Vanderbilt Law Review

Volume 47
Issue 3 *Issue 3 - April 1994*

Article 7

4-1994

# New York's Loyalty to the Spirit of "Miranda": Simply the Best for Twenty-Five Years

Lorraine J. Adler

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Criminal Procedure Commons, and the Law Enforcement and Corrections Commons

Recommended Citation

Lorraine J. Adler, New York's Loyalty to the Spirit of "Miranda": Simply the Best for Twenty-Five Years, 47 *Vanderbilt Law Review* 889 (1994)

Available at: https://scholarship.law.vanderbilt.edu/vlr/vol47/iss3/7

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

# New York's Loyalty to the Spirit of *Miranda*: Simply the Best for Twenty-Five Years


I. INTRODUCTION ..... 890
II. *MIRANDA V. ARIZONA*: A MEANS TO AN END ..... 891
- A. *The Concern Over Incommunicado Interrogation* ..... 891
- B. *The Warnings as a First Step* ..... 893

III. *MORAN V. BURBINE*: *MIRANDA* AS THE END IN ITSELF ..... 895
- A. Miranda *Becomes the First and Final Step* ..... 895
- B. *The Court's Concern Over Muddying* Miranda's *Clear Waters* ..... 898

IV. THE STATES' RESPONSE: PUTTING THE PROPER PIECES IN THE WRONG PLACES ..... 901
- A. *The Specifically Retained, Physically Present, and Requesting Access Requirements* ..... 902
- B. *Eliminating the Physically Present Requirement* ..... 904
- C. *Easing the Requesting Access Requirement* ..... 906

V. THE NEW YORK RULE: FINALLY THE RIGHT BALANCE STRUCK ALONG THE RIGHT SCALE ..... 906
- A. *The Rule of* People v. Arthur ..... 907
  - 1. New York Follows *Miranda*'s Advice ..... 907
  - 2. Recognizing the Relation Between Coercion and Rationality ..... 908
- B. *Policy Concerns in Adopting the New York Rule* ..... 909
  - 1. A Vague and Unworkable Standard ..... 909
    - a. *When an Attorney Has "Entered the Proceeding"* ..... 910
    - b. *Period of Time the Police Are Required to Wait* ..... 911
    - c. *Procedure Regarding a Separate, Unrelated Charge* ..... 912
  - 2. Burdening Law Enforcement ..... 913

VI. CONCLUSION ..... 916

## I. INTRODUCTION

The landmark Supreme Court decision *Miranda v. Arizona*[1] recognized a defendant's right to be informed of the rights guaranteed by the Fifth Amendment's self-incrimination clause,[2] including the right to counsel. The *Miranda* Court realized that a suspect may feel compelled to waive his Fifth Amendment privilege while in official detention.[3] The Court held that the police must read the now-familiar warnings to a subject in custodial interrogation before he can waive his rights.[4] Therefore, the Court in *Miranda* chose to strike the balance between effective law enforcement and protecting a subject's constitutional rights at the point of informing the subject of his rights, including his right to counsel, once he is under custodial interrogation. The crucial question then and now remains—how does a Fifth Amendment right to counsel protects a subject from this compulsion to confess?

*Miranda* has been criticized for decreasing the confession rate and placing a burden upon effective law enforcement.[5] In *Moran v. Burbine*,[6] the Supreme Court refused to extend *Miranda* further to provide the subject with additional protections.[7] Many states expressly rejected *Burbine*, however, and extended the *Miranda* protections through their respective state constitutions. These states, echoing the *Miranda* Court's concern over coerced confessions, have attempted to prevent coercion by providing the subject with more information once under custodial interrogation.[8] New York has taken a slightly different approach toward extending *Miranda*'s protections. New York focuses not on the quantity of information supplied to the

---

1. 384 U.S. 436 (1966).
2. The Fifth Amendment reads in relevant part: "No person . . . shall he compelled in any criminal case to be a witness against himself." U.S. Const., Amend. V.
3. The Court emphasized that "the modern practice of in-custody interrogation is psychologically rather than physically oriented," *Miranda*, 384 U.S. at 448, and "[t]he difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado." Id. at 445. The Court described incommunicado interrogations as those occurring "in a room in which [the subject] was cut off from the outside world." Id.
4. The Court held that the police must inform the subject that he has the right to remain silent, that any statement he makes may be used against him, and that he has the right to have a retained or appointed atterney present during interrogation. Id. at 444.
5. See, for example, Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda," 54 U. Chi. L. Rev. 938, 945-47 (1987).
6. 475 U.S. 412 (1986).
7. See id.; Part III.A.
8. The Fifth Amendment rights guaranteed by the *Miranda* decision are applied to the states via the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964). See also Part IV.

subject in reaching his decision to confess, but rather on the nature and quality of the suspect's final decision.

The New York model is precisely the type of protection that the *Miranda* Court contemplated; therefore, all the states should adopt this approach. Part II of this Note explains the central concerns, reasoning, and holding of the landmark *Miranda* decision. Part III examines how the *Burbine* Court betrayed both the letter and spirit of *Miranda*. Part IV describes how many states have used their own constitutions in an effort to correct the results of the flawed *Burbine* decision. Part IV also demonstrates that these states' efforts have failed to achieve the goals envisioned by the *Miranda* Court because although states struck the appropriate balance between individual and state rights, they used the wrong scale. Part V describes the New York approach and demonstrates that it fully effectuates *Miranda*'s goals by ensuring that the subject's decision to confess is rational and uncoerced. Part V concludes that the policy concerns and implications of adopting the New York rule nationwide do not present impractical or undesirable barriers.

