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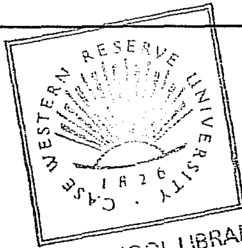

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THE LAW OF CONFESSIONS — PART I

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Confessions play an important role in criminal prosecutions. Despite landmark decisions such as *Miranda v. Arizona,* criminal defendants continue to make incriminatory statements. In addition, the initial controversy that greeted *Miranda* and other confession cases has not abated. Recently, Attorney General Meese commented:

> The Miranda decision was wrong. We managed very well in this country for 175 years without it. Its practical effect is to prevent the police from talking to the person who knows the most about the crime — namely, the perpetrator. As it now stands under Miranda, if the police obtain a statement from that person in the course of the initial interrogation, the statement may be thrown out at the trial. Therefore, Miranda only helps guilty defendants. Most innocent people are glad to talk to the police. They want to establish their innocence so that they're no longer a suspect. U.S. News & World Report, Oct. 14, 1985, at 67.

For recent articles on *Miranda, see* Caplan, *Questioning Miranda,* 38 Vand. L. Rev. — (1985); White, *Defending Miranda: A Reply to Professor Caplan,* 38 Vand. L. Rev. — 1986); Frey, *Modern Police Interrogation Law: The Wrong Road Taken,* 42 U. Pitt. L. Rev. 731 (1981); Inbau, *Over-Reaction — The Mischief of Miranda v. Arizona,* 73 J. Crim. L. & Criminology 797 (1982).

This article surveys the law of confessions. The admissibility of confessions raises numerous issues. Although most of these issues are constitutional, several important evidentiary issues are also involved. Moreover, several different constitutional challenges are possible. *Miranda* is based on the Fifth Amendment privilege against compelled self-incrimination. Prior to that decision, however, confessions were analyzed under the due process voluntariness test. That test remains intact and offers an independent constitutional basis for the suppression of confessions. In addition, right to counsel issues have become increasingly important since the Supreme Court's 1977 decision in *Brewer v. Williams,* 430 U.S. 387 (1977). Finally, confessions may be excluded on a derivative evidence or "fruit of the poisonous tree" theory. For example, a confession derived from an illegal arrest may be suppressed due to an initial Fourth Amendment violation.

EVIDENTIARY ISSUES

Admissions of a Party-Opponent

A defendant's out-of-court statements are, of course, hearsay if offered to prove the truth of the assertions contained in the statement. Nevertheless, such statements by an accused are admissions of a party-opponent and are thus exempt from the hearsay rule when offered by the prosecution. *See* Ohio Evid. R. 801 (D) (2) (a); United States v. Garmany, 762 F.2d 929, 938 (11th Cir. 1985); United States v. Roe, 670 F.2d 956, 963 (11th Cir.), *cert. denied,* 459 U.S. 856 (1982); United States v. Hewitt, 663 F.2d 1381, 1388 (11th Cir. 1981). Admissions are not limited to statements made to the police. Any statement made by the defendant to *any* person and at *any* time may be an admission. This would include statements made prior to arrest or, for that matter, prior to the crime. Futhermore, an admission need not be incriminating; it need only relate to the offense. *See* Territory of Guam v. Ojeda, 758 F.2d 403, 408 (9th Cir. 1985).

One type of admission — an adoptive admission — presents special problems. Adoptive admissions are also exempt from the hearsay rule. Ohio R. Evid. 801 (D) (2) (b). A statement made in the defendant's presence, that he understood, and with which he agrees is admissible as an adoptive admission. United States v. Farid, 733 F.2d 1318, 1320 (8th Cir. 1984), is illustrative. In that case an accomplice made statements about a drug sale to undercover officers. The statements were admitted against the defendant as adoptive admissions because he was present at the time and agreed with the accomplice's remarks.

The circumstances under which the statement was made, however, must indicate an adoption or approval. "The mere fact that the party declares that he has heard that another person has made a given statement is not standing alone sufficient to justify a finding that the party has adopted the third person's statement." C. McCormick, Evidence 797 (3d ed. 1984). For example, in Fuson v. Jago, 773 F.2d 55 (6th Cir. 1985), the defendant and an accomplice were arrested for aggravated burglary. After being advised of their rights, the accomplice made an incriminating statement, at which point the arresting offi-

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cer asked, "then you both were breaking in." The accomplice said "yes." The defendant shrugged his shoulders. On habeas review, the Sixth Circuit declined to find that the defendant's "non-commital shrug constituted an adoption of [the accomplice's] statements. . . . [He] did not verbally assent to [the] statements. . . . Nor would the petitioner be expected to refute [the] statements after twice being advised of his right to remain silent." *Id.* at 61.

