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MIRANDA V. STATE OF ARIZONA—THE FIFTH
AMENDMENT ENTERS THE POLICE STATION

The Supreme Court of the United States, in rendering its monumental right to counsel decision in the case of *Escobedo v. State of Illinois*,¹ prompted a deluge of scholarly articles, some decrying the ruling, some praising it, but all attempting to interpret it.² Equal confusion is to be noted in the court decisions seeking to unravel its precise holding.³ In an attempt to clarify its ruling in *Escobedo*, and to give the states and federal government precise guidelines, the Supreme Court took up for consideration four cases dealing with station-house confessions.⁴

On June 13, 1966, in the case of *Miranda v. State of Arizona*,⁵ the Supreme Court rendered, perhaps, its most controversial decision to date. In brief, the Court ruled that prior to any interrogation of an accused, he must be warned of his right to remain silent and his right to have counsel present during any questioning. It will be the purpose of this comment to analyze this decision in depth and to suggest a possible alternative to the states in their attempt to effectuate it.

In the series of confession and right to counsel cases beginning in the federal courts with *Johnson v. Zerbst*⁶ and culminating with *Mallory v.*

¹ 378 U.S. 478 (1963). In that case, the police did not effectively advise the accused of his right to remain silent or of his right to consult with his attorney. The Court ruled as follows: "We hold, therefore, that where, 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 that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

² See, e.g. Enker and Elsen, *Counsel for the Suspect: Massiah v. United States, and Escobedo v. Illinois*, 49 Minn. L. Rev. 47 (1964); Hermann, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449 (1964); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *Criminal Justice in Our Time* (1965); Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 J. CRIM. L., C. & P.S. 143, 156 (1965).

³ For a concise summary, in digest form, of the cases attempting to interpret *Escobedo*, see DEFENDER NEWSLETTER, Vol. II, No. 2, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION (March 1, 1965).

⁴ *Miranda v. State of Arizona*, *Vignera v. State of New York*, *Westover v. United States*, and *State of California v. Stewart*. All are cited as 384 U.S. 436 (1966). In each of the four cases, the defendant was interrogated by police officials while in custody, and was not effectively warned of his right to counsel or silence.

⁵ 384 U.S. 436 (1966).

⁶ 304 U.S. 458 (1938).

*United States*⁷ and the Public Defender Act of 1964,⁸ and from *Powell v. Alabama*⁹ to *Escobedo*, on the state level, the Supreme Court has expressed a growing concern over the protection of the ignorant and indigent in our system of criminal justice. These decisions, especially *Escobedo*, have moved closer and closer to the realization that the protections of our federal constitution go into effect as soon as society moves against an individual. This was clearly evidenced in *Escobedo*, where for the first time the court expressly stated the need for effectuation of basic constitutional rights at the police-station level.¹⁰

Aside from its ruling as to counsel, the court in *Escobedo* also emphasized the failure of the police to inform the accused of his right to remain silent.¹¹ It is this factor which is the main concern of the Court in its decision in the *Miranda* case:

That case [*Escobedo*] was but an explication of basic rights that are enshrined in our [c]onstitution—that ‘No person . . . shall be compelled in any criminal case to be a witness against himself’ and that ‘the accused shall . . . have the Assistance of Counsel’—rights which were put in jeopardy in that case through official overbearing.¹²

CASE ANALYSIS

Prior to any extended analysis of the principles and practical considerations involved in the *Miranda* decision, it is necessary to examine rather closely just what it requires as prerequisites to the admissibility of an accused’s statements given at the in-custody level. The Court states that the prosecution may not use in evidence statements, whether exculpatory or inculpatory, elicited during in-custody interrogation of an accused, unless it first demonstrates the use of procedural safeguards to protect the defendant’s privilege against self-incrimination.¹³ Custodial interrogation is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his liberty of action in any significant way.”¹⁴

Initially, if an accused is to be interrogated by the police he must be told in clear and unequivocal terms that he has the right to remain silent. This warning must be accompanied by an explanation that anything said can be used against the accused in court.¹⁵ As a necessary protective device to assure that the accused’s fifth amendment right remains unfettered

⁷ 354 U.S. 449 (1957).