## II. *MIRANDA V. ARIZONA*: A MEANS TO AN END

### A. *The Concern Over Incommunicado Interrogation*

The primary concern the *Miranda* Court identified, and the recurring theme of its opinion, is that custodial interrogations are inherently coercive.[9] The Court noted that interrogations take place in private; therefore, courts lack any knowledge of what actually transpires in the interrogation rooms.[10] An examination of police interrogation manuals—sources that codify interrogation procedures—further concerned the Court. The Court began by noting that the manuals instruct officers that the key psychological factor to a successful interrogation is privacy.[11] It noted several other instructions

---

9. See *Miranda*, 384 U.S. at 457-58; note 3 and accompanying text. One commentater expanded on this observation and noted that "[c]ustodial interrogation brings psychological pressure to bear for the specific purpose of overcoming the suspect's unwillingness to talk, and it is therefore inherently compelling within the meaning of the fifth amendment." Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. Chi. L. Rev. 435, 446 (1987).

10. *Miranda*, 384 U.S. at 448.

11. The Court noted that the manuals dictato:

> 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 indiscretious or criminal behavior within the walls of his

in the manuals designed to create an atmosphere of intimidation and coercion.[12] In addition, the manuals specifically advised officers to discourage subjects from pursuing their desires to speak with an attorney or a relative.[13]

The Court concluded that these manuals strive to create an intimidating interrogation setting with no distractions and an experience in which the subject is totally deprived of outside support.[14] The Court found this atmosphere inherently coercive.[15] It therefore concluded that the subject must be informed of certain rights to help dispel this coercion and to limit custodial interrogation properly.[16]

The Court also emphasized that this coercion is not limited to the uneducated or those unaware of their rights.[17] Commentators

---

> home. Moreover his family and friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.

Id. at 449-50 (footnote omitted).

12. For instance, the manuals direct officers to display an air of confidence in assuming the suspect's guilt. Id. at 450. In addition, they state that the most important qualities in an interrogator are patience and perseverance, leaving the subject with "no prospect of surcease" and "no respite from the atmosphere of domination." Id. at 450-51 (footnote omitted).

13. One manual instructs:

> [T]he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the intorrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, "Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself."

Id. at 454 (quoting Fred E. Inbau and John E. Reid, *Criminal Interrogation and Confessions* 112 (Williams & Wilkins, 1962)).

14. *Miranda*, 384 U.S. at 455. One commentator asserts that this conclusion is the primary basis for the *Miranda* Court's finding that custodial interrogation is inherently coercive. Professor White states:

> The *Miranda* majority based its conclusion that suspects subjected to police interrogation would believe that there were legal or extralegal sanctions for a failure to answer . . . on an exuminatiqn of the interrogation tactics recommended in police manuals. As Professor Caplan recognizes, these tactics were designed to place the suspect at a disadvantage.

Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 Vand. L. Rev. 1, 3 (1986) (footnote omitted).

15. The Court buttressed its assertion by describing several cases in which subjects succumbed to this pressure although they might have exercised their Fifth Amendment right against self-incrimination if the ceercion had been dispelled. *Miranda*, 384 U.S. at 456. The first case involved a 19-year-old defendant who was a heroin addict and described as a "near mental defective." Id. (citing *Townsend v. Sain*, 372 U.S. 293, 307-10 (1963)). The defendant in the second case was a woman who confessed after an officer urged her to "cooperate" to prevent the authorities from taking her children. *Miranda*, 384 U.S. at 456 (citing *Lynumn v. Illinois*, 372 U.S. 528 (1963)). The third case involved a defendant who repeatedly requested to phone his wife or attorney during the interrogation. *Miranda*, 384 U.S. at 456 (citing *Haynes v. Washington*, 373 U.S. 503 (1963)).

16. *Miranda*, 384 U.S. at 467.

17. The Court explained that "[i]t is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations . . . that the interrogation will continue until a confession is obtained or that silence in the face of an accusation is itself damning and will bode ill when presented to a jury." Id. at 468. Commentators have agreed with the Court on this point,

agree that subjects who are fully aware of their rights need to know that the police are equally aware of suspects' rights and will honor them.[18] The Court in *Miranda* therefore concluded that a subject's knowledge of his rights is insufficient to effect a valid waiver of those rights and that a subject may waive his *Miranda* rights only if that waiver is made knowingly, voluntarily, and intelligently.[19]

### *B. The Warnings as a First Step*

*Miranda's* analysis cannot end with its bare-bones holding, however, because the Court's intent regarding the nature and function of the warnings is crucial to determine whether later decisions are consistent with *Miranda's* principles. The *Miranda* opinion made clear that the warnings should be considered only as a minimum starting point to dispel any degree of coercion that the subject may feel in an incommunicado setting. The Court specifically encouraged the states to create even greater protections for the accused than those provided by the warnings.[20] Thus, to effectuate fully the right to silence embodied in the privilege against self-incrimination, the warnings were imposed as a minimum means to show that the subject voluntarily waived his rights under the Fifth and Sixth Amendments.[21] Additionally, the Court's own statement supports the interpretation that the actual presence of counsel during interrogation would be optimal to ensure that the waiver was voluntary.[22] In *Miranda,* the Court articulated the foundational requirements to

---

noting that a subject's knowledge of his rights does not necessarily have any relation to the coercion he will feel under custodial interrogation. See, for example, Schulhofer, 54 U. Chi. L. Rev. at 447 (cited in note 9). They have explained that although an educated subject may be aware of his rights, he also will know that the police can subject him to extended periods of interrogation and that, practically speaking, his silence can operate against him. Id.

18. Schulhofer, 54 U. Chi. L. Rev. at 447 (cited in noto 9). See also White, 39 Vand. L. Rev. at 6 (cited in note 14).

19. *Miranda,* 384 U.S. at 444.

20 The Court stated:

> We encourage Congress and the States to continue 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.

Id. at 467.

21. The Court specifically used this language. It stated that "unless other fully effective means are devised to inform accused persons" of their rights, the *Miranda* warnings must be given. Id. at 444.