The adoptive admission rule also applies to documents, although the courts are divided on the scope of the rule in this context. *Compare* United States v. Marino, 658 F.2d 1120, 1125 (6th Cir. 1981) (possession of a document with written statements is an adoption of its contents), *with* United States v. Ordonez, 737 F.2d 793, 800-01 (9th Cir. 1984) (possession of a document standing alone is not an adoptive admission).

Confessions

Oral confessions

As noted above, confessions are admissible as party admissions. Although some suspects do not realize it, oral as well as written statements are admissible. As one court has noted, "there can be no doubt that testimonial evidence of an oral confession is legally admissible." United States v. Dodier, 630 F.2d 232, 236 (4th Cir. 1980). *See also* United States v. Morris, 491 F. Supp. 226, 230 (S.D. Ga. 1980); Hayes v. State, 152 Ga. App. 858, 859, 264 S.E.2d 307, 309 (1980).

Even if an *oral* confession is recorded or transcribed, there is no legal rule that requires the recorded or written statement to be introduced by the prosecution. The original writing ("Best Evidence") rule does not apply to oral confessions, even if they are recorded. Ohio R. Evid. 1002 provides: "To prove the content of a writing, recording, or photograph the original writing, the recording, or photograph is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio." In this situation, the prosecution is not proving the content of a writing but rather an independent verbal statement that happened to be recorded.

Written confessions

For tactical reasons, the prosecution generally prefers to introduce a written confession in evidence if one is available. Typically, a defendant does not write out a confession. Instead, the police prepare the statement and the defendant signs it. Such statements are adoptive admissions. Even if the defendant does not sign the statement, it may still be admitted as an adoptive admission if the prosecution can establish that he read it or otherwise adopted it. *See* Commonwealth v. Harper, 485 Pa. 572, 585 n.15, 403 A.2d 536, 543 n.15 (1979).

If the defendant does not adopt the written statement, the statement may still be admissible as recorded recollection. *See* Ohio R. Evid. 803(5). This situation presents a double hearsay problem. The defendant's oral statements are party admissions and the police's transcription of these statements qualifies as recorded recollection provided (1) the officer made the record when the matter was fresh in his memory, (2) the record reflects the officer's knowledge correctly, and (3) the officer lacks sufficient recollection to testify fully and accurately about the matter recorded. *Cf.* State v. Shaffer, 229 Kan. 310, 314, 624 P.2d 440, 444 (1981). If the record does not qualify under this hearsay exception, if could still be used to refresh the officer's recollection. *See* Ohio R. Evid. 613.

Plea Negotiations

Although confessions are admissible as party admissions, there is one other evidentiary rule that may preclude admissibility. Ohio Evidence Rule 410 provides:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of no contest, or the equivalent plea from another jurisdiction, or a plea of guilty in a violation bureau, or *of an offer to plead guilty* or no contest to the crime charged or any other crime, or *of statements made in connection with, and relevant to, any of the foregoing pleas or offers,* is not admissible in any civil or criminal proceeding against the person who made the plea or offer. . . . (emphasis added).

Federal Rule 410 differs from its Ohio counterpart. It provides for exclusion only if the statement is "made in the course of plea discussions with an *attorney for the prosecuting authority* which do not result in a plea of guilty or which result in a plea of guilty later withdraw." (emphasis added). The difference between the Ohio and federal rules is critical. The prior Federal Rule 410, which is similar to the present Ohio rule, had been applied to statements made by an accused to law enforcement officers. *See* United States v. Herman, 544 F.2d 791, 795-99 (5th Cir. 1977); United States v. Brooks, 536 F.2d 1137, 1138-39 (6th Cir. 1976); United States v. Smith, 525 F.2d 1017, 1020-22 (10th Cir. 1975). Thus, Ohio Rule 410 provides a nonconstitutional basis for excluding statements made to the police during plea bargaining.

The test for determining whether a statement is excludable under Rule 410 was set forth in United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978): "The trial court must apply a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances." *Id.* at 1366. Moreover, the legislative history indicates that Rule 410 also precludes the impeachment use of the statement. *See* United States v. Lawson, 683 F.2d 688, 690-93 (2d Cir. 1982); United States v. Martinez, 536 F.2d 1107, 1108-09 (5th Cir.), *cert. denied,* 429 U.S. 985 (1976).

Impeachment

One other rule of evidence deserves attention. Admissions must be offered by the opposing party, *i.e.* the prosecution. Ohio Evidence Rule 801(D)(2) applies only when the statement is "offered against a party" who made it. Therefore, the rule does not permit the introduction of the defendant's pretrial statements when offered by the defense unless those statements fall within some other exception to the hearsay rule.