⁹ 287 U.S. 45 (1932).

⁸ 18 U.S.C. § 3006A (1964).

¹⁰ *Supra* note 1, at 488.

¹¹ *Ibid.* “. . . Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.”

¹² *Supra* note 5, at 442.

¹⁴ *Ibid.*

¹³ *Id.* at 444.

¹⁵ *Ibid.*

throughout the entire interrogation process, the accused must also be told of his right to have counsel present during any questioning, and that if he is indigent, counsel will be provided for him. The Court emphasizes that the giving of these warnings are "absolute prerequisites to any interrogation of the accused."¹⁶

Once the warnings have been administered, if the accused indicates in any manner, or at any time prior to or during questioning, that he wishes to remain silent or have counsel present, the interrogation must cease. If questioning continues without the presence of counsel and a statement is given by the accused, a heavy burden rests on the government to establish that the defendant knowingly and intelligently waived his rights. If the prosecution fails to demonstrate the giving of the warnings to the accused and his waiver,¹⁷ any statements made by the accused are inadmissible in evidence.

RATIONALE OF THE DECISION

Given the basic requirements set out by the Court in *Miranda* as to the admissibility of station-house confessions, it is necessary to analyze the reasoning behind the Court's ruling. The Court stressed the belief that present day police interrogation methods are in conflict with the cherished principle that an individual may not be compelled to incriminate himself.¹⁸

The principles inherent in the privilege against self-incrimination have had a steady development from their inception in the early common law,¹⁹ to its utilization in documentary form in the United States.²⁰ At the time of the *Miranda* decision the constitutions of forty-eight of the fifty states contained a provision guaranteeing the privilege.²¹ The Court points out that the underlying premise beneath the growth and development of the privilege is the proper balance between the rights of society and the individual:

¹⁶ "We will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Supra* note 5, at 468.

¹⁷ ". . . a valid waiver will not be presumed simply from the silence of the accused after the warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id.* at 475.

¹⁸ "No person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

¹⁹ See, *The Trial of John Lilburn and John Wharton*, 3 How. ST. TR. 1315 (1637-1645), discussed in *Miranda*, *supra* note 5, at 1459.

²⁰ Provisions as to the privilege against self-incrimination were incorporated into the Federal Bill of Rights as well as in the first bills of rights in Massachusetts, Pennsylvania, Maryland, Virginia, and North Carolina. See POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 86 (1957).

²¹ See, 8 WIGMORE, EVIDENCE, § 2252, n. 3 (3d ed. 1940). New Jersey and Iowa achieved the same result through other legal procedures.

[T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizen. . . . Our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors rather than by the cruel, simple expedient of compelling it from his own mouth.²²

The Court cites its decision of nearly seventy years ago in the case of *Bram v. United States*,²³ as recognizing that principle in confession cases in federal courts. However, the court notes that due to the adoption by Congress of Rule 5(a) of the Federal Rules of Criminal Procedure,²⁴ and the Court's effectuation of that rule in *McNabb v. United States*²⁵ and *Mallory v. United States*,²⁶ they have had little occasion to delve into the constitutional issues in federal confession and interrogation cases. Nevertheless, the principles expostulated in those two cases were based on the same considerations as to the fifth and sixth amendment rights as are involved in the *Miranda* decision.²⁷ Due to the Court's ruling in *Malloy v. Hogan*,²⁸ which held the fifth amendment's privilege against self-incrimination, as well as all substantive standards underlying it, squarely applicable to the states,²⁹ a brief examination of the principles behind the *McNabb* and *Mallory* decisions will lend insight into the current ruling in the *Miranda* case.

The purpose of the federal procedural requirement of producing an accused before a magistrate without unnecessary relay, and the resultant exclusion of statements given during such a delay, is to avoid the evils of incommunicado interrogation.³⁰ Upon production before the commissioner the accused is told of his right to counsel; his right to remain silent; and is warned of the use in evidence of any given statement.

²² *Supra* note 5, at 460. See also, *Chambers v. Florida*, 309 U.S. 227 (1940).

²³ 168 U.S. 532 (1897), "In criminal trials in the courts of the United States, whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Id.* at 542.

