make this suggestion as a way to combat *Miranda*'s shortcomings. *See* Ogletree, *supra* note 24, at 1842-45 (contending Fifth Amendment protection necessary during interrogation); Ashikawa, *supra* note 15, at 263-65 (proposing adoption of Canadian rule granting immediate access to counsel).

28. *See* James S. Montana & John A. Galotto, *Right to Counsel: Courts Adhere to Bright-Line Limits*, CRIM. JUST., Summer 2001, at 4, 11 (arguing "[i]n many cases the point of 'commitment to prosecute' is reached prior to the filing of formal charges"); *see also* Ogletree, *supra* note 24, at 1845 (arguing "[t]he only way to protect this foundation is by excluding all custodial statements made without the advice of counsel").

both the Fifth and Sixth Amendments) more broadly than its federal counterpart.[29]

Part II of this article will explore why *Miranda* has failed to honor the constitutional principles and notions of fairness it was designed to protect. Part III will discuss why a reformulation of the point of attachment under article XII is both a legally sound and socially justified solution to the failure of *Miranda* in the Commonwealth of Massachusetts. Part IV concludes by imploring the SJC to alter its jurisprudence accordingly.

## II. THE PROBLEM: *MIRANDA*'S "PROPHYLACTIC" RULE HAS FAILED TO ADEQUATELY PROTECT AGAINST COMPELLED SELF-INCRIMINATION

*"Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process."*[30]

In *Miranda*, the Supreme Court recognized the insidious and coercive nature of custodial interrogation when it noted, "[i]t is obvious that such an interrogation environment is created for no other purpose than to subjugate the individual to the will of his examiner."[31] The Court therefore reasoned that a suspect would be much less likely to falsely confess if he understood he had an absolute right against self-incrimination.[32] By requiring police to recite a suspect's constitutional rights, while at the same time offering that suspect a theoretical "right" to speak with an attorney, the Court believed it had once and for all solved the problem of compelled self-incrimination.[33] Yet if *Miranda* sought to eliminate coerced self-incrimination by giving each suspect the unfettered choice to remain silent, it has utterly failed.[34] What the Court did

29. *See* Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405, 408-10 (2004) (discussing SJC's various analytical methods in interpreting state constitution); *cf.* Joseph A. Grasso, Jr., *"John Adams Made Me Do It": Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts' Declaration of Rights*, 77 MISS. L.J. 315, 315-16 (2007) (analyzing SJC's authority to independently interpret its own state constitution).

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

31. *Id.* at 457.

32. *See id.* at 467-68 (requiring suspect "be informed in clear and unequivocal terms").

33. *Id.* at 470.

34. *See generally* Richard A. Leo, *The Problem of False Confession in America*, CHAMPION, Dec. 2007, at 30 (noting substantial number of demonstrably false confessions elicited in recent years). Indeed, history has shown that *Miranda* has been much more beneficial to police than detainees. *See* Fiandach, *supra* note 12, at 29. As Fiandach argues:

> On the eve of that famous decision, the Fifth Amendment clearly encompassed custodial interrogation. Likewise recognized was the Sixth Amendment's assistance of counsel including the appointment of counsel for those who were unable to meet the financial burden that hiring counsel would entail. A knowing and intelligent relinquishment was thus already mandated by the fact that each of the foregoing were deemed fundamental trial rights. *Miranda*, therefore, simply reiterated the requirement of advisement and waiver while adding nothing at all.

not (and perhaps could not) realize was that the forms of psychological coercion it sought to address would simply be refined and replaced with equally sinister forms of manipulation.[35]

### *A. The Supreme Court's Historical Efforts at Honoring the Right Against Compelled Self-Incrimination*

#### *1. Pre-*Miranda

Prior to *Miranda*, the Supreme Court analyzed the constitutionality of confessions through the Due Process Clause of the Fourteenth Amendment.[36] Prosecutors were required to demonstrate that a suspect confessed only after making a "knowing and intelligent relinquishment" of his Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel–both of which were considered "fundamental" constitutional protections.[37] In spite of these protections, law enforcement officers regularly intruded upon or completely disregarded suspects' rights in relentless pursuit of a confession.[38]

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*Id.*

35. *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 287 (1993) (arguing "[m]any features of the typical police interrogation reinforce the questioned suspect's sense of powerlessness"); *see also* Leo, *supra* note 34, at 30 (discussing "myth of psychological interrogation," or misconception that "an innocent person will not falsely confess to police unless he is physically tortured or mentally ill"). As Professor Leo notes:

> Throughout American history, police-induced false confessions have been among the leading causes of wrongful conviction. It is easy to understand how beatings, torture, sleep deprivation, and threats of violence may lead an innocent suspect to falsely confess. Yet with psychological interrogation methods, the idea that an innocent person would confess to a crime he did not commit-particularly to a felony that carries the possibility of a lengthy prison sentence or even the death penalty-is highly counterintuitive.

Leo, *supra* note 34, at 30*; see also* Leo, *Police Interrogation*, supra note 12, at 37. According to Professor Leo:

> Psychological deception has replaced physical coercion as one of the most salient, defining features of contemporary police interrogation. Where once custodial interrogation routinely involved physical violence and duress, police questioning now consists of subtle and sophisticated psychological ploys, tricks, stratagems, techniques and methods that rely on manipulation, persuasion, and deception for their efficacy. Not only do police now openly and strongly condemn the use of physical force during interrogation, they also believe that psychological tactics are far more effective at eliciting confessions.

Leo, *Police Interrogation*, *supra* note 12, at 37.

36. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 205 (1960); Spano v. New York, 360 U.S. 315, 315 (1959); Brown v. Mississippi, 297 U.S. 278, 280 (1936).

37. Fiandach, *supra* note 12, at 24-26 (describing historical evolution of waiver cases under Fifth and Sixth Amendments).

38. *See* Steven Vallarelli, Case Comment, *Constitutional Law—In-Home Interrogation in a Police-Dominated Atmosphere Ruled Custodial Requiring* Miranda *Warnings*—United States v. Craighead*, 539 F.3d*

Interrogators routinely used "the third degree"–physical and psychological abuse–during "incommunicado interrogations to extract confessions that were later used in court to prosecute defendants."[39]

The Supreme Court attempted to address these abuses in *Escobedo v. Illinois*.[40] The *Escobedo* Court was faced with the question of whether the Sixth Amendment's guarantee of the right to counsel in all criminal prosecutions applied to pre-arraignment custodial interrogations.[41] The Court answered in the affirmative, reasoning that even the "most illustrious counsel" would be of little use unless present at any pre-trial examinations.[42] As Justice Goldberg explained:

> In *Gideon v. Wainwright*, we held that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination."[43]

In addition to holding that the right to counsel extends to pre-trial interrogation, the Court provided defendants with an additional safeguard by requiring police to advise them of their right to remain silent.[44] Therefore, the

*1073 (9th Cir. 2008)*, 14 SUFFOLK J. TRIAL & APP. ADVOC. 150, 153 (2009) (citing *Miranda* Court's discussion of unfair practices used by law enforcement in obtaining confessions). The *Miranda* Court cited the National Commission on Law Observance and Enforcement's 1931 Report on Lawlessness in Law Enforcement (the "famous Wickersham Report"), which detailed law enforcement use of physical and emotional abuse to extract confessions from suspects. *See* Miranda v. Arizona, 384 U.S. 436, 445-46 & n.5 (1966) (citing NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS AND LAW ENFORCEMENT (1931)). From the Wickersham Report, the *Miranda* Court concluded that "[n]ot only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence." *Id.* at 447.

39. *See* Vallarelli, *supra* note 38, at 153 & n.21 (citing cases where law enforcement used unjust tactics); *see also, e.g.*, People v. Matlock, 336 P.2d 505, 512 (Cal. 1959) (holding confession produced by threat to family and delayed detention inadmissible); People v. Wakat, 114 N.E.2d 706, 707-08 (Ill. 1953) (affirming post-conviction court's order for new trial based on evidence of coerced confession); People v. Portelli, 205 N.E.2d 857, 858 (N.Y. 1965) (stating defendant's coerced out-of-court confession not admissible at trial).

40. 378 U.S. 478 (1964).

41. *Id.* at 488.

42. *Id.*

43. *Id.* at 487 (alterations in original) (citations omitted) (quoting *In re* Groban, 352 U.S. 330, 344 (1957) (Black, J., dissenting)).

44. *Escobedo*, 378 U.S. at 491 (holding failure to inform suspect of right to remain silent violated constitutional rights). The Court held that

> [where] the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied [assistance of counsel in violation of the Sixth Amendment and state analogs] . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

state of the law following *Escobedo* was such that defendants could "actualize" their right to counsel at the time of pre-trial interrogation, which undoubtedly would have led to fewer coerced confessions and a greater chance that defendants prevail during subsequent stages of the criminal prosecution.[45] Unfortunately, the Court has since limited *Escobedo* to its own facts, explaining that it was simply a precursor to the protections afforded by *Miranda*, which are more than adequate to safeguard the constitutional rights of defendants.[46]

### *2. The* Miranda *Decision*

In *Miranda v. Arizona*,[47] the Court held that prior to a custodial interrogation, police must warn a criminal suspect that: he has the right to remain silent, anything he says can be used against him in court, he has the right to the presence of attorney, and if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.[48] After police so advise the suspect, "the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement."[49] The Court noted isolated interrogation in a police-dominated atmosphere was a shared characteristic of Fifth Amendment violations.[50] Such an atmosphere contained "inherently compelling pressures" that prevented the lone suspect from exercising his right to remain silent.[51] Accordingly, "the privilege against self-incrimination is jeopardized" when police conduct a custodial interrogation.[52] Therefore, the Court reasoned, a suspect who has been advised of his right to remain silent and to stop the interrogation would be less likely to crack under

*Id.* (citations omitted).

45. *See* Fiandach, *supra* note 12, at 29 (discussing need for waiver of right to counsel at time of original interrogation post-*Escobedo*).

46. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972) (citing Johnson v. New Jersey, 384 U.S. 719, 729, 733-40 (1966)).

47. 384 U.S. 436 (1966).

48. *Id.* at 478-79 (detailing necessary warnings).

49. *Id.* at 479.

50. *See* Vallarelli, *supra* note 38, at 154 n.24 (discussing characteristics of Fifth Amendment violations); *see also Miranda*, 384 U.S. at 444-46 (requiring constitutional warnings prior to incommunicado custodial interrogations). The *Miranda* Court was keenly aware that most interrogations took place behind closed doors, with the suspect at the mercy of the interrogators, and therefore tailored its ruling to those situations. *See Miranda*, 384 U.S. at 445. *Compare* United States v. Revels, 510 F.3d 1269, 1275 (10th Cir. 2007) (concluding separation of suspect from family during questioning demonstrates complete police control), *and* United States v. Griffin, 922 F.2d 1343, 1352 (8th Cir. 1990) (citing United States v. Jones, 630 F.2d 613, 616 (8th Cir. 1980)) (discussing circumstances evidencing police domination including control of who may be present at questioning), *with* Sprosty v. Buchler, 79 F.3d 635, 641 (7th Cir. 1996) (holding suspect not isolated when detained in presence of mother).

51. *Miranda*, 384 U.S. at 467; *see also* Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1525 (2008).

52. *Miranda*, 384 U.S. at 479; Weisselberg, *supra* note 51, at 1525.

pressure and confess.[53] The Court held that such protective measures are required when a suspect is either officially in police custody, or "otherwise deprived of his freedom of action in any significant way."[54]

Yet while the Court's intentions were undoubtedly noble, the landmark decision was not without its detractors.[55] Justice White objected in his dissent that "for all the Court's expounding on the menacing atmosphere of police interrogation procedures, it has failed to supply any foundation for the conclusions it draws or the measures it adopts."[56] Law enforcement officers and prosecutors argued that protective measures, such as those required by *Miranda*, would hinder criminal investigations and ultimately harm society at

53. *See* Miranda v. Arizona, 384 U.S. 436, 467-79 (1966); *see also* Weisselberg, *supra* note 51, at 449 n.9 (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962)) (outlining official police tactics for coercing confessions from suspects). The *Miranda* Court entered into the record official police manuals advising officers on how to best extract confessions from suspects:

> If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. *He is more keenly aware of his rights* and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages.

*Miranda*, 384 U.S. at 449-50 (emphasis added) (quoting GREGORY L. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1956)); *see also* Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 49 (2006) (describing police interrogation tactics at the time of *Miranda*); Roscoe C. Howard, Jr. & Lisa A. Rich, *A History of* Miranda *and Why It Remains Vital Today*, 40 VAL. U. L. REV. 685, 704-06 (2006) (discussing coercive nature of custodial interrogations addressed by *Miranda*); Vallarelli, *supra* note 38, at 154.

54. *Miranda*, 384 U.S. at 444; *see also* 23 C.J.S. *Criminal Law* § 1239 (2010) (defining custodial interrogation under *Miranda*).

> Custody, for Miranda purposes, is determined by inquiring into the circumstances surrounding the interrogation, and, given those circumstances, determining whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. The relevant inquiry is how a reasonable person in the accused's position would have understood the situation, and whether a reasonable person would believe himself or herself deprived of freedom to the degree associated with a formal arrest.

23 C.J.S. *Criminal Law* § 1239; *see also* Timothy P. O'Neill, *Rethinking* Miranda*: Custodial Interrogation as a Fourth Amendment Search and Seizure*, 37 U.C. DAVIS L. REV. 1109, 1115 (2004) (describing appropriate times for custodial interrogation); Vallarelli, *supra* note 38, at 154. Following *Miranda*, the Court characterized the decision as imposing "prophylactic" remedies, suggesting that the protections were subconstitutional in nature. *See* Winthrow v. Williams, 507 U.S. 680, 690-91 (1993); New York v. Quarles, 467 U.S. 649, 653 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974). The character of *Miranda*'s protective measures has subsequently been clarified. *See* Dickerson v. United States 530 U.S. 428, 432, 438 (2000) (holding "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress," and declining to overrule *Miranda*).

55. *See* Weisselberg, *supra* note 51, at 1527 (criticizing ability of warnings to protect Fifth Amendment privileges).

56. *Miranda*, 384 U.S. at 537 (White, J., dissenting) (focusing on lack of foundation for majority's conclusions).

large by allowing guilty suspects to avoid prosecution on the basis of a procedural technicality.[57] However, in addition to the *Miranda* Court's grave concern over coerced self-incrimination, the Supreme Court sought to promote justice by reducing the chance of false confessions and "contribut[ing] directly to a more effective, efficient and professional level of law enforcement."[58] In support of this conclusion, the Court made a number of assumptions as to how its decision would play out in real world interrogations.[59] These included assumptions that officers would give warnings and obtain waivers *before* employing interrogation tactics designed to pressure suspects into confessing, that suspects would understand their rights and be capable of freely choosing whether to speak or remain silent, and that officers would not begin the interrogation unless the suspect waived his rights and would immediately stop questioning if that suspect later indicated he wished to invoke his rights.[60] However, evolving methods of police interrogation and the Court's own subsequent jurisprudence have brought these assumptions into question.[61]

### *3.* Miranda*'s Progeny*

The Supreme Court's jurisprudence following *Miranda* has significantly narrowed the protections mandated in that landmark decision.[62] Immediately

57. *See id.* at 440-41 (reiterating concerns over scope and ramifications of prophylactic measures); *supra* note 20 (offering Los Angeles Police Chief's statement on constitutional warnings to accused, as quoted by *Miranda* Court).

58. *Miranda*, 384 U.S. at 441 n.3 (quoting L.A. TIMES, Oct. 2, 1965, at 1); *see also* Howard & Rich, supra note 53, at 706; Vallarelli, *supra* note 38, at 154. Howard and Rich state:

> "The *Miranda* rule has become an important and accepted element of the criminal justice system." Ultimately, *Miranda* did not result in a lack of confessions. The law enforcement community has not crumbled under its weight. Law enforcement retains the ability under *Miranda* and its progeny to conduct investigations, question potential suspects, and even to get them to confess. *Miranda* simply ensures that when an individual is deprived of her liberty in any way or taken into custody for questioning, certain safeguards are in place so that when a confession is obtained, that confession is admissible.

*Id.* (quoting Missouri v. Seibert, 542 U.S. 600, 618 (2004) (Kennedy, J., concurring)).

59. *See* Weisselberg, *supra* note 51, at 1527-29.

60. *See id.* at 1527-28 (describing assumptions made by Court in determining how warnings affect pressure of custodial questioning).

61. *See* Stansbury v. California, 511 U.S. 318, 324-25 (1994) (per curiam) (narrowing definition of "in custody"); California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (holding *Miranda* only necessary where subject restrained in manner akin to formal arrest).

62. *See* Ogletree, *supra* note 24, at 1839-42 (describing decisions narrowing scope of *Miranda*). With a few notable exceptions, the SJC has mirrored the Supreme Court's *Miranda* jurisprudence. *See, e.g.*, Commonwealth v. Martin, 827 N.E.2d 198, 200 (Mass. 2005) (holding derivative evidence resulting from *Miranda* violation inadmissible); Commonwealth v. Mavredakis, 725 N.E.2d 169, 179 (Mass. 2000) (declining to follow *Moran* and holding police must inform custodial suspect of attorney's efforts to offer representation); Commonwealth v. Smith, 593 N.E.2d 1288, 1295 (Mass. 1992) (finding *Miranda* violation presumptively taints any subsequent statements obtained following proper warning). *Compare* Commonwealth v. Day, 444 N.E.2d 384, 387 (Mass. 1983) (requiring proof of voluntary *Miranda* waiver beyond reasonable doubt), *with*

following *Miranda*, absent a valid waiver, evidence derived from an unlawful interrogation was inadmissible at trial against a defendant.[63] However, in *Harris v. New York*,[64] the Court limited the scope of the exclusionary rule as a remedy for *Miranda* violations.[65] The Court decided that as long as a statement obtained in violation of *Miranda* was voluntary under the Fourteenth Amendment standard, the prosecution could use the illegally obtained statement to impeach a testifying defendant.[66]

The Court continued to erode *Miranda's* protection in *Michigan v. Mosley*.[67] In *Mosley*, the majority concluded that as long as a suspect's invocation of his rights had been "scrupulously honored" and the police had re-advised the suspect, the police were not barred after the passage of time from renewing contact with the suspect.[68] Therefore, the suspect's subsequent confession was admissible.[69] In his dissent, Justice Brennan sharply criticized the majority for distorting *Miranda's* constitutional principles and further eroding the rights created by *Miranda*.[70] Quoting from *Miranda*, Justice Brennan emphasized that "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."[71]

In *California v. Beheler*,[72] the defendant accompanied officers to the police station, where he made a statement without being advised of his *Miranda* rights and was later arrested based on that statement.[73] The Supreme Court held that his statement was admissible because officers had informed the defendant that he was not under arrest, and, as such, he was not in custody and therefore not entitled to receive *Miranda* warnings.[74]

In *Oregon v. Elstad*,[75] the Court held that a suspect's statement, obtained after police advised him of his *Miranda* rights, was admissible even though it

Colorado v. Connelly, 479 U.S. 157, 168 (1986) (holding government must prove waiver voluntariness of waiver by preponderance of evidence), *and* Oregon v. Elstad, 470 U.S. 298, 306 (1985) (determining voluntariness of waiver threshold requirement). *But see* United States v. Patane, 542 U.S. 630, 634 (2004) (holding failure to give *Miranda* warning does not require suppression of evidentiary fruits of statements). However, these differences have a marginal deterrent effect on the fundamental flaws that flow from the *Miranda* doctrine. *See infra* Part II.B.

63. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (requiring warning to deem evidence admissible).

64. 401 U.S. 222 (1971).

65. *See id.* at 226 (holding *Miranda* defense not license to commit perjury).

66. *Id.* at 224-36; *accord* Commonwealth v. Harris, 303 N.E.2d 115, 116 (Mass. 1973) (following *Harris* use of statements obtained without *Miranda* compliance).

67. 423 U.S. 96, 104 (1975); *accord* Commonwealth v. Doe, 636 N.E.2d 308, 311 (Mass. App. Ct. 1994) (following *Mosley* on right to cut off questioning).

68. *See* 432 U.S. at 104, 106 (concluding policed honored suspect's right to cut off questioning).

69. *See id.* at 107 (holding admission of incriminating statement did not violate *Miranda* principles).

70. *Id.* at 112 (Brennan, J., dissenting) (suggesting Court will ultimately overrule *Miranda*).

71. *Id.* at 111 (quoting Miranda v. Arizona, 384 U.S. 436, 473-74 (1966)).

72. 463 U.S. 1121 (1983).

73. *Id.* at 1122 (reciting facts).

74. *Id.* at 1125 (explaining reasoning for finding statement admissible).

75. 470 U.S. 298 (1985).

was arguably the product of an earlier, unwarned statement, i.e., a "fruit of the poisonous tree."[76]

More recently, the Supreme Court declined to hold that the right-to-counsel portion of *Miranda* warnings mandated actual access to an attorney. Specifically, in *Moran v. Burbine*,[77] the Court concluded that the police did not have a duty to inform a custodial suspect of efforts by an attorney to offer legal advice.[78]

In *Duckworth v. Eagan*,[79] officers fully advised the defendant of his rights, but also informed him, "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court."[80] In spite of the obvious deviation from standard warnings required by *Miranda*, the Court held that this warning "touched all of the bases" required by that decision.[81] The test, the Court suggested, is whether the warnings "reasonably convey[ed]" the necessary rights.[82]

In *Stansbury v. California*,[83] police questioned the defendant at the stationhouse late at night without *Miranda* warnings and ultimately arrested him after determining that he had been involved in a homicide.[84] The Supreme Court held that the determination of custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."[85] Accordingly, even if police bring a suspect to the station with the intent to arrest him, and even if that suspect believes he is under arrest, he is not "in custody" unless a court later determines that an objectively reasonable person in his situation would not have felt free to leave.[86]

In *Davis v. United States*,[87] the defendant was fully advised of his rights prior to interrogation and waived them orally and in writing.[88] During the interrogation, however, he told interrogators, "Maybe I should talk to a lawyer."[89] When the interrogators sought to clarify his statement, Davis first

76. *See id.* at 305-06 (quoting Wong Sun v. United States, 371 U.S. 471, 487-88 (1963)) (discussing difference between Fourth Amendment violation in *Wong Sun* and *Miranda* violation).

77. 475 U.S. 412 (1986).

78. *See id.* at 425-26 (holding requiring police to inform suspect of attorney's efforts undermines *Miranda*); *cf.* Commonwealth v. Mavredakis, 725 N.E.2d 169, 179-80 (2000) (holding Massachusetts Constitution requires informing suspect of attorney's efforts to reach him).

79. 492 U.S. 195 (1988).

80. *Id.* at 198 (emphasis omitted) (quoting police waiver form signed by defendant).

81. *Id.* at 203.

82. *Id.* (quoting California v. Prysock, 453 U.S. 355, 361 (1981)).

83. 511 U.S. 318 (1994).

84. *Id.* at 320-21.

85. *Id.* at 323.

86. *See* Weisselberg, *supra* note 51, at 1541 (discussing *Stansbury*).

87. 512 U.S. 452 (1994).

88. *Id.*

89. *Id.* at 455.

indicated that he would continue but finally made an unequivocal request for counsel, whereupon the questioning ceased.[90] Davis later argued that the interrogators should have stopped questioning when he first indicated he wished to speak with an attorney.[91] The Supreme Court disagreed, ruling:

> A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.[92]

The Court concluded that unless the statement is "an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him."[93]

Finally, in *United States v. Patane*,[94] police presented the defendant with incomplete *Miranda* rights before interrogating him, and he later gave them the location of a firearm.[95] In a plurality decision, the Supreme Court held that the Fifth Amendment is not implicated by admitting into evidence "the physical fruit of a voluntary statement."[96]

### *B. Exposing* Miranda*'s Failures to Protect Against Compelled Self-Incrimination*

In the forty years since the Supreme Court handed down its decision in *Miranda v. Arizona*, courts have consistently endorsed its reasoning by relying on a number of assumptions or myths that have proven false.[97] Probing *Miranda*'s mythology provides persuasive and compelling proof of the decision's shortcomings. This section explores three of the most significant problems, or myths, that cast doubt upon the decision's continued viability as a safeguard against compelled self-incrimination. All three myths were, and

90. *Id.*

91. *Davis*, 512 U.S. at 459.

92. *Id.* at 460-61.

93. Davis v. United States, 512 U.S. 452, 462 (1994).

94. 542 U.S. 630 (2004) (Thomas, J.) (plurality opinion).

95. *Id.* at 635 (explaining defendant interrupted officers as they advised him and claimed he understood his rights).

96. *Id.* at 636. Justices Thomas, Scalia, and Chief Justice Rehnquist argued that, "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule." *Id.* at 641. In a concurring opinion, Justices O'Connor and Kennedy found it "unnecessary to decide whether the detective's failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself . . . so long as the unwarned statements are not later introduced at trial." *Id.* at 645 (O'Connor, J., concurring).

97. *See* Leo, supra note 34, at 31; Richard Rogers et al., *Miranda Rights . . . and Wrongs: Myths, Methods, and Model Solutions*, CRIM. JUST., Summer 2008, at 4. *See generally* Weisselberg, *supra* note 51. These scholars have used a similar framework in their analysis of *Miranda*'s shortcomings.

continue to be, necessary assumptions to achieving *Miranda*'s goals.[98]

### *1. Myth Number 1: Suspects Understand Their Rights and Therefore Can Make an Unfettered Choice Between Silence and Speech*

The great weight of evidence indicates most suspects do not understand their *Miranda* rights and are therefore unable to waive them validly without first speaking to counsel.[99] *Miranda* and its progeny require a waiver to be knowing, intelligent and voluntary.[100] Voluntariness depends on whether suspects make "free and deliberate choice[s]" rather than succumbing to "intimidation, coercion, or deception."[101] For waivers to be knowing and intelligent, suspects must possess the capacity and sufficient information to make informed decisions.[102] Obviously, subjects of interrogation must understand the warnings and any subsequent waiver. The Supreme Court recently suggested that the threshold is so low that understanding is assumed when the suspect speaks English.[103] Yet social science has demonstrated that suspects do not have a full appreciation of either their rights or the effect of a waiver when they choose to speak to the police.[104] This problem is exacerbated when a suspect is simultaneously faced with a barrage of psychological trickery and manipulation.[105] Though modern-day interrogations contain less of the physical brutality that was commonplace in 1966, the reality is that law enforcement officers continue to exact coerced confessions and incriminating statements from otherwise innocent individuals who are no more protected now than pre-*Miranda*.[106]

98. *See, e.g.*, Ogletree, *supra* note 24, at 1839-42 (listing decisions limiting *Miranda*'s reach); Weisselberg, *supra* note 51, at 1563 (exploring assumption that suspects understand rights); Ashikawa, *supra* note 15, at 267-68 (arguing vast majority of interrogated persons know virtually nothing about rights).

99. *See* Ashikawa, *supra* note 15, at 267-68. Ashikawa maintains that "[t]he vast majority of persons arrested or detained for interrogation are poorly educated and indigent, and know nothing about their rights beyond the dismissive reading of a *Miranda* warning by law enforcement." *Id.*

100. *See* Miranda v. Arizona, 384 U.S. 436, 467-73, 478-79 (1966).

101. Moran v. Burbine, 475 U.S. 412, 421 (1986).

102. *See* Weisselberg, *supra* note 51, at 1563 (analyzing legal requirements for warnings).

103. *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2262 (2010) (reasoning suspect understood English and thus *Miranda* warnings).

104. *See* Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124 (2008) (analyzing verbal comprehension of *Miranda* warnings). Rogers and his colleagues argue that "[l]egal scholars and forensic researchers can immediately recognize how unfamiliar terminology hampers their own understanding of professionals from other disciplines. Clearly, criminal suspects face far greater challenges than professionals in understanding erudite language or words with specialized meanings." *Id.* at 130.

105. *See* Ainsworth, *supra* note 35, at 287 (arguing "[m]any features of the typical police interrogation reinforce the questioned suspect's sense of powerlessness"); *see also* Leo, *Police Interrogation*, *supra* note 12, at 37 (noting police preference for psychological rather than physical coercion).

106. *See* Weisselberg, *supra* note 51, at 1537. As Professor Weisselberg argues:

> Isolation was then, and remains today, one of the most significant aspects of interrogation. And interrogation, we now know, is a carefully designed, guilt-presumptive process. It works by

Scholars have identified significant comprehension issues surrounding *Miranda* warnings and waivers, including both the content and underlying legal concepts.[107] The warnings vary significantly in content, detail, complexity and clarification of what the legal concepts actually mean.[108] The results of those studies conclusively demonstrate that without the guiding hand of counsel, "a significant percentage of suspects simply cannot comprehend the warnings or the rights they are intended to convey."[109] One study found as many 900 different variations of *Miranda* warnings in use.[110] The number of words ranges from 21 to 231 for the warnings alone and 49 to 547 words for the warnings and waiver portions.[111] This lack of standardization is condoned if not encouraged by the Supreme Court's requirement that, to withstand constitutional scrutiny, a waiver must only "touch all the bases" of *Miranda*.[112]

Social science has also found a disparity between the reading level required to comprehend the *Miranda* warnings and the reading levels of suspects who are expected to understand the warnings on their own.[113] The evidence proves many warnings demand a "greater educational background than many suspects possess."[114] According to one *Miranda* scholar, Richard Rogers, the content of *Miranda* waivers requires reading levels that range from second grade to post college.[115] Many of the words used in typical *Miranda* warnings require at

> increasing suspects' anxiety, instilling a feeling of hopelessness, and distorting suspects' perceptions of their choices by leading them to believe that they will benefit by making a statement.

*Id.*; *see also* Fiandach, *supra* note 12, at 28 (discussing numerous wrongful convictions resulting from false confessions). As Professor Fiandach notes, "[p]erhaps the saddest commentary one can make is to point out that in the first 123 exonerations by the Innocence Project, 33 or nearly 27 percent, involved individuals who allegedly confessed. Of the first 70 exonerations, 38 or 54 percent, involved police misconduct." Fiandach, *supra* note 12, at 29.

107. *See* Weisselberg, *supra* note 51, at 1564-66 (detailing "proliferation of versions of warnings").

108. *See id.* at 1564 (discussing requirements of *Miranda*). Clarification of any one of *Miranda's* legal requirements, whether couched in simple or complex vocabulary is, unfortunately, not required by the case law. *Id.*

109. *Id.* at 1563.

110. *See id.* at 1565 (outlining Rogers study findings).

111. *See* Weisselberg, *supra* note 51, at 1565 (discussing Rogers study); *see also* Rogers et al., *supra* note 104, at 128 (analyzing length and reading level of various *Miranda* warnings).

112. *See* Duckworth v. Eagan, 492 U.S. 195, 203 (1988) (requiring warnings to simply "touch[] all the bases required by *Miranda*"); California v. Prysock, 453 U.S. 355, 359 (1981) (disavowing any implication that "'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant"); *see also* Weisselberg, *supra* note 51, at 1563-64. Professor Weisselberg has intimated a cause and effect between *Duckworth* and the variations among *Miranda* warnings. *Id.*

113. *See* Weisselberg, *supra* note 51, at 1567-68 (detailing high reading levels necessary to comprehend warnings).

114. *See id.* (arguing criminal defendants' education and literacy levels significantly lower than general population).

115. *See* Rogers et al., *supra* note 104, at 133 (noting required reading comprehension). Rogers and his colleagues note "the odds are likely similar that any given detainee would receive a very simple *Miranda* caution (i.e. a 5th grade reading level) or an abstruse warning requiring the comprehension level of a college graduate." *Id.*

least a tenth-grade reading level.[116] In contrast, one 2003 study found that seventy percent of inmates read at a sixth grade level or below.[117]

Rogers specifically catalogued sixty separate vocabulary words from *Miranda* warnings that required at least a tenth-grade education.[118] For example, the warnings included words like "appointed" and "indigent."[119] Rogers astutely pointed out that a misunderstanding of key verbs, common in most *Miranda* warnings, could lead to a critical misunderstanding of one or more of *Miranda*'s components.[120] "In many instances the only common thread is a handful of well-worn phrases aligned with the five requisite components. The remainder is a vast assortment of diverse statements that vary in content, detail, wording and understandability."[121] Rogers has conservatively estimated that "318,000 suspects waive their rights annually while failing to comprehend even 50% of representative *Miranda* warnings."[122]

Even assuming a custodial suspect understands the literal meaning of the words contained in the warnings, the constitutional principles embedded in those words are far from obvious.[123] This unfortunate dynamic disproportionately impacts vulnerable populations, including juveniles, the disabled, and individuals for whom English is not their first language.[124] Yet even the well-educated have difficulty understanding their *Miranda* warnings. In one study, sixty-four percent of college students displayed two or more fundamental errors in their understanding of the warnings.[125] Twenty-eight percent of those college students did not appreciate that the Constitution

116. *Id.* For example, the "legal counsel component" requires an average tenth grade reading level. *Id.*

117. *Id.* at 132. (noting inmate literacy levels).

118. *Id.* at 132; *see also* Weisselberg, *supra* note 51, at 1569 (citing THOMAS GRISSO, INSTRUMENTS FOR ASSESSING UNDERSTANDING AND APPRECIATION OF MIRANDA RIGHTS, 19-29 (1998)).

119. Rogers et al., *supra* note 104, at 130.

120. *Id.*

121. *Id.*

122. Richard Rogers, *A Little Knowledge is a Dangerous Thing . . . Emerging Miranda Research and Professional Roles for Psychologists*, 63(8) AM. PSYCHOL. 776, 777 (2008).

123. *See* Ashikawa, *supra* note 15, at 255 (describing complexity of *Miranda* warnings). "Many detainees are unable to understand the warning, the nature and function of the constitutional rights at stake, how to decide whether to answer a given question, or the significance of the right to silence or functions a lawyer might perform for them." *Id.* at 255.

124. *See* Weisselberg, *supra* note 51, at 1568-73; *see also* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 540-41 (2002); Floralynn Einesman, *Confessions and Culture: The Interaction of* Miranda *and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 39-43 (1999); Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1149-51 (1980); Richard Rogers et al., *Spanish Translations of Miranda Warnings and the Totality of the Circumstances*, 33 LAW & HUM. BEHAV. 61 (2009). One study concluded that disabled subjects understood about twenty percent of the critical words comprising *Miranda*, compared with non-disabled subjects who understood eighty-three percent. *See* Cloud et al., *supra*, at 540-41; *cf.* Commonwealth v. Jackson, 855 N.E.2d 1097, 1104 (Mass. 2006) (holding waiver valid despite defendant's IQ of eighty and learning disability); Commonwealth v. Libran, 543 N.E.2d 5, 8 (Mass. 1989) (concluding mental retardation and impairment did not render waiver invalid).

125. *See* Rogers et al., *supra* note 97, at 5.

guarantees their right to silence.[126] Perhaps most tellingly, they believed that you're damned if you do speak up and damned if you don't speak up, believing their silence would be viewed as incriminating evidence because they had something to hide.[127]

Yet as long as they "touch all the bases," interrogators are not required to clarify or explain the legal principals contained in a warning. And even though an officer must inform a custodial suspect of his "right" to remain silent, over ninety-nine percent of 945 sampled *Miranda* warnings did not include the clarification that a suspect's silence cannot be used against them.[128] Not surprisingly, then, thirty-six percent of college students tested and thirty percent of criminal defendants mistakenly believed that silence was likely to incriminate them.[129] Therefore, "[b]elieving that both choices (talking or silence) are likely to be incriminating, defendants may opt to waive their rights—reasoning that it is better to talk than to be convicted with silence."[130] In another study, twenty percent of defendants did not comprehend that a court-"appointed" attorney was free and therefore indicated they did not want one.[131] This troubling disconnect—between a person's actual constitutional rights and his perceived constitutional rights *after being Mirandized*—can be traced directly to the weakening of the Court's "prophylactic remedies."[132] Thus,

126. *Id.* This is understandable because although *Miranda* requires a suspect to be told that he has the right to remain silent, it does not require that the suspect be told that his silence cannot be used against him. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966).

127. *See* Rogers et al., *supra* note 97*,* at 9 (noting "many suspects prefer to give their own versions about offenses rather than have investigators 'assume the worst' about their alleged actions"); *see also* Ashikawa, *supra* note 15, at 255 (discussing 1966 study by Institute of Criminal Law and Procedure, Georgetown University Law Center). In one of the first post-*Miranda* studies, a group of arrestees was asked what Miranda warnings meant: fifteen percent failed to understand the right to silence, eighteen percent failed to understand the right to counsel, and twenty-four percent failed to understand the right to appointed counsel. Ashikawa, *supra* note 15, at 255. In 1986, Thomas Grisso conducted examinations to study detainees' competency to understand and waive *Miranda* warnings and reached similar results. *Id.*

128. Richard Rogers et al., "*Everyone Knows Their Miranda Rights": Implicit Assumptions and Countervailing Evidence*, 16 PSYCHOL. PUB. POL'Y & L. 300, 303 (2010). Furthermore "many defendants misinterpret the word 'right' as a choice or something correct rather than a Constitutional protection." *Id.*

129. Rogers et al., *supra* note 97, at 5. Over thirty percent of the same pool of undergraduates mistakenly believed that police officers could continue to ask questions even after a suspect requested an attorney. *Id.* The same principles have been recognized, albeit anecdotally, by one scholar with significant experience in representing criminal defendants. *See* Ogletree, *supra* note 24, at 1828. Ogletree noted that his "clients and [his] colleagues' clients often report that, notwithstanding the warnings, they believed either that their silence could be used against them as evidence of guilt, or more frequently, that by remaining silent they would forfeit their opportunity to be released on bail." *Id.* In fifteen years as a criminal defense lawyer, the first ten spent as a full-time public defender, I have heard similar sentiments from my clients and -second hand-my colleagues' clients. The most frequent waiver explanations offered by defendants have been that they did not feel like they had a choice (whether to speak or not), and they thought, even if they chose not to speak, their silence could still be used against them.