If an accused's hearsay statements are admitted at trial, either because they come within a hearsay exception or because the prosecution fails to object to their introduction, Rule 806 may apply. Rule 806 provides:

> When a hearsay statement, or a statement defined in Rule 801(D)(2), (c), (d), or (e), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a wit-

> ness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain....

This rule applies to hearsay statements made by the accused and permits the prosecution to impeach the defendant, even thought the defendant has not testified. One method of impeachment would be the introduction of evidence of the defendant's prior convictions. *See* United States v. Noble, 754 F.2d 1324, 1330-31 (7th Cir.) (When a defense counsel introduces a defendant's exculpatory hearsay statements in evidence, the defendant's credibility becomes an issue and he may be impeached with a prior conviction.), *cert. denied,* 106 S.Ct. 63 (1985); United States v. Bovian, 708 F.2d 606, 613 (11th Cir.), *cert. denied,* 464 U.S. 898 (1983); United States v. Lawson, 608 F.2d 1129, 1130 (6th Cir. 1979), *cert. denied,* 444 U.S. 1091 (1980). Another method of impeachment would be the introduction of evidence of an inconsistent statement. *See* United States v. Wuagneux, 683 F.2d 1343, 1357-58 (11th Cir. 1982) (prior inconsistent statement admitted to impeach declarant's hearsay statements), *cert. denied,* 464 U.S. 814 (1983).

Corpus Delicti Rule

Virtually every jurisdiction has recognized some type of corroboration rule for confessions. The rule is designed to "preclude[] the possibility of conviction of crime based solely on statements made by a person suffering a mental or emotional disturbance or some other aberration." Commonwealth v. Forde, 392 Mass. 453, 457, 466 N.E.2d 510, 513 (1984). As McCormick points out, however, the formulation of this corroboration requirement may differ in the various jurisdictions.

> Much confusion has been caused by failure to distinguish between two different formulations of the requirement. One requires only that in addition to the confession the record contain evidence tending to establish the reliability of the confession. The other — a requirement of independent proof of the *corpus delicti* — requires that the corroborating evidence tend to prove the commission of the crime at issue. C. McCormick, Evidence 366 (3d ed. 1984).

In Ohio a confession is inadmissible if the corpus delicti has not been established by *some evidence* tending to show two elements of the substance of the crime: (1) the act, and (2) the criminal agency of the act. Neither a prima facie case nor proof beyond a reasonable doubt is required. State v. King, 10 Ohio App.3d 161, 166, 460 N.E.2d 1383, 1389 (1983). Moreover, the Ohio Supreme Court has written:

> Considering the revolution in criminal law of the 1960's and the vast number of procedural safeguards protecting the due-process rights of criminal defendants, the *corpus delicti* rule is supported by few practical or social-policy considerations. This court sees little reason to apply the rule with a dogmatic vengeance. State v. Edwards, 49 Ohio St.2d 31, 35-36, 358 N.E.2d 1051, 1056 (1976), *vacated on other grounds,* 438 U.S. 911 (1978).

It would be a mistake, however, to assume that the corpus delicti rule has been watered down to the point where it no longer has much effect. In State v. Ralston, 67 Ohio App.2d 81, 425 N.E.2d 916 (1979), the defendant's murder conviction was reversed because the prosecution failed to establish the corpus delicti. In that case the defendant confessed to murder after a skeleton was found in a remote location. According to the court, the prosecution failed to establish that the death was homicidal by means of independent evidence.

> There was no evidence, circumstantial or direct, of the cause of death, or of any injury to the body or of any attempt at concealment of the body. In sum, there is nothing in the record on which to base even a suspicion of a homicide, other than the fact that the victim was not known to be suffering from disease and was found in a lonely place. *Id.* at 84, 425 N.E.2d at 918.

For other cases on the corpus delicti rule, *see* State v. Black, 54 Ohio St.2d 304, 307-08, 376 N.E.2d 948, 951 (1978); State v. Maranda, 94 Ohio St. 364, 114 N.E. 1038 (1916); State v. Duerr, 8 Ohio App.3d 396, 398-99, 457 N.E.2d 834, 838-39 (1982), *cert. denied,* 464 U.S. 816 (1983). *See generally* C. McCormick, Evidence § 145 (3d ed. 1984); 7 J. Wigmore, Evidence § 2070-74 (Chadbourn rev. 1978); Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions,* 1984 Wis. L. Rev. 1121; Annot., 45 A.L.R.2d 1316 (1956).