22. The Court stated that "[t]he presence of counsel . . . would be the adequate protective device necessary to make the process of polico interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." Id. at 466.

protect the Fifth Amendment privilege and listed additional protections that would prevent coercion.[23] Additionally, it invited the states to fashion their own, more protective requirements.[24]

Additional aspects of the *Miranda* opinion demonstrate the Court's intent that the warnings should serve merely as a means to protect the Fifth Amendment privilege against self-incrimination; they should serve to strike a balance between the subject's rights and efficient law enforcement in favor of the subject.[25] First, the Court stated that the decision ensures that the constitutional guarantee against self-incrimination does not become a "form of words" in the hands of government officials.[26] Therefore, the *Miranda* Court never intended a mere recitation of the warnings alone as a goal or result of the decision. Specifically, the Court made clear that it intended precisely the opposite. The warnings serve not as a "form of words," an end in themselves, but rather as a means of effecting the constitutional guarantees.

Second, the Court held that although the subject may have answered questions or volunteered information, he may indicate in any manner and at any time that he wishes to exercise his constitutional rights.[27] Certainly, rights that are invoked easily cannot be waived easily[28] because the principles behind one are flatly contradictory to the principles behind the other.[29] By providing for an easy invocation of the rights, and thereby implying a strict requirement to prove waiver of them,[30] the Court demonstrated a lesser concern for

---

23. In fact, only two terms earlier, the Court expressly stated that "[o]ur Constitution . . . 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 (1964).

24. In addition to explaining the effect on the compulsive atmosphere, the Court noted several collateral benefits provided by the attorney's presence. For instance, if law enforcement officers successfully coerce the suspect, the attorney may testify to that fact in court. Furthermore, counsel's presence during an interrogation helps guarantee that the subject gives an accurate statement to the police and, in turn, that both the police and prosecution accurately report that statement. *Miranda*, 384 U.S. at 470.

25. See generally White, 39 Vand. L. Rev. at 6 (cited in note 14).

26. *Miranda*, 384 U.S. at 444.

27. Id. at 444-45.

28. Indeed, the Court has stated in an often-quoted passage that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

29 If the courts have struck the balance in favor of the subject in providing a broad interpretation of invocation, the same preference evidently would be given for waiver; that is, the balance would be struck in favor of the subject and waiver would be given a narrow interpretation.

30. In fact, the Court expressly required a strict test for waiver. The Court held that "[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently," *Miranda*, 384 U.S. at 444, and that "a heavy burden rests on the government to demonstrate" that this test has been satisfied. Id. at 475. See text accompanying note 19.

efficient law enforcement in the face of its great concern for the subject's constitutional rights.

Thus, the *Miranda* opinion reflects the Court's deep concern over the inherently coercive, incommunicado atmosphere of custodial interrogations and the intimidating techniques suggested by police interrogation manuals. To overcome this coercive atmosphere, which exists regardless of the particular subject's knowledge of his rights, the Court required that officers inform the subject of certain constitutional rights. The Court intended its holding to serve only as a starting point, one way of many to reach the goal of relieving the inherent compulsion of incommunicado interrogation and giving full effect to the privilege against self-incrimination. This latter point has been neglected, forgotten, or twisted hopelessly in many subsequent decisions; therefore, it is the one factor the state courts should hold in the highest regard when crafting their future decisions.

## III. *MORAN V. BURBINE*: *MIRANDA* AS THE END IN ITSELF

### *A.* Miranda *Becomes the First and Final Step*

In 1986, the Supreme Court in *Moran v. Burbine*[31] drastically departed from the principles underlying *Miranda.* Police detained Brian Burbine under suspicion of murder.[32] An attorney retained by Burbine's sister telephoned the police station and asked whether his client would be interrogated that night. The police informed the attorney that Burbine would be questioned in the morning.[33] Burbine did not request an attorney, nor did the police inform him that an attorney had been retained for him and had contacted the police.[34] After the officers informed Burbine of his *Miranda* rights, he signed a waiver and confessed to the murder.[35] Burbine claimed that the police's failure to inform him of the availability of retained counsel

---

31. 475 U.S. 412 (1986).

32. Id. at 416. The police originally arrested Burbine in connection with a burglary, but the police had obtained evidence connecting him to a murder earlier that year. Id.

33. Id. at 416-17. Burbine's sister, unaware that Burbine was a suspect in the murder investigation, called the Public Defender's office to obtain legal assistance for her brother on the burglary charge. That evening, an attorney from the Public Defender's office telephoned the police station, identified herself, and stated that she would represent Burbine if the police intonded to place him in a lineup or question him. The police told the attorney that they were through with Burbine for the evening and would not be questioning him. Less than an hour lator, however, the officers began interrogating Burbine about the murder. Id.

34. Id. at 417.

35. Id. at 417-18.

rendered his waiver invalid; therefore, he moved to suppress his statements.[36] In a six-to-three opinion, the Court stated that Burbine's waiver of his *Miranda* rights was knowing, intelligent, and voluntary and therefore valid.[37] The Court's rationale and its ultimate holding blatantly contradict the guiding principles provided in the *Miranda* decision. The *Burbine* Court ignored *Miranda*'s concerns and viewed the warnings not as a means of decreasing the coercion of an incommunicado interrogation, but rather as ends in themselves.

The Court based its holding on its view that events occurring outside the presence of the suspect and entirely unknown to him have no bearing on his capacity to comprehend and knowingly relinquish a constitutional right.[38] The *Miranda* Court, however, did not focus on, and in fact expressly rejected, the sufficiency of a subject's knowledge and comprehension of his constitutional rights as a consideration.[39] The *Miranda* Court's greatest concern was the inherent coercion in incommunicado interrogation that arises from the privacy and secrecy of these proceedings; this concern is totally independent of the suspect's knowledge of his rights.[40] Even events occurring outside the presence of the suspect and those entirely unknown to him concerned the *Miranda* Court, because seclusion and lack of awareness contribute to the coercion that the entire *Miranda* opinion aimed to dispel. Therefore, the *Burbine* Court's approval of this seclusion, by considering its consequences consistent with one's constitutional rights, is contrary to *Miranda*'s goals.[41]