130. Rogers et al., *supra* note 128, at 303.

131. *Id.* at 304.

132. *See id.* at 303. A valid warning must contain the admonition that you have the right to remain silent and that what you say can be used against you, however, the critical concept that silence cannot be used against

Professor Rogers has aptly characterized the likelihood that a given suspect will fully comprehend his *Miranda* warnings as "Fifth Amendment roulette."[133]

This disconnect is equally problematic regarding a suspect's limited "right to counsel" under the Fifth Amendment.[134] Currently, *Miranda*'s progeny place a heavy burden on suspects who wish to assert their right to counsel during a custodial interrogation.[135] Appellate courts have held that words like "maybe" and "I might want to speak to a lawyer" are insufficient to invalidate a waiver, instead requiring a suspect to invoke his right to counsel "affirmatively" and "unequivocally."[136] Yet almost seventy percent of defendants questioned in one study had no appreciation for the precision required to request counsel and stop interrogation.[137] Moreover, studies have indicated that a significant number of defendants mistakenly believe that the interrogation can continue until a lawyer arrives—even after a request for counsel.[138]

Furthermore, police officers are trained to take advantage of this dynamic.[139] Law enforcement may be trained to comply with the letter of *Miranda*'s technical requirements, but the recommended content of *Miranda* warnings has been designed to "maximize opportunities for waiver."[140] Finally, the common claim by suspects that they did not fully understand their rights frequently falls on deaf ears, as long as there was testimony from an officer that the suspects said they understood their rights (or signed waiver a to that effect) and an officer testifies the responses were coherent.[141]

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you is rarely conveyed to a suspect *because* it is not required. *Id.*

133. Rogers et al., *supra* note 104, at 132.

134. Rogers et al., *supra* note 128, at 304.

135. *See* Davis v. United States, 512 U.S. 452, 459 (1994). The *Davis* Court held that, "[a]lthough a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* (citations and internal quotation marks omitted); *see also* Connecticut v. Barrett, 479 U.S. 523, 529 (1987) (citing Michigan v. Jackson, 475 U.S. 625, 633 (1986)) (construing requirements for requesting counsel under *Miranda*).

136. *See Davis*, 512 U.S. at 459. Massachusetts courts have largely followed the lead of their federal counterparts with respect to this area of the law. *See e.g.*, Commonwealth v. Scoggins, 789 N.E.2d 1080, 1083 (Mass. 2003) (holding "mere inquiry regarding the need for an attorney does not require the police to cease an interrogation"); Commonwealth v. Jones, 786 N.E.2d 1197, 1205-06 (Mass. 2003) (finding statement "I'm going to need a lawyer sometime" insufficient to constitute invocation); Commonwealth v. Judge, 650 N.E.2d 1242, 1252-53 (Mass. 1995) (requiring clear request for counsel to invoke *Miranda* rights).

137. Rogers et al., *supra* note 128, at 310.

138. *Id.* at 311.

139. *See* Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 266 (1996) (arguing "[i]n the past 30 years, police interrogators have refined their skills in human manipulation and become confidence men par excellence").

140. Weisselberg, *supra* note 51, at 1574.

141. *Id.* at 1575; *see supra* note 111 and accompanying text (discussing various levels of complexity of different *Miranda* warnings).

### 2. *Myth Number 2:* Miranda *Provides Adequate Protection Against Coercive and Psychologically Powerful Interrogation Techniques*

*"Because [custodial interrogation] is designed to break the anticipated resistance of an individual who is presumed guilty, police interrogation is stress-inducing by design; it is intentionally structured to promote isolation, anxiety, fear, powerlessness, and hopelessness."*[142]

The purpose of modern-day police interrogation is to illicit incriminating statements from a suspect through the use of psychological pressure and manipulation.[143] The Supreme Court recognized both the inherently compulsory nature of custodial interrogation, as well as the purpose of questioning, when it noted: "[i]t is obvious that such an interrogation environment is created for no other purpose than to subjugate the individual to the will of his examiner."[144] Yet the compulsion that the Court recognized as being inherent in custodial surroundings still exists due to the nuanced, coercive and deceptive police interrogation tactics that have survived and thrived post-*Miranda*.[145] Therefore, the Court's own stated mission—to put in place adequate protective devices to dispel that compulsion—has failed.[146]

As noted above, pre-*Miranda* jurisprudence held that the Fifth Amendment's protection against self-incrimination and the Sixth Amendment right to counsel were fundamental rights that suspects could only waive "knowingly and intelligently."[147] Accordingly, though *Miranda* was widely decried as fatal to law enforcement officers, it actually did little more than require a brief recitation of a suspect's Fifth Amendment right against self-incrimination.[148] Interrogators have simply turned their attention to securing a *Miranda* waiver, which has proven all too easy given the inherently coercive nature of an interrogation room and the vulnerability of a lone suspect at the hands of determined interrogators.[149] As Professor Patrick Malone notes, "on closer

142. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 910 (2004).

143. *See* Leo, *supra* note 139, at 262 (describing police interrogators as "highly experienced and trained human manipulators who resemble confidence men because of the subtle and sophisticated strategies of persuasion they effortlessly employ during interrogation").

144. Miranda v. Arizona, 384 U.S. 436, 457 (1966).

145. *See supra* notes 105-106 and accompanying text.

146. *See* Leo, *supra* note 139, at 262 (discussing police detectives' abilities to elicit confessions through deception).

147. *See* DeFilippo, *supra* note 2, at 680 (noting Court's presumption against coercion in such cases); *see also supra* text accompanying note 2 (discussing public's historical view of such rights).

148. *See* Patrick A. Malone, *"You Have the Right to Remain Silent":* Miranda *After 20 Years*, 55 AM. SCHOLAR 367, 367 (1986) (observing most law enforcement officers complied with *Miranda* prior to issuance of decision).

149. *See* Fiandach, *supra* note 12, at 28. Fiandach argues that "[f]ar from handcuffing the police, *Miranda* empowered them to secure the necessary waiver at a time when the suspect was most vulnerable, immediately after the trauma of an arrest and while in custody." *Id.*; *see also* Leo, Miranda *Revisited*, *supra* note 12, at 661.

examination, *Miranda* turns out to be the police officer's friend . . . [m]ost suspects routinely waive their *Miranda* rights and submit to police questioning. Next to the warning label on cigarette packs, *Miranda* is the most widely ignored piece of official advice in our society."[150]

During the interrogation process, police still utilize techniques that, contrary to *Miranda's* purpose, are psychologically coercive and compel self-incrimination.[151] The interrogation process is fluid and begins before warnings and a waiver are technically required.[152] Interrogation is seamless with strategic considerations that start with the initial contact.[153] As a result, custodial suspects who are already in a pressured situation are psychologically induced into speech rather than silence.[154]

The Court has also historically (both pre- and post-*Miranda*) held some level of deception not only constitutionally permissible, but also an important tool for law enforcement in obtaining confessions.[155] Judicial tolerance of trickery and deceit has also undermined *Miranda*'s purpose by making it increasingly difficult for a suspect to make informed decisions.[156] Indeed, interrogators

As Leo notes, the "defining feature of the conditioning strategy is that the police structure the environment and the interaction in a way to facilitate a waiver without explicitly stating so." Leo, Miranda *Revisited*, *supra* note 12, at 661.

150. *See* Malone, *supra* note 148, at 368.

151. *See* Weisselberg, *supra* note 51, at 1558.

152. *Id.* at 1558-61 & n.224; *see also* Commonwealth v. Duguay, 720 N.E.2d 458, 461-62 (Mass. 1999) (holding officer's response of "[j]ust tell them what happened" did not amount to interrogation); Commonwealth v. D'Entremont, 632 N.E.2d 1239, 1242 (Mass. App. Ct. 1994) (concluding "subtle" compulsion does not equal interrogation).

153. *See* Weisselberg, *supra* note 51, at 1547-48 (describing differing understandings of interrogation between courts and police officers).

154. *Id.* at 1537-38, 1557-58 (concluding suspect under interrogation will feel compelled to speak).

155. *See* Illinois v. Perkins, 496 U.S. 292, 297 (1990) (discussing *Miranda*). The *Perkins* Court stated that "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner." *Id.*; *see also* Colorado v. Spring, 479 U.S. 564, 576 (1987) (holding no requirement defendant be informed of crime to be questioned about); Moran v. Burbine, 475 U.S. 412, 423-24 (1986) (stating "'deliberate or reckless' withholding of information . . . is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them"); *accord* Commonwealth v. Raymond, 676 N.E.2d 824, 832 (Mass. 1997) (holding no need to provide defendant information regarding crime to uphold waiver of *Miranda* rights).

156. *Compare* Commonwealth v. Williams, 448 N.E.2d 1114, 1118-19, 1121 (Mass. 1983) (holding prosecution must prove defendant made statements voluntarily without intimidation or coercion), *with* Commonwealth v. DiGiambattista, 813 N.E.2d 516, 523-24 (Mass. 2004) (allowing, though "disapproving" of, deceptive interrogation tactics). In *DiGiambattista*, the SJC noted:

> Twenty-five years ago, this court stated that "we expressly disapprove of the tactics of making deliberate and intentionally false statements to suspects in an effort to obtain a statement," as "such tactics cast doubt" on both the validity of a suspect's waiver of rights and the voluntariness of any subsequent confession. We have, however, repeatedly held that while the use of false statements during interrogation is a relevant factor on both waiver and voluntariness, *such trickery does not necessarily compel suppression of the statement*. Rather, the interrogator's use of trickery is to be considered as part of the totality of the circumstances, the test that is used to determine the validity

often present the *Miranda* warnings as a trivial aside—simply another step in the booking process—no more important than taking the suspect's photo or fingerprints.[157] Often the waiver itself is equally deceptive because it conveys to the suspect that his only option is to read and then waive his rights.[158] This combination of downplaying *Miranda*'s importance and the use of misleading waivers gives the suspect the false impression that he has no choice but to speak to his interrogators.[159] Before, during, and after a suspect agrees to

of a waiver and the voluntariness of any statement.

*Id.* (emphasis added) (citations omitted).

157. *See* Leo, Miranda *Revisited*, *supra* note 12, at 621-22. As Richard Leo describes:

> Following the standard booking questions and the detective's rapport-building small talk, the detective may attempt to de-emphasize *Miranda*'s potential significance in one of two ways: either by blending the *Miranda* warnings into the conversation as if to camouflage it, or by explicitly calling attention to the formality of the *Miranda* warnings so as to understate it.

*Id.* at 662; *see also* Commonwealth v. Gaboriault, 785 N.E.2d 691, 696-97 (Mass. 2002) (determining officer's explicitly labeling *Miranda* warnings as "formality" did not render waiver inadequate).

158. For example, the *Miranda* waiver used by the Quincy, Massachusetts, Police Department reads as follows:

> (1) You have the right to remain silent. Do you understand this right?
> (2) Anything you say can be used against you at trial. Do you understand this right?
> (3) You have the right to an attorney. Do you understand this right?
> (4) If you cannot afford an attorney, one will be appointed to you by the Commonwealth at no expense and prior to any questioning. Do you understand this right?
> (5) If you decide to waive your Fifth Amendment Rights pursuant to *Miranda*, you may stop answering questions at any time if you so desire. Do you understand this right?

Quincy, Mass., Police Dep't, *Miranda* Waiver Form (Dec. 2004) (on file with author). Directly below the enumerated warnings reads "WAIVER OF MIRANDA WARNINGS–Having these rights in mind, do you now waive your Fifth Amendment Rights pursuant to *Miranda*, and desire to talk to me now concerning this or other matters of concern to us?" *Id.* If the suspect agrees, he initials "Yes, I wish to talk to you now and waive my Fifth Amendment Rights pursuant to *Miranda*." *Id.* Note that there is no option on the form allowing the suspect to decline the proffered waiver and, more importantly, even if the suspect requests counsel, he will not actually be put in touch with an attorney until he is finally brought to court and formally charged. The form used by the Quincy Police Department as recently as 2010 suffers the same infirmity, again suggesting that a waiver is the only option rather than offering an alternative. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972). The Supreme Court held in *Kirby* that a person's "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal charge, preliminary hearing, indictment, information or arraignment". *Id.* at 688-89.

159. *See* Ogletree, *supra* note 24, at 1827-28. Professor Ogletree notes that:

> My own experience as a public defender has been that many suspects make statements during the process of police interrogation and are surprised to learn thereafter that they had a constitutional right to remain silent or to have an attorney present during questioning . . . . My clients and my colleagues' clients often report that, notwithstanding the warnings, they believed either that their silence could be used against them as evidence of guilt, or more frequently, that by remaining silent they would forfeit their opportunity to be released on bail.

*Id.* This anecdotal evidence is supported by Professor Leo's research, which found that:

waive his rights, highly trained interrogators employ a plethora of stratagems and tactics that are proven to elicit incriminating responses from even the most resistant suspects.[160] For example, police will often "soften up" the suspect by developing a rapport or a relationship of trust.[161] Both the intent and effect of these pre-warning techniques is to create a waiver-friendly environment, by creating a sense of hopelessness or the opposite—a sense of false hope.[162]

> [A] suspect with a felony record in my sample was almost four times as likely to invoke his Miranda rights as a suspect with no prior record and almost three times as likely to invoke as a suspect with a misdemeanor record . . . . The more experience a suspect has with the criminal justice system, the more likely he is to take advantage of his Miranda rights to terminate questioning and seek counsel.

Leo, Miranda *Revisited*, *supra* note 12, at 655-56.

160. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L & CRIMINOLOGY 266, 300 (1990) (stating interrogating officers employed approximately six different tactics per interrogation). According to Professor Leo:

> If a portrait of the typical interrogation emerges from the data, it involves a two prong approach: the use of negative incentives (tactics that suggest the suspect should confess because no other course of action is plausible) and positive incentives (tactics which suggest the suspect will in some way feel better or benefit if he confesses). In approximately 90% of the interrogations I observed, the detectives confronted the suspect with some evidence (whether truthful or false) of his guilt and then suggested that the suspect's self-interest would be advanced if he confessed.

*Id.*; *see also* Weisselberg, *supra* note 51, at 1530-34. Professor Weisselberg highlights several private companies that provide "Interrogation and Interviewing" training to law enforcement, including Chicago-based John E. Reid & Associates, whose "Reid Technique" (or a form thereof) is used by interrogators throughout the nation. Weisselberg, *supra* note 51, at 1530-34. Many of these techniques are highly evolved and include multiple steps that have proven effective in eliciting confessions. *Id.* Professor Weisselberg describes the nine-step "Confrontation Interrogation Technique" as follows:

> The first step, "Psychological Domination," advises an investigator to leave the suspect alone in the interrogation room "for a period of time" to "heighten[] anxiety and stress." Re-entering the room, the officer may use props, including "case files with the suspect's name prominently displayed and real or improvised items of evidence . . . . [The officer] may want to inspect the case file. This may create a psychological dominance and will heighten the suspects' anxiety level."

*Id.* (quoting CAL. COMM'N ON PEACE OFFICER STANDARDS & TRAINING, INTERVIEW AND INTERROGATION TECHNIQUES TELECOURSE HANDBOOK 20 (1994))

161. Weisselberg, *supra* note 51, at 1554.

162. *See id.* at 1557. According to Professor Weisselberg:

> Investigators in one department were taught to use "conditioning" strategies to structure the environment so that the suspect would respond favorably to the questions and, hopefully, give an automatic waiver to the Miranda admonition. A second approach was to de-emphasize Miranda's potential significance by blending the warnings into the conversation or by calling attention to the formality of the warnings in a way that understated their importance. Third, officers sometimes sought to persuade suspects to waive their rights by explaining, for example, "that there are two sides to every story and that they will only be able to hear the suspect's side of the story if he waives his rights and chooses to speak to them." Another part of the strategy "is to tell the suspect that the purpose of interrogation is to inform the suspect of the existing evidence against him and what is going to happen to him, but that the detective can only do so if the suspect waives his rights."

Furthermore, because the communication does not necessarily qualify as "interrogation" per se, it does not run afoul of *Miranda* and its progeny.[163]

Often the police will tell a suspect what they are charged with and describe the evidence, in an attempt to convince the suspect that it is better to cooperate and that some tangible benefit will inure to a suspect if he cooperates.[164] Although the explicit quid pro quo, "you will receive a lesser sentence by cooperating," is unacceptable, more subtle versions of the same ploy—such as "it is better to tell the truth" or "your cooperation will be brought to the attention of the prosecutor"—are both permitted by the case law and equally effective.[165] Another classic "softening up" technique involves minimizing the alleged conduct.[166] For example, the interrogator will offer an excuse for a suspect's alleged actions or mitigating circumstances in an attempt to convince the suspect to confess.[167] Minimizing the conduct or offering a moral justification for conduct may not qualify as interrogation, but such techniques are no less psychologically effective and deceptive than the tactics condemned by the *Miranda* Court.[168]

One of the most striking and disturbing methods of deception is officers'

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*Id.* (quoting Leo, Miranda *Revisited*, *supra* note 12, at 661-64).

163. *See generally* JOSEPH A. GRASSO, JR. & CHRISTINE M. MCEVOY, SUPPRESSION MATTERS UNDER MASSACHUSETTS LAW § 18-3 (2010).

164. *See* Commonwealth v. O'Brian, 840 N.E.2d 500, 504 (Mass. 2006) (discussing factors weighing on determination of voluntariness of *Miranda* waiver). In its decision, the *O'Brian* Court recognized:

> An officer may suggest broadly that it would be better for a suspect to tell the truth, may indicate that the person's cooperation would be brought to the attention of the public officials or others involved, or may state in general terms that cooperation has been considered favorably by the courts in the past.

*Id.* (quoting Commonwealth v. Meehan, 387 N.E.2d 527, 534 (1979)); *see also* Commonwealth v. Ortiz, 760 N.E.2d 282, 288-89 (Mass. 2002) (holding defendant not coerced into waiving *Miranda* rights).

165. *See O'Brian*, 840 N.E.2d at 504 (characterizing certain statements as permissible for interrogation purposes); Commonwealth v. Jordan, 785 N.E.2d 368, 374 (Mass. 2003) (holding police cannot assure defendant confession would aid defense or result in lesser sentence).