DUE PROCESS

The Supreme Court's initial confession cases were based on the due process clause. In deciding these cases, the Court employed a "voluntariness" test. From the time it decided the first state confession case, Brown v. Mississippi, 297 U.S. 278 (1936), until it decided Escobedo v. Illinois, 378 U.S. 478 (1964), the Court applied the voluntariness test in over thirty cases. The test was summarized by Justice Frankfurter in Culombe v. Connecticut, 367 U.S. 568 (1961):

> The ultimate test... [is] voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.... The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession. *Id.* at 602.

See also Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973).

Purpose of the Voluntariness Test

Several distinct interests are protected by the voluntariness test. In Blackburn v. Alabama, 361 U.S. 199 (1960), the Supreme Court stated that "a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary." *Id.* at 207. In some cases, the Court has focused on the unreliability of involuntary statements. *E.g.,* Brown v. Mississippi, 297 U.S. 278 (1936) (confession obtained by beatings). In other cases, the Court has focused on deterring offensive police conduct. *E.g.,* Rogers v. Richmond, 365 U.S. 534 (1961) (confession obtained after police threatened to take defendant's ailing wife into custody). In still other cases, the Court has emphasized the defendant's lack of free will. *E.g.,* Townsend v. Sain, 372 U.S. 293 (1963) (confession obtained from defendant while under the influence of drugs even though police were unaware of drug's effect).

Relevant Factors

In applying the voluntariness test, courts have looked

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to the totality of circumstances surrounding the confession, including the characteristics of the accused and the police conduct, to determine their psychological impact on the accused's ability to resist pressures to confess. Wigmore lists the following factors as relevant to determining the voluntariness of a confession:

1. *Character of Accused*

   Health. Reck v. Pate, 367 U.S. 433 (1961).

   Age. Gallegos v. Colorado, 370 U.S. 49 (1962).

   Education. Ward v. Texas, 316 U.S. 547 (1942).

   Subnormal intelligence. Fikes v. Alabama, 352, U.S. 191 (1957).

   Mental condition. Blackburn v. Alabama, 361 U.S. 199 (1960).

   Prior criminal experience. Davis v. North Carolina, 384 U.S. 737 (1966).

2. *Character of Detention*

   Delay in arraignment. Gallegos v. Nebraska, 342 U.S. 55 (1951).

   Failure to warn of rights. Haynes v. Washington, 373 U.S. 503 (1963).

   Length of incommunicado detention. Chambers v. Florida, 309 U.S. 227 (1940).

   Living conditions. Davis v. North Carolina, 384 U.S. 737 (1966).

   Access to lawyer, friends or others. Culombe v. Connecticut, 367 U.S. 568 (1961).

3. *Manner of Interrogation*

   Lengthy periods of questioning. Ashcraft v. Tennessee, 322 U.S. 143 (1944).

   Use of relays. Watts v. Indiana, 338 U.S. 49 (1949).

   Number of interrogators. Turner v. Pennsylvania, 338 U.S. 62 (1949).

   Condition of place of interrogation. Harris v. South Carolina, 338 U.S. 68 (1949).

4. *Force, threats, promises, or deception.*

   Physical abuse. Brown v. Mississippi, 297 U.S. 278 (1936).

   Lack of food. Payne v. Arkansas, 356 U.S. 560 (1958).

   Lack of sleep. Leyra v. Denno, 347 U.S. 556 (1954).

   Movement from place to place. Ward v. Texas, 316 U.S. 547 (1942).

   Stripped during interrogation. Malinski v. New York, 324 U.S. 401 (1945).

   Threats of harm against accused or others. Rogers v. Richmond, 365 U.S. 534 (1961).

   Threat of mob violence. Thomas v. Arizona, 356 U.S. 390 (1958).

   Advice, promises, or assurances. Lynumn v. Illinois, 372 U.S. 528 (1963).

   Deceptions. Spano v. New York, 360 U.S. 315 (1959).

For additional factors and cases, *see* 3 J. Wigmore, Evidence 352 n.11 (Chadbourn rev. 1970); American Law Institute, Model Code of Pre-Arraignment Procedure 351-58 (1975); *Developments in the Law—Confessions,* 79 Harv. L. Rev. 935 (1966).

Contrast with Miranda

Although the *Miranda* decision overshadowed the importance of the voluntariness doctrine, the doctrine is still important. C. McCormick, Evidence 376 (3d ed. 1984) (voluntariness doctrine "continues to have substantial current vitality."). The due process voluntariness test and the *Miranda* rules differ significantly. "The two issues — the voluntariness of a confession and compliance with *Miranda's* strictures — are analytically separate inquires." State v. Arrington, 14 Ohio App.3d 111, 112 n.1, 470 N.E.2d 211, 213 n.1 (1984). *See also* State v. Chase, 55 Ohio St.2d 237, 246-47, 378 N.E.2d 1064, 1070 (1978); State v. Kassow, 28 Ohio St.2d 141, 143-45, 277 N.E.2d 435, 439 (1971).

