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The Missing Miranda Warning: Why What You Don’t Know Really Can Hurt You

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Abstract

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Miranda – at least the core rule that statements made by suspects in response to custodial interrogation are admissible in the prosecution’s case-in-chief only following a knowing and voluntary waiver of the Miranda rights – has survived decades of attacks. While the “stormy seas” the decision navigated produced a wake of academic study of the wisdom of the decision, little attention has been focused on an equally logical question: did Miranda go far enough? If, as the Miranda Court emphasized, the purpose of Miranda’s warnings was to ensure criminal suspects were provided a meaningful opportunity to exercise their privilege against self-incrimination, why has Miranda never debilitated law enforcement in the ways predicted when the decision was handed down?

Three apparent answers emerge. First (as Justice Scalia periodically asserts), perhaps waiver and confession by a criminal suspect is a natural, logical, and laudable action motivated by contrition and the desire to accept responsibility for criminal wrongdoing – a natural product of human catharsis. This conclusion is suspect. If true, the interrogation techniques on which police routinely rely to obtain confessions (albeit after a valid Miranda waiver) would generally be unnecessary; suspects would be inclined to confess of their own immediate volition. Second, perhaps the whittling away of the breadth of the Miranda decision by subsequent jurisprudence has rendered Miranda a practical nullity? This explanation is equally unlikely considering most confessions are obtained in the traditional custodial interrogation environment where compliance with Miranda remains a requirement for admissibility of these confessions. Third, perhaps the Miranda warnings never truly achieved their intended objective: to restore confidence that a suspect’s decision to cooperate during a police interrogation is the product of his own decision and not governmental coercion. If the purpose of the warnings was to educate a criminal suspect of his inconsequential right to refuse to assist the government in establishing his guilt, perhaps suspects do not clearly and completely understand that right?

This article will assert that, contrary to the criticism that Miranda was overly protective of the rights of criminal suspects, the warnings required by that decision are in fact not protective enough. This accounts for the reality that most criminal suspects waive their rights and facilitate their own convictions. More specifically, this article will assert that, from the outset of the warning and waiver requirement established by the Miranda decision, what is perhaps the most important warning has never been required:
that silence in the face of an allegation is never incriminating. This “missing” *Miranda* warning is, in the opinion of the author, perhaps the most important warning a suspect confronted with custodial interrogation requires to meaningfully exercise the privilege against self-incrimination, and yet it is the one warning that has never been required. Without this warning, the suspect is left to fear the instinctual expectation that silence in the face of accusation will be inferred by the accuser as guilt. Without being informed of the constitutional prohibition against such inferential guilt, the suspect is left to choose between standing on the right to silence and “looking guilty,” or attempting to explain to the accuser why the accusation is erroneous. When considered from this perspective, it becomes easily understandable why a suspect would choose to enter into a dialogue with the interrogator, even knowing full well “anything said or done can be used against you in a court of law.” In short, unless the suspect understands that saying nothing cannot be used against him, the risk that what he does say may be used against him seems far less significant.

This underinclusiveness is a necessary consequence of any rule of presumption, and does not in the abstract justify abandoning *Miranda* and reverting back to the case-by-case voluntariness test it effectively replaced. Acceptance of this consequence has been a central theme of all post-*Miranda* jurisprudence. However, tolerance is not synonymous with the conclusion that underinclusiveness is unavoidable. Instead, the recognition of underinclusiveness warrants consideration of whether it is genuinely inevitable and unavoidable, or whether it is the result of a defect in the method used to strike the balance *Miranda* sought to achieve? If the answer is the latter, then considering how *Miranda* should be adjusted is both logical and appropriate. Perhaps because *Miranda* has been under attack since its inception, this question has received virtually no consideration. What calibrations could *Miranda*’s presumptive rule undergo to mitigate some of its natural underinclusiveness?

This article will address this question. First, it will review the purpose for the *Miranda* warning and waiver requirement. Second, it will consider how the established warnings left criminal suspects vulnerable to the influence of an adverse inferential perception of guilt, resulting from silence in the face of allegation. Third, it will discuss the proclivity of criminal suspects to waive their *Miranda* rights. Fourth, it will discuss incongruity between the absence of a no adverse inference warning and the prohibitions of exploiting a suspect’s silence at trial. The article will then propose how adding this missing *Miranda* warning would more effectively align the original purposes of *Miranda* with the prophylactic actually used to protect the free exercise of
the privilege against self-incrimination and, in so doing, create symmetry between the investigatory and trial phases of criminal prosecution.
In 1967, the Supreme Court decided a case that has become more engrained in American culture than perhaps any other decision in the history of the Court: *Miranda v. Arizona*. The Court first analyzed the nature of custodial interrogation, and concluded that the inherent coercion associated with such questioning undermined any confidence that a suspect’s decision to cooperate with police was the result of a voluntary relinquishment of the privilege against self-incrimination. As a result, the Court held that answers to questions elicited in that environment would be presumptively involuntary, and their admission against the suspect at trial prohibited. The Court then held that “something more” than a suspect simply responding to questions in custody was required to prove his decision to cooperate with police was the product of a voluntary waiver of the privilege to remain silent. That “something more”, according to the Court, required informing the suspect of a list of rights, and obtaining from the suspect a voluntary waiver as a condition precedent to questioning.

The *Miranda* decision unleashed a barrage of criticism directed at the Court, with dire predictions of the disabling effect the warning and waiver requirement would have on effective law enforcement. These predictions, however, proved false. Evidence quickly established that most suspects waived their rights, even when doing so resulted in incriminating statements, and in the view of many critics, left them vulnerable to police manipulation. Furthermore, the warning and waiver requirement substantially disabled a defendant’s ability to successfully allege incriminating statements were the product of actual coercion, often benefiting law enforcement. Ironically, the proclivity of suspects to waive their rights, coupled with the presumption of actual voluntariness demonstrated by a valid waiver, produced a net gain for law

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2 See *Miranda*, 384 U.S. at 458 (noting that, without adequate constitutional safeguards to combat the inherently coercive nature of custodial interrogation, no suspect’s confession can be considered truly voluntary).
3 Id. at 469 (“[A] warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.”).
6 See infra pp. 11-12.
enforcement: almost the same number of suspects provided incriminating statements. Those statements became even more reliable in both their admissibility and probative value.

At the same time, the *Miranda* warnings quickly became a ubiquitous component of both criminal procedure and American culture. As Chief Justice Rehnquist noted in what is widely regarded as the decision that saved *Miranda* from the precipice of demise, *Dickerson v. United States*\(^7\), “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”\(^8\) In spite of this, and the fact that *Miranda* never truly disabled law enforcement as was so direly predicted, the decision retreated from its proverbial high ground almost as soon as it established a foothold. In the decisions following *Miranda*, the Supreme Court steadily whittled it away: endorsing a public safety exception\(^9\); narrowing the warning and waiver requirement’s impact by limiting the meaning of “custody” and “interrogation”\(^10\); endorsing an “implied waiver”\(^11\); defining *Miranda* as a constitutional “prophylactic” that “sweeps more broadly than the privilege it protects” thereby justifying the conclusion that a *Miranda* violation does not implicate the fruit of the poisonous tree doctrine\(^12\); and limiting the impact of a *Miranda* violation to prohibiting

\(^7\) 530 U.S. 428 (2000).

\(^8\) *Dickerson*, 530 U.S. at 443.