166. *See* Weisselberg, *supra* note 51, at 1557.

167. *See id.* at 1558. Professor Weisselberg discusses the detailed interrogation study performed by Professors Leo and White, noting:

> Leo and White explain how interrogators may communicate that giving a statement benefits suspects. For example, officers may suggest that a person would be viewed more favorably (and thus, implicitly, receive more lenient punishment) if she speaks with investigators. Officers might also suggest that the "why" question is paramount. Another tactic "is to create the appearance of a non-adversarial relationship" between the suspect and the interrogator, so that the suspect may regard the officer as a neutral problem solver who is trying to work things out.

*Id.* (citing 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, 432-47 (1999)).

168. *See id.* (noting fifty-eight percent of suspects surveyed waived their rights following use of "softening up" tactics).

reliance on false evidence during the "interrogation" continuum. Although disapproved, the use of false statements or references to fabricated evidence does not necessarily invalidate a *Miranda* waiver or render a statement otherwise involuntary. Appellate courts continue to condone this technique, clearly failing to appreciate the powerful and coercive impact it has on the voluntariness of a waiver.[169]

Renowned *Miranda* scholar Richard Leo has personally observed hundreds of interrogations substantiating the compulsive nature of police tactics. He has witnessed most, if not all, of the "conditioning" strategies I have mentioned, often observing an amalgam of persuasive techniques that collaborate to create a waiver-friendly environment.[170] An individual, in custody, oftentimes in a room by himself, is already extraordinarily vulnerable.[171] Simple overtures of sympathy and kindness, however subtle, enhance and take advantage of the inherent power imbalance between the suspect and the interrogator-in-waiting.[172] Unfortunately the powerful impact of these interrogation tactics "appears [to be] lost on judges."[173]

The decision to speak with officers often proves disastrous because a suspect who waives his *Miranda* rights and makes incriminating statements is much more likely to be charged and convicted of a crime.[174] Nowhere is this more

169. *See* Commonwealth v. Edwards, 651 N.E.2d 398, 401-02 (Mass. 1995) (declaring false statements one factor in totality of circumstances test); Commonwealth v. Nero, 442 N.E.2d 430, 431 (Mass. App. Ct. 1982) (holding although disapproved, use of false statements only relevant factor to waiver and voluntariness); *cf.* Commonwealth v. Magee, 668 N.E.2d 339, 345 (Mass. 1996) (holding officers' actions did not constitute deception but invalidated waiver under totality of circumstances test).

170. *See* Leo, Miranda *Revisited*, *supra* note 12, at 660-62 (outlining examples of conditioning strategies used by police); Weisselberg, *supra* note 51, at 1557 nn.211 & 215 (citing Leo's work on conditioning strategies). If suspects were aware deception and trickery were permitted, that awareness alone would reduce coercion. I would suggest that advising a custodial suspect of permissible police tactics is precisely one of the functions a lawyer should perform in every instance, prior to custodial interrogation. *See generally* Leo, *Police Interrogation*, *supra* note 12 (suggesting trickery and coercion "functional equivalent[s]" because both strategies induce involuntary behavior).

171. *See* Miranda v. Arizona, 384 U.S. 436, 461 (1966) (acknowledging strain upon "individual swept from familiar surroundings into police custody, surrounded by antagonistic forces"). As the *Miranda* Court recognized, "the compulsion to speak in the isolated setting of the police station may well be greater than in courts." *Id.*; *see also* Ashikawa, *supra* note 15, at 256 (describing interrogation environment as "crisis-laden").

172. *See* Weisselberg, *supra* note 51, at 1562.

173. *Id.* As Professor Weisselberg notes:

> Courts are more likely to cite officers' rapport-building acts as evidence that a waiver is voluntary, rather than understand it as part of a strategic and well-structured interrogation sequence . . . . Nor are courts seemingly able to draw a connection between friendly "small talk" and officers' ability to try out interrogation themes that resonate with suspects, using information gathered from pre-Miranda conversations.

*Id.*

174. *See* Leo, *supra* note 160, at 300. Specifically, Professor Leo found that seventy-eight percent of suspects waived their *Miranda* rights, sixty-four percent made incriminating statements, sixty-nine percent of the suspects who incriminated themselves were charged and approximately sixty-three percent of those

apparent than in Professor Leo's study, where, after observing countless custodial interrogations, he concluded:

> [A] suspect's decision to provide detectives with incriminating information was fateful. Suspects who incriminated themselves during interrogation were significantly more likely to be charged by prosecutors, significantly less likely to have their case dismissed, significantly more likely to have their cases resolved by plea bargaining, significantly more likely to be convicted, and significantly more likely to receive punishment than their counterparts who did not provide interrogators with any incriminating information.[175]

Leo goes on to argue that such confessions are "the most damning and persuasive evidence of criminal guilt," an assertion that is confirmed by the numerous exonerations of individuals who were originally convicted after giving a coerced and/or false confession.[176] One explanation for the great weight given confessions is that courts, prosecutors, and juries may well assume that a defendant fully understood his *Miranda* rights and therefore made incriminating statements voluntarily (and truthfully).[177]

The *Miranda* Court provided the remedy of exclusion to address inadequate warnings and invalid waivers.[178] However, in subsequent decisions, the Court has marginalized that remedy.[179] As a result, even when the police cross the line, the jurisprudence has incentivized these tactics to the point where forgoing the use of a suppressed statement might be an acceptable compromise from the government's perspective.[180] In essence, *Miranda*'s progeny allow law enforcement to derive investigative benefits and the prosecution strategic trial

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suspects were ultimately convicted, far more suspects with no criminal record (ninety-two percent) waived their *Miranda* rights than those with a felony record (seventy percent), and suspects who waived their *Miranda* rights were twice as likely to resolve their case through plea bargaining, ninety-eight percent of which resulted in convictions. *Id.*

175. *See id.* at 301. (discussing effect of providing detectives incriminating statements).

176. *See id.* at 298-99 (noting correlation between confession and guilt); *see also* Fiandach, *supra* note 12, at 29 (describing exonerations of convicts based on false confessions and police misconduct).

177. *See* Malone, *supra* note 148, at 376-78. As Malone notes:

> With one or two exceptions, the court has voted to make it easy for the police to show a valid waiver of rights and at the same time it has taken a forgiving approach to police failures to give *Miranda* warnings. Moreover, when it has been concluded that a suspect waived his rights voluntarily, courts have often leaned on this finding to conclude that the entire subsequent interrogation was properly conducted, even though that is supposed to remain a separate inquiry.

*Id.* at 378.

178. *See* Miranda v. Arizona, 384 U.S. 436, 461 (1966).

179. *See supra* Part II.A.3 (discussing *Miranda*'s progeny).

180. *See* Harris v. New York, 401 U.S. 222, 224-26 (1971) (holding defendant's voluntary statement, taken in violation of *Miranda*, admissible to impeach defendant's testimony); *accord* Commonwealth v. Ly, 908 N.E.2d 1285, 1288-89 (Mass. 2009).

benefits because the reach of the exclusionary rule has been limited.[181]

The intention of the police during the "interrogation" process, recognized by the *Miranda* court forty years ago, is no different today. If anything, the sophistication of police tactics has evolved and adapted to the Court's holding. The police still take advantage of the pressures inherent in any interrogation to compel speech and the use of documented and legally accepted tactics amplify the compulsion. Further, the jurisprudence demonstrates a fundamental misconception regarding the actual impact interrogation tactics have on the will of custodial suspects.[182] In sum, it is no more challenging today for an interrogator to achieve the ultimate goal of a confession simply because the law requires *Miranda* warnings and waiver before "official" interrogation commences.

### *3. Myth Number 3:* Miranda*'s Safeguards Protect the Innocent*

In the last quarter century, research has documented approximately 250 "interrogation-induced false confessions."[183] That number is undoubtedly a

181. *See* Ashikawa, *supra* note 15, at 258-59 (arguing police have interest in obtaining "derivative evidence from an inadmissible confession"). As Ashikawa points out:

> Police can question suspects either (1) to obtain statements that they can later present in court as evidence, or (2) to obtain leads from a suspect on the basis of which they can discover real or demonstrative evidence, or identify prosecution witnesses . . . . What data there are suggest that the latter objective is usually more important to law enforcement than the former.

*Id.* (citing Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 713 n.180 (1968))

182. In my experience, successful motions to suppress based on invalid *Miranda* waivers are exceedingly rare. Trial court judges rarely believe a testifying defendant over a testifying police officer. For example, if a defendant claimed he had requested a lawyer and the police officer testified that request was never made, or if a defendant testified that a police officer made a specific promise of leniency and the officer denied the same, the officer's version is typically given credence. I acknowledge there is no scientifically perfect way to test this hypothesis, but I know it to be true. Fifteen years of experience and hundreds of discussions with defendants and criminal defense lawyers alike supply all the proof I need. Further, my conclusion does not account for the vast majority of cases where a defendant does not testify at a suppression hearing and the tactical and, perhaps at times misguided, reasons why. Nor does it account for the innumerable cases where the mere existence of a signed *Miranda* waiver or even a recorded confession, despite potentially viable claims by a defendant that he did not understand his rights or felt coerced or tricked into waiving his rights, induced a defeatist attitude in both lawyer and client alike, leading to a guilty plea.

183. *See* Drizin & Leo, *supra* note 142, at 31 (arguing "interrogation-induced false confessions" occur frequently and pose serious questions for judicial consideration); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 3 (2010) (noting "research suggests that false confessions and admissions are present in 15-20% of all DNA exonerations"). Professor Leo detailed numerous studies providing empirical evidence of false confessions:

> Since the late 1980s, six studies alone have documented approximately 250 interrogation-induced false confessions. In 1987, Hugo Bedau and Michael Radelet found 49 miscarriages of justice in capital or potentially capital cases that were caused by false confessions. In 1998, Richard Ofshe and I documented 60 cases of police-induced false confession in the post-*Miranda* era (i.e., after 1966). In 2000, Barry Scheck, Peter Neufeld, and Jim Dwyer reported on the first 62 cases in the

gross underestimation of the problem because similar analysis is impossible in cases that predate DNA testing and in cases where convincing, exculpatory forensic evidence does not exist.[184] It is irrational to assume deception and coercion during the interrogation continuum have not been the leading causes of induced false confessions.[185] The result is two-fold: innocent people are forced to confess and possibly face jail time, and the actual perpetrator remains at large. Yet this fact seems to have little effect on police, who consistently presume that the suspect they have brought in for questioning is guilty.[186] As

> United States involving wrongful conviction established through DNA exoneration beginning in 1989; by September 2007, the number of DNA exonerations had grown to 207. False confessions cause (or were related to) 15-20 percent of these wrongful convictions. In 2003, Rob Warden studied the role of false confession in miscarriages of justice in homicide prosecutions in Illinois since 1970, and found that 60 percent (25 out of 42) of those wrongfully convicted had falsely confessed. In 2004, Steve Drizin and I collected and analyzed a new cohort of 125 proven false confession cases in the post-*Miranda* era. Most recently, Sam Gross and his colleagues identified 340 official exonerations of wrongly convicted individuals from 1989 to 2003, 15 percent of which resulted from false confessions.

Leo, *supra* note 34, at 31.

184. *See* Leo, *supra* note 34, at 32-33 (commenting on lack of interrogation-induced false confession reports). As Professor Leo notes:

> [T]here is good reason to believe that the documented cases of interrogation-induced false confession understate the extent of the phenomenon. False confessions are rarely publicized. They are likely to go unreported by the media, unacknowledged by police and prosecutors, and unnoticed by researchers. As many have pointed out, the documented cases of interrogation-induced false confession are therefore likely to represent only the tip of a much larger problem. Indeed, recent studies suggest that interrogation-induced false confessions may be a bigger problem for the American criminal justice system than ever before. Researchers have documented far more false confessions in recent years than in any previous time period. If there is no worse error than the wrongful conviction and incarceration of the innocent, then police-induced false confessions-especially in capital cases-are one of the most serious problems in the criminal justice system today.

*Id.*

185. *See* Richard J. Ofshe, *Defending the Innocent*, CHAMPION, Dec. 2007, at 10, 11 (discussing psychology behind false confessions). As Professor Ofshe explains:

> Despite the fact that interrogations are conducted under atypical circumstances and in settings that are unusually stressful, there is no reason to imagine that a suspect's decision-making is anything but rational given the information on which he is relying. That said, one should not forget the adage "garbage in, garbage out" and bear in mind that in assessing options the suspect is enmeshed in a fantasy deliberately created by the interrogator. Even knowing he is innocent of the crime, in assessing risk a suspect relies on false information about the amount of evidence that mistakenly links him to the crime. In deciding what is best for him to do, the suspect does not know that the offer of a way out is a fraud. What makes psychological coercion so dangerous is that it can lead an innocent person to erroneously conclude that giving a false confession is the best choice under what he perceives to be his circumstances.

*Id.*

186. *See* Hans Sherrer, Miranda*'s Failure to Protect the Innocent Exposed in False Confession Study*, JUST.: DENIED, Winter 2005, at 17, 17, *available at* http://www.justicedenied.org/issue/issue_27/miranda%27s_failure.html (discussing false confessions). Sherrer argues that "a significant reason false confessions

eminent English jurist William Blackstone said, "It is better that ten guilty persons escape than that one innocent suffer."[187] The use of psychological interrogation to exact false confessions runs directly counter to Blackstone's noble standard of justice.[188]

## III. THE SOLUTION: ADVANCING THE POINT OF ATTACHMENT UNDER ARTICLE XII

### *A. When the Right to Counsel Attaches Under the Sixth Amendment*

*"We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights."*[189]

The Sixth Amendment guarantees an "accused" the right to counsel in "all criminal prosecutions" and applies to the states through the incorporation clause of the Fourteenth Amendment.[190] Beginning with its landmark 1932 decision, *Powell v. Alabama*,[191] the Supreme Court has consistently held that there are certain "critical stages" when this right attaches.[192] Although *Powell* was decided exclusively on due process grounds, prior to the incorporation of the Sixth Amendment to the states, the Court recognized that counsel was important as early as an arraignment.[193]

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occur is because a person targeted for interrogation is presumed guilty–and that belief provides a justification for the use of techniques that are designed to extract a confession that is likewise presumed to be true." *Id.*

187. 4 WILLIAM BLACKSTONE, COMMENTARIES 359 (Oxford 1765-1769).

188. *See* Leo, *supra* note 34, at 31 (discussing "myth of psychological interrogation").

189. Escobedo v. Illinois, 378 U.S. 478, 490 (1964) (arguing American criminal justice system relies on ignorance of individual rights).

190. U.S. CONST. amend. VI. The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Id.*; *see also* Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963) (holding Sixth Amendment right to counsel applies to states through Fourteenth Amendment).

191. 287 U.S. 45 (1932).

192. *See id.* at 59-60 (holding defendants deprived of any meaningful assistance of counsel under Due Process Clause); *see also* Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (determining arraignment "first critical stage" in criminal proceedings where right to counsel initially attaches).

193. *See Kirby*, 406 U.S. at 689-90.

Forty years after *Powell*, the Supreme Court purported to clear up any residual confusion on the point of attachment. In *Kirby v. Illinois*,[194] the Court declined to extend the right to counsel to a pre-charge identification procedure conducted by the government.[195] Rather, relying on both the text and purpose of the Sixth Amendment, the Court determined that the right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against [an accused]."[196] The Court reasoned that the protection of counsel ripens at that point because

> it is only then that the government has committed itself to prosecute, and only then that the *adverse positions of government and defendant have solidified.* It is [only] then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.[197]

It is this point that marks the commencement of the "criminal prosecutions to which alone the explicit guarantees of the Sixth Amendment are applicable."[198] Courts have consistently reaffirmed the bright-line attachment rule.[199]

Despite establishing a clear point of demarcation at which the right to counsel first applies, the Court has relied on language that is susceptible to a more expansive interpretation.[200] The Sixth Amendment right to counsel attaches at "critical stages" that may occur both before trial and at the trial itself.[201] A critical stage has been defined as "proceedings between an individual and agents of the State (whether 'formal or informal, in court or out') that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary.'"[202] Yet

194. 406 U.S. 682 (1972).

195. *See id.* at 690 (declining to extend Sixth Amendment protection to identification process). *But see* United States v. Wade, 388 U.S. 218, 226 (1967) (noting "accused is guaranteed that he need not stand alone against the State at any stage of the prosecution"); Escobedo v. Illinois, 378 U.S. 478, 485-86 (1964) (holding Sixth Amendment right to counsel can attach prior to filing of formal charges).

196. *Kirby*, 406 U.S. at 688.

197. *Id.* at 689. (emphasis added)

198. Kirby v. Illinois, 406 U.S. 682, 690 (1972) (internal quotation marks omitted); *accord* United States v. Gouveia, 467 U.S. 180, 187 (1984) (holding right to counsel attaches "at the initiation of adversary judicial criminal proceedings").

199. *See generally* Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008) (reaffirming that attachment arises during first court appearance). The *Rothgery* Court also rejected the suggestion that prosecutorial involvement is a prerequisite for attachment. *Id.* at 209-10.

200. *See Gouveia*, 467 U.S. at 193 (Stevens, J., concurring) (suggesting majority's reasoning unnecessarily limits when right to counsel attaches). The Sixth Amendment "does not foreclose the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial criminal proceedings." *Id.*

201. *Rothgery*, 554 U.S. at 211-12 (claiming attachment occurs when government signals commitment to prosecute).

202. *Id.* at 212 n.16 (alteration in original) (citations omitted); *see also* United States v. Wade, 388 U.S.

as many courts and commentators have argued, the Court's proffered "bright-line rule" has become increasingly arbitrary because most suspects face numerous "trial-like confrontations" long before the right to counsel attaches.[203]

The purpose of the Sixth Amendment is "protecting the unaided layman at critical confrontations with his adversary,"[204] by giving him "the right to rely on counsel as a 'medium' between him and the State."[205] To find whether such a medium is necessary, the Court "has called for the examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary."[206] Some Justices have recognized that:

> The assistance offered by counsel protects a defendant from surrendering his rights with an insufficient appreciation of what those rights are and how the decision to respond to interrogation might advance or compromise his exercise of those rights. . . . Such assistance goes far beyond mere protection against police badgering.[207]

The right to counsel germinates at this point because the person's status has evolved from a mere "suspect" into an "accused."[208] A suspect is not entitled to the assistance of counsel in the Sixth Amendment sense; it is only when a suspect graduates to an "accused" that the right attaches.[209] An "accused" in this context, however, requires the formality of a charge and an in-court event

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218, 226-27 (1967). In *Wade*, the Court noted:

> [We] scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.

*Wade*, 388 U.S. at 227; *see also* United States v. Ash, 413 U.S. 300, 309 (1973) (recognizing "core purpose" of counsel guarantee assuring aid at trial). The *Ash* Court reasoned that trial is the point at which "the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." 413 U.S. at 309.