A due process challenge may be viable in a situation where *Miranda* would not be applicable — for example, prior to custodial interrogation. United States v. Murphy, 763 F.2d 202 (6th Cir. 1985), is an illustrative case. In that case a robbery suspect was tracked by a 88-pound German shepherd police dog. The dog dragged the defendant from trees in which he had been hiding. As a consequence, the defendant screamed: "You caught us. You caught us. Get this fucking dog off me. We shouldn't have robbed the bank." The court held the statement involuntary. Moreover, even if the police comply with *Miranda,* a statement still may be inadmissible under a due process analysis. For example, in United States v. Brown, 557 F.2d 541 (6th Cir. 1977), the defendant was read the *Miranda* warnings. Nevertheless, the court suppressed his statement on due process grounds because it was obtained after a violent arrest and after the defendant had been struck by the police. *See also* State v. Arrington, 14 Ohio App.3d 111, 470 N.E.2d 211 (1984) (improper inducements and misstatements of law rendered statement involuntary even though *Miranda* warnings given).

Several other differences between *Miranda* and the voluntariness test are noteworthy. As will be discussed later, the Supreme Court has recognized an impeachment exception to *Miranda.* The Court, however, has declined to recognize a comparable exception for involuntary statements. In Mincey v. Arizona, 437 U.S. 385 (1978), the Court wrote: "Statements made by a defendant in circumstances violating the strictures of *Miranda* . . . are admissible for impeachment if their 'trustworthiness . . . satisfies legal standards.' . . . But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law. . . ." *Id.* at 397-98. Addressing the facts in the record, the Court held: "Mincey was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne. Due process of law requires that statements obtained as these were cannot be used *in any way* against a defendant at his trial." *Id.* at 401-02 (emphasis added). Similarly, the Court in New York v. Quarles, 467 U.S. 649 (1984), recognized a public safety exception to *Miranda.* In a footnote, however, the Court noted that this exception would not apply to involuntary statements: "[The] respondent is certainly free on remand to argue that his statement was coerced under traditional due process standards." *Id.*— n.5.

Another difference is that *Miranda* does not apply to

statements obtained by private citizens. In contrast, a coerced and involuntary confession made to a private citizen may be inadmissible due to its unreliability. For example, in People v. Switzer, 135 Mich. App. 779, 355 N.W.2d 670 (1984), a relative of an eight-month-old child confronted and accused the defendant of causing the child's death. After being struck by the relative, the defendant confessed. On appeal, the court held that it made no difference that the confession had been obtained by a private citizen: "We therefore conclude that a confession found to be coerced and involuntarily made is not admissible in evidence in a criminal trial, even if the state is not involved in the coercion." *Id.* at 784-85, 355 N.W.2d at 672. *See also* State v. Kelly, 61 N.J. 283, 292-93, 294 A.2d 41, 46 (1972); State v. Hess, 9 Ariz. App. 29, 31, 449 P.2d 46, 48 (1969).

For articles and books on the voluntariness test, *see* Berger, Taking the Fifth: The Supreme Court and the Privilege Against Self-Incrimination 104-12 (1980); Grano, *Voluntariness, Free Will, and the Law of Confessions,* 65 Va. L. Rev. 859 (1979); Schulhofer, *Confessions and the Court,* 79 Mich. L. Rev. 865, 867-78 (1981).

FIFTH AMENDMENT

The Supreme Court's holding in Miranda v. Arizona, 384 U.S. 436 (1966), is now familiar:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning... the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.... After such warnings have been given,... the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. 384 U.S. at 478-79.

For a comphrehensive history of *Miranda, see* L. Baker, Miranda: Crime, Law and Politics (1983). *See also* Kamisar, Book Review, 82 Mich. L. Rev. 1074 (1984).

Compulsion & Custodial Interrogation

The doctrinal basis for *Miranda* is the Fifth Amendment privilege against compelled self-incrimination. "[T]he Court in *Miranda,* for the first time, expressly declared that the Self-Incrimination Clause was applicable to state interrogations at a police station...." Michigan v. Tucker, 417 U.S. 433, 443 (1974). Prior to *Miranda* it could have been argued that there was no compulsion within the meaning of the Fifth Amendment in this context because a suspect was not compelled to answer police questions; the police had no *legal* authority, such as the contempt power, to compel a statement if the suspect refused to answer. The *Miranda* Court rejected this argument, finding that the custodial setting contains "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467.