\(^10\) See *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (“[C]ustodial interrogation, [means] 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.” (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). The court then held that one who enters a police station voluntarily and with freedom to leave at any time, is not considered to be “in custody” so as to trigger a *Miranda* warning requirement. See also *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (“[P]ersons temporarily detained pursuant to [traffic] stops are not ‘in custody’ for the purposes of *Miranda*.’’); *Rhode Island v. Innis*, 446 U.S. 291 (1980) (holding that the term “interrogation” under *Miranda* referred not only to express questioning, but also to any words or actions on the part of the police that the police should know were reasonably likely to elicit an incriminating response from a suspect).

\(^11\) See *North Carolina v. Butler*, 441 U.S. 369 (1979) (holding that an express oral or written waiver of rights is not inevitably neither necessary nor sufficient to satisfy *Miranda*’s waiver requirement. Rather, the determination turns on whether one knowingly and intentionally waives his rights to silence and counsel). See also *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) (holding that one who wishes to invoke his rights under *Miranda* must do so unambiguously).

\(^12\) *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (holding that a suspect who has once responded to unwarned yet uncoercive questioning (here, within the defendant’s own home) is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings, and that in the present case the defendant’s
the prosecution’s use of the suspect’s statement in the case-in-chief only. In fact, that perceived attack on *Miranda* was so significant that Justice Brennan characterized one of these decisions as reflecting nothing less than a palpable hostility to the core *Miranda* rule itself.

These repeated attacks, in the view of *Miranda*’s proponents and critics alike, seemed to predict the inevitability of *Miranda*’s demise. To many, *Dickerson v. United States* should have been the coup de grace. In *Dickerson*, the Court confronted whether Congress could provide a legislative substitute for *Miranda* based on the traditional due process voluntariness test. To the scholastic community’s surprise, Chief Justice Rehnquist, writing for a seven-justice majority, answered the question in the negative. The Chief Justice conceded that if *Miranda* had failed to exist in 1996, the Court might not embrace it, as its predecessor Court did in 1967. Additionally, he acknowledged that the Court’s subsequent *Miranda*-related jurisprudence had significantly altered the breadth of the original decision. However, the combined effect of *stare decisis*, the ubiquitous place of *Miranda* in our national culture, and the efficacy of the Court’s adjustments to the original decision justified preserving the core requirement of *Miranda* as a “constitutional rule.” In a charged dissenting opinion, Justice Scalia condemned the majority for refusing to overrule *Miranda*, and more directly for failing to reach the only logical conclusion that could be derived from the prior decisions.

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14. *See Oregon v. Elstad*, 470 U.S. 298, 319 (1984) (Brennan, J. dissenting) (“[T]he Court has engaged of late in a studied campaign to strip the *Miranda* decision piecemeal and to undermine the rights *Miranda* sought to secure. Today’s decision not only extends this effort a further step, but delivers a potentially crippling blow to *Miranda* and the ability of courts to safeguard the rights of persons accused of crime.”).


17. *Id.* at 443 (“Whether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”).

18. *See Id.* at 443-44 (“[O]ur subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”).

19. *Id.*
modifying the original *Miranda* rule: *Miranda* was not a rule of constitutional law and the Court had no legitimate authority to sustain its primacy over an inconsistent statute.20

*Miranda* – at least the core rule that statements made by suspects in response to custodial interrogation are admissible in the prosecution’s case-in-chief only following a knowing and voluntary waiver of the *Miranda* rights – had survived. While the “stormy seas”21 the decision navigated produced a wake of academic study of the wisdom of the *Dickerson* decision, little attention has been focused on an equally logical question: did *Miranda* go far enough? If, as the *Miranda* Court emphasized, the purpose of *Miranda*’s warnings was to ensure criminal suspects were provided a meaningful opportunity to exercise their privilege against self-incrimination, why has *Miranda* never debilitated law enforcement in the ways predicted when the decision was handed down?

Three apparent answers emerge. First (as Justice Scalia periodically asserts), perhaps waiver and confession by a criminal suspect is a natural, logical, and laudable action motivated by contrition and the desire to accept responsibility for criminal wrongdoing – a natural product of human catharsis.22 This conclusion is suspect. If true, the interrogation techniques on which police routinely rely to obtain confessions (albeit after a valid *Miranda* waiver) would generally be unnecessary; suspects would be inclined to confess of their own immediate volition. Second, perhaps the whittling away of the breadth of the *Miranda* decision by subsequent jurisprudence has rendered *Miranda* a practical nullity? This explanation is equally unlikely considering most confessions are obtained in the traditional custodial interrogation environment where compliance with *Miranda* remains a requirement for admissibility of these confessions. Third, perhaps the *Miranda* warnings never truly achieved their intended objective: to

20 *Dickerson*, 530 U.S. at 454 (Scalia, J. dissenting) (“The Court today insists that the decision in *Miranda* is a “constitutional” one . . . but what makes a decision “constitutional” . . . is the determination that the Constitution requires the result that the decision announces and the statute ignores. By disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people.”).

21 The characterization often used by Professor Joshua Dressler to introduce students to the post-*Miranda* jurisprudence.

22 See e.g. *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J. dissenting) (“While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself . . . [a] confession . . . ‘demonstrates a recognition and affirmative acceptance of personal responsibility for . . . criminal conduct,’ (quoting U.S. Sentencing Commission, Guidelines Manual § 3E1.1 (1988)) . . . We should, then, rejoice at an honest confession, rather than pity the “poor fool” who has made it.”).
restore confidence that a suspect’s decision to cooperate during a police interrogation is the product of his own decision and not governmental coercion. If the purpose of the warnings was to educate a criminal suspect of his inconsequential right to refuse to assist the government in establishing his guilt, perhaps suspects do not clearly and completely understand that right?

This article will assert that, contrary to the criticism that *Miranda* was overly protective of the rights of criminal suspects, the warnings required by that decision are in fact not protective enough. This accounts for the reality that most criminal suspects waive their rights and facilitate their own convictions. More specifically, this article will assert that, from the outset of the warning and waiver requirement established by the *Miranda* decision, what is perhaps the most important warning has never been required: that silence in the face of an allegation is never incriminating. This “missing” *Miranda* warning is, in the opinion of the author, perhaps the most important warning a suspect confronted with custodial interrogation requires to meaningfully exercise the privilege against self-incrimination, and yet it is the one warning that has never been required. Without this warning, the suspect is left to fear the instinctual expectation that silence in the face of accusation will be inferred by the accuser as guilt. Without being informed of the constitutional prohibition against such inferential guilt\(^\text{23}\), the suspect is left to choose between standing on the right to silence and “looking guilty,” or attempting to explain to the accuser why the accusation is erroneous. When considered from this perspective, it becomes easily understandable why a suspect would choose to enter into a dialogue with the interrogator, even knowing full well “anything said or done can be used against you in a court of law.” In short, unless the suspect understands that saying nothing cannot be used against him, the risk that what he does say may be used against him seems far less significant.

As a rule of presumption, *Miranda* has always suffered from overbreadth and underinclusiveness in the interests of clarity and predictability. This presumption was factually overbroad from the outset. There are undoubtedly certain suspects who do not need to be advised of their *Miranda* rights to make a knowing and voluntary decision to submit to police interrogation. For example, a veteran police officer, criminal defense attorney, or prosecutor is almost certainly able to make a knowing decision to submit to custodial interrogation without being advised of his *Miranda* rights. Nonetheless, the failure to do so by police interrogators results in the inadmissibility of any subsequent statement. The *Miranda* Court, in fact, specifically

addressed this possibility, holding that the interests of a clearly applicable rule outweighed the interests of engaging in case-by-case assessments of whether the warnings were actually necessary. Thus, the Court implicitly acknowledged the over-breadth of the rule it created, and concluded that this over-breadth was an acceptable cost of a rule of presumption intended to produce a more efficient and certain indication of voluntariness.