²⁴ 18 U.S.C.A., Rule 5(a): "An officer making an arrest . . . shall take the arrested person without unnecessary delay before the nearest available commissioner. . . ."

²⁵ 318 U.S. 332 (1943).

²⁷ *Supra* note 5, at 463.

²⁶ *Supra* note 7.

²⁸ 378 U.S. 1 (1964).

²⁹ "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Id.* at 8.

³⁰ "this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the implications of secret interrogation of persons accused of crime." *Supra* note 25, at 344.

The Supreme Court, by way of its ruling in *McNabb* and *Mallory*, realized the necessity of warning the accused of his rights as a means to avoid the harmful effect of secret questioning. As stated by Justice Frankfurter in *Mallory*:

The arrested person may of course be "booked" by the police. But, he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, *even if not so designed*, to eliciting damaging statements to support the arrest and ultimately his guilt.³¹

It is these principles³² that the Supreme Court elucidates in its ruling in the *Miranda* case, being of the opinion that the very fact of in-custody interrogation tends to undermine the accused's fifth amendment right.

As to the basic requirement of the silence warning, the court emphasizes the point that the adversary system has begun once the accused is in the hands of skilled interrogators.³³ The very fact of being within the physical confines of a police interrogation room causes the accused to be under a compulsion to speak:³⁴

[A]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion

³¹ *Supra* note 7, at 454 (emphasis added).

³² "We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." *Miranda v. State of Arizona*, *supra* note 5, at 461.

³³ A suggestion to law enforcement officers as to the proper atmosphere in which to interrogate an accused has been stated as follows: "If at all practicable, the interrogation should take place in the interrogator'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. . . . Moreover, his family and other friends are nearby, their presence lending moral support. In his office the interrogator possesses all the advantages. The atmosphere suggests the invincibility of the law." O'HARA, *FUNDAMENTALS OF CRIMINAL INVESTIGATION* (1959). This text, along with LIE DETECTION AND CRIMINAL INVESTIGATION (1953) and CRIMINAL INVESTIGATIONS AND CONFESSIONS (1962), by INBAU and REID, are handbooks of current investigative techniques, and while not official manuals, are extensively used by law enforcement agencies, with sales over forty-four thousand. See, *Miranda v. State of Arizona*, *supra* note 5, at 449, n. 9.

³⁴ The following is a paraphrase of the materials contained in the texts listed *supra* note 33, and was taken from a footnote in a comment, *The Right to Counsel During Police Interrogation*, 53 CALIF. L. REV. 337, 351-352, n. 75, and utilized in the Brief of Counsel for Ernesto A. Miranda, p. 45: "Impress the accused with your certainty of his guilt, and comment upon his psychological symptoms of guilt, such as the pulsation of a carotid artery, nail biting, dryness of mouth etc., smoking should be discouraged because this is a tension reliever . . . the sympathetic approach—anyone else under such circumstances would have acted the same way, suggests a less repulsive reason for the crime, and, once he confesses, extract the real reason, condemn the victims, the accomplice or anyone else upon whom some degree of moral responsibility might be placed; understanding approach—a gentle pat on the shoulder, a confession is the only decent

. . . cannot be otherwise than under a compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than, in the courts or other official investigations where there are often impartial observers to guard against intimidation or trickery.³⁵

Aside from what the Court feels are the inherent compulsions to speak in the atmosphere of police custody, the factor of the unawareness of the accused as to the existence of his fifth amendment right is stressed.³⁶ The warning as to silence will aid in overcoming the pressures of interrogation,³⁷ and enable the accused to fully comprehend his position. Warning the accused that any statement made by him may be used as evidence against him, is necessary to make the individual aware of the consequences of waiving his right to remain silent. The Court expressed this point by saying that "[i]t is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege."³⁸

The requirement of counsel is the most controversial of the procedural safeguards insisted upon by the Court. The dilemma between the rights of society on one hand, and the rights of the individual on the other, created by the presence of counsel during interrogation, has been ably stated by Justice Jackson in his concurring opinion in *Watts v. Indiana*:³⁹

To subject one without counsel to questioning which may be and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to the solution of crime. . . . Any lawyer worth his salt will tell the suspect in no uncertain terms to make no such statement to police under any circumstances.⁴⁰

thing to do, I would tell my own brother to confess; forceful approach—exaggerate the charges against the accused; sweet and sour approach (one policeman is hostile to him while another acts as his friend); interrogation of the reluctant witness—at first be gentle and promise him police protection, then, if he still refuses to talk, attempt to break the bond of loyalty between him and the accused or even accuse him of the offense and interrogate him as if he were the offender."