Miranda's Fifth Amendment basis is critical to an understanding of the Court's holding. For one thing, it explains why the *Miranda* warnings are required *only* when there is custodial interrogation. Custody alone or interrogation alone does not amount to compulsion within the meaning of the Fifth Amendment. As one commentator has noted:

> It is the impact on the suspect's mind of the *interplay* between police interrogation and police custody — each condition *reinforcing* the pressures and anxieties produced by the other — that, as the *Miranda* Court correctly discerned, makes "custodial police interrogation" so devastating. It is the suspect's realization that the *same persons* who have cut him off from the outside world, and have him in their power and control, want him to confess, and are detemined to get him to do so, that makes the "interrogation" more menacing than it would be without the custody and the "custody" more intimidating than it would be without the interrogation. Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?,* 67 Geo. L.J. 1, 63 (1978).

A number of limitations on the scope of the *Miranda* rule follow from this analysis. For example, it seems questionable whether *Miranda* should apply in "jail plant cases" — situations where an undercover agent is placed in a cell with the defendant. If the agent asks questions about the crime, there may appear to be both custody and interrogation. Nevertheless, there would not seem to be "compulsion" as viewed by the *Miranda* Court. The psychological pressure to respond to the questions of a cellmate is simply not the same as the pressure to respond to a police officer's questions. *Id.* at 61-62.

The Fifth Amendment analysis also explains why *Miranda* warnings are not required when statements are obtained by private citizens. That Amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion." Oregon v. Elstad, 105 S.Ct. 1285, 1291 (1985). For example, in People v. Ray, 65 N.Y.2d 282, 480 N.E.2d 1065, 491 N.Y.S.2d 283 (1985), the court held that a statement made to a private store detective was not subject to *Miranda:* "The avowed purpose of *Miranda* was to secure the privilege against self-incrimination from encroachment by governmental action." *Id.* at —, 480, N.E.2d at 1067, 491 N.Y.S.2d at 285. The court, however, did point out that private conduct "may become so pervaded by governmental involvement that it loses its character as such and invokes the full panoply of constitutional protections." *Id. See also* State v. Ferrette, 18 Ohio St.3d 106, 480 N.E.2d 399 (1985) (security personnel of state lottery commission are not law enforcement officers and are not required to give *Miranda* warnings); 1 W. LaFave & J. Israel, Criminal Procedure § 6.10(b) (1984).

The Burger Court

Although it seems apparent that a majority of the present Supreme Court would not have adopted *Miranda,* it also seems clear that the Court is not about to overrule it. As Chief Justice Burger has written: "*Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule Miranda, disparage it, nor extend it at this late date." Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (concurring opinion).

Nevertheless, the present Court's view of *Miranda* differs markedly from the Warren Court's view. In particular, the present Court sees a distinct difference between *Miranda* and the Fifth Amendment: "The *Miranda* exclu-

sionary rule. . . serves the Fifth Amendment and sweeps more boardly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation." Oregon v. Elstad, 105 S.Ct. 1285, 1292 (1985). *See also* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (The *Miranda* warnings are "not themselves rights protected by the Constitution . . . ."). This view of the relationship between the Fifth Amendment and *Miranda* has provided the basis for many of the Court's decisions, including the impeachment and public safety exceptions to *Miranda* as well as the Court's recent analysis of a "fruit of the poisonous tree" issue in *Elstad*. This view of *Miranda*, however, has not escaped criticism: "This curious characterization of *Miranda* ignores much of the language in that case, and is most perplexing because it seems to have 'deprived *Miranda* of a constitutional basis but did not explain what other basis for it there might be.' " 1 W. LaFave & J. Israel, Criminal Procedure 483 (1984). In other words, if a *Miranda* violation is not a Fifth Amendment violation, on what authority does the U.S. Supreme Court require exclusion in a state trial; the Court has no constitutional authority to determine state evidentiary rules.

Custody

The threshold issue in applying *Miranda* is to determine when the warnings are required. The *Miranda* safeguards apply only when a suspect is subjected to *custodial interrogation*. The *Miranda* Court provided the following guidance on this issue: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Notwithstanding this explanation, both "custody" and "interrogation" have required further elaboration.

Stationhouse interrogations

The Court's opinion in *Miranda* focused on the inherent coercion of stationhouse interrogations. Nevertheless, subsequent cases have made clear that not all stationhouse interrogations trigger the *Miranda* safeguards. For example, in Oregon v. Mathiason, 429 U.S. 492 (1977), a police officer requested the defendant to come to the stationhouse and informed him that he was not under arrest. During this interview, the defendant confessed. The Court held that warnings were not required:

> In the present case . . . there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way." *Id.* at 495.