At the same time, *Miranda* was also under-inclusive from the outset. *Miranda* established an alternate presumption for suspects who execute a voluntary waiver of their rights after having been informed of those rights: that their subsequent statements are the product of voluntary choice. While this presumption is not conclusive for purposes of the alternative assessment of voluntariness under due process jurisprudence, it is for purposes of the voluntary exercise of the privilege against self-incrimination. In essence, the *Miranda* waiver conclusively establishes that the suspect made a voluntary choice to waive the right not to speak with police interrogators. Beyond that point, a suspect still has the opportunity to prove that the tactics used by police during the interrogation overbore the suspect’s free will thereby producing a due process violation. Such a challenge subsequent to a *Miranda* warning is, however, extremely difficult to sustain. Thus, the *Miranda* waiver, while not controlling on the alternative due process analysis, is an extremely beneficial factor on behalf admissibility pursuant to the due process totality of the circumstances analysis.

Some suspects would never need a rights warning to meaningfully exercise their privilege. Nonetheless, even a custodial confession by a Supreme Court Justice or a chief of police will be inadmissible in the prosecutor’s case-in-chief unless the police complied with *Miranda*. Other suspects waive their rights without genuinely understanding them, a reality known all too well by criminal defense attorneys. Nonetheless, evidence of a valid warning and waiver creates a conclusive presumption that the decision to cooperate with law enforcement reflects a meaningful waiver of the privilege of self-incrimination. Since *Miranda* was decided, our society accepted this inherent overbreadth and underinclusiveness in exchange for the overall benefit of clarity, predictability, and confidence in the balance between the investigatory process and respect for the “precious” privilege against self-incrimination produced by *Miranda*.

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24 *See Miranda*, 384 U.S. at 468-69 (“Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation . . . [m]ore important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.”).
Overbreadth and underinclusiveness is a necessary consequence of any rule of presumption, and does not in the abstract justify abandoning *Miranda* and reverting back to the case-by-case voluntariness test it effectively replaced. Acceptance of this consequence has been a central theme of all post-*Miranda* jurisprudence, and was the *ratio decidendi* at the core of Chief Justice Rehnquist’s *Dickerson* opinion. However, tolerance is not synonymous with the conclusion that underinclusiveness is unavoidable. Instead, the recognition of underinclusiveness warrants consideration of whether it is genuinely inevitable and unavoidable, or whether it is the result of a defect in the method used to strike the balance *Miranda* sought to achieve? If the answer is the latter, then considering how *Miranda* should be adjusted is both logical and appropriate. Perhaps because *Miranda* has been under attack since its inception, this question has received virtually no consideration. What calibrations could *Miranda*'s presumptive rule undergo to mitigate some of its natural underinclusiveness?

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**Revisiting the Core Purpose of Miranda**

When the Supreme Court issued its ruling in the consolidated case of *Miranda v. Arizona*, it was felt as a seismic shock through the law enforcement community. This “shock effect” was the result of the broad implications created by the plain language of the ruling and the assumption that the efficacy of criminal interrogations by law enforcement had been permanently hobbled.25 According to the Court, protecting the criminal suspect’s Fifth Amendment privilege against self-incrimination required

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25 See *Miranda*, 384 U.S. at 500 (Clark, J. dissenting) (“When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient.”).
“something more” than the mere availability of the privilege during trial – previously embraced by a totality-of-the-circumstances test – to offset the inherent coercion associated with police interrogation.\(^\text{26}\) That ‘something more’ became the ubiquitous \textit{Miranda} warning: unless police interrogators informed a criminal suspect of the essential rights noted by the Court, and obtained an express waiver of those rights, responses to police interrogation would be suppressed based on a presumption that they were the product of coercion.

The \textit{Miranda} decision was undoubtedly the high water mark of protecting suspects from the efforts of police interrogators. The purpose of the ruling seemed absolutely clear: level the playing field between police interrogators and individuals subjected to custodial interrogation. The imbalance between police interrogators and suspects was highlighted by the Court’s extensive review of police interrogation tactics, a review that led the Court to conclude that these tactics routinely resulted in a lack of confidence that confessions and admissions were the result of a meaningful choice on the part of the suspect to cooperate with police. According to the Court:

> From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: to be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must “patiently maneuver himself or his quarry into a position from which the desired objective may be attained.” When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights . . . Even without employing brutality, the “third degree” or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty, and trades on the weakness of individuals . . . In other settings, these

\(^{26}\) \textit{See Dickerson}, 530 U.S. at 442. (“In \textit{Miranda}, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession . . . a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary.”).
individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.\textsuperscript{27}

The Court then emphasized that the nature of contemporary police interrogation tactics presented a genuine threat to the “precious” protection against compulsory self-incrimination.\textsuperscript{28} Therefore, it became incumbent on the Court to erect “adequate safeguards” to ensure a suspect’s free will was being meaningfully exercised in the custodial interrogation environment, even in those arenas where the type of physical coercion traditionally necessary to find a confession involuntary was absent:

In these cases, we might not find the defendants’ statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest . . . in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.\textsuperscript{29}

The current practice of incommunicado interrogation is at odds with one of our Nation’s most cherished principles -- that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.\textsuperscript{30}

It is the last statement that provides the foundation for everything that followed in the opinion and its subsequent implementation by law enforcement agencies. The entire purpose of the \textit{Miranda} warning and waiver requirement was to ensure a suspect’s decision to engage in an interrogation dialogue with police is the product of genuine free will. For the \textit{Miranda} Court, informing the suspect of the rights outlined in the opinion and obtaining a voluntary waiver of those rights effectively ensured that free exercise. The presumption that free exercise was established by obtaining a valid \textit{Miranda} warning was not conclusive; suspects would still have the opportunity to

\textsuperscript{27} \textit{Miranda}, 384 U.S. at 455-56.

\textsuperscript{28} \textit{Miranda}, 384 U.S. at 457

\textsuperscript{29} \textit{Id.}

\textsuperscript{30} \textit{Id.} at 457-58 (emphasis added).
prove a statement was the product of actual police coercion in violation of the due process voluntariness test. However, as the Court noted in its subsequent decision in *Missouri v. Seibert*[^31], “giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; [a suspect’s] maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver.”[^32]

Almost as soon as *Miranda* was decided, however, the Supreme Court began to dilute the broad sweep of the decision. This was accomplished through a chain of decisions interpreting the meaning of key components of the *Miranda* decision, including the meaning of custody[^33], interrogation[^34], voluntary waiver[^35], and the consequence of a violation itself[^36]. The most profound manifestation of the Court’s conclusion that *Miranda* as originally conceived was constitutionally overbroad came in the decision of *Oregon v. Elstad*.[^37] Writing for the majority, Justice O’Connor concluded that the “*[t]he *Miranda* exclusionary rule … serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.*”[^38] Accordingly, the Court rejected the assertion that a *Miranda* violation constitutes a ‘poisoned tree’ for purposes of derivative fruits admissibility analysis because a *Miranda* violation was not *ipso facto* a

[^31]: 542 U.S. 600.


[^33]: *Oregon v. Mathiason*, 429 U.S. 492 (1977) (*Miranda* applies when a suspect has been taken into formal police custody or otherwise deprived of his freedom of action).