³⁵ *Miranda v. State of Arizona*, *supra* note 5, at 461.

³⁶ The problem of the unawareness of the accused was noted by Justice Black in an earlier decision in *In Re Grogans Petition*, 352 U.S. 330, 345 (1957): "It is said that a witness can protect himself against some of the many abuses possible in a secret interrogation by asserting the privilege against self-incrimination. But this proposition collapses under anything more than the most superficial consideration. The average witness [suspect] has little, if any, idea when or how to raise any of his constitutional privileges."

³⁷ "It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury." *Miranda v. State of Arizona*, *supra* note 5, at 468.

³⁸ *Ibid.*

³⁹ 338 U.S. 49 (1949).

⁴⁰ *Id.* at 59.

The necessity of counsel at an early stage as required by *Miranda*, was previously noted by Justice Black in his dissenting opinion in *In Re Grogans Petition*.⁴¹ Justice Black stated that "the right to use counsel at the formal trial is a very hollow thing, when for all practical purposes, the conviction is assured by pre-trial examination."⁴² Justice Douglas, also a member of the majority in *Miranda*, made an earlier comment on the need for counsel at an early critical stage, in a preface to a symposium on the right to counsel in the *Minnesota Law Review*.⁴³

[T]he need for the advice and guidance of counsel is not limited to formal courtroom proceedings. The need for counsel exists whenever the procedural and substantive rights of an accused may fail to be asserted fully because of his ignorance or experience. . . . Police interrogation is a very relevant example where this need arises. . . .⁴⁴

The presence of counsel during interrogation also will protect against the possibilities of "led confessions," and avoid the untrustworthiness of the statement. It is emphasized that the right to counsel at this point does not depend upon a formal request, and the failure to request counsel does constitute a waiver of that right. As stated by the Court, "the accused who does not know his rights and therefore does not make a request may be the person who most needs counsel."⁴⁵

The requisite of appointing counsel has raised the legitimate concern of all interested parties as to the cost and practicality problems raised by the advent of the station-house lawyer.⁴⁶ While realizing these difficulties, the Court also realized the injustice involved in allowing counsel at the interrogation stage for only those who can afford it:

⁴¹ *Supra* note 36.

⁴² *Id.* at 344.

⁴³ 45 MINN. L. REV. 693, 694 (1961).

⁴⁴ *Id.* at 694. See also *United States v. Richmond*, 197 F. Supp. 125, (D. Conn. 1960), wherein the court stated: "Statements elicited during questioning are bound to be colored to some extent by the purpose of the questioner, who eventually leads the witness in the absence of court control. The coloring is compounded where the statement is not taken down stenographically, but written out as a narrative in language supplied by the questioner. Where the state of mind of the defendant is an issue in the case, as in determining the degree of a homicide, this wording is of vital importance."

⁴⁵ *Miranda v. State of Arizona*, *supra* note 5, at 470. This same point was noted earlier by the Supreme Court of California in a much discussed case interpreting *Escobedo v. State of Illinois*: "We cannot penalize a defendant who, not understanding his constitutional rights, does not make a request and by such failure demonstrates his unawareness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it." *People v. Dorado*, 62 Cal. 2d 338, 351, 398 P.2d 361-370 (1965).

⁴⁶ See, e.g., Brief for the National District Attorneys Association as amicus curiae, *Miranda v. State of Arizona* as appearing in May, June N.D.A.A. (1966); Brief for the State of Arizona, and DEFENDER NEWSLETTER, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, Vol. I, No. 3 (July 2, 1964).