Although the *Burbine* Court conceded that informing Burbine that a retained attorney had contacted the station would have been useful to him and might have affected his decision to confess, the Court found this irrelevant and summarily decided that Burbine's waiver was uncoerced.[42] This finding is totally inconsistent with the *Miranda* Court's opinion that considered relevant any factor that may

---

36. Id. at 418.
37. Id. at 421.
38. Id. at 422.
39. See notes 17-19 and accompanying text.
40. See Part II.A.
41. One commentator has agreed, asserting that "*Burbine* betrays the spirit of *Miranda* by placing a judicial seal of approval on official deception, thereby encouraging incommunicado interrogation. . . ." Note, *The Supreme Court—Leading Cases*, 100 Harv. L. Rev. 100, 126 (1986). Robert B. Mann, Brian Burbine's lead counsel before the Supreme Court, summarized the issue by stating "You can't just take the defendant off the streets and keep him away from everybody. . . ." Graeme Browning, Moran v. Burbine: *The Magic of Miranda*, 72 ABA J. 58, 59 (Jan. 1986).
42. *Burbine*, 475 U.S. at 422-23. The Court stated: "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete. . . ." Id.

affect a subject's decision to succumb.[43] Therefore, the Court's admission that Burbine might have exercised his constitutional rights if he knew of the availability of an attorney should have sent a clear signal that elements of coercion may have existed that had not been dispelled, and thus *Miranda's* goal may not have been achieved in this case.

The majority in *Burbine* entirely ignored this signal, however, because it failed to recognize the purpose of the *Miranda* warnings.[44] Although the *Miranda* Court intended the warnings as a means to dispel coercion and to strike the balance in favor of the subject,[45] the majority in *Burbine* considered the warnings themselves sufficient to protect the suspect's constitutional rights and struck the balance in favor of efficient law enforcement.[46] The *Burbine* majority apparently considered the *Miranda* warnings as both the beginning and end of the government's role in advancing and protecting a suspect's constitutional rights; after the police recite the *Miranda* warnings, the constitutional mandate is satisfied and nothing more need be done. The *Burbine* Court thus allowed, and indeed encouraged, the proclamations in the Constitution to become precisely the "form of words" in the hands of government officials that the *Miranda* Court expressly intended to avoid[47] and did nothing to decrease the coercion of incommunicado interrogation, the *Miranda* decision's chief concern.[48]

---

43. See note 15 for cases in which the Court set aside convictions when coercion played a role in obtaining the subject's waiver and confession. In approving these reversals, the Court expressed its concern that "[i]n other settings, these individuals might have exercised their constitutional rights." *Miranda,* 384 U.S. at 456.

44. The dissent, written by Justice Stevens and joined by Justices Brennan and Marshall, offered another reason why the majority may have ignored this signal. Justice Stevens wrote that the opinion makes sense only if the majority views the lawyer as a "nettlesome obstacle" to law enforcement rather than as an "aid to the understanding and protection of constitutional rights. . . ." *Burbine,* 475 U.S. at 468 (Stevens, J., dissenting).

45. See notes 25-30 and accompanying text.

46. The Court in *Burbine* concluded that "[b]ecause [Burbine's] voluntary decision to speak was made with full awareness and comprehension *of all the information* Miranda *requires the police to convey,* the waivers were valid." *Burbine,* 475 U.S. at 424 (emphasis added).

47. See text accompanying note 26.

48. In addition, at least one commentator has argued that the *Miranda* Court's explicit requirement that a waiver be voluntary, knowing, and intelligent demonstrates that proof of a mere recitation of the warnings, and the subject's comprehension of them, is not at all the end of the analysis. See Reinaldo Pascual, Comment, *A Farewell to* Miranda: *Knowing and Intelligent Waiver After* Moran v. Burbine, 20 Creighton L. Rev. 111, 127-28 (1986). Pascual reasons that a narrow interpretation of "intelligent," such as the interpretation the majority in *Burbine* appeared to adopt, requires only that the subject understand his rights and the options available to him. Id. at 127. This interpretation, however, renders the requirement that a waiver be "intelligent" no different than the requirement that it be knowing. Id. (footnote omitted). Therefore, the *Miranda* Court likely intended the intelligent prong to encompass much more, including perhaps the consequences of a waiver, which would require that the suspect be provided

### *B. The Court's Concern Over Muddying* Miranda's *Clear Waters*

The *Burbine* Court misinterpreted and therefore misapplied the *Miranda* holding. It viewed the *Miranda* warnings as ends in themselves and therefore refused to create a rule that would require the police to do more than simply read the warnings to the suspect. The *Burbine* Court also justified its refusal to expand a suspect's constitutional protection on another similarly flawed ground. The Court justified its refusal to impose additional obligations on the police by stating that policy and practical concerns,[49] and the resulting muddying of *Miranda's* clear waters,[50] counseled against such a rule. The Court then attemptod to soften its holding by allowing the states to address individually any concerns they may have for the suspect's constitutional rights.[51] A closer examination of this reasoning reveals that the Court's rationale is misguided, its concerns are overstated, and its suggestion of individual state action has increased the departure from *Miranda*'s basic principles.

First, the *Burbine* Court's rationale that requiring the police to inform a defendant of an attorney's efforts to reach him will muddy *Miranda*'s otherwise clear waters is neither a sound nor justifiable basis for declining to adopt such a rule. As discussed in Part II, the *Miranda* Court was concerned primarily with protecting the suspect's constitutional rights. The *Miranda* Court recognized that full protec-

---

with additional information that could substantially affect the decision whether to waive his rights. Id. at 127-28.

Obviously, one of the consequences of waiver to Burbine was that a retained attorney, ready and willing to represent him, would remain unknown and therefore of no assistance to him. Certainly, this information could have affected his decision to waive his rights. Therefore, Burbine might have required this information to make an intelligent waiver. This approach appears to recognize that the *Miranda* Court was concerned not ouly about the quantity of information provided to the subject, but also the quality and rationality of the ultimato decision.

49. These concerns included:

> To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the stationhouse knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?