203. *See supra* Part II.B (discussing myths surrounding interrogation techniques).

204. Michigan v. Jackson, 475 U.S. 625, 631 (1986) (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)), *overruled by* Montejo v. Louisiana, 129 S. Ct. 2079 (2009).

205. *Id.* at 632 (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)).

206. *See Ash*, 413 U.S. at 313; *see also Gouveia,* 467 U.S. at 196 (Stevens, J., concurring) (citing *Ash*, 413 U.S. at 313).

207. Montejo, 129 S. Ct. at 2096 n.2 (Stevens, J., dissenting) (emphasis added).

208. *See Jackson*, 475 U.S. at 639-40 (holding Sixth Amendment attaches once suspect becomes "accused"); *see also* Brewer v. Williams, 430 U.S. 387, 398 (1977) (noting when Sixth Amendment attaches). The *Brewer* Court held that "the right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." 430 U.S. at 398.

209. *Cf.* Miranda v. Arizona, 384 U.S. 436, 477 (1966) (recognizing "it is [during custodial interrogation] that our adversary system of criminal proceedings commences").

or adversarial judicial proceeding.[210] According to the Supreme Court, it is only after the initiation of judicial proceedings that the "*adverse positions of government and defendant have solidified*."[211]

Numerous jurists and scholars have criticized the Court's requirement that only the initiation of adverse judicial proceedings can trigger the right to counsel.[212] In the aftermath of *Kirby*, Justice Stevens strongly disagreed with the Court's bright-line rule.[213] In his concurrence in *United States v. Gouveia,*[214] Stevens pointed out that when the court initially formulated the rule, only a plurality of the Court supported the decision.[215] Stevens went on to note that this new rule was inconsistent with the Court's own precedents,[216] "which [do] not foreclose the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings."[217] Indeed, previous cases demonstrate how "Sixth Amendment jurisprudence has turned not on the formal initiation of judicial proceedings but rather on *the nature of the confrontation between the authorities and the citizen*."[218] Contrary to the majority's view, Stevens believed that once "the authorities take a person into custody in order to interrogate him . . . [that] person is sufficiently 'accused' to be entitled to the protections of the Sixth Amendment."[219]

In his forceful opposition to the majority's analysis in *Gouveia*, Justice Stevens relied primarily on the Court's decision in *Escobedo v. Illinois*.[220] In that case, the Court held that a statement obtained by a police officer during a pre-charge interrogation violated the individual's Sixth Amendment right to counsel.[221] Subsequent Supreme Court decisions have both limited *Escobedo* to its own facts and have re-characterized it as a Fifth Amendment decision whose prime purpose was not "to vindicate the Sixth Amendment right to counsel" as such, but like *Miranda*, "to protect the Fifth Amendment privilege

210. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 198 (2008); United States v. Gouveia, 467 U.S. 180, 189 (1984).

211. Kirby v. Illinois, 406 U.S. 682, 689 (1972) (emphasis added).

212. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2096 n.2 (2009) (Stevens, J., dissenting); Ogletree, *supra* note 24, at 1839-42.

213. *See Gouveia*, 467 U.S. at 193-97 (Stevens, J., concurring).

214. 467 U.S. 180 (1984).

215. *Id.* at 196 n.3 (Stevens, J., concurring).

216. *Id.* at 193-95.

217. *Id.* at 193.

218. *Gouveia*, 467 U.S. at 195 (emphasis added) (discussing *Wade*); *see also* United States v. Wade, 388 U.S. 218, 226 (1967) (holding presence of counsel required under Sixth Amendment for any pretrial identification procedure).

219. *Gouveia*, 467 U.S. at 197 (quoting Gerstein v. Pugh, 420 U.S. 103, 123 (1975)).

220. 378 U.S. 478 (1964). In his *Gouveia* concurrence, Justice Stevens argued, "In *Escobedo v. Illinois*, this Court squarely held that the Sixth Amendment's right to counsel can attach before formal charges have been filed." United States v. Gouveia, 467 U.S. 180, 193 (1984) (Stevens, J., concurring) (citations omitted).

221. *Escobedo*, 378 U.S. at 490-91.

against self-incrimination."[222] However, a careful and honest reading of the decision belies that assertion. The *Escobedo* court specifically held that:

> [W]here, as here, *the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect*, the suspect has been taken into police custody, the police carry out a process of interrogations . . . [and] the suspect has requested and been denied an opportunity to consult with his lawyer . . . the accused has been denied 'The Assistance of Counsel' in violation of the Sixth Amendment.[223]

In spite of this unambiguous language, the case has been subject to contortionist history. While the Court has re-characterized *Escobedo* as exclusively a Fifth Amendment decision, the case has never been overruled.[224]

In *Escobedo*, the Court focused specifically on the inherent unfairness of an uncounseled person being interrogated without expert legal assistance when the police sought to obtain a confession.[225] The court noted that "[t]he fact that many confessions are obtained during this period [a pre-charge interrogation] points up its critical nature as a 'stage when legal aid and advice' are surely needed. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained."[226] According to the Court, divining the right to counsel based purely on the existence of a formal charge missed the point.[227] Yet the *Miranda* decision itself—the Supreme Court's intended refinement to address the abuses identified in *Escobedo*—contains language that supports a more expansive reading of the right to counsel.[228] The Court characterized custodial interrogation as the "point that our adversary system of

222. *Gouveia*, 467 U.S. at 188 n.5.

223. *Escobedo*, 378 U.S. at 490-91 (emphasis added). In *Escobedo*, the Court held that only "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." *Id.* at 492; *see also Gouveia*, 467 U.S. at 193 (Stevens, J., concurring) (noting *Escobedo*'s recognition that "Sixth Amendment's right to counsel can attach before formal charges have been filed").

224. *See Gouveia*, 467 U.S. at 188 n.5 (declaring *Escobedo*'s language should be interpreted to provide Fifth Amendment privileges). The notion that *Escobedo* and *Miranda* were designed collectively to protect Fifth Amendment concerns, adopted by the *Kirby* plurality as "black letter law," was first raised by the majority in *Johnson v. New Jersey*. *See* 384 U.S. 719, 729-730 (1966). Ironically, the language transferred to *Kirby* from *Johnson* is unquestionably dicta–the holding in that case, that *Miranda* and *Escobedo* did not apply retroactively, bore no relation to the time at which the right to counsel attached. *See id.* at 732.

225. *See Escobedo*, 378 U.S. at 485.

226. Escobedo v. Illinois, 378 U.S. 478, 488 (1964) (citations omitted); *see also* Sarma et al., *supra* note 26, at 461 (distinguishing Fifth and Sixth Amendment right to counsel issues).

227. *Escobedo*, 378 U.S. at 486 (arguing securing formal indictment not required for right to counsel to apply). The Court noted: "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." *Id.*

228. *See* Miranda v. Arizona, 384 U.S. 436, 477 (1966).

criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries."[229]

Even while declining to extend the Sixth Amendment right to counsel to pre-charge interrogations, the Court has routinely commented on the fundamental importance of the role of counsel during police interrogation.[230] However, despite language, precedent, and reasoning that would support an earlier point of attachment, a majority of the Court has steadfastly refused to interpret the point of attachment as occurring any earlier than the initial judicial proceeding.[231]

The federal circuit courts of appeal have generally followed in lockstep with the Supreme Court's analysis of when the right to counsel attaches under the Sixth Amendment.[232] However, despite clear guidance to the contrary, several circuits have sought an *Escobedo*-like exception where "the government [has] crossed the constitutionally significant divide from fact-finder to adversary."[233] This is particularly evident in *DeAngelo v. Wainwright*,[234] where the Eleventh Circuit was asked to decide whether police violated the defendant's Fifth and Sixth Amendment rights when they secretly recorded his conversations.[235]

The Eleventh Circuit began its analysis by recognizing that the defendant would have a Sixth Amendment claim "only if [he] had the right to be represented by counsel at the time the conversations took place."[236] The court

229. *Id.*

230. *See* United States v. Wade, 388 U.S. 218, 224 (1967) (extending accused's right to counsel to certain "critical" pretrial proceedings); *see also* United States v. Ash, 413 U.S. 300, 310 (1973) (defining "critical stage" as one where "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both").

231. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 195 (2008) (holding attachment does not require prosecutor awareness of initial proceeding); United States v. Gouveia, 467 U.S. 180, 189-90 (1984) (stating "core purpose" of right to counsel is aid at trial).

232. *See* United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992). The *Larkin* Court stated, "[i]t is axiomatic that the right to counsel attaches 'at or after the initiation of adversary judicial criminal proceedings–whether by way of formal charge, preliminary hearing, indictment, information or arraignment.'" *Id.* (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

233. Roberts v. Maine, 48 F.3d 1287, 1291 (1st Cir. 1995) (quoting Larkin, 978 F.2d at 969; *see also* United States *ex rel.* Hall v. Lane, 804 F.2d 79, 82 (7th Cir. 1986). The Seventh Circuit in *Lane* stated that "[t]he right to counsel attaches only when a defendant proves that, at the time of the procedure in question, the government had crossed the constitutionally-significant divide from fact-finder to adversary." 804 F.2d at 82; *see also* DeAngelo v. Wainwright, 781 F.2d 1516, 1519 (11th Cir. 1986). The Eleventh Circuit in *DeAngelo* held that the right to counsel "may attach although no accusatory pleading is pending when the investigation of the crime focuses on that particular person." 781 F.2d at 1519.

234. 781 F.2d 1516 (11th Cir. 1986).

235. *Id.* at 1519. The police in *DeAngelo* suspected that the defendant had been involved in a murder following an apparent drug deal gone wrong, resulting in the death of one man and injury to the defendant. *Id.* at 1517. During the ensuing investigation, police placed a wire on the victim's brother and sent him to discuss the events with the defendant who was recovering in the hospital. *Id.* The defendant made incriminating statements and police arrested him for murder and armed robbery. *Id.* During the subsequent trial, the court excluded the tape recordings but allowed the victim's brother to testify regarding the conversations and the defendant was ultimately convicted. *Id.* at 1518.

236. *Id.* at 1519.

noted that the right traditionally does not attach until "after an accusatory pleading is filed against the accused."[237] However, the court invoked *Escobedo* for the proposition that the right to counsel "may attach although no accusatory pleading is pending when the investigation of the crime focuses on that particular person."[238] The Eleventh Circuit noted the Supreme Court's subsequent limitation of *Escobedo*;[239] however, it went on to reason that DeAngelo's Sixth Amendment right to counsel *could have* attached if "the second conversation was accusatory in nature and solely intended to produce an audible taped confession that would ensure DeAngelo's conviction at trial."[240] The court stated that both *Miranda* and the Sixth Amendment are implicated when police seek to coerce a suspect into confessing, and concluded, "[t]he conduct of the police in this case could qualify as an effort to circumvent DeAngelo's sixth and fifth amendment rights after the police had decided to arrest him."[241]

### *B. The Point of Attachment Under the Massachusetts Constitution*

Thus far, the SJC has aligned itself lockstep with the Supreme Court in its assessment of when the right to counsel attaches.[242] Under article XII of the Massachusetts Declaration of Rights, the right to counsel attaches only once formal adversarial proceedings have commenced against a defendant.[243] The

237. *Id.*

238. *DeAngelo*, 781 F.2d at 1519 (citing Escobedo v. Illinois, 378 U.S. 478, 485 (1964)).

239. *Id.* (recognizing "[t]he reach of *Escobedo*, however, has been severely curtailed by the Supreme Court").

240. DeAngelo v. Wainwright, 781 F.2d 1516, 1520 (11th Cir. 1986).

241. *Id.* (directing "[o]n remand, these matters should be considered by the district court on the full record of DeAngelo's trial, followed by written findings of fact and conclusions of law").

242. *See* Commonwealth v. Anderson, 862 N.E.2d 749, 755-56 (Mass. 2007) (holding both Sixth Amendment and article XII confer right to counsel in order to protect unaided layman at critical confrontations with government after being charged); Commonwealth v. Torres, 813 N.E.2d 1261, 1275 (Mass. 2004) (holding defendant's Sixth Amendment right to counsel attached as result of indictment); Commonwealth v. Beland, 764 N.E.2d 324, 334-35 (Mass. 2002) (rejecting argument that prior to initial appearance in court lawyer can be ineffective because right to counsel has not attached); Commonwealth v. Smallwood, 401 N.E.2d 802, 806 (Mass. 1980) (holding complaint and arrest warrant does not equal an adversary criminal proceeding and right to counsel does not attach); *see also* Commonwealth v. Holliday, 882 N.E.2d 309, 325 (Mass. 2008) (holding issuance of complaint and arrest warrant does not trigger Sixth Amendment right to counsel); Commonwealth v. Mandeville, 436 N.E.2d 912, 918 (Mass. (1982) (holding issuance of complaint and arrest warrant not commencement of adversary proceeding); Commonwealth v. Simmonds, 434 N.E.2d 1270, 1273-74 (Mass. 1982) (declining to require article XII right to counsel arises at pre-indictment identification procedure).

243. *See* Commonwealth v. Jones, 526 N.E.2d 1288, 1292 (Mass. 1988). The *Jones* Court stated that:

> "[I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." The same is true of the right to counsel under art. 12 of the Declaration of Rights of the Massachusetts Constitution.

SJC has reasoned that the complaint and arrest warrant procedure does not qualify as an adversarial proceeding and nothing occurs at those stages that "could impair a defense."[244] Echoing the sentiments of the Supreme Court in *Kirby*, the SJC has concluded that the right to counsel only applies when the "adverse positions of the government and the defendant have solidified."[245] Despite its unwillingness to accelerate the point of attachment, on one occasion the SJC commented that under article XII, the right to counsel "attaches *at least* by the time of arraignment."[246] Yet a review of the court's decisions declining to alter the attachment rule reveals an almost blind deference to the Supreme Court's Sixth Amendment jurisprudence with little or no policy discussion supporting a legal conclusion that impacts the fortunes of numerous citizens every day.[247] As will be discussed below, such unexamined allegiance to the federal judiciary stands in stark contrast to the SJC's history of interpreting its own constitution on its own terms.[248]

### *C. The SJC's History of Providing Greater Protections Under the Massachusetts Declaration of Rights*

*"We need not move lock-step with Washington on every point. I think of the Supreme Court as describing a common base from which we can go up. We often agree with them. We are not trying to be contrary. We are, however, entitled to our own views, indeed constitutionally required to have them. There will likely be more to come in this area."*[249]

Despite its unwillingness, thus far, to depart from the Supreme Court in determining when the right to counsel attaches, the SJC has a rich and, at times, bold history of interpreting the Massachusetts Constitution as providing greater protection to those accused of a crime.[250] In fact, this trend towards exercising

*Id.* (citations omitted) (quoting Kirby v. Illinois, 406 U.S. 682, 688 (1972)).

244. *Smallwood*, 401 N.E.2d at 806, 884-85.

245. *Simmonds*, 434 N.E.2d at 1273. Adopting language from *Kirby*, the *Simmonds* Court stated, "it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Id.* (quoting *Kirby*, 406 U.S. at 689.

246. Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895, 903 (Mass. 2004) (emphasis added). The *Lavallee* Court stated that the right to counsel attached at arraignment, "or the point at which 'the government has committed itself to prosecute' and 'a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Id.* (quoting *Kirby*, 406 U.S. 682, at 689.

247. *See Beland*, 764 N.E.2d at 336. The *Beland* Court held, without explanation, that "[n]owhere in our decision in *Commonwealth v. Mavredakis*, did we create a limited right to the assistance of counsel prior to the imposition of adversary criminal proceedings." *Id.* (citations omitted).

248. Herbert P. Wilkins, *Remarks of Chief Justice Herbert P. Wilkins to Students at New England School of Law on March 27, 1997*, 31 NEW ENG. L. REV. 1205, 1213 (1997).

249. *Id.*; *see also* Commonwealth v. Gonsalves, 711 N.E.2d 108, 115 (Mass. 1999) (stating although Fourth Amendment replicates article XII, SJC not required to follow Supreme Court's interpretation).

250. *See generally* Grasso, *supra* note 29 (analyzing SJC's authority to independently interpret its own

sovereign independence has become increasingly common in recent years.[251]

Under fundamental principles of federalism, the SJC has the sovereign authority to independently interpret the Massachusetts Constitution.[252] Indeed, the SJC has "an obligation to make an independent determination of rights, liberties and obligations" that apply to its citizens.[253] The court can—and has—applied its own "standards of decency" when "essential fairness" dictates the result.[254] This interpretative autonomy exists even when the United States and Massachusetts provisions at issue have similar or identical language.[255] However, to not run afoul of the Supreme Court, the SJC's decision must clearly rely on independent and adequate state grounds.[256] The court has been far from timid in applying the fundamental principle that the Bill of Rights is a floor not a ceiling.[257] When it has provided additional safeguards, the SJC has,

state constitution); Ireland, *supra* note 29 (discussing various analytical methods by SJC in interpreting state constitution); Alexander Wohl, *New Life for Old Liberties-The Massachusetts Declaration of Rights: A State Constitutional Law Case Study*, 25 NEW ENG. L. REV. 177 (1990) (discussing use of state constitutions to grant greater liberties than under United States Constitution).

251. *See* Ireland, *supra* note 29, at 405-06.

252. Arizona v. Evans, 514 U.S. 1, 8 (1995) (recognizing state courts' ability to interpret state constitutions as affording greater rights than United States Constitution); Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) (reiterating rule that state courts need not follow majority ruling); Oregon v. Hass, 420 U.S. 714, 719 (1975) (claiming states may impose greater restrictions on police activity than under United States Constitution); *accord* Commonwealth v. Mavredakis, 725 N.E.2d 169, 177-78 (Mass. 2000) (noting SJC may interpret Massachusetts Constitution more expansively to protect citizens); Commonwealth v. Hodge, 434 N.E.2d 1246, 1249 (Mass. 1982) (recognizing general principle of interpreting state constitution beyond protection of United States Constitution).

253. Charles G. Douglas, III, *State Judicial Activism–The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1145 (1978) (quoting *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 285 (1973)) (citations and internal quotation marks omitted).

254. *See* Ireland, *supra* note 29, at 418-19 (noting SJC's attempts to establish constitutional standard for administering death penalty); *see also* Dist. Attorney v. Watson, 411 N.E.2d 1274, 1283 (Mass. 1980) (describing death penalty's inconsistency with standards of decency). "The death penalty, with its full panoply of concomitant physical and mental tortures, is impermissibly cruel under art. 26 when judged by contemporary standards of decency." *Watson*, 411 N.E.2d at 1283. The state legislature sought to overrule *Watson* by amending article XXVI, but a later SJC case concluded that the new death penalty statute violated article XII, and therefore struck it down. *See* Commonwealth v. Colon-Cruz, 470 N.E.2d 116, 129 (Mass. 1984); Ireland, *supra* note 29, at 419 (discussing how pleading guilty allows defendants to avoid death penalty); *see also* Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U. L. REV. 887, 921 (1980) (encouraging state judges to establish state constitutional rights of defendants).