Similarly, in California v. Beheler, 463 U.S. 1121 (1983) (per curiam), the defendant voluntarily came to the stationhouse, where he was informed that he was not under arrest. According to the Court, the inquiry for determining custody "is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.* at 1125. Since the restraints imposed on the defendant did not satisy this test, no warnings were required and his stationhouse statements were admissible.

Nonstationhouse interrogations

The *Miranda* Court's definition of custody also encompasses some interrogations outside the stationhouse. Interrogation, when the defendant is "in custody at the station or otherwise deprived of his freedom of action in any significant way," triggers the warning requirement. One of the first cases applying *Miranda* involved this issue. In Orozco v. Texas, 394 U.S. 324 (1969), four police officers entered the defendant's bedroom and questioned him concerning a homicide. One of the officers testified that the defendant was under arrest at the time of the interrogation. The Court held that *Miranda* applied.

Nevertheless, the exact point at which custody occurs remained unclear until the Court addressed the issue in a series of later cases. In Beckwith v. U.S., 425 U.S. 341 (1976), IRS agents from the Criminal Division questioned Beckwith at a private home about his tax liability. Beckwith was not under arrest at the time of the questioning. The Court ruled *Miranda* inapplicable because this situation "simply does not present the elements which the *Miranda* Court found so inherently coercive. . . ." *Id.* at 347.

Beckwith is also important because it clearly marked the abandonment of the "focus" test which had been used in *Escobedo*. In explaining custodial interrogation in *Miranda*, the Court added the following footnote: "This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." 384 U.S. at 444 n.4. Despite this attempt to reconcile *Escobedo* and *Miranda*, the two tests — focus and custodial interrogation — are not the same. *Beckwith* exemplifies this point. While the Court conceded that "the 'focus' of an investigation may indeed have been on Beckwith . . . , he hardly found himself in the custodial situation described by the *Miranda* Court . . . ." *Id.* at 347.

The Court's latest examination of the custody requirement occurred in Berkemer v. McCarty, 104 S.Ct. 3138 (1984). In that case a misdemeanor traffic offender made incriminating statements after being stopped for weaving in and out of a highway lane. Although the Court stated that a traffic stop is a seizure of the person within the meaning of the Fourth Amendment, it ruled that such a seizure does not constitute custody under *Miranda*. According to the Court, the brief duration of the stop and the fact that the typical traffic stop occurs in a public place "reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse." *Id.* at 3150. The Court, however, recognized that such a stop could escalate into custody and thereby trigger *Miranda:*

> It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest." . . . If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*. *Id.* at 3151.

See also California v. Beheler, 463 U.S. 1121, 1125 (1983);

Minnesota v. Murphy, 465 U.S. 420, 430 (1984) (There was no custody "since there was no 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."); United States v. Roark, 753 F.2d 991, 993 (11th Cir. 1985) (bank teller who was questioned at place of employment and who was not under arrest nor subjected to threats or coercion was not in custody).

Interrogation

In addition to custody, *Miranda* requires interrogation before the warnings are mandated. In *Miranda* the Court defined interrogation as "questioning initiated by law enforcement officers." 384 U.S. at 444. This statement left several issues unresolved. The Court, however, did provide some guidance by distinguishing interrogation from volunteered statements.

Volunteered statements

The *Miranda* Court commented that there "is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime. . . . Volunteered statements of any kind are not barred by the Fifth Amendment. . . ." 384 U.S. at 478. The principal problem with this example is that there is also no "custody" in this situation and for that reason alone *Miranda* warnings are not required. Nevertheless, even if there is custody, a statment may be volunteered and thus not covered by *Miranda.* For example, in United States v. Castro, 723 F.2d 1527 (11th Cir. 1984), a customs officer, after detecting the odor of marijuana, ordered the defendant to come out of a house. When the defendant exited the house, the officer, who had drawn his gun, asked, "What in the world is going on here?" The accused replied, "You want money? We got money." Although the defendant was subjected to custodial interrogation, the Eleventh Circuit held that the defendant's statements were unresponsive and thus volunteered: "These utterances were not responsive to any interrogation. The statement was not only totally voluntary but also constituted a deliberate attempt to commit a separate crime. Such a declaration is clearly outside the protection of *Miranda.*" *Id.* at 1532.

Interrogation defined

The leading case defining the term "interrogation" is Rhode Island v. Innis, 446 U.S. 291 (1980). In that case the defendant was placed in a police car, at which time one officer said to another officer, "[T]here's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves." The defendant overheard this comment and made incriminatory statements. On review, the Court held that there had been no interrogation. Although one might disagree with the Court's view of the facts, its definition of interrogation in *Innis* is a favorable interpretation of *Miranda.*

Initially, the Court rejected the view that custody alone triggers *Miranda.* According to the Court, interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300. This result is consistent with *Miranda,* which required both custody and interrogation. More importantly, the Court rejected the view that *Miranda* applies only if there is express questioning:

> Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Id.* at 300-01.