*Burbine,* 475 U.S. at 425.

50. The Court argued that:

> While such a rule might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations counsel against its adoption. . . . "One of the principal advantages" of *Miranda* is the ease and clarity of its application. . . . We have little doubt that [creating such a rule] would have the inevitable consequence of muddying *Miranda*'s otherwise relatively clear waters.

Id. at 425 (citations omitted).

51. The Court explained that "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." Id. at 428.

tion of a suspect's constitutional rights and efficient law enforcement are competing interests and concluded that the balance should be struck in favor of the suspect.[52] Therefore, creating a rule of utmost clarity and imposing a duty on police that could be discharged with absolute certainty were not the *Miranda* Court's ultimate, or even subsidiary, goals. The *Burbine* Court's refusal to adopt a rule that would further protect a suspect's constitutional rights because it would decrease the clarity of the *Miranda* holding thus is fundamentally at odds with the most basic principles underlying the *Miranda* decision.[53]

Second, *Miranda* never was intended to be crystal clear or immune from "muddying." Therefore, both the reasoning of the *Miranda* decision and practical experience reveal that the *Burbine* majority's concern over muddying *Miranda*'s waters is misplaced. Many questions regarding the application of *Miranda* have been litigated, evidence that the rule is far from clear and that police often do not know what *Miranda* requires.[54] For instance, courts have struggled with, and given police conflicting definitions of, the terms "interrogation"[55] and

---

52. See notes 25-30 and accompanying text.

53. Commentators have agreed with this assertion, both in theory and in practice. For instance, one commentator observed that the dissent in *Burbine* recognized that "*Miranda* was intended not only as a guide for police officers, but also as a guide to the suspect being asked to waive his constitutional rights." Althea Kuller, Note, Moran v. Burbine: *Supreme Court Tolerates Police Interference with the Attorney-Client Relationship*, 18 Loyola U. Chi. L. J. 251, 274 (1986). Another commentator has argued that "providing attorney availability information burdens only minimally, if at all, the police's investigatory function. On the other hand, this information is essential for the intelligent exercise or waiver of the suspect's rights." Pascual, 20 Creighton L. Rev. at 141 (cited in note 48) (footnote omitted).

54. One commentator has noted the many ambiguities inherent in the *Miranda* holding:

> To suggest that the *Miranda* procedures are clear is an overstatement. Before the police read a suspect his *Miranda* rights, the suspect must be in "custody," and the police must be "interrogating" the suspect. . . .
>
> In addition, many conflicts surround the adequacy of the warnings given, the consequences of invoking *Miranda* rights, and the proper manner of waiving *Miranda* rights. . . .

Daniel J. Lynch, Note, Moran v. Burbine: *Constitutional Rights of Custodial Suspects*, 34 Wayne L. Rev. 331, 352 n.111 (1987) (citations omitted). Another commentator has described *Miranda* as "a major source of litigable issues in its own right." Markman, 54 U. Chi. L. Rev. at 944 (cited in note 5).

55. Courts have held "interrogation" to include express questioning and its functional equivalent, defined as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1979) (citation omitted). The court in *United States v. Thierman*, 678 F.2d 1331 (9th Cir. 1982), addressed the scope of this definition. The suspect had stated repeatedly his wish that none of his family or friends, particularly his girlfriend Pat, become involved with his criminal investigation. He subsequently invoked his right to counsel. The police, within earshot of the suspect, stated their intention to question the suspect's friends and that it was "teo bad" that Pat had to become involved. Over a strong dissent, the court rejected Thierman's claim that the police knew this action would prompt Thierman's subsequent confession and held that the police acts did not constitute interrogation. Id. at 1336.

"custody,"[56] as well as the requirements for a valid waiver.[57] In fact, the Supreme Court has granted certiorari to two of these cases,[58] presumably because it senses the lack of clarity and the resulting need to provide the lower courts with guidance on these recurring issues. Accordingly, it appears that *Miranda's* waters were never clear, and thus the *Burbine* majority's conclusion that requiring the police to inform a suspect of an attorney's efforts to reach him will muddy *Miranda*'s otherwise clear waters is unjustified.

Finally, the *Burbine* majority's concern over the legal questions that would arise if it recognized the new rule seems unnecessary.[59] First, there appears to be little, if any, difference between the first and second questions that the Court identified: if the Court specifies the extent to which the police will be held accountable for knowing the suspect has counsel, this answer clearly encompasses whether it is

---

56. The *Miranda* Court defined "custody" to include those circumstances in which "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. In *Oregon v. Mathiason*, 429 U.S. 492 (1977), the suspect was interrogated alone at a police station; however, the Court held that Mathiason was not in custody because he had come to the police station voluntarily and was told that he was not under arrest and was free to leave. In *Orozco v. Texas*, 394 U.S. 325 (1969), police questioned the suspect in his bedroom. The Court held that the suspect was in custody because he "was not free to go where he pleased but was 'under arrest.'" Id. at 325. In *United States v. Mesa*, 638 F.2d 582 (3rd Cir. 1980), however, the court appeared to reach a contrary holding. The suspect in *Mesa* barricaded himself in a motel room. The police evacuatod the adjacent rooms, surrounded the motel, informed the suspect that they had a warrant for his arrest, and provided a hostage negotiator who engaged in a three-and-one-half-hour telephone conversation with the suspect. The district court held that the suspect was in custody; therefore, the *Miranda* warnings should have been read to him prior to the telephone discussion. The court of appeals reversed, holding that the suspect was not controlled by a police-dominated atmosphere and therefore was not in custody. Id. at 586. It is difficult, however, to see how Mesa could have gone where he pleased.

Most recently, the Supreme Court of California held that a suspect was not in custody for the purposes of invoking the *Miranda* requirements in *People v. Stansbury*, 846 P.2d 756 (Cal. 1993). The police approached Stansbury's residence with guns drawn, but not visible, and asked him to come to the police station to make a statement as a witness. Id. at 776. The court held that Stansbury was not in custody because the police merely "invited," rather than "commanded," Stansbury to come to the police station, and he was free to leave the interview room at any time, although he would have needed the assistance of the police because he was in a locked room in a secured area of the station. Id. at 776.