255. Ireland, *supra* note 29, at 414-15. Ireland noted "[b]ut even when a provision of the Declaration of Rights is identical to a portion of the Federal Constitution, the mirrored language 'does not mean that the state constitution's framers intended to incorporate federal constitutional law into their own constitutions.'" *Id.* (quoting *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1497 (1982))

256. *See Evans*, 514 U.S. at 8; Michigan v. Long, 463 U.S. 1032, 1040-42 (1983).

257. *See* Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 390 (Mass. 1981). The *Moe* Court granted Massachusetts citizens greater protection in the right to choose an abortion under the Massachusetts Declaration of rights than provided by the Federal Constitution. *Id.*; *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948-49 (Mass. 2003) (holding Massachusetts Constitution prohibits use of gender distinctions regarding marriage, a question left unanswered by Supreme Court); *Watson*, 411 N.E.2d at 1283-85

with great pride, often made the point that the Massachusetts Constitution served as the progenitor for the United States Constitution.[258]

Most notably, the SJC has taken tremendous liberties in departing from the Supreme Court in the area of search and seizure.[259] On numerous occasions, the SJC has interpreted article XIV of the Massachusetts Declaration of Rights as providing more protection to the accused than the Fourth Amendment.[260]

In the 1980s, the SJC and the Supreme Court battled back and forth in the pivotal *Upton* trilogy.[261] Initially, the SJC flaunted its independence by mischaracterizing the probable cause standard required for the issuance of a search warrant under the Fourth Amendment, despite clear Supreme Court precedent to the contrary.[262] In light of the SJC's defiance, the Supreme Court overturned the decision and, in a per curiam opinion, remanded the case.[263] In his concurrence, Justice Stevens both challenged the SJC's gravitas and emboldened the court to rely on its own state constitution to come to a different conclusion.[264] The SJC accepted the challenge, and, in the final round of the *Upton* trilogy, rejected the Fourth Amendment's totality of the circumstances test as articulated in *Illinois v. Gates*,[265] relying exclusively on article XIV to come to its original conclusion.[266] In the aftermath of *Upton*, the SJC has become increasingly empowered to exercise its sovereign independence, interpreting article XIV to provide greater protection than the Fourth Amendment in a variety of contexts.[267]

(holding death sentence violates Massachusetts Constitution even if permissible under Federal Constitution); Commonwealth v. Soares, 387 N.E.2d 499, 515 (Mass. 1979) (holding peremptory challenges to eliminate racial groups from jury deprived defendant of fair trial).

258. *See* Grasso, *supra* note 29, at 319 (noting Massachusetts Constitution ratified seven years prior to Federal Constitution); Ireland, *supra* note 29, at 407 (explaining drafters of United States Constitution used Massachusetts Constitution as model).

259. *See* Grasso, *supra* note 29, at 334-40 (highlighting SJC's inconsistent article XIV jurisprudence and occasional infidelity to Supreme Court precedent).

260. *See id.* at 338 (holding article XIV provides more substantive protection than does Fourth Amendment); *see also infra* note 262 and accompanying text (dismissing SJC's Fourth Amendment jurisprudence as hypertechnical).

261. *See* Grasso, *supra* note 29, at 325-29 (discussing *Upton* trilogy).

262. *Compare* Commonwealth v. Upton, 458 N.E.2d 717, 720-21 (Mass. 1983) (rejecting, despite clear guidance from Supreme Court, totality of circumstances test), *rev'd*, 466 U.S. 727 (1984), *with* Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (promulgating totality of circumstances standard).

263. Massachusetts v. Upton, 466 U.S. 727, 732 (1984) (requiring totality of circumstances test for measuring probable cause under *Gates*).

264. *Id.* at 738 (Stevens, J., concurring). Justice Stevens argued that "[w]hatever protections Art. 14 does confer are surely disparaged when the Supreme Judicial Court of Massachusetts refuses to adjudicate their very existence because of the enumeration of certain rights in the Constitution of the United States." *Id.*

265. 462 U.S. 213 (1983).

266. Commonwealth v. Upton, 476 N.E.2d 548, 556 (Mass. 1985). The SJC concluded that article XIV "provides more substantive protection to criminal defendants than does the Fourth Amendment in the determination of probable cause." *Id.* In so holding, it rejected, the "'totality of the circumstances' test . . . espoused by a majority of the United States Supreme Court." *Id.*

267. *See generally* Commonwealth v. Balicki, 762 N.E.2d 290 (Mass. 2002) (declining to eliminate inadvertence requirement under article XIV in evaluation of plain view searches); Commonwealth v.

More recently, the SJC has displayed a willingness to interpret portions of article XII to provide greater protection than its cognate federal provisions, the Fifth and Sixth Amendments. Unlike the United States Constitution, the Massachusetts Constitution provides both the right to counsel (Sixth Amendment) and the right against compelled self-incrimination (Fifth Amendment) in one provision: article XII of the Declaration of Rights.[268] The SJC has deviated from the Supreme Court on the questions of whether refusal evidence is admissible,[269] whether pre-*Miranda* questioning taints subsequent statements,[270] whether physical evidence resulting from a *Miranda* violation is subject to the exclusionary rule,[271] whether a detainee must be informed of an attorney's efforts to render assistance on a pre-charge basis,[272] the quality of

Amendola, 550 N.E.2d 121 (Mass. 1990) (adopting automatic standing rule); Commonwealth v. Blood, 507 N.E.2d 1029 (Mass. 1987) (holding warrantless electronic surveillance violates article XIV). *Compare* Horton v. California, 496 U.S. 128, 141 (1990) (holding inadvertence not necessary component of plain view search), *and* California v. Hodari D., 499 U.S. 621, 624 (1991) (holding police chase not seizure until suspect apprehended), *with* Commonwealth v. Stoute, 665 N.E.2d 93, 97 (Mass. 1996) (determining actual acquiescence or physical control not required to establish stop under article XIV), *and* Commonwealth v. Gonsalves, 711 N.E.2d 108, 118 (Mass. 1999) (rejecting federal test under article XIV requiring only reasonable suspicion to justify exit order), *and* Commonwealth v. Ford, 476 N.E.2d 560, 563-64 (Mass. 1985) (requiring under article XIV exclusion of evidence seized during storage search not conducted pursuant to standard police procedures), *and* Commonwealth v. Panetti, 547 N.E.2d 46, 48 (Mass. 1989) (holding article XIV prohibits warrantless eavesdropping).

268. MASS. CONST. pt. 1, art. XII. Article XII provides:

> No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

*Id.*

269. *See* Commonwealth v. Conkey, 714 N.E.2d 343, 347 (Mass. 1999) (holding article XII bar applied when defendant failed to appear to provide fingerprints); Commonwealth v. McGrail, 647 N.E.2d 712, 715 (Mass. 1995) (extending refusal prohibition to field sobriety tests); *see also* Commonwealth v. Bergstrom, 524 N.E.2d 366, 375-76 (Mass. 1988) (requiring in-court presence of child witness to satisfy face-to-face provision of article XII). *Compare* South Dakota v. Neville, 459 U.S. 553, 564 (1983) (ruling no Fifth Amendment bar to introducing refusal evidence), *with* Op. of the Justices to the Senate, 591 N.E.2d 1073, 1078 (Mass. 1992) (determining evidence of refusal to take breathalyzer barred by article XII).

270. *See* Commonwealth v. Smith, 593 N.E.2d 1288, 1291-96 (Mass. 1992) (concluding any pre-*Miranda* statements presumptively taint subsequent statements under article XII). *Contra* Oregon v. Elstad, 470 U.S. 298, 312 (1985) (holding "immunity comes at a high cost to legitimate law enforcement activity").

271. *Compare* United States v. Patane, 542 U.S. 630, 636-37 (2004) (holding self-incrimination clause not implicated by admission of "physical fruit" of voluntary statement), *with* Commonwealth v. Martin, 827 N.E.2d 198, 204-06 (Mass. 2005) (adopting rule based on state constitution that physical evidence resulting from *Miranda* violation presumptively excludable).

272. Commonwealth v. Mavredakis, 725 N.E.2d 169, 179-80 (Mass. 2000) (holding police must cease questioning and inform suspect when counsel arrives). *Contra* Moran v. Burbine, 475 U.S. 412, 442 (1986)

immunity that is necessary to adequately protect a testifying witnesses' right against self-incrimination,[273] and the test for evaluating discriminatory juror selection.[274]

In referring to the right to counsel embedded in the text of article XII, the SJC has "long interpreted that text generously to recognize the 'fundamental . . . right of a person accused of a serious crime to have the aid and advice of counsel.'"[275] The court highlighted its distinction of granting indigent defendants the right to counsel years before the United States Supreme Court.[276] In spite of holding fast on the point of attachment, the SJC has on at least one occasion interpreted the right to counsel more expansively under article XII.[277] In another decision, discussing the Sixth Amendment and article XII, the court held that even if the issue were decided differently by the Supreme Court, a more expansive interpretation of the right to counsel is independently guaranteed by article XII.[278] In some instances, the SJC has not had the opportunity to reexamine issues related to the right to counsel on independent state constitutional grounds, despite a change in the federal law.[279] Recently, the court noted that the federal interpretation of a right-to-counsel issue had been settled but declined to consider the issue under article XII because it was not properly raised—perhaps foreshadowing that the issue might be decided differently under the Declaration of Rights.[280]

### *D.* Commonwealth v. Mavredakis*: The Birth of the Actualization Principle*

*"We prefer to view the 'role of the lawyer . . . as an aid to the understanding*

(holding failure to inform suspect of attorney's calls does not undermine *Miranda* waiver).

273. *See* Attorney Gen. v. Colleton, 444 N.E.2d 915, 918-19 (Mass. 1982) (concluding both use and transactional immunity required to properly protect individual's article XII rights). *Contra* Kastigar v. United States, 406 U.S. 441, 448 (1972) (holding Congress may pass immunity legislation to lawfully compel incriminating testimony).

274. *See* Commonwealth v. Soares, 387 N.E.2d 499, 515 (Mass. 1979) (prescribing test for evaluating discriminatory juror selection).

275. Commonwealth v. Murphy, 862 N.E.2d 30, 41 (Mass. 2007) (quoting Commonwealth v. Rainwater, 681 N.E.2d 1218, 1227 (Mass. 1997)).

276. *See id.* at 41-42 (noting SJC provides greater protection to indigent defendants); *see also Rainwater*, 681 N.E.2d at 1227 (reasoning SJC has long taken steps to provide defendants with representation), *abrogated by* Texas v. Cobb, 532 U.S. 162 (2001).

277. *Compare* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (concluding Sixth Amendment imposes no duty to inquire into propriety of multiple representation), *with* Commonwealth v. Hodge, 434 N.E.2d 1246, 1249 (Mass. 1982) (holding article XII does not require proof of actual prejudice for violative conflict of interest).

278. *See Murphy*, 862 N.E.2d at 41 (holding informant with general agreement with prosecutor constituted agent of government for purposes of deciding if right to counsel applied).

279. *See Rainwater*, 681 N.E.2d at 1227-30 (determining Sixth Amendment and article XII right to counsel applied to uncharged but inextricably intertwined criminal conduct). *But see* Cobb, 532 U.S. at 168 (2001) (rejecting inextricably intertwined exception under Sixth Amendment).

280. *See* Commonwealth v. Tlasek, 930 N.E.2d 170, 173 (Mass. App. Ct. 2010) (declining to address article XII right not argued by defendant). *But cf.* Montejo v. Louisiana, 129 S. Ct. 2079, 2091 (2009) (overruling precedent and holding valid *Miranda* waiver suffices to waive Sixth Amendment right to counsel).

*and protection of constitutional rights,' rather than 'as a nettlesome obstacle to the pursuit of wrongdoers.'"*[281]

In *Moran*, the United States Supreme Court was asked whether the Fifth Amendment created a duty of the police to inform a detained suspect, prior to any judicial adversarial proceedings, of any efforts by an attorney to speak and offer legal advice to the detainee.[282] The Court declined to extend the protections against compelled self-incrimination to that scenario, concluding, in part, that the *Miranda* warnings provided any necessary constitutional safeguards for detainees.[283] The Court also noted that the defendant's Sixth Amendment rights had not been compromised because the right to counsel had not yet attached.[284]

Fourteen years later, in *Commonwealth v. Mavredakis*,[285] the SJC—when confronted with the identical issue—came to the opposite conclusion as a matter of state constitutional law. The *Mavredakis* Court held that the failure to apprise a detainee of an attorney's efforts to render legal assistance violated article XII of the Massachusetts Declaration of Rights. Therefore, any subsequently obtained statements of the detainee were inadmissible against the individual. The SJC applied many of the factors previously recognized as justifying departure from federal precedent, including textual differences between article XII and the Fifth Amendment,[286] decisions made by state courts in other jurisdictions,[287] and Massachusetts jurisprudence preceding *Moran*.[288]

In holding that article XII provides greater protection than its federal counterpart, the majority noted that "there is an important difference between the *abstract right to speak with an attorney* mentioned in the *Miranda* warnings and a *concrete opportunity to meet* 'with an identified attorney actually able to provide at least initial assistance and advice.'"[289] Further clarifying the principles behind its decision, the SJC commented that, "the duty to inform a

281. Commonwealth v. Mavredakis, 725 N.E.2d 169, 179 (Mass. 2000) (quoting Moran v. Burbine, 475 U.S. 412, 430 (1986) (Stevens, J., dissenting)).

282. *Moran*, 475 U.S. at 415 (declining to require police to inform suspect of "attorney's efforts to reach him").

283. *See id.* at 422-23 (holding waiver valid as matter of law upon determination that suspect not coerced).

284. *See id.* at 425-26. The Court noted that "[t]he difficulty for respondent is that the interrogation sessions that yielded the inculpatory statements took place *before* the initiation of 'adversary judicial proceedings.'" *Id.* (quoting United States v. Gouveia, 467 U.S. 180, 192 (1984)).

285. 725 N.E.2d 169 (Mass. 2000).

286. *See id.* at 178 (concluding article XII "requires a higher standard of protection than that provided by *Moran*").

287. *See id.* at 176-77 & nn.13 & 14 (citing various state cases).

288. *Id.* at 176-80 (noting prior to *Moran*, SJC required informing suspects of attorney's efforts to offer advice). The court had not clarified, however, whether its decisions were based on the Federal or Massachusetts Constitution. *Id.*

289. *Mavredakis*, 725 N.E.2d at 178 (emphasis added) (quoting State v. Haynes, 602 P.2d 272, 278 (Or. 1979)).

suspect of an attorney's efforts to render assistance *is necessary to actualize the abstract rights listed in Miranda v. Arizona.*"[290] The SJC's view of the criminal defense attorney as the protector of constitutional rights shed some additional light on its perspective.[291]

While rejecting the Supreme Court's decision in *Moran* and concluding that article XII provides enhanced protection against self-incrimination, the SJC seized on the historical backdrop that led to the creation of the Massachusetts Declaration of Rights. The court recognized that "Article 12 and other similar State constitutional provisions evolved from a sense of disapproval of the inquisitorial methods of the Star Chamber and ecclesiastical courts in England."[292] Viewed in this historical context, the SJC noted that "[o]ur precedents have often interpreted art. 12 expansively."[293] Though the court was not asked to address whether the conduct of the police also ran afoul of the defendant's right to counsel under article XII, in *Commonwealth v. Beland*[294] the SJC held—without analysis—that *Mavredakis* did not create an independent right to counsel during pre-charge interrogations.[295] Recently, however, the SJC reaffirmed the reasoning of *Mavredakis* and arguably extended the reach of article XII.[296]

### *E. The History and Methodology of the SJC's Broad Interpretation of the Massachusetts Declaration of Rights: Reexamining the Point of Attachment Under Article XII*

*"To force an accused to stand alone against the full force and investigative powers of organized society, until he is actually charged with the commission of the crime, is an outrageous injustice."*[297]

The SJC has relied on a series of factors when interpreting the Massachusetts Constitution more expansively than its federal counterpart.[298] These include: textual differences between the parallel provisions of the two constitutions;[299] the history of the Massachusetts Constitution;[300] prior

290. *Id.* at 179 (emphasis added).

291. Commonwealth v. Mavredakis, 725 N.E.2d 169, 179 (Mass. 2000) (quoting Moran v. Burbine, 475 U.S. 412, 433 (1986) (Stevens, J., dissenting)).

292. *Id.* at 178.

293. *Id.*

294. 764 N.E.2d 324, 335 (Mass. 2002).

295. *Id.* at 335 (rejecting argument that *Mavredakis* creates right to counsel before adversary proceedings begin).

296. *See generally* Commonwealth v. McNulty, 937 N.E.2d 16 (Mass. 2010) (requiring police relay legal advice to suspect when advice bears "directly" right to counsel).

297. Commonwealth v. Richman, 320 A.2d 351, 361 (Pa. 1974) (Eagen, J., concurring).

298. *See generally* Ireland, *supra* note 29 (discussing SJC methodology in constitutional analysis).

299. *See* Grasso, *supra* note 29, at 329 n.78 (noting textual differences between Federal and Massachusetts Constitutions); Ireland *supra* note 29, at 412-15 (analyzing construction of textual differences between Federal and Massachusetts Constitutions).

interpretations of the relevant state provision (especially in areas where the law was settled in Massachusetts before any announced change by the Supreme Court);[301] and jurisprudence from sister states confronted with similar issues and their rationales for departing from the Federal Constitution.[302] Yet perhaps most profoundly, the SJC has occasionally looked to "evolving standards of decency" as grounds for providing greater protections to Massachusetts citizens in matters of great pubic importance.[303]

The SJC has not applied the factors in a rigid fashion. It has not required the presence of any or all of the factors as a prerequisite for a more expansive constitutional interpretation; nor does it accord additional weight to any of the identified factors. Indeed, current Chief Justice Roderick Ireland has aptly characterized the approach as blending methodologies.[304]

### *1. Textual Differences*

The SJC has specifically analyzed the semantic differences between the state and federal constitutions and explained that those differences are meaningful in that they provide greater protections in Massachusetts. Two examples are the SJC's treatment of an accused's confrontation rights and the admissibility of refusal evidence.[305]

In the context of an accused's confrontation rights, article XII requires that "every subject shall have a right . . . to meet the witnesses against him face to face."[306] The Sixth Amendment's leaner language affords the accused the right "to be confronted with the witnesses against him."[307] Although the concepts are fundamentally the same, the distinct words "face to face" provided the legal lynchpin for the SJC to decide that confrontation under article XII requires the actual presence of the witness in the courtroom, affording the defendant an opportunity to observe and literally face his accuser.[308]

300. *See* Ireland, *supra* note 29, at 409-11 (outlining role of history in Massachusetts constitutional interpretation).