[^34]: *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (“*[T]he 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.” This standard is commonly referred to as questioning or its “functional equivalent.”).

[^35]: *North Carolina v. Butler*, 441 U.S. 369 (1979) (An accused’s express statement can constitute a valid waiver, although such a statement is not required to find a waiver was voluntary. In the absence of an express statement, whether a voluntary waiver is given is to be determined on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of defendant.)

[^36]: *Oregon v. Elstad*, 470 U.S. 298, 317 (1985) (“When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State’s case in chief”).


[^38]: *Elstad*, 470 U.S. at 307.
constitutional violation, but instead merely the violation of a Court imposed ‘prophylactic’ intended to protect the core constitutional privilege against self-incrimination. As a result, the only evidentiary consequence of a Miranda violation is exclusion of the statement obtained in response from the prosecution case-in-chief. Furthermore, while the violation is a factor in analysis of actual coercion to determine whether police violated the due process voluntariness test, it is almost never a dispositive factor in the totality of the circumstances analysis required to assess due process compliance.

This chain of decisions led many to predict the ultimate downfall of Miranda, culminating with United States v. Dickerson, discussed above. While the Dickerson decision saved Miranda from ultimate demise, the nature of the protection for criminal suspects it saved was a far more restrictive than that provided by the original Miranda decision. Indeed, the narrowing of the scope of the Miranda protections resulting from more than two decades of Supreme Court “adjustments” proved to be a significant factor in the Court’s willingness to preserve the warning and waiver requirement. According to Justice Rehnquist, “our subsequent cases have reduced the impact of the Miranda rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”

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39 See Id. at 307-08. (“[T]he Miranda presumption, though irrebuttable for purposes of the prosecution’s case in chief, does not require that the statements and their fruits be discarded as inherently tainted.” The Court elaborated by noting that “unwarned questioning ‘did not abridge respondent’s constitutional privilege . . . but departed only from the prophylactic standards later laid down by this Court in Miranda to safeguard that privilege . . .’ (quoting Michigan v. Tucker, 417 U.S. 433, 446 (1974)). Since there was no actual infringement of the suspect’s constitutional rights, the case was not controlled by the doctrine expressed in [Wong Sun v. United States, 317 U.S. 417 (1963)] that fruits of a constitutional violation must be suppressed.).

40 See supra note 34 and accompanying text.

41 See Elstad, 470 U.S. at 318. (“Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect’s initial inculpatory statement, though technically in violation of Miranda, was voluntary. . . . [I]n any [voluntariness] inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is [however], highly probative.”).


43 Id.
unavoidable inference: the Dickerson Court concluded that Miranda had become a net gain for law enforcement.

This inference that police were benefitting from Miranda is unsurprising. By the time Dickerson was decided, empirical evidence demonstrated that the vast majority of criminal suspects continued to provide statements during custodial interrogation. All Miranda had essentially done was bolster the presumption that these statements were actually voluntary. This unexpected consequence was partially attributable to the improvement in police conduct, which resulted from Miranda’s rule that a valid warning and waiver be the predicate to admissibility of custodial confessions. However, that the Supreme Court ultimately chose to retain the core Miranda requirement – even after repeatedly emphasizing that this requirement swept more broadly than the Constitution itself – is a powerful indicator that Miranda never produced the disabling effect on law enforcement predicted at the time of the decision.

Perhaps because the Court began to dilute the impact of Miranda almost as soon as it created it - a process that has continued unabated even through today - almost all analysis devoted to Miranda has focused on its overbreadth. When should Miranda be triggered? What allowance should be made for good faith mistakes, or non-investigatory motive for questioning? What qualifies as a valid waiver? Is Miranda a constitutional rule? If not, can legislatures override the warning and waiver requirement? All of these questions have generated an abundance of scholarship and many have produced answers from the Supreme Court. Ironically, however, very little legal attention has been generated by the fact that the vast majority of suspects continue to submit to custodial interrogation, even during the classic station-house questioning (the situation at the core of the Miranda concern).

As noted above, it seems relatively clear that one reason Miranda survived the Dickerson challenge was that the Court concluded the Miranda and its progeny did not

44 See e.g. infra note 64 and accompanying text.


disable effective law enforcement, and may have even enhanced the evidentiary value of custodial interrogation.50 But this should raise an important question: why is this so? Why didn’t the dire predictions that most suspects would invoke their right to silence and thereby disable the effectiveness of law enforcement ever come to fruition? As noted above, Justice Scalia periodically asserts that suspects are often motivated by a general sense of contrition.51 While this may indeed be true in the abstract, human nature suggests that only a fraction of suspects would be so motivated by a desire to accept responsibility for criminal misconduct that they would forego the opportunity to consult with counsel and confess at the first possible opportunity. If this theory had genuine merit, one must wonder why these suspects would not spontaneously confess to their wrongdoing (statements which would be admissible even without *Miranda* warnings due to an absence of interrogation). Furthermore, because empirical data indicates that many innocent suspects confess to crimes they did not commit during the course of custodial interrogation following a *Miranda* waiver, there is no rational basis to conclude these confessions are motivated by contrition.

The only plausible alternative explanation for why the majority of suspects waive their *Miranda* rights and submit to police interrogation is that the warnings themselves have never effectively achieved the *Miranda* Court’s objective: ensure that individuals make a truly knowing decision to cooperate with interrogators by offsetting the ‘evils’ associated with the custodial interrogation environment. Until now, the primary focus of the scholarly analysis on the subject has been on the techniques utilized by law enforcement to exploit the probability that suspects don’t really understand the rights provided by the warnings. Indeed, the entire construct of having the same officer who harbors the suspicion be the one required to educate the suspect on his right to refuse to cooperate has always been regarded as somewhat illogical.

What has received virtually no attention is the question of whether the warnings themselves are inherently defective. If the purpose of the warning is to offset the inherent coercion associated with the custodial interrogation environment, then they must provide the suspect with the information necessary to make a meaningful choice as to whether to stand on the right to silence or cooperate. The *Miranda* Court obviously assumed that this offset would be effectively achieved by informing a suspect

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50 See *Id.* at 443. (“*[O]ur subsequent cases have reduced the impact of the Miranda rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.*”).

51 See *supra* note 22 and accompanying text.
that he has a right to remain silent, a right to consult with counsel prior to cooperating and have counsel present during questioning, and the evidentiary consequence of waiving those rights. However, the post-Miranda record suggests that the Court may have underestimated or failed to consider that which may explain the choice of so many suspects to run the gauntlet of police interrogation: the fear that silence will produce an inference of guilt.

Nothing in the warnings required by the Miranda Court address this quite natural concern for a suspect confronted with an allegation of criminal wrongdoing. While the suspect is clearly informed he has the absolute right to refuse to cooperate with the interrogator, it is only the consequence of cooperation that is brought to his attention, not the consequence of invoking his rights. This creates a deficiency in allowing a suspect the full scope of his rights under Miranda’s rule. Thus, a suspect is confronted with police interrogators with a clear understanding that he is under suspicion. He is then offered a Hobson’s choice: either waive his rights and submit to their questioning, or stand on his rights and terminate the encounter (either indefinitely or until he has the assistance of counsel), with zero knowledge of the consequences of refusing to cooperate, or lack thereof. In the abstract, it would seem that a suspect in such a situation would generally opt for the latter course of action, especially considering the interrogator has told the suspect that he has a right to consult with and have a lawyer present during all questioning. Why would any rational individual facing an allegation of criminal misconduct opt to run the gauntlet of interrogation without having that assistance? The answer seems obvious: standing on one’s rights terminates the encounter, and it is human nature for the suspect to assume that doing do suggests to the interrogator the suspect has something to hide. In the mind of the suspect, his guilt has been inferred by his silence.