57. In *North Carolina v. Butler*, 441 U.S. 369 (1979), the suspect read a written statement of his *Miranda* rights, then told the officers, "I will talk to you but I am not signing any form." Id. at 371. The suspect then made incriminating statements. The state court held that the suspect's statement and actions were insufficient to satisfy *Miranda*'s requirement that a waiver be explicit. The Supreme Court reversed, holding that a valid waiver under *Miranda* may be implicit. Id. at 373. The dissent read *Miranda* as holding precisely the opposite, requiring an explicit waiver and mandating that any ambiguity be resolved in favor of the accused. Id. at 377.

In *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), the Court of Military Appeals confronted, and rejected, the argument that the suspect's statement, "Maybe I should talk to a lawyer," was a valid invocation of his right to counsel. Id. at 339-40.

58. *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), cert. granted, 114 S. Ct. 379 (1993); *People v. Stansbury*, 846 P.2d 756 (Cal. 1993), cert. granted, 114 S. Ct. 380 (1993).

59. See note 49.

sufficient that someone at the stationhouse knows. Additionally, the Court partially answered this question when it addressed a related issue fifteen years before *Burbine.* In *Santobello v. New York,*[60] the Court held a replacement prosecutor accountable for the details of a plea bargain entered into by the former prosecutor.[61] Thus, if the staff of a government office has the responsibility of conveying information to one another concerning the circumstances of the defendant's right to trial, it logically follows that the police station staff should have the duty to inform each other of information related to the suspect's constitutional right to counsel. Even if the Court declines to accept the former as an answer to the latter, however, *Santobello* is evidence that the Court previously has been willing, and therefore should be willing today, to address the scope of government accountability.

## IV. THE STATES' RESPONSE: PUTTING THE PROPER PIECES IN THE WRONG PLACES

Many states have recognized that *Burbine* was a departure from the principles and goals of *Miranda* and have followed the *Burbine* majority's suggestion to adopt different rules under their state constitutions' self-incrimination provisions to guide police behavior.[62] Although the state courts profess a distaste for *Burbine* and claim to be crafting rules that further protect a suspect's constitutional rights in accord with *Miranda,* a closer examination reveals that the states actually have deviated further from *Miranda.* The states' rules appear to be based largely or solely on the facts of the specific case that came before the court, resulting in a collection of arbitrary rules that, although perhaps providing more protection than *Burbine,* still fall short of fulfilling the *Miranda* Court's goals.

60. 404 U.S. 257 (1971).

61. The defendant had agreed to plead guilty to the charge in exchange for the prosecutor's promise to make no recommendation regarding the sentence. Id. at 258. At the sentencing hearing, however, the original prosecutor had been replaced by one who was unaware of that particular term of the plea bargain and subsequently recommended the maximum sentence. Id. at 258-59. The Court held that the prosecution had breached its agreement, stating that "[t]he staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing. . . .'" Id. at 262. The dissenters in *Burbine* adhered te this position, stating that "[o]bviously, police should be held responsible for getting a message of this importance from one officer te another." *Burbine,* 475 U.S. at 461 n.46 (Stevens, J., dissenting).

62. See note 51 and accompanying text.

### A. *The Specifically Retained, Physically Present, and Requesting Access Requirements*

In *People v. Griggs*,[63] the Illinois Supreme Court rejected *Burbine* and created a rule requiring the police to inform a suspect of an attorney's efforts to contact him.[64] In *Griggs*, the defendant was arrested and taken to the police station for questioning.[65] Griggs telephoned his sister from the station; she told him that she had retained an attorney for him.[66] That evening, the attorney arrived at the police station, identified himself as Griggs's attorney, and stated several times that he wished to speak with his client.[67] The police denied the attorney access to Griggs until nearly three hours later; however, by that time, Griggs had signed a statement, including a waiver of his *Miranda* rights.[68] The court held that Griggs's waiver was invalid because it did not satisfy the knowing requirement.[69] In reaching this holding, the court established the rule that to effect a valid waiver of *Miranda* rights under the Illinois constitution's provision against self-incrimination, the police must inform a suspect of his attorney's efforts to contact him if: (1) the suspect knows that an attorney has been retained for him, (2) the attorney is physically present at the police station before the conclusion of the interrogation, and (3) the attorney requests access to his client.[70]

This rule fails to provide future courts or police departments with any guidance because it is too specific; future cases in which the facts differ even slightly will need new and independent evaluation. Furthermore, it is difficult to see how the requirement that a suspect know that an attorney has been retained for him before compelling the police to tell him of his attorney's attempts to contact him furthers *Miranda*'s goal of dispelling the inherent coercion of incommunicado custodial interrogations. All suspects should be informed of an attorney's efforts to contact them, but those who are unaware that an attorney has been retained are especially in need of this information because they will be more susceptible to police coercion than a suspect

---

63. 152 Ill. 2d 1, 604 N.E.2d 257 (1992).

64. The Supreme Court of Illinois created a similar rule, based on the Fifth Amendment's self-incrimination provision, in a pre-*Burbine* case, *People v. Smith*, 442 N.E.2d 1325 (Ill. 1982). Because *Burbine* eliminated the federal constitution as grounds for such a rule, *Griggs* reaffirmed *Smith* on state constitutional grounds in light of *Burbine*. *Griggs*, 604 N.E.2d at 269.

65. *Griggs*, 604 N.E.2d at 258.

66. Id.

67. Id. at 259.

68. Id.

69. Id. at 270.

70. Id. at 269-70.

who knows a specific attorney is available to represent him.[71] Therefore, the suspect who is unaware that an attorney has been retained for him needs to be informed of an attorney's efforts to reach him. Examination of other states' experiences reveals further deviance from *Miranda*'s principles and additional flaws in the reasoning of the state courts in their attempts to stay true to *Miranda*.