301. *See* Commonwealth v. Mavredakis, 725 N.E.2d 169, 177 (Mass. 2000) (looking to prior interpretation of Massachusetts Constitution).

302. *See* Grasso, *supra* note 29, at 329 (noting sister state jurisprudence); Ireland, *supra* note 29, at 416-18 (explaining same).

303. *See* Ireland, *supra* note 29, at 417-18; *see also* Dist. Attorney v. Watson, 411 N.E.2d 1274, 1283 (Mass. 1980) (exemplifying SJC's willingness to reach different results from Supreme Court).

304. *See* Ireland, *supra* note 29, at 409 (explaining SJC uses textual analysis, history, common law and comparison to other states in analysis).

305. *Compare* Commonwealth v. Amirault, 677 N.E.2d 652, 661-63 (Mass. 1997) (describing complex analysis of language and historical roots), *and* Commonwealth v. Bergstrom, 524 N.E.2d 366, 371 (Mass. 1988) (noting Massachusetts first to use face-to-face language), *with* Maryland v. Craig, 497 U.S. 836, 846 (1990) (announcing actual face-to-face encounter not absolute requirement).

306. MASS. CONST. pt. 1, art. XII.

307. U.S. CONST. amend. VI.

308. *See Amirault*, 677 N.E.2d at 662 (requiring witness give testimony to accused's face); *Bergstrom*, 524 N.E.2d at 371 (declaring face to face means physical presence in court).

In analyzing the admissibility of refusal evidence, the SJC has determined that under article XII the principles against compelled self-incrimination are more comprehensive due to linguistic differences. The Fifth Amendment states: "[N]o person . . . shall be compelled in any criminal case to be a witness against himself," while article XII provides that no person shall "be compelled to accuse, or furnish evidence against himself."[309] The SJC has concluded, based in great part on the textual variations, that when a person is confronted with the choice between refusing to acquiesce to a request by authorities or complying, which runs the risk of providing incriminating evidence, either alternative is capable of furnishing incriminating evidence.[310] Therefore, in Massachusetts state courts, a refusal to provide evidence is inadmissible.[311]

However, the SJC has, at times, when interpreting its own constitution more expansively, merely mentioned the textual differences without undertaking any in-depth analysis as to why the differences required it to reach a contrary result.[312] For example, in deciding that the self-incrimination clause of article XII, unlike the Fifth Amendment, required the police to inform a custodial suspect of an attorney's efforts to speak to him, the SJC pointed out that "[t]he text of art. 12, as it relates to self-incrimination, is broader than the Fifth Amendment."[313] However, the court omitted any explanation of what specific words in article XII, not included in the Fifth Amendment, compelled it to reach a different result.[314] Therefore it is apparent that the mere presence of minor textual differences can support providing expanded rights.[315] Not

309. U.S. CONST. amend. V; MASS. CONST. pt. 1, art. XII.

310. *See* Commonwealth v. Conkey, 714 N.E.2d 343, 347 (Mass. 1999) (noting situation presents two alternatives with potential to furnish incriminating evidence); Op. of the Justices to the Senate, 591 N.E.2d 1073, 1078 (Mass. 1992) (stating proposed legislation authorizing admission of refusal evidence violates state constitution). *But see* South Dakota v. Neville, 459 U.S. 553, 564 (1983) (characterizing choice as difficult for suspect but not actual coercion).

311. *See generally* Herbert P. Wilkins, *The State Constitution Matters*, BOS. B.J., Dec. 2000, at 4 (discussing differences between state constitutions and Federal Constitution). Although the SJC has determined that refusal evidence is inadmissible based on a more expansive reading of article XII, it has declined to hold that a person has the constitutional right to refuse. *Id.*

312. *See* Commonwealth v. Mavredakis, 725 N.E.2d 169, 178 (Mass. 2000) (describing broader interpretation of article XII). The SJC stated that "[b]ased on the textual differences between art. 12 and the Fifth Amendment, we have 'consistently held that art. 12 requires a broader interpretation [of the right against self-incrimination] than that of the Fifth Amendment.'" *Id.* (alteration in original) (quoting Op. of the Justices to the Senate, 591 N.E.2d 1073, 1078 (Mass. 1992)); *cf.* Commonwealth v. Martin, 827 N.E.2d 198, 202-05 (Mass. 2005) (stating textual differences between article XII and Sixth Amendment not relevant in providing greater protection).

313. *See Mavredakis*, 725 N.E.2d at 178.

314. *See id.* at 178-79 (omitting possible distinctions between article XII and Fifth Amendment).

315. *See* Ireland, *supra* note 29, at 414-15 (discussing SJC's reliance on other factors to justify differing conclusions). The SJC has departed from the Supreme Court without mentioning or relying on textual differences between the two constitutions. *See, e.g.*, Commonwealth v. Gonsalves, 711 N.E.2d 108, 111-12 (Mass. 1999) (requiring police officer to have reasonable doubt under article XIV); Commonwealth v. Amendola, 550 N.E.2d 121, 125-26 (Mass. 1990) (retaining concept of automatic standing under article XIV despite contrary Supreme Court decisions); Commonwealth v. Hodge, 434 N.E.2d 1246, 1248 (Mass. 1982)

surprisingly, the SJC's approach to resolving questions of whether the Massachusetts Constitution provided greater protection has occasionally engendered controversy and criticism.[316]

The SJC's history of using textual differences between the state and federal constitutions as grounds for providing greater protections in Massachusetts supports a broader interpretation of the right to counsel under article XII. The right to counsel provisions contained in article XII and the Sixth Amendment contain stark textual differences.[317] The Sixth Amendment begins "In all criminal prosecutions" and ends by stating that the accused shall enjoy the right "to have the Assistance of Counsel for his defence."[318] In contrast, article XII begins, "No subject shall be held to answer for any crimes or offence," and continues, "every subject shall have a right to . . . be fully heard in his defence by himself, or his council, at his election."[319]

There are several differences between the two provisions that are worth noting. First, the language "in all criminal prosecutions" is not contained in article XII. The absence of this phrase supports the inference that the drafters

(holding defendant entitled to new trial under protections of article XII); Dist. Attorney v. Watson, 411 N.E.2d 1274, 1285 (Mass. 1980) (holding capital punishment cruel or unusual under article XXVI). *Compare* Commonwealth v. Stoute, 665 N.E.2d 93, 97 (Mass. 1996) (holding pursuit implicates article XIV), *with* California v. Hodari D., 499 U.S. 621, 625 (1991) (holding pursuit not seizure under Fourth Amendment when subject does not yield). The *Hodari* Court stated that "[a]n arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority." *Id.* at 626.

316. *See* Grasso, *supra* note 29, at 329-32, 340-42; Ireland, *supra* note 29, at 408-09, 418-19. The exercise of independent judgment based on state constitutional grounds has been labeled "judicial chauvinism." *See* Commonwealth v. Gonsalves, 711 N.E.2d 108, 123 (Mass. 1999) (Fried, J., dissenting). The criticism has decried the practice as based on pure policy judgments that are better left to the legislature, rather than on sound constitutional principles. *Id.* at 118-22. Interpreting the Massachusetts Declaration of Rights more broadly has been criticized as a proclamation by "fiat," rather than based on sound legal reasoning. Ireland, *supra* note 29, at 408. Dissenting in the SJC's landmark opinion that upheld the concept of automatic standing under article XIV, Justice Nolan commented that "[i]t seems that, whenever we wish to expand the rights of defendants in criminal cases, we simply invoke the Massachusetts Constitution without so much as a plausible argument that the Massachusetts Constitution requires the expansion." Commonwealth v. Amendola, 550 N.E.2d 121, 127 (Mass. 1990) (Nolan, J., dissenting); *cf.* Dist. Attorney v. Watson, 411 N.E.2d 1274, 1294-1302 (Mass. 1980) (Quirico, J., dissenting).

317. *See* Commonwealth v. Mavredakis, 725 N.E.2d 169, 177 (Mass. 2000). Article XII embodies several constitutional principles, including the right to counsel and the right against compelled self-incrimination. *Id.* In contrast, the analogous federal principles are found in separate provisions, the Fifth and Sixth Amendment in the United States Constitution. *Id.*

318. U.S. CONST. amend. VI. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Id.*

319. MASS. CONST. pt. 1, art. XII; *see also supra* note 312 and accompanying text (discussing interpretation of article XII).

of the Massachusetts Constitution were not necessarily limiting themselves to a formal prosecution, but rather envisioned a less restrictive view about when an individual's right to counsel might apply. Indeed, the Supreme Court pointed to the language "in all criminal prosecutions" as grounds for holding that the Sixth Amendment right to counsel does not attach until the commencement of criminal proceedings.[320]

Second, the language "shall not be held" is omitted from the Sixth Amendment. Conversely, the inclusion of the words "shall not be held" in article XII suggests the possibility of a moment in time prior to the commencement of a formal prosecution where certain rights may germinate. The plain meaning of the word "held" in this context gives rise to the inference that anyone being held or detained by authorities—even prior to a formal prosecution—is entitled to some constitutional protections.

Third, the words "the accused" do not appear anywhere in article XII.[321] Rather, the drafters of the Declaration of Rights instead chose to use the word "subject," suggesting a more expansive class of individuals to be protected.[322]

Finally, only article XII contains the broader language "or council at his election." This phrase has never been analyzed in this context, and it is not explicitly limited by any procedural constraints or prerequisites such as the initiation of formal judicial proceedings.

The qualifier contained in article XII "for his defence" could be interpreted to limit the right to counsel to a formal prosecution.[323] However, even if the significant differences in wording alone do not conclusively speak to an earlier point of attachment, the differences are significant. In combination with other justifications, they support a departure. Further, as discussed above, the SJC has relied on the mere existence of textual differences as a justification for interpreting the Declaration of Rights more expansively than the Bill of Rights.[324]

### *2. Sister States*

Several states have recognized that the right to counsel attaches at the time

320. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 198 (2008). The *Rothgery* Court held that "[t]he Sixth Amendment right of the accused to assistance of counsel in all criminal prosecutions is limited by its terms: it does not attach until a prosecution is commenced." *Id.* (internal quotation marks omitted) (quoting U.S. CONST. amend. VI; McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)).

321. In fact, the inclusion of the words "the accused" has played a significant role in the Supreme Court's attachment jurisprudence. *See id.*

322. *See Mavredakis*, 725 N.E.2d at 178 (noting standard principle of constitutional interpretation that words presumed to be "chosen advisedly").

323. *See* United States v. Wade, 388 U.S. 218, 226-27 (1967) (noting similar language in Sixth Amendment interpreted to limit right to counsel).

324. *See supra* notes 312-315 and accompanying text (discussing broader interpretation of Massachusetts Constitution).

of arrest, either as a matter of statute or state constitutional law.[325] Most compelling is the Pennsylvania Supreme Court's decision in *Commonwealth v. Richman*.[326] In that case, the defendant was convicted of burglary and rape following a warrantless arrest.[327] Subsequent to his arrest but prior to the arraignment, the defendant waived his right to counsel and was identified in a lineup.[328] He was ultimately convicted and sought review of the lineup, claiming that his Sixth Amendment right to counsel had attached at the pre-indictment lineup and that his waiver was invalid.[329] A majority of the Pennsylvania Supreme Court held that the defendant had a Sixth Amendment right to counsel at a pretrial lineup following an arrest.[330] The court recognized that that the Supreme Court held in *Kirby* that "the Sixth Amendment right to counsel applies only to lineups conducted 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment.'"[331] However, the court reasoned that "*Kirby* does not establish an all inclusive rule; rather, the line to be drawn depends upon the procedure employed by each state."[332] The court concluded that it could, under *Kirby*'s analysis, "draw[] the line for determining the initiation of judicial proceedings in Pennsylvania at the arrest."[333]

In a concurring opinion, Justice Eagen agreed with the majority's decision to extend the right to counsel but "totally disagree[d]" with the majority's analysis of *Kirby*.[334] In an eloquent passage, Justice Eagen articulated why a state's highest court might part ways with federal jurisprudence when justice so requires:

> This Court has it well within its power to establish a higher standard of constitutional protection than that afforded by the United States Supreme Court where the rights of an individual are threatened. I deem this an appropriate case to exercise our power, and choose to do so for the following reasons. The artificial distinction drawn by the plurality in *Kirby*, between post-charge and pre-charge lineups is unwise and infringes upon the protections society should grant an accused. *To force an accused to stand alone against the full force and investigative powers of organized society, until he is actually charged with the commission of the crime, is an outrageous injustice.* The accused's liberty is

325. *See, e.g.*, Phillips v. State, 612 So. 2d 557, 559 (Fla. 1992); State v. Matthews, 408 So. 2d 1274, 1277 (La. 1982); Jimpson v. State, 532 So. 2d 985, 988 (Miss. 1988); State v. Cobb, 243 S.E.2d 759, 762 (N.C. 1978); Commonwealth v. Richman, 320 A.2d 351, 359-61 (Pa. 1974).

326. 320 A.2d 351 (Pa. 1974).

327. *Id.* at 361.

328. *Id.*

329. *Id.*

330. *Richman*, 320 A.2d at 353.

331. *Id.* (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

332. Commonwealth v. Richman, 320 A.2d 351, 353 (Pa. 1974).

333. *Id.*

334. *Id.* at 358 (Eagen, J., concurring).

> equally jeopardized by a pre-charge lineup, as it is by a post-charge lineup. Thus, I consider the line as laid down in *Kirby* to be arbitrary and unfounded. To follow the constitutional mandate of *Kirby* would be to encourage the law-enforcement personnel of this Commonwealth to hastily conduct all lineups prior to the institution of the "adversary judicial criminal proceedings." Thus, it is my strong feeling that the superior procedure is to grant the right to counsel at all lineups subsequent to arrest, with the exception of immediate on-the-scene identifications. Moreover, this opinion, although not in accord with *Kirby* is consistent with that opinion, in that: at the arrest the accused is, in actuality, informed for the first time of the charges for which he is being investigated and is the initial point in our "accusatory" criminal process. Hence, it is a meaningless distinction to postpone the granting of the right to counsel at lineups until the "official" initiation of the judicial criminal process.[335]

The Supreme Court of Mississippi has also consistently held as a matter of state constitutional law that the right to counsel attaches as early as the issuance of an arrest warrant.[336] In *Jimpson v. State*,[337] the defendant was the sole suspect in the shooting of a bank employee, in spite of conflicting descriptions of the perpetrator and a two-day lapse between the crime and the arrest.[338] Over the course of forty-eight hours following the defendant's arrest, police secured a *Miranda* waiver, interrogated him, elicited a signed confession, and subjected him to a lineup where two witnesses identified him—all without providing him with a lawyer.[339]

Though it denied his appeal, the Supreme Court of Mississippi held as a matter of state constitutional law that the defendant's right to counsel had attached during the pre-indictment lineup.[340] The court began its analysis by reaffirming that under Mississippi law the right to counsel attaches "after arrest

335. *Id.* at 361 (emphasis added) (citations omitted).

336. *See, e.g.*, Jimpson v. State, 532 So. 2d 985, 988 (Miss. 1988) (establishing point at which right to counsel attaches); Livingston v. State, 519 So. 2d 1218, 1220-21 (Miss. 1988) (concluding appellant's right to counsel attached); Nixon v. State, 533 So. 2d 1078, 1087-88 (Miss. 1987) (holding right to counsel had not attached), *overruled on other grounds by* Wharton v. State, 734 So. 2d 985 (Miss. 1998). *See generally* Page v. State, 495 So. 2d 436 (Miss. 1986); Cannaday v. State, 455 So. 2d 713 (Miss. 1984).

337. 532 So. 2d 985 (Miss. 1988).

338. *See id.* at 987. The perpetrator shot the victim at close range in the back of the neck, severing her spinal cord and leaving her permanently paralyzed. *Id.*

339. *See id.* at 987-89 (detailing arrest, interrogation, and lineup).

340. *Id.* at 988-89 (finding harmless error in denial of right to counsel). The *Jimpson* court, quoting directly from Supreme Court precedent, stated that the defendant's right to counsel was "so unimportant and insignificant that [it] may, consistent with the federal constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 989 (quoting Chapman v. California, 386 U.S. 18, 21 (1967)). The court opined that the officers' conduct amounted to a "technical violation of [defendant's] Sixth Amendment right to counsel," which the court deemed harmless because "the amount of evidence favoring conviction was overwhelming." *Id.*

and at the point when the initial appearance 'ought to have been held.'"[341] The court also cited its own precedent extending attachment to "as early as the issuance of a warrant."[342] The court then concluded that the defendant's right to counsel had attached because he was in custody pursuant to an arrest warrant and should have been indicted by the time police conducted the lineup.[343] The court articulated the policy concerns that justify broader protections for suspects in the pre-charge context, reasoning that safeguards are necessary "to assure that a defendant 'need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.'"[344]

Justice Eagen's concurrence in *Richman* and the Supreme Court of Missouri's opinion in *Jimpson* demonstrate the ability, and sometimes even the necessity, of state courts to extend the right to counsel to the time of arrest. Both opinions grant broader protections as a matter of state constitutional law.[345] Both opinions highlight the patent unfairness of forcing an accused to "stand alone" when faced with determined and experienced investigators.[346] Both opinions also recognize the arbitrary nature of the Supreme Court's decision in *Kirby*, which held that the right to counsel only attaches "at or after the initiation of adversary judicial criminal proceedings."[347] Finally, both opinions implicitly acknowledge that *Miranda* simply does not provide sufficient protections to suspects prior to formal charge or indictment. In both *Jimpson* and *Richman*, police read the defendants their *Miranda* rights, the defendants signed written waivers without counsel, and in both cases, the

341. *Jimpson*, 532 So. 2d at 988 (quoting May v. State, 524 So. 2d 957, 967 (Miss. 1988)).

342. Cannaday v. State, 455 So. 2d 713, 722 (Miss. 1984).

343. *See* Jimpson v. State*,* 532 So. 2d 985, 988-89 (Miss. 1988). The court concluded:

> There is no dispute in the record that Jimpson was in custody as the result of an arrest warrant when this lineup was held. It thus seems clear that Jimpson's right to counsel had attached by the time he was placed in the lineup. The point when the initial appearance ought to have been held was well past.