The warning of the right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.⁴⁷

The Court is concerned with the rights of our less fortunate citizens, and it is precisely those who will benefit by the decision in *Miranda*. This was succinctly stated by counsel for Ernesto A. Miranda in their brief on his behalf before the Supreme Court:

None of this has any application to organized crime at all. The criminal gangs know perfectly well what tools, both physical and legal, they may use in their battle with society. The confession and right to counsel cases which have been before this court so constantly since *Powell v. Alabama* have almost never involved gangtype criminals. The crimes from *Powell* (rape) to *Miranda* (rape) have almost always been rapes and murders, involving defendants poor, poorly educated, and very frequently, as here, of very limited mental abilities. The rich, the well born, and the able are adequately protected . . . and the sophisticates of crime do not need this protection.⁴⁸

It is thus seen that it is primarily the low income and uneducated groupings in our society who will be given the judicial consideration due them, by way of the requirements of the *Miranda* case and not the organized criminal or recidivist.

A LEGISLATIVE SUGGESTION TO THE EFFECTUATION OF MIRANDA

Questions have arisen as to how much opportunity exists on the part of law enforcement agencies to meet the requirements of the *Miranda* decision through appropriate legislation. The Court has not set out rules of law requiring strict adherence. What the Court has done is to state the substantive needs, while allowing legislative action by state bodies and Congress. Chief Justice Warren, speaking for the majority, has put it in the following manner:

Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the states to continue in their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed. . . .⁴⁹

⁴⁷ *Miranda v. State of Arizona*, *supra* note 5, at 473. The Court also states that "the expedient of giving a warning is too simple and the rights involved too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score."

⁴⁸ Brief for Ernesto A. Miranda, *supra* note 34 at 37.

⁴⁹ *Miranda v. Arizona*, *supra* note 5, at 467.

Thus it is seen that the Court leaves room for the adoption of reasonable alternatives so long as the accused's privilege against self-incrimination is adequately protected.⁵⁰

At this point, it will be of value to examine one possible method of effectuation open to law enforcement agencies; the adoption of a Model Code of Pre-Arrest Procedure,⁵¹ drawn by the American Law Institute. The Model Code will receive extensive analysis in the following pages due to the fact that its provisions parallel strikingly the admissibility requirements as set out by the Supreme Court in the *Miranda* decision. An additional reason for this examination is that the Code is directed primarily at pre-arrest procedures in an urban setting, the area most affected by the *Miranda* decision. The Code seeks to protect the same basic rights that were the basis of the Court's concern in *Miranda*:

The recognition of the dignity of the individual also requires that he not be lightly accused of wrongdoing. Official action which implies no accusation is more easily justified than is constraint such as post arrest detention in a police station. [Finally, when] there is an urgent public need to immobilize a person and to require his presence for official inquiry, his dignity and autonomy must not be infringed by tactics which lead him to feel that the choice whether or not to cooperate is no longer his. . . .⁵²

As to the warnings required by the Court in *Miranda*, it was noted earlier in this comment that they are operable whenever the individual is first subjected to police interrogation or "otherwise deprived of his liberty of actions in any significant way."⁵³ These requirements are paralleled in Sections 3.08 (d) and 4.01 (2) of the Model Code. Section 3.08 provides for a warning upon arrest:

Upon making any arrest, a law enforcement officer shall

- (d) as promptly as is reasonable under the circumstances, and in any event before engaging in any sustained questioning, warn such person that he is not obliged to say anything or answer any questions, that anything he says may be used in evidence, and that upon arrival at the police station he will be permitted to communicate by telephone with counsel, relatives or friends.⁵⁴

⁵⁰ *Ibid.*: "It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States. . . . Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsion of the interrogation process as it is presently conducted."

⁵¹ MODEL CODE OF PRE-ARREST PROCEDURE (Tent. Draft No. 1, 1966).

⁵² *Id.* at xxi.

⁵³ *Miranda v. State of Arizona*, *supra* note 5, at 444.