When, and Under What Circumstances Do Criminal Suspects Waive Their Rights?

While statistics vary slightly, most empirical studies suggest that standing on the right to silence is not a popular choice among criminal suspects. A waiver is considered valid and voluntary if, after the administration of a suspect’s rights under Miranda, he

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52 See discussion infra pp. 21-23.

53 A “Hobson’s choice” is a “take it or leave it” option in which a party is offered the free choice of only one option. According to the Court, “a Hobson’s choice is not a choice, whatever the reason for being Hobsonian.” Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).
“intelligently and understandingly” chooses not to exercise those rights. As Cassell and Hayman note, a suspect may waive in one of two ways.

First, he can refuse at the start of an interview to waive his rights (including the right to remain silent and the right to counsel), thus precluding any interview. Second, even if he initially waives his rights, he can assert them at any point in the interview. If a suspect asserts Miranda rights, police questioning must stop.

The Cassell and Hayman study examined a sample of over 200 cases in Salt Lake County, Utah, a large urban area, during the mid-1990’s. The results of this empirical study suggest that, in cases where the Miranda warning is given, roughly 84 percent of all suspects waive their rights.

Leo’s analysis around the same era yielded similar results across a similar empirical spectrum. Leo examined 182 cases from the investigation unit of a “major, urban police department” (the San Francisco Bay area). In step with Cassell and Hayman, Leo observed a waiver rate that hovered near 80 percent. Thomas 2002 investigation of 211 (primarily) appellate records reveals a slightly lower rate of 68 percent, though in step with the general notions of other experts that suspects waive in large numbers.

If data on the proclivity of criminal suspects to waive their Miranda rights is a rare species, data on a criminal suspect’s motives for waiver are critically endangered. Why do criminal suspects waive at such high rates? The limited analysis of the subject reveals a fear of inferred guilt as a primary motive among criminal suspects for a


56 Id. at 858-59.

57 Id. at 839.

58 Id. at 859.


61 Leo, supra note 59, at 276.


63 Id. at 1970, 1972 tbl. 1 (denoting a suspect waiver rate of 68%).
Miranda waiver. In the Kassin/Norwick study\textsuperscript{64}, 72 participants – some innocent, some guilty – were each subject to an investigation after being implicated in a mock crime. Each participant was administered their rights under Miranda, and given an option of invoking their rights or waiving them.\textsuperscript{65} Of the total number of suspects implicated, 58 percent\textsuperscript{66} waived their rights, admittedly lower than Leo’s 78 percent in actual practice.\textsuperscript{67} Both the innocent and guilty suspects displayed measurable fears of being inferred guilty from invoking their right to silence. As the authors explained:

[W]e examined the open-ended explanations they gave for this decision . . . These data revealed clearly the basis for the effect. Specifically, 12 of the 13 guilty suspects [92 percent] who waived their rights articulated strategic self-presentation reasons for the waiver (e.g., “if I didn’t, he’d figure I was guilty,” “I would’ve looked suspicious if I chose not to talk”). [Notably, 11] of the 29 innocent waiver suspects offered similar explanations . . .\textsuperscript{68}

Additionally, the Kassin/Norwick study reveals that the inference has significant merit among observers in a majority of cases.\textsuperscript{69} The effects of these studies indisputably reveal 1) that the waiver rate among criminal suspects is incredibly high, and 2) that in a majority of cases, the fear of guilt being inferred from silence is, \textit{to a significant degree}, a motivating factor behind the suspect’s choice to waive.

\textit{An Inexplicable Disconnect: Miranda Warnings and Trial Practice}

That a suspect would assume standing on the right to silence would create an inference of guilt is in no way unreasonable. In fact, the human instinct to equate silence with guilt is explicitly acknowledged in the law of criminal procedure. It is an axiom of criminal trial practice that commenting on the silence of an accused is violation of the privilege against self-incrimination. \textit{Griffin v. California}, 380 U.S. 609

\begin{itemize}
\item\textsuperscript{65} \textit{See Id.} at 216.
\item\textsuperscript{66} \textit{Id.} at 215
\item\textsuperscript{67} \textit{Id.}
\item\textsuperscript{68} \textit{Id.} at 216.
\item\textsuperscript{69} \textit{See Id.} at 217.
\end{itemize}
(1965). In Griffin, the Supreme Court held that prosecutors may not assert that the defendant’s silence warrants an adverse inference against the defendant.\textsuperscript{70} Griffin was convicted of murder and sentenced to death for the killing of a victim named Essie Mae. The Court struck down a California rule of evidence that permitted the trial court to issue the following instruction in Griffin’s case:

As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn there from those unfavorable to the defendant are the more probable.\textsuperscript{71}

In addition to this instruction, the prosecutor made extensive reference to Griffin’s decision not to testify in his summation to the jury. The Court included within its opinion the following extract from the trial record of the prosecutor’s summation:

The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.

What kind of a man is it that would want to have sex with a woman that beat up if she was beat up at the time he left?

He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

These things he has not seen fit to take the stand and deny or explain.

\textsuperscript{70} See Griffin v. California, 380 U.S. 609, 614 (1965).

\textsuperscript{71} Id. at 610.
And in the whole world, if anybody would know, this defendant would know.

Essie Mae is dead, she can’t tell you her side of the story. The defendant won’t.\textsuperscript{72}

The Court set aside Griffin’s conviction because it concluded that the rule of evidence exacerbated the natural instinct to assume a defendant who refuses to testify must be guilty because any innocent defendant would choose to explain his side of the story.\textsuperscript{73} By legally sanctioning this instinct, California had violated Griffin’s Fifth Amendment privilege (applied to the state through the Fourteenth Amendment). According to the Court, “comment on the refusal to testify is a remnant of the ‘inquisitorial system of criminal justice,’ which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.”\textsuperscript{74}

What is most significant about the Griffin decision for purposes of this analysis was the Court’s explicit acknowledgment of the lay instinct to equate silence in the face of an allegation with guilt. Responding to California’s argument that the rule of evidence was consistent with this natural response to a defendant who chooses not to testify, the Court noted:

It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused’s knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.\textsuperscript{75}

Griffin therefore stands on two critical pillars. First, a recognition that any comment on an accused’s decision to stand on the right to silence undermines the protection

\textsuperscript{72} Griffin v. California, 380 U.S. 609, 610-11 (1965).

\textsuperscript{73} Id. at 614; See also Kassin supra note 69.

\textsuperscript{74} Griffin, 380 U.S. at 614.

\textsuperscript{75} Id.
afforded by that right by creating in the mind of the accused compulsion to testify in order to avoid an adverse inference of guilt. Second, the prohibition against drawing any such adverse inference against an accused who chooses not to testify is contrary to the common sense instincts of the average juror.

This second pillar of the *Griffin* foundation has been translated into the ubiquitous ‘no adverse inference’ instruction normally provided to juries in trials where the accused chooses not to testify. In fact, in *Carter v. Kentucky*[^76], the Supreme Court held that such an accused has a constitutional right for the jury to be so instructed. *Carter* took the acknowledgment that jurors will instinctually equate silence with guilt one step further than *Griffin*, holding that:

> [E]ven without adverse comment, a jury, unless instructed otherwise, may well draw adverse inferences from a defendant’s silence.^[77] “[I]nstructing a jury in the basic constitutional principles that govern the administration of criminal justice,” is often necessary.^[78] Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since “[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are . . . guilty of crime . . . .”^[79]

A trial judge has a powerful tool at his disposal to protect the constitutional privilege -- the jury instruction -- and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum[^80]


[^77]: *Id.* at 301.