*Id.*

344. *Id.* at 989 (quoting United States v. Wade, 388 U.S. 218, 226 (1967)). The court went on to conclude that "[a]n accused enjoys the right to counsel at a lineup because there exists the possibility of irremediable prejudice if counsel is not afforded." *Id.*

345. *See id.* (discussing state cases where right to counsel attached early); Commonwealth v. Richman, 320 A.2d 351, 361 (Pa. 1974). *Jimpson* is particularly noteworthy because article III, section 26, of the Mississippi Constitution, like article XII of the Massachusetts Declaration of Rights, encompasses protections guaranteed by both the Fifth and Sixth Amendments to the United States Constitution. *See* MISS. CONST. art. III, § 26 (providing "[i]n all criminal prosecutions the accused shall have a right to be heard by himself or counsel . . . and he shall not be compelled to give evidence against himself").

346. *See Jimpson*, 532 So. 2d at 989 (quoting *Wade*, 388 U.S. at 226) (explaining reasoning); *Richman*, 320 A.2d at 363 (Eagen, J., concurring) (emphasizing injustice of forcing accused to face investigators alone).

347. Kirby v. Illinois, 406 U.S. 682, 689 (1972); *see also Jimpson*, 532 So. 2d at 989 (stating right to counsel meant to attach at any stage of the prosecution, even if informal); *Richman*, 320 A.2d at 361 (Eagen, J., concurring) (characterizing distinction between informal and official proceedings as meaningless).

decision proved disastrous.[348] In seeking to grant broader protections under their respective state constitutions, Justice Eagen and the court in *Jimpson* part ways with the Supreme Court's erroneous conclusion that only after arraignment does a defendant find himself "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[349] As Justice Eagen wisely concluded, "[t]o force an accused to stand alone against the full force and investigative powers of organized society, until he is actually charged with the commission of the crime, is an outrageous injustice."[350]

Furthermore, the highest court of at least one foreign nation—Canada—has interpreted its constitution to provide detainees the opportunity to consult with a lawyer prior to a waiver decision in all instances.[351]

### *3. Historical Context*

The SJC has often interpreted the state constitution through the lens of Massachusetts' unique history.[352] In particular, the court has repeatedly recognized that the Declaration of Rights was enacted in response to invasive police practices perpetrated by British colonial authorities—practices that ultimately led to revolution.[353] The SJC has used this fear of unrestrained government invasion as justification for granting broader protections under the Massachusetts Constitution.[354] Such a historical perspective is equally applicable to a defendant's right to counsel at the time of arrest—or at the latest prior to any custodial interrogation. Indeed, there are few practices more invasive than the arrest, detention, and custodial interrogation of an individual by government agents. Moreover, while the SJC has recognized the right of a suspect under article XII to speak with an identified, retained counsel prior to interrogation, the court has not extended that same protection to defendants

348. *See Jimpson*, 532 So. 2d at 987 (stating "[t]he appellant signed a waiver form, and his written and signed confession was introduced into evidence"); *Richman*, 320 A.2d at 352 (noting defendant "signed a written waiver of counsel, and at about 2:00 P.M. he was placed in a six-man lineup where the complaining witness identified him as her assailant").

349. *Kirby*, 406 U.S. at 689.

350. *See Richman*, 320 A.2d at 361 (Eagen, J., concurring).

351. *See* Constitution Act, 1982, c.11, sch. B (U.K.) (outlining rights of detainees). The Canadian Supreme Court has ruled under its Charter of Rights that a detainee is immediately entitled to contact information of a free lawyer to obtain advice prior to having to decide whether to exercise or waive his right to remain silent. *See* R. v. Brydges, [1990] 1 S.C.R. 190 (Can.). That interpretation is based on specific text that supports the position. *See* Ashikawa, *supra* note 15, at 245-46; *see also id.* at 254 (discussing Canadian detainees' rights).

352. *See* Ireland, *supra* note 29, at 410-11 (describing historical context surrounding drafting of Massachusetts Constitution and Declaration of Rights).

353. *See id.* (discussing SJC's analysis of British search procedures).

354. *See* Commonwealth v. Mavredakis, 725 N.E.2d 169, 178 (Mass. 2000) (addressing evolution of state constitutional provisions). The *Mavredakis* Court stated that "Article 12 and other similar State constitutional provisions evolved from a sense of disapproval of the inquisitorial methods of the Star Chamber and ecclesiastical courts in England." *Id.*

who do not have immediate access to a lawyer.[355] In light of this historical background, the continued use of coercive interrogation tactics and the use of false confessions against indigent defendants, the SJC should extend the right to counsel to the time of arrest. The unfairness inherent in any custodial interrogation, in light of *Miranda*'s failure, is no less inquisitorial when it happens before a formal charge exists.

### *4. Contemporary Standards of Decency*

*"A constitutional provision 'is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had therefore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.'"*[356]

Perhaps the most relevant and malleable method of interpretation (and the most striking exercise of sovereign independence) employed by the SJC to justify providing greater protection to Massachusetts citizens is the so-called "contemporary standards of decency" analysis.[357] This analysis was most prominent in *District Attorney v. Watson*,[358] where the court held that the state's capital punishment statute violated article XXVI's prohibition of cruel and unusual punishment.[359] The SJC conceded that, "at the time of its adoption, art. 26 was not intended to prohibit capital punishment. Capital punishment was common both before and after its adoption."[360] The court also noted that there was no public consensus in favor of abolishing the death penalty.[361] The majority opinion was not based on any textual differences between article XXVI and the Eighth Amendment, nor was it based on the persuasiveness of other states' jurisprudence, but rather it was based on the SJC's independent assessment of decency.[362]

Yet the court boldly defied both history and popular opinion, stating that article XXVI "like the Eighth Amendment, 'must draw its meaning from the

355. *See id.* (discussing article XII); *cf.* Commonwealth v. Beland, 764 N.E.2d 324, 326 (Mass. 2002) (rejecting idea of lawyer's ineffectiveness prior to initial appearance because right to counsel not yet attached). Although not the intended consequence, the practical application of *Mavredakis* disadvantages the indigent because a more affluent individual is much more likely to have immediate access to a lawyer.

356. Dist. Attorney v. Watson, 411 N.E.2d 1274, 1281 (1980) (quoting Furman v. Georgia, 408 U.S. 238, 263-64 (1972) (Brennan, J., concurring)).

357. *See* Ireland, *supra* note 29, at 419 (discussing court's broader interpretation of article XXVI of Massachusetts Declaration of Rights).

358. 411 N.E.2d 1274 (Mass. 1980).

359. *See id.* at 1284 (noting death penalty "impermissibly cruel" under article XXVI).

360. *Id.* at 1281.

361. *See id.* at 1282 (noting no public unanimity favoring or opposing capital punishment).

362. *Cf. Watson*, 411 N.E.2d at 1289 (Liacos, J., concurring) (noting possibility of textual difference justifying SJC departure). There is in fact a textual difference that could have been articulated as another justification for departing from the Supreme Court on the issue. *Id.*

evolving standards of decency that mark the progress of a maturing society.'"[363] The court noted that "[f]rom the beginning of 1948 until the end of 1972 . . . no person was executed in this Commonwealth. The death sentences of forty-three persons were commuted or reduced by executive action."[364] The court also reasoned that the death penalty "may cruelly frustrate justice," because "[d]eath is the one punishment from which there can be no relief in light of later developments in the law or the evidence."[365] The court concluded that the physical pain incident to the procedure, as well as its ultimate infringement on the individual's "fundamental" right to life, amounted to cruel and unusual punishment.[366] The SJC was so convinced of the rightness of its decision that it took on the state legislature in *Commonwealth v. Colon-Cruz*[367] when the latter sought to supersede *Watson* by amending the state constitution.[368] The SJC struck back, holding that the new death penalty statute violated article XII's self-incrimination clause "because it provided that only those defendants who pleaded not guilty and demanded a jury trial were at risk of being put to death. Those who pleaded guilty avoided the death penalty."[369]

*Watson* and *Colon-Cruz* demonstrate that the SJC will challenge history, public opinion, and even the state legislature when its independent assessment of "contemporary standards of decency" so require. Even if this interpretative method serves, in part, as a proxy for the SJC's independent policy determinations, the methodology remains legally and conceptually viable.[370] This bold interpretation also applies to the attachment of a person's right to counsel when arrested by police and prior to any custodial interrogation. While other analysis discussed above supports the extension of the right to counsel under article XII, there is admittedly no direct evidence that the framers of the Massachusetts Constitution envisioned such a procedure. Nor is there a consensus of public opinion supporting such an interpretation; only a handful of jurisdictions currently interpret the right to counsel as attaching at arrest.[371] Yet the court's awareness of the dangers of custodial interrogation—and the deficiencies of federal safeguards as interpreted by the Supreme Court—is

363. *See id.* at 1281 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

364. Dist. Attorney v. Watson, 411 N.E.2d 1274, 1282 (Mass. 1980).

365. *Id.*

366. *See id.* at 1282-83 (concluding "[t]he mental agony is, simply and beyond question, a horror").

367. 470 N.E.2d 116 (Mass. 1984).

368. *See* Ireland, *supra* note 29, at 419 (noting sensitive constitutional issues raised by capital punishment). In 1982, the legislature amended article XXVI to read, "No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death." *Id.*

369. Alan Rogers, *The Death Penalty and Reversible Error in Massachusetts*, 6 PIERCE L. REV. 515, 531 (2008) (describing *Colon-Cruz* Court's reasoning).

370. *Cf.* Dist. Attorney v. Watson, 411 N.E.2d 1274, 1298 (Mass. 1980) (Quirico, J., dissenting) (criticizing majority for using "essentially, a moral [analysis] rather that [sic] a legal one").

371. *See* N.C. GEN. STAT. § 7A-451(b) (2009) (stating right to counsel "begins as soon as feasible," and listing proceedings where right guaranteed). *See generally supra* Part III.E.2.

evident in its jurisprudence.[372] If the SJC took a fresh look at the attachment question in light of *Miranda*'s failure to adequately protect the article XII right against self-incrimination, it would be clear that advancing the point of attachment is a viable and necessary solution. Indeed, the discussion of *Watson* here is particularly apt, as time has repeatedly shown that an uncounseled confession is most often fatal to an individual's defense.[373] In light of the continued proliferation of false and coerced confessions, coupled with the complete failure of *Miranda* and subsequent Supreme Court jurisprudence to adequately protect the constitutional rights of those in police custody, the SJC can and should rely on "contemporary standards of decency" to interpret article XII more broadly and provide counsel as soon as practicable after arrest. At the very least, representation should be available prior to the commencement of custodial interrogation.

In *Watson*, the SJC embraced then-current social science literature to support its opinion of decency.[374] Similarly, if *Miranda*'s purpose was "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process" then social science has unquestionably established *Miranda*'s failure to fulfill that purpose.[375] Although each of *Miranda*'s pitfalls discussed above is amply supported by the literature, the proliferation of false confessions in particular lends itself to the SJC's analysis in *Watson*. In almost all instances, the possibility of convicting an innocent person, based on a false confession, would be eliminated if that individual had the article XII right to actually speak with a lawyer prior to any custodial interrogation.

Whether it is couched as an independent notion of what is decent or a "different measure of what essential fairness requires,"[376] the methodology is a constitutionally permissible tool for the expansion of individual rights when a reevaluation of relevant policy concerns supports a change in jurisprudence. It is also worth noting that the majority in *Watson* failed to mention, let alone rely on, any textual differences between the Eighth Amendment and article XXVI. Similarly, most of the other factors relied on by the SJC in later cases,

372. *See* Commonwealth v. Mavredakis, 725 N.E.2d 169, 178 (Mass. 2000) (discussing scope of *Miranda*). The *Mavredakis* court noted that "there is an important difference between the abstract right to speak with an attorney mentioned in the *Miranda* warnings, and a concrete opportunity to meet 'with an identified attorney actually able to provide at least initial assistance and advice.'" *Id.* (quoting State v. Haynes, 602 P.2d 272, 278 (Or. 1979)).

373. *See* Fiandach, *supra* note 12, at 29 (describing exonerations of convicts based on false confessions and police misconduct). Fiandach goes on to state that "in the first 123 exonerations by the Innocence Project, 33 or nearly 27 percent, involved individuals who allegedly confessed. Of the first 70 exonerations, 38 or 54 percent, involved police misconduct." *Id.* As Justice Brennan famously noted, "[n]o other class of evidence is so profoundly prejudicial [as a false confession]." Colorado v. Connelly, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting).

374. *See* Dist. Attorney v. Watson, 411 N.E.2d 1274, 1282-83 (Mass. 1980).

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

376. *See Mavredakis*, 725 N.E.2d at 178 (quoting Wilkins, *supra* note 254, at 921).

justifying expanded protections, are also conspicuously absent. Stripped to its core, *Watson* relied on the SJC's independent assessment, albeit supported by social science, of what was right. Although not without criticism, the SJC relied on its own balancing of policy concerns as the principle reason to provide greater protections for its citizens.[377] As former Chief Justice Herbert Wilkins explained, "We are . . . entitled to our own views, indeed constitutionally required to have them."[378]

### *5. Actualizing the Right to Counsel During Custodial Interrogation*

In *Mavredakis*, the SJC articulated a visionary constitutional principle based on an independent assessment of "essential fairness." The SJC recognized that it was unfair to deny an individual in custody the opportunity to speak with a lawyer to obtain legal advice when the lawyer is affirmatively offering his help before interrogation. The opportunity the court mandated was the "actual" ability to speak to a lawyer before choosing whether to speak or remain silent. Even if grounded in self-incrimination principles, the requirement was also about honoring the fundamental role of counsel. In fact, in recently reaffirming and arguably extending the principles of *Mavredakis*, the SJC concluded that withholding specific legal advice to a custodial suspect offended article XII because it "bore directly on the right to counsel."[379] What the SJC found constitutionally necessary in *Mavredakis* is no less compelling in any pre-charge custodial interrogation. Viewed in the context of *Miranda*'s inadequacies, the right to make an intelligent and voluntary choice before interrogation presupposes the need to speak to a lawyer to ensure that choice is informed. The only way to truly actualize the right against compelled self-incrimination is to provide all Massachusetts citizens the opportunity to which the SJC said the defendant in *Mavredakis* was entitled.

In disagreeing with the *Moran* decision, the SJC appreciated in one context that *Miranda* warnings alone are not enough to actualize the protections against compelled self-incrimination. The SJC acknowledged the importance of the professional and unconflicted advice of a lawyer. If the knowledge of an attorney's availability does in fact have a bearing on a suspect's ability to waive his *Miranda* rights knowingly and intelligently, then the SJC recognized the value of legal advice at that stage.[380]

In other words, what is the purpose of providing the opportunity to speak to the lawyer if it is not to provide advice on whether to waive the suspect's

377. *See generally* Commonwealth v. Gonsalves, 711 N.E.2d 108 (Mass. 1999) (considering policy concerns in decision-making process).

378. Wilkins, *supra* note 248, at 1213.

379. Commonwealth v. McNulty, 937 N.E.2d 16, 26 (Mass. 2010) (quoting Commonwealth v. Mavredakis, 725 N.E.2d 169, 179 (Mass. 2000)).

380. *Mavredakis*, 725 N.E.2d at 178-79 (explaining state of interpretation of right against self-incrimination).

*Miranda* rights? That purpose implicitly recognizes the perils of all custodial interrogation. Moreover, if one views the decision in light of the compelling evidence that *Miranda* has failed to achieve its objectives, then why should that actualization hinge on the mere fortuity that a lawyer is waiting in the wings? Are not all individuals subject to custodial interrogation deserving of same opportunity—the opportunity to "meet with an identified attorney actually able to provide at least initial assistance and advice"?[381] Only by constitutionalizing that concrete opportunity for all citizens of the Commonwealth will article XII's prohibition against being compelled to accuse oneself be thoroughly honored.

## IV. CONCLUSION

If *Miranda* was created to solve the problem of compelled self-incrimination, then history has proven the solution inadequate. The notion that the mere recitation of the now familiar refrain, and the requirement of a legally valid waiver, eliminates or even reduces compulsion is fiction. The jurisprudence since *Miranda* assessing the validity of waivers grossly undervalues how coercive the confrontation between suspects and law enforcement is, both before and during custodial interrogation.

The fiction pervades the logic behind the line-drawing of the point of attachment as well. Both a "suspect," not entitled to the right to counsel, and one who is formally "accused" would be subject to the same potential abuses during custodial interrogation. In fact, the mere "suspect" is significantly more vulnerable and exposed ***because*** the right to counsel has not yet attached. The concrete opportunity to a consult with a lawyer before choosing to speak is the most significant safeguard that protects against compulsion after that right attaches. In both instances, the police would be permitted to utilize nuanced interrogation tactics and deceit. In both contexts, the detainee could be equally unsophisticated and equally unlikely to appreciate what is at stake if they give a statement. The risk of constitutionally offensive compulsion is present in all custodial interrogations.

Similarly, it is disingenuous to justify the line-drawing because the adverse positions have not yet solidified. On the one hand the Supreme Court has said the right to counsel is triggered based on the initiation of "formal adversarial proceedings."[382] On the other hand it has acknowledged that even pre-charge custodial interrogations must be scrutinized because that is when the "adversary system of criminal proceedings commences."[383] Even without the formality of a charge and a court appearance, most frequently the investigation has focused on a particular person. To claim otherwise belies reality. The advice of a

381. *Id.* at 178 (quoting State v. Haynes, 602 P.2d 272, 278 (1979)) (internal quotation marks omitted).

382. Kirby v. Illinois, 406 U.S. 682, 689-90 (1972).

383. Miranda v. Arizona, 384 U.S. 436, 477 (1966).

lawyer is most needed when self-incrimination is most likely to occur—during a pre-charge interrogation. A detainee is unquestionably most vulnerable at that moment in time. Simply put, a layperson cannot appreciate what is really at stake without the advice of counsel. Moreover, it is unadulterated fiction to ascribe any other primary motive to police interrogation other than obtaining an incriminating statement. At that point in time, right or wrong, someone has been arrested and is being interrogated because the police believe that individual has a committed a crime. In sum, pre-charge custodial interrogation is no less inquisitorial than post-charge interrogation.

The Supreme Court was on the right track in *Escobedo*. Justice Stevens' subsequent assertion that pre-charge custodial interrogation renders someone "sufficiently accused," entitling the right to counsel, accurately and honestly reflects the dynamics of that confrontation.[384] An honest assessment of *Miranda*'s failure compels the opportunity to consult with a lawyer prior to any custodial interrogation. However, the Supreme Court is bound by precedent grounded in the more restrictive language of the Sixth Amendment.

Unlike the Supreme Court, the SJC possess the tools to solve the problem. The SJC is empowered to provide greater protection and has demonstrated an increased willingness to do so based on independent state constitutional grounds. Moreover, the SJC has a compelling and laudable track record of providing greater protection than the Supreme Court when its own view of fundamental fairness dictates the result. *Mavredakis* was a significant step in the right direction. Interpreting article XII to advance the point where the right to counsel attaches, to protect all Massachusetts citizens against compelled self-incrimination, is the next logical and fair step.

384. United States v. Gouveia, 467 U.S. 180, 197 (1984).