⁵⁴ "[T]he coercive effect of an arrest is such that it will often lead the arrested person to believe that he must respond to police inquiry, and given the importance that the Code attaches to uncompelled choice to cooperate, a warning which informs the

Article Four, entitled "Disposition of Arrested Persons," adequately insures that the accused is made continuously aware of his privilege of not cooperating if he so chooses. Section 4.01, "Disposition of Arrested Persons; Warnings," provides in subsection (2) that,

- (T)he station officer shall immediately inform the arrested person,
- (b) that he is not obliged to say anything⁵⁵ and that anything he says may be used in evidence;
 - (c) that he may promptly communicate by telephone with counsel,⁵⁶ relatives or friends and that if necessary, funds will be provided to enable him to do so. . . .⁵⁷

The arrested person is also to be immediately given a printed form which in plain language contains the substance of the spoken warnings. He is asked to read and sign a statement that reads, "I have read the warning given above and understand it."⁵⁸ The officer is then required to countersign the form. Section 4.09 also requires sound recordings of the administration of the warnings.⁵⁹ These sections adequately inform the accused of his fifth amendment right and give the state a means of establishing at trial the giving of the required warnings.

The most controversial portion of the *Miranda* decision, that which requires the presence of counsel during interrogation, is covered by the Model Code in Section 5.07 (1):

Counsel for an arrested person shall have prompt access to him, by telephone, and in person on counsel's arrival at any place where such person is detained. Counsel for an arrested person shall not be prevented from staying at any such place and being allowed access to the arrested person whenever such person requests his presence.⁶⁰

arrested person of the limits of his obligation in his new situation seems indispensible." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 3.08, note (Tent. Draft No. 1, 1966). This parallels the warning to suspects as required in the English *Judges Rules*: "You are not obliged to say anything unless you wish to do so, but what you say may be put in writing and given in evidence." 1964 CRIM. L. REV. (Eng.) 166-170.

⁵⁵ *Id.* Comment to Article Four. ". . . a full and fair warning is a crucial premise to the state's right to subject one in custody to inquiry. . . . An arrested person's situation at the police station will so often imply compulsion, particularly to the ignorant and uneducated, that an affirmative step to dispel the implication is surely called for."

⁵⁶ Section 4.01, in a note following it, provides for a warning as to appointed counsel for indigents if required in the jurisdiction, and thus will cover that requirement of *Miranda*.

⁵⁷ *Supra* note 51, at 4.01 (2).

⁵⁸ *Ibid.*

⁵⁹ Section 4.09, dealing with sound recordings, will be discussed later in this comment when dealing with the interrogation of the accused.

⁶⁰ *Supra* note 51, at 5.07 (1).

By thus providing access of counsel at any time, the Code attempts to dispel, as desired by the court in *Miranda*, "the compelling pressures of the interrogation process."⁶¹

The framers of the Model Code, in this section, as does the Court in *Miranda*, express their main concern in the direction of the accused's privilege against self-incrimination:

Although we do not believe that a state has an affirmative obligation to insure that persons in custody will not incriminate themselves, this does not mean that the state has the right to tip the scales the other way and prevent a person in custody from seeking aid and assistance at every step of the investigation if he wishes to have it.⁶²

In addition to allowing the presence of counsel,⁶³ the Code also requires sound recordings of all interrogation as a means of avoiding controversy at trial as to what transpired. Section 4.09 (3) (b) requires such recordings for any interrogation involving more than a few brief questions. This recording is to indicate the duration of the session and is to be accompanied by a written record indicating the names of the officers conducting the questioning.⁶⁴ Various other sections of the Code provide that no abuse, deceptions as to rights, or unfair inducements be used during any questioning,⁶⁵ in an attempt to bolster the accused's right to remain silent.

The final section of the Model Code to be examined is article nine, which provides for the exclusion of statements elicited through violations of the Code. Section 9.03 (1) provides in part that,

[I]f an officer fails to issue the warning required . . . no statement made by such person after he should have been so warned and prior to any time that such failure is cured,⁶⁶ [unless] it is made in the presence or upon consultation

⁶¹ *Supra* note 51, note to § 5.07: "This section expresses the principle that at no time may an arrested person be held incommunicado in order to facilitate the investigation. Not only is coercion deterred if the person is always available to advisors, but more important, the affirmative effort to undermine a person's autonomy, which purposeful isolation imports, cannot be justified as a means of eliciting information. . . . This section thus provides that counsel shall have prompt access to the prisoner and may at his request remain and consult with him during any questioning."

⁶² *Supra* note 51, Comment to § 5.07.