[^79]: *Id.* (quoting *Ullman v. United States*, 350 U.S. 422, 426 (1956)).

[^80]: *Id.* at 303.
This recognition of the natural assumption triggered by silence in the face of an accusation of wrongdoing has clearly influenced the Court’s assessment of erecting effective safeguards at the trial phase of criminal adjudication. However, as the Court has repeatedly noted, eliciting a confession from a suspect in a very practical sense often times seals a suspect’s fate well before trial.  

It is clear that the safeguards erected at the trial phase are intended to protect the accused from the improper assumptions of jurors, whereas the safeguards provided in Miranda were intended to protect the suspect in a very real sense from himself. There is, however, an important link between these two contexts: in both, a natural assumption that is inconsistent with a core constitutional protection presents a genuine risk that the protection will be diluted. In the trial context, the protection is diluted either by jurors drawing a legally invalid adverse inference against a silent accused or the accused feeling compelled to testify. In the interrogation context, the protection is diluted by the suspect’s own erroneous instinctual assumption that standing on the Miranda rights will produce an inference of guilt.

Perhaps the Miranda Court assumed that by creating a Fifth Amendment right to counsel, the risk that a suspect would be motivated by an erroneous expectation that standing on his rights would infer guilt were negligible. Establishing this right was certainly a central feature of the Miranda decision, as well as the most controversial. However, this aspect of the decision only bolsters the significance of a suspect’s erroneous assumptions related to remaining silent. As the Miranda Court noted, the right to counsel it created sprang from the conclusion that assistance of counsel prior to and/or during custodial interrogation would enable virtually any suspect to make a meaningful decision to cooperate with police and to decide if and when to terminate that cooperation. In essence, the presence of counsel serves as the ultimate leveler of power between the suspect and the police, thereby creating the most powerful presumption that statements made by a suspect with that assistance are truly voluntary.

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82 See e.g. Miranda v. Arizona, 384 U.S. 436, 470 (“[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . [and] assure that the individual’s right to choose between silence and speech remains unfettered throughout the interrogation process.”)).
Lawyers and law enforcement officers know, however, that this leveling effect is primarily the result of defense counsel’s ability to educate the suspect on the relative pros and cons of cooperation. And the first principle in that cost/benefit equation is the default position of remaining silent. Indeed, it is almost axiomatic that the first thing counsel advises a suspect who invokes the Miranda right to counsel is to say nothing to the police without counsel present. The reason for this, and corresponding axiom that a suspect who invokes the right to counsel (or “lawyers up” in common parlance) will be unlikely to provide a confession, is self-evident: defense counsel know that they must immediately offset the suspect’s assumption that silence equates to guilt, and police know that once the suspect consults with counsel they will no longer be able to exploit this assumption to obtain a waiver and ultimately a confession. Thus, the impact of invoking the Miranda right to counsel implicates the same concerns that motivated the Supreme Court in Griffin and Carter.

Had the Miranda Court required consultation with counsel prior to interrogators seeking a Miranda waiver, the impact of the suspect’s assumption that silence equates to guilt would have indeed been nullified. Of course, that would have created a very different Miranda rule, and might have indeed produced the disabling effect on law enforcement predicted by the original decision. But that begs the question: if the absence of ‘something more’ to offset this natural human reaction to being confronted with an allegation – a reaction so significant that it led the Court to impose offsets at the trial phase of criminal adjudication – resulted in no genuine disabling effect on police interrogations, does something more need to be added to Miranda’s ‘something more’?

**Combating ‘Guilt by Silence’**

It is the thesis of this article is that the goal of the Miranda Court was never effectively achieved by the warnings required by the Court. Advising a suspect that he has a right to remain silent without also ensuring he understands the full consequence of exercising that right – a consequence fundamentally inconsistent with lay instincts – undermines the goal of leveling the field between police interrogators and the suspect. The Court has historically advanced the goal that criminal suspects be afforded the full scope of their protection under the Constitution, particularly in cases of custodial interrogation.\(^{83}\) Mere awareness of this full scope is critical factor in determining if an

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\(^{83}\) See Escobedo v. Illinois, 378 U.S. 478, 491 (1964) (Police who fail to warn a suspect in custody of his “absolute constitutional right[s],” do so in violation of the constitution).
accused waived their rights knowingly and voluntarily. As the Court noted, “[awareness of one’s rights is] the threshold requirement for an intelligent decision as to [their] exercise.” 84 Failure to inform a suspect of the constitutional prohibition against inferential “guilt by silence,” as announced in Griffin is deficient in achieving the Court’s demonstrated goal.

The Court identified an analogous deficiency in Miranda's application and scope regarding an accused’s right to counsel.

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. 85

The Court determined that not informing an accused that his inability to pay was irrelevant in exercising the right to counsel would fall short of the required Constitutional scope, and lead to the erroneous assumption that “[a suspect may only] consult with a lawyer if he has one or has the funds to obtain one.” 86 According to the Court:

The warning of a 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. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it. 87

To the Court, requiring police to explicitly make the accused aware that his right to counsel existed irrespective of financial ability was a simple remedy to fulfill the desired Constitutional scope and prevent the erroneous assumption which the Court feared would hinder a suspect’s intelligent decision of whether or not to exercise his rights.

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84 Miranda, 384 U.S. at 468 (1966).
85 Id. at 473 (emphasis added).
86 Id.
87 Id. (emphasis added).
The *Miranda* Court was equally concerned with apprising a suspect of the full scope of his Constitutional right to silence and preventing the erroneous assumption that those who choose not to speak with police would be presumed guilty:

More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator’s imprecatations, 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*. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.88

The difference in the two cases is that, upon its creation of the *Miranda* warnings, the Court did not have the benefit of the empirical evidence available in the post-*Miranda* era. As evidenced *supra*, the proclivity of suspects to waive rights based on an erroneous assumption that silence equates to guilt is disturbingly high. This clearly demonstrates that a failure to explicitly apprise an accused of *Griffin’s* prohibition against inferential guilt by silence results in a lack of awareness of the full scope of his rights under the constitution, as contemplated by the *Miranda* Court. Further, as the *Miranda* Court acknowledged with respect to the indigent’s right to counsel, an additional, explicit *Griffin* warning would provide a simple and effective remedy to bring *Miranda* within the full scope and purview the Court originally intended.

**Reconciling Miranda Warnings with Trial Practice**

Because of the inherent danger of inferential guilt by silence, and the Court’s aversion to it as contemplated in cases such as *Griffin* and *Miranda*, some remedy to cure this deficiency and fully achieve the objective of the *Miranda* Court is necessary. Addressing this deficiency may seem inconsistent with the overall trend in *Miranda* jurisprudence – namely the continual erosion of the scope of the *Miranda* protection. But if, as the *Dickerson* Court held, the core of *Miranda* has crystallized to the point where it is considered a fundamental “constitutional rule,”89 then addressing a deficiency in the core purpose of *Miranda* is not inconsistent with limitations on the scope of the rule. Instead, it merely ensures the effectiveness of the core *Miranda* rule without impinging upon the adjustments to that scope resulting from prior jurisprudence.