In *People v. Wright*,[72] the Michigan Supreme Court held that the defendant's waiver of his *Miranda* rights was not made knowingly or voluntarily. After being arrested and taken to the police station, the defendant waived his *Miranda* rights and confessed to the charge.[73] The defendant never was informed, however, that his grandfather had retained an attorney for him who was present at the police station and had attempted to contact the defendant.[74] The court stated that the critical question was whether the information the police withheld would have changed the defendant's understanding of the circumstances of a waiver.[75] The court held that the police must inform a suspect of a retained attorney's in-person efforts to contact him,[76] reasoning that Wright would not have waived his right to silence if he had known that a retained attorney was waiting for him.[77]

This reasoning is inconsistent, however, with the narrow rule that the *Wright* court announced. The court appeared to recognize that the *Miranda* Court was concerned with any factor that could affect a defendant's decision to succumb to police coercion but then crafted a rule that is too limited to protect against these factors. Two problems are readily apparent with this statement and the *Wright* court's resulting rule. First, it seems that a defendant could be equally hesitant to waive his rights if he knew that an attorney only had telephoned the station and told the police that he would be at the station shortly; therefore, the court's requirement that the attorney be physically present at the station is illogical. Second, it is irrelevant to the defendant whether the attorney was retained by a family member or was, for instance, a Public Defender who learned of the defendant's

71. The Oregon Supreme Court remarked: "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available. . . . A suspect indifferent to the first offer may well react quite differently to the second." *State v. Haynes*, 288 Or. 59, 602 P.2d 272, 278 (1979), cert. denied, 446 U.S. 945 (1980).

72. 441 Mich. 140, 490 N.W.2d 351 (1992).

73. Id. at 356. After arrest, the suspect agreed to give the police a statoment. Id.

74. Id. at 353.

75. Id. at 356.

76. Id. at 357.

77. Id.

situation and came to the station of his own volition to assist the subject. In both scenarios, an attorney is immediately available to assist the defendant, a circumstance that could affect a defendant's decision to surrender his rights—yet the rule in *Wright* does not protect a suspect in the second scenario.

### *B. Eliminating the Physically Present Requirement*

Several states have designed rules that address at least one of these oversights yet still stray from *Miranda*'s ultimate goal. In *Bryan v. State*[78] and *State v. Stoddard*,[79] the Supreme Courts of Delaware and Connecticut held the defendants' waivers of their *Miranda* rights invalid under similar circumstances. In both cases, an attorney retained for the defendant telephoned the police station attempting to contact his client,[80] and the defendant was not informed of his attorney's efforts.[81] The courts reached similar holdings, requiring the police to inform a suspect of a specifically retained attorney's efforts to contact him, if the attorney made a reasonable, diligent, and timely attempt to provide legal services to his client.[82] The Connecticut court, however, declined to adopt a per se rule of excluding waivers obtained upon the failure of the police to fulfill this duty. Rather, it held that a waiver under these circumstances will be excluded if, based on the totality of the circumstances,[83] the information withheld by the police likely would have changed the subject's understanding of the circumstances.[84] The facts of these cases and the rules announced demonstrate that the courts did not intend to limit their holdings to efforts made only by attorneys actually physically present at the station; therefore, these courts have made better attempts than others to stay true to the concerns of the *Miranda* Court.

Most recently, the Supreme Court of New Jersey designed a similar rule in *State v. Reed*.[85] The police failed to inform Reed that an attorney retained for him was physically present at the prosecutor's

---

78. 571 A.2d 170 (Del. 1990).
79. 206 Conn. 157, 537 A.2d 446 (1988).
80. *Bryan*, 571 A.2d at 173-74; *Stoddard*, 537 A.2d at 449.
81. *Bryan*, 571 A.2d at 174; *Stoddard*, 537 A.2d at 450.
82. *Bryan*, 571 A.2d at 175; *Stoddard*, 537 A.2d at 450-51.
83 The factors to be considered under this totality-of-the-circumstancos tost include the relationship of the suspect to the attorney, the nature of counsel's request, the extent to which the police had reasonable notice of counsel's request, and the suspect's conduct. *Stoddard*, 537 A.2d at 456.
84. Id.
85. 133 N.J. 237, 627 A.2d 630 (1993).

office and had requested to speak with Reed while he was being questioned.[86] The court held Reed's confession invalid, reasoning that the police withheld information that was essential to a knowing waiver of the privilege against self-incrimination.[87] The court stated that the police have a duty to inform the suspect when an attorney makes it known that he has been retained to represent the person held in custody, is present or readily available, and makes a request to contact the suspect in a reasonably diligent and timely manner.[88] This rule requires the police to inform the suspect even when a retained attorney has only telephoned the police and requested to speak with the suspect. Thus, the New Jersey, Delaware, and Connecticut courts have formulated rules that address factors that concerned the *Miranda* Court but were neglected by other state courts.

The rules created by these states, however, are limited by a requirement that appears unrelated to any goal or concern of *Miranda*, and the courts failed to provide a reason for imposing the particular limit. The rules impose a duty on the police to inform the suspect only if the attorney expressly requests access to the subject. The *Miranda* decision, however, focused almost exclusively on the suspect's perspective. The *Miranda* Court was concerned with informing the suspect of his rights and dispelling any coercion he may feel in attempting to exercise them. More specifically, the secrecy and incommunicado nature of custodial interrogation, with the suspect's lack of knowledge of events occurring outside of the interrogation room that may have an effect on his decision to succumb to police coercion, particularly troubled the *Miranda* Court.[89] Therefore, it is difficult to see the logic of a rule that imposes a duty to inform the suspect only if the attorney expressly requests access to his client. To fulfill the goals of *Miranda*, the police should be required to inform the suspect even if the attorney did not specifically request access to the suspect.