⁶³ The Code allows questioning of the accused until the arrival of counsel, and thus would require amending to meet the *Miranda* requirement of no questioning until the arrival of counsel.

⁶⁴ *Supra* note 51, § 4.09 (3) (b).

⁶⁵ "It would be grossly inconsistent with the purpose of these protective provisions if the Code were to fail to make it clear that officers must not undercut those warnings of rights by deceiving an arrested person about his right to remain silent." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Comment to § 5.02.

⁶⁶ A failure to warn will be cured if after such failure the warning was subsequently issued and the court feels that the delay in issuing it did not substantially prejudice the arrested person. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 9.03 (1).

with counsel, shall be admitted into evidence against such person in a criminal proceeding in which he is the defendant.⁶⁷

Thus it is seen that this section, as does *Miranda*, excludes statements taken via a violation of the accused's fifth amendment privilege. It can be perceived, by the above examination of relevant extracts from the Model Code of Pre-Arrest Procedure, that adequate measures may be taken by law enforcement bodies, on their own, to effectuate the procedural requirements of the *Miranda* decision.

CONCLUSION

The recognition by the Supreme Court, as well as by the framers of the Model Code, of the importance of apprising an accused of his basic constitutional rights, indicates an awareness among those concerned with criminal justice in this nation, that large groups in our population have been inadequately protected in a system espousing equality under the law. The methodology utilized to protect these individuals has, however, drawn the grave concern of the dissenting Justices.⁶⁸ The fact that the Court bases its decision on the fifth amendment, rather than on the traditional case by case method, under the due process test, drew sharp criticism from the dissenters.⁶⁹ Nevertheless, the very nature of our Constitution requires and demands elasticity to meet the needs of time. As noted by Judge Frank in his dissenting opinion in *United States v. Grunewald*:⁷⁰

The critics of the Supreme Court, however, in their overemphasis on the history of the fifth amendment privilege, overlook the fact that a noble privilege often transcends its origins, that creative misunderstandings account for some of our most cherished values and institutions; such a misunderstanding may be the mother of invention.⁷¹

The apprising of an accused, especially a poor and uneducated one, of his right to remain silent, and the procedural devices necessary to secure that

⁶⁷ *Supra* note 51, § 9.03 (1).

⁶⁸ "The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed, and unrepresented in this case." *Miranda v. State of Arizona*, *supra* note 5, at 542 (White, J., dissenting).

⁶⁹ "The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the fifth amendment." *Id.* at 526.

⁷⁰ 233 F.2d 556 (2d Cir. 1956), rev'd, 353 U.S. 391 (1957).

⁷¹ *Id.* at 581.

right, are required by our Constitution, which is designed to protect the sophisticates as well as the uninformed of our nation.⁷²

The problem of crime is a continuing one, calling for greater and more scientifically effective methods of detection. However, the need for a solution to the problem does not warrant a denial of basic rights to the citizenry. As stated by Professor Sutherland, "[t]he war on crime is not a sporadic crisis, here today and gone tomorrow, justifying in its brief combat stage a shelving of long-standing immunities of the citizens."⁷³

The concern expressed by some that the warning to an accused of his constitutional right to remain silent will tend to hamper effective law enforcement,⁷⁴ is not one that should exist in a free society. This point was admirably noted by Justice Goldberg in the majority opinion in *Escobedo v. State of Illinois*:⁷⁵

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. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.⁷⁶

The Supreme Court of the United States, in rendering its decision in the *Miranda* case, has given affirmative voice to that principle and paved the way for a true and just application of constitutional guarantees to the accused.

Terrence Kiely

⁷² "There is necessarily a direct relation between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused. . . . Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination." *Escobedo v. Illinois*, 378 U.S. 478, 488 (1963).

⁷³ Sutherland, *Crime and Confessions*, 79 HARVARD L. REV. 21, 40-41 (1965).

⁷⁴ "The fear of admonishment is that it will benefit only the recidivist and the professional." Brief for the N.D.A.A. as amicus curiae, *supra*, note 46.

⁷⁵ *Escobedo v. Illinois*, 378 U.S. 478 (1963).

⁷⁶ *Id.* at 490.