88 *Id.* at 468 (emphasis added).

There are two conceivable methods to address the defect in the *Miranda* warnings asserted herein. The first would be to require consultation with counsel prior to executing a *Miranda* waiver. This approach would certainly protect a suspect from the effect of the erroneous assumption that silence in the face of an allegation creates an inference of guilt. As noted above, this is because of the axiomatic advice most counsel would provide the suspect facing the waiver decision: there will be no detriment from invoking your rights and only risk from waiving them. But such a remedy seems inefficient. Requiring counsel be made available to every suspect prior to the waiver decision would create a significant burden on law enforcement at very early stages of the investigatory process, a burden the Court would unlikely be inclined to impose.\(^90\) Perhaps more importantly, this approach seems clearly at odds with the Court’s recent ‘lawyer as intermediary’ jurisprudence. Although focused on the Sixth Amendment right to counsel, this jurisprudence reflects the Court’s uneasiness with the assumption that defendants – even those who are already represented by counsel – are incapable of effectively exercising their rights absent the involvement of counsel. Instead, the Court seems much more focused on the validity of that exercise based on the defendant’s knowledge of both the right and the consequence of waiver.

The much more efficient method to cure this defect would be to modify the required *Miranda* warnings to include informing the suspect of the legal consequence of invocation. This is much more feasible than the stated alternative, as it would require nothing more than a simple additional warning. Prior to requesting a *Miranda* waiver, the interrogator would be required to inform the suspect that invoking the right to silence – either explicitly or by requesting a lawyer and thereby terminating the encounter – cannot and will not be used against the suspect in a court of law. The exact phrasing of such a warning is less important that the effectiveness in rebutting the instinctual assumption that invocation will produce a determinate consequence. For example, the interrogator would inform the suspect:

“If you choose to waive your rights, anything you say can and will be used against you in a court of law. However, if you choose not to waive your rights, I will not be permitted to

\(^{90}\text{See e.g. }{Miranda}, 384 \text{ U.S. at 474. Advising suspects prior to }{Miranda} \text{ would likely require the presence of a “station house” lawyer, essentially available at all times to advise criminal suspects. The }{Miranda} \text{ Court understood the inefficiency such action would create, and declined to require it: “[The right to counsel] does not mean, as some have suggested, that each police station must have a ‘station house lawyer’ present at all times to advise prisoners.”}
question you. That means if you decide you don’t want to talk with me or any other officer, this in no way indicates you are guilty and cannot be used against you in a court of law.”

Adding such a warning to the existing *Miranda* requirement would, of course, provide no guarantee that a suspect who subsequently waives his rights fully understands the consequence of doing so. In fact, it is likely that some suspects would either be confused about the warnings or, more specifically, about the consequence of invocation or waiver. Of course, the remedy for such confusion is already included within the *Miranda* warnings: informing the suspect of the right to counsel. Nonetheless, it would be naive to assume that all confused suspects avail themselves of that right. Indeed, the percentage of suspects who waive their rights seems inconsistent with such an assumption.

The purpose of this additional warning is not therefore to guarantee that every waiver is in the best interest of a suspect. *Miranda* has never been intended to produce this effect. Instead, it is to enhance the confidence in the presumption created by the waiver *Miranda* intended to produce by eliminating a fundamental disconnect between the instinctual reaction of the lay suspect and the legal consequence of invoking the right to silence. Ultimately, such an effect is thoroughly consistent with the *Miranda* decision, for that decision made reliance on presumptions the focal point of compliance with the privilege against self-incrimination in the custodial interrogation context.91

The tolerance of *Miranda*’s effect as a rule of presumption is manifest in the consequence of both a *Miranda* violation and a *Miranda* waiver. As a result of the decision, a *Miranda* violation produced a conclusive presumption: that the suspect’s decision to cooperate with the police and submit to interrogation was involuntary.92 This presumption resulted in the exclusion of any statement made by the suspect during the interrogation. When the Court acknowledged that statements made in violation of its new warning and waiver requirement would often not be involuntary in the “traditional” sense, it effectively conceded it had created a presumption-based rule. In short, because the violation of the *Miranda* warning and waiver requirement

91 See e.g. *Miranda*, 384 U.S. at 535. (White, J., dissenting) (“[I]t has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will.”).

92 See cases cited supra note 78.
resulted in a presumption of involuntariness, the suspect’s confession would be inadmissible even if the government could show that it had not been actually coerced.

With regard to the exercise of the privilege against self-incrimination, the Miranda presumption resulting from voluntary waiver is conclusive. When a suspect executes a valid Miranda waiver, the prosecution gains the benefit of this presumption, and unless that suspect can prove actual coercion during the subsequent interrogation, the statement is admissible – a consequence the suspect is provided notice of in the Miranda warnings. In symmetry with the conclusiveness of the involuntary presumption resulting from invoking Miranda rights, once a suspect executes a valid Miranda waiver there is no consideration of whether the suspect truly understood the consequences of the waiver. Indeed, the only avenue available to challenge a confession made following the execution of a Miranda waiver (other than proving actual coercion) is to challenge the validity of the waiver itself, an avenue that is extremely narrow and almost totally foreclosed when there is a written rights warning and express waiver.

Like the presumption that statements made without a valid Miranda waiver are involuntary, the presumption that those made after a valid waiver are voluntary is also over-broad. Thus, the Miranda presumption is also under-inclusive, for it fails to account for suspect’s who remain incapable of making a truly voluntary and knowing waiver of their right to silence even after being advised of the Miranda warnings. The sheer number of suspect’s who execute waivers – a decision regarded by the defense bar and understood by the police as inherently detrimental – justifies the inference that many suspect’s do not truly understand the full evidentiary consequence of waiver even after having receive the Miranda rights warning. Nonetheless, the Miranda rule refuses to account for such a possibility. Like the inverse presumption, the interests of efficiency and clarity outweighed the danger of this under-inclusiveness.

For the Miranda Court, the primary concern of a presumption-based rule was not its underinclusiveness, but its overbreadth. As noted above, the Court specifically addressed the argument that the Miranda rule was overbroad because not all suspects required a warning to make a voluntary waiver of the right to silence, ultimately rejecting it as justifying a case-by-case assessment. No attention was paid to the possibility that the Miranda presumption might in fact be under-inclusive in that it failed to account for suspects who remained incapable of a truly voluntary waiver of the right to silence even after receiving Miranda warnings. The irony in this is
palpable. Contrary to the concern of over-breadth, the real weakness in the *Miranda* presumption was under-inclusiveness. Indeed, this under-inclusiveness is an obvious sub-text to the *Dickerson* decision.

It is therefore clear that over-breadth and under-inclusiveness were inherent in the *Miranda* rule from its inception. Accordingly, an additional *Miranda* warning cannot be justified based solely on the conclusion that the existing warnings are factually under-inclusive. However, it is legitimate to question whether the current extent of under-inclusiveness is justified in light of the purpose of the *Miranda* warning requirement and the simplicity of modifying the warnings in a way that will mitigate that under-inclusiveness. Requiring police interrogators to inform a suspect of the consequences not only of waiver, but also of invocation, would not eliminate the under-inclusiveness of the *Miranda* presumption, but it would mitigate it. Furthermore, it would be a mitigation that would reconcile the content of the *Miranda* warnings with evidentiary consequence of invocation.