Thus, interrogation may sometimes include conduct. For example, in People v. Ferro, 63 N.Y.2d 316, 472 N.E.2d 13, 482 N.Y.S.2d 237 (1984), *cert. denied,* 105 S.Ct. 2700 (1985), the police placed furs stolen from a murder victim in front of the accused's cell. The court held that this conduct constituted interrogation.

Warnings

The *Miranda* decision requires a four-part warning: "He must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." 384 U.S. at 479.

The Supreme Court has had occasion to consider the adequacy of *Miranda* warnings in only one case. In California v. Prysock, 453 U.S. 355 (1981), after the defendant had been given the first three parts of the warning, a police officer informed him, because of his juvenile status, of the right to have his parents present during questioning. The officer then stated: "[You have] the right to have a lawyer appointed to represent you at no cost to yourself." The issue before the Court was whether this warning was sufficient. The dissent believed that the warnings did not convey to the defendant that he had a right to consult a lawyer without charge before he decided whether to talk to the police, even if his parents decline to pay for such legal representation. A majority of the Court disagreed. The majority wrote: "This Court has never indicated that the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. . . . Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." *Id.* at 359.

In contrast to the Supreme Court, the lower courts have considered a number of "warnings" issues. One of these issues — whether the police are required to inform a suspect that an attorney has been retained for him — has divided the courts. Some courts have imposed such a requirement. For example, in Weber v. State, 457 A.2d 674 (Del. 1983), a leading case on this issue, the court stated:

> If prior to or during custodial interrogation, and unknown to the suspect, a specifically retained or properly designated lawyer is acutally present at a police station seeking an opportunity to render legal advice or assistance to the suspect, and the police intentionally or negligently fail to inform the suspect of that fact, then any statement obtained after the police themselves know of the attorney's efforts to assist the suspect, or any evidence derived from any such statement, is not admissible on any theory that the suspect intelligently and knowingly waived his right to remain silent and his right to counsel as established by *Miranda. Id.* at 686.

See also Lodowski v. State, 302 Md. 691, 490 A.2d 1228, 1243 (1985) ("[A] suspect must be fully informed of the

acutal presence and availability of counsel who seeks to confer with him, in order that any waiver of a right to counsel, as established by *Miranda,* can be knowing and intelligent."); State v. Matthews, 408 So.2d 1274, 1278 (La. 1982).

Other courts have adopted an even more stringent requirement, which is often known as the "New York" rule:

> Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, *in the presence of the attorney,* of the defendant's right to counsel. People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) (emphasis added).

See also People v. Hobson, 39 N.Y.2d 479, 481, 348 N.E.2d 894, 896, 384 N.Y.S.2d 419, 420 (1976) (state constitutional rule).

Still other courts have rejected both the New York rule and the approach set forth in *Weber.* For example, in Blanks v. State, 254 Ga. 420, 330 S.E. 2d 575 (1985), the court held that an otherwise valid waiver is not vitiated by the police's refusal to permit an attorney retained by a third party to speak with the suspect: "The desirability of legal assistance during interrogation does not turn upon the rapidity with which third parties have acted to retain an attorney to enter the proceedings." 330 S.E.2d at 579.

The Supreme Court has accepted certiorari in a case raising this issue. In Burbine v. Moran, 753 F.2d 178 (1st Cir.), *cert. granted,* 105 S.Ct. 2699 (1985), a public defender called the police station and asked whether the defendant, a murder suspect, would be interrogated. An unidentified detective said that the defendant would not be interrogated. The defendant subsequently made an incriminatory statement without being informed of the public defender's call or offer of assistance. The First Circuit held that under the circumstances of that case the defendant's waiver was unconstitutional. The court, however, was careful to limit its holding to cases in which the "failure to communicate by the police can only be characterized at the minimum as reckless." *Id.* at 187.

Another "warning" issue was raised in People v. Locke, 152 Cal. App.3d 1130, 200 Cal. Rptr. 20 (1984). In *Locke* the court held that where a suspect claims the right to counsel under *Miranda,* a "minimal requirement is that the arrested suspect be told of his or her right, and be given an opportunity, to use a telephone for the purpose of securing the desired attorney. Such telephone calls should be allowed immediately upon request, or as soon thereafter as practicable. Anything less would make *Miranda* a hollow ineffectual pretense." *Id.* at 1133, 200 Cal. Rptr. at 22.