According to the Court, “the Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege.” Thus, the police need not inform the suspect of the offense for which he is under suspicion. This might lead to the argument that an additional warning informing the suspect of the legal consequence of invocation is inconsistent with this jurisprudence. However, there are two critical distinctions between the additional warning proposed herein and informing a suspect of the nature of the offense under suspicion. First, the nature of the offense is collateral to the core *Miranda* concern, a significant factor in the Court’s conclusion that such a warning is not necessary. Informing the suspect of the consequence of the decision to exercise the right to silence is, in contrast, at the very core of the *Miranda* rule. Second, the entire purpose of the *Miranda* warning is to establish confidence in the suspect’s decision to cooperate with police interrogators. A suspect need not know everything he is suspected of to understand that the decision to so cooperate exposes him to potential risk. However, without understanding that the decision not to cooperate will produce

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94 *See Id.* The fact that the agents failed to disclose all possible charges against defendant or all the possible consequences of the waiver did not make the waiver any less knowing or valid. *But see Vanderbilt v. Collins*, 994 F. 2d 189 (5th Cir. 1993) *cert. denied* 456 U.S. 910 (1982) (the failure to inform a criminal suspect that a psychiatric examination could be used against him to prove future dangerousness violated his right against self-incrimination and deprived him of the guiding hand of counsel).
no adverse legal consequence, the suspect makes this critical choice based on a legally invalid assumption.

Perhaps more importantly than either of these distinctions is that failing to inform a suspect of the offense for which he is under suspicion produced no inconsistency with evidentiary limitations imposed by the Constitution; failing to inform the suspect of the legal consequence of invocation does. Supreme Court jurisprudence indicates that the lay assumption that silence in the face of accusation infers guilt creates a genuine threat to the privilege against self-incrimination. In the trial context, this has resulted in imposition of strict evidentiary protections for the accused who chooses to exercise that privilege. It is only logical to conclude that the influence of this legally erroneous inference is equally problematic when a suspect is confronted with an allegation and asked to make a rational choice whether to waive the privilege. Failing to include within the predicate rights warnings notice of a similar ‘no adverse inference’ rule produces an inconsistency between what a lay suspect is expected to know and what a lay juror is expected to know.

One response to this argument might be that the totality of the existing Miranda warnings sufficiently mitigates the risk that a suspect will be motivated by the legally erroneous assumption that standing on his rights will create an inference of guilt. Here again, however, the analogy to the protections established by the Court at the trial phase of adjudication indicates that the strength of this erroneous lay assumption is too powerful to assume peripheral safeguards offset its pernicious influence. This was a major element of the Court’s ‘no adverse inference’ jurisprudence. In Griffin, the jury instruction under review included the following qualifier: “failure of a defendant to deny or explain the evidence of which he had knowledge does not create a presumption of guilt nor by itself warrant an inference of guilt nor relieve the prosecution of any of its burden of proof.” In Carter, the Court considered the government argument that the standard jury instruction emphasizing the presumption of innocence and the prosecution’s burden of proof sufficiently offset any unfair prejudice resulting from the trial court’s denial of the defense requested no adverse inference instruction.

In both of these cases the Supreme Court rejected the argument that peripheral safeguards sufficiently protected an accused against the lay instinct that silence inferred guilt. Instead, the Court required specific safeguards to offset this instinct.

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even acknowledging that the instinct was so powerful that the safeguards can never guarantee jurors drawing this adverse inference (a fact well understood by criminal defense lawyers who must struggle with the difficult question of advising their clients on whether to testify). It is therefore disingenuous to suggest warning a suspect of the consequence of choosing to waive the right to silence and submit to police interrogation would sufficiently offset the influence of the adverse inference assumption. Like the lay juror, the lay suspect must be specifically advised that no adverse inference will result from his decision to invoke the right to silence. Without such a warning, the pernicious influence of this lay assumption will be just as operative, and perhaps even more so, on the suspect as it is on the juror.

**Back to Miranda Basics: Confidence in a Suspects Choice to Cooperate**

Because ramparts of *Miranda* have been proverbially battered by attack since its inception, it is easy to lose sight of the core objective of that seminal opinion. That objective was to restore the confidence in the voluntariness of the decision of suspects to submit to custodial interrogation. This restoration was necessitated, according to the Court, by the effectiveness of police interrogation tactics that were developed to and routinely did exploit the vulnerability of incommunicado suspects.

Adding notice of the consequence of invocation to the *Miranda* warnings will address a significant gap between the existing warnings and their intended effect. Without such notice, suspects remain vulnerable to the influence of the lay assumption that invocation will produce an adverse consequence. This assumption is likely a significant influence on the large percentage of suspects who choose to waive their right to silence and submit to police interrogation. Because the assumption is fundamentally inconsistent with constitutional evidentiary limitations, it is an invalid influence on the waiver decision. Since the *Miranda* waiver has and will remain a conclusive indicator of a knowing and voluntary decision to submit to police interrogation, allowing it to be influenced by such a legally erroneous assumption is inconsistent with the purpose of *Miranda*. In contrast, providing an additional warning intended to offset the influence of this erroneous lay assumption will add tremendous legitimacy to the presumption of voluntariness resulting from a voluntary waiver.

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96 See e.g. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (“[T]he failure to limit the jurors’ speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege.”).
Perhaps the *Miranda* Court assumed that advising suspects of their absolute right to assistance of counsel would offset this influence. However, because that assistance was not required prior to the waiver decision, the *Miranda* right to counsel created by the Court has never eliminated or significantly mitigated the risk that fear of the inference derived from invocation would influence waiver. Because it is unrealistic to expect police to provide counsel as a predicate to waiver, an additional *Miranda* warning is the logical cure to this existing defect. Furthermore, it is consistent with the Supreme Court’s trend to vest greater confidence in the waiver of both the right to silence and the right to counsel by criminal suspects adequately appraised of their rights, even those already represented by counsel.

Proposing any change to the *Miranda* rule that strengthens the protections it affords may seem contrary to the ongoing chipping away of that rule. However, the Supreme Court has never abandoned the core premise of *Miranda*. That premise is built on the rule of presumption established by the *Miranda* decision: that a statement without waiver is involuntary; and that a statement following waiver is voluntary. Both of these presumptions are conclusive, and both require tolerance of a certain degree of inevitable over-breadth and under-inclusiveness. Statistical evidence indicates, however, that contrary to the concerns following the *Miranda* decision, over-breadth of the presumption of involuntariness has never been truly problematic. Instead, these statistics indicate that the under-inclusiveness of the *Miranda* warnings degraded the legitimacy of the presumption of voluntariness resulting from waiver since the inception of the *Miranda* rule.

*Miranda*, as a presumption based ruling, must inevitably tolerate some over-breadth and under-inclusiveness. This consequence of the rule was acknowledged by the *Miranda* Court itself. However, that acknowledgment focused on the suspect who would not need *Miranda* warnings to make a knowing decision to cooperate with police interrogators, not on the suspect who would remain ignorant of the full consequences of that decision even after receiving the warnings outlined by the Court. It seems clear that the Court did not contemplate the possibility that these warnings would fail to adequately protect the rights of a large percentage of suspects. However, statistics on the percentage of suspects who make decisions fundamentally contrary to their self-interest by waiving their right to silence suggests the original *Miranda* warnings produced just such a failure. Requiring police interrogators to inform suspects of the consequence of invocation will substantially effectively address this failure, and substantially reduce the under-inclusiveness of the existing *Miranda* warnings. Unless and until suspects receive this ‘missing *Miranda* warning’,
confidence in the presumption of a knowing and voluntary waiver of the right to silence can never be justified.