As noted earlier, the mere fact that a specific attorney is available to assist the defendant immediately is a factor that may have great significance to a defendant in jeopardy of waiving his constitutional rights.[90] Therefore, requiring an attorney to do any more than merely state his willingness to assist the suspect seems an unnecessary obstacle to the suspect's exercise of his constitutional rights.

86. Id. at 633.

87. Id. at 647. This privilege against self-incrimination is based upon New Jersey's common law because the state constitution has no such provision. Id. at 637.

88. Id. at 644 (quoting *Stoddard*, 537 A.2d at 454).

89. *Miranda*, 384 U.S. at 455-56.

90. See note 71 and accompanying text.

### *C. Easing the Requesting Access Requirement*

The Supreme Court of Oregon has created a rule that lessens, but does not eliminate, the requirement that an attorney expressly request access to the subject. In *State v. Haynes*,[91] an attorney retained for the defendant telephoned the police station and stated that he was representing the defendant and was coming to the station to see his client.[92] Because the police failed to inform the defendant of the attorney's call, the court held the defendant's waiver of his *Miranda* rights invalid on the grounds that it was neither knowing nor intelligent.[93] The Oregon court did not require the attorney specifically to request contact with his client; the duty to inform the suspect of his attorney's call arose merely upon the attorney's statement that he was coming to the station. The Oregon Supreme Court's rule gives slightly greater effect than others to the *Miranda* Court's concern over external events that could influence a suspect's decision to succumb to police interrogation.[94] However, one state court has gone even further and accordingly is the only one that appears to give full effect to the principles and goals underlying *Miranda*.

## V. THE NEW YORK RULE: FINALLY THE RIGHT BALANCE STRUCK ALONG THE RIGHT SCALE

New York is the only state with a rule that adequately addresses the *Miranda* Court's core concern. Although many other states provided the subject with an increasing amount of information regarding external events, New York created a rule that affected what was occurring behind the closed door to the interrogation room. Because other states tried to help suspects but never took that crucial step through the interrogation room door, they have left the subject as isolated as before. New York recognized that, to fully protect a subject's Fifth Amendment privilege against compelled self-incrimination, the balance must be struck in favor of the subject not increasingly as a matter of degree, but rather of kind.

---

91. 288 Or. 59, 602 P.2d 272 (1979).
92. Id. at 273-74.
93. Id. at 277.
94. One commentator has explained that "the [Oregon] rule serves the purpose of providing the suspect with information that materially changes the circumstances and options of the suspect, thus allowing the suspect to make a truly intelligent waiver." Pascual, 20 Creighton L. Rev. at 140 (cited in note 48).

### A. *The Rule of* People v. Arthur

#### 1. New York Follows *Miranda*'s Advice

In *People v. Arthur*,[95] New York created a rule instructing that after a subject is under custodial interrogation and an attorney has entered the proceeding, the subject is permitted to waive his *Miranda* rights only in the presence of the attorney.[96] If the subject already has waived his rights and an attorney later enters the proceeding, the subject must re-waive them in that attorney's presence before questioning may continue.[97] Therefore, once an attorney enters the proceeding, the police must cease all questioning until the attorney is present, regardless of what the subject desires. No requirements exist that the attorney be retained specifically for the subject, request access to the subject, or instruct the police to cease questioning.[98] This extremely broad rule provides the ultimate protection to a subject with only the slightest of triggers, and it gives full effect to the concerns and reasoning in *Miranda*. Therefore, it is a rule that the *Miranda* Court would embrace.

The New York rule gives great weight to *Miranda's* encouragement to the states to adopt their own, more protective means of decreasing the coercion of incommunicado interrogation and securing a subject's constitutional rights.[99] The New York court recognized its power, and perhaps duty, to follow the lead and advice of the Supreme Court and provide its residents with greater protection than that provided by the Supreme Court itself.

More importantly, however, the New York rule recognizes the vital role that attorneys play in the criminal justice system and ensures that after an attorney enters the proceeding, no incommunicado, private questioning can occur without the attorney's presence. This holding addressed *Miranda's* central concern and what it considered to be the greatest possible evil of interrogation.[100] In fact, the New York rule gives effect to what the *Miranda* Court itself indicated could be the best possible method of reducing coercion—to have an attorney present in the interrogation room.[101] An attorney eliminates the

---

95. 22 N.Y.2d 325, 239 N.E.2d 537 (1968).
96. Id. at 539.
97. Id.
98. Id. at 538-39.
99. See note 20 and accompanying text.
100. See notes 9-16 and accompanying text.
101. See note 22 and accompanying text. In addition, the New York Court of Appeals has expressed its "belief that the presence of an attorney is the most effective means we have of

incommunicado nature of the interrogation and therefore eliminates the coercive aspects that troubled the *Miranda* Court. In addition, the New York rule contains none of the nonsensical restrictions and qualifications that plague the rules of other states.[102]

### 2. Recognizing the Relation Between Coercion and Rationality

The New York rule ultimately allows the subject not only to make an informed and uncoerced decision to speak, but also to make a rational decision. Although the Fifth Amendment, by its language alone, does not appear to address an irrational decision to speak, this subpart asserts that a rational decision is, by necessity and logic, part and parcel of a truly uncoerced decision. If a subject is not informed by his attorney of all the possible options, strategies, and pleas legitimately available to him within the criminal justice system, then any choice he makes, by definition, will be coerced to some degree.[103] Therefore, if the police inform a subject that his options are either to tell the truth or remain silent, his decision still will be compelled to the extent that he is unaware of, for instance, the relevance under the law of certain mitigating or aggravating circumstances, or the law's recognition and acceptance of plea bargains. A subject's view of the relevant truth, and therefore of what he perceives to be his options about whether to speak, may be affected by facts that he does not know.

---

minimizing the disadvantage at which an accused is placed when he is directly confronted with the awesome law enforcement machinery possessed by the State." *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 363 (1980).

102. The New York rule does not require that the attorney: (1) be retained specifically for the subject, (2) request access to the subject, (3) instruct the police to cease questioning, or (4) be physically present at the station—restrictions that do not further any goal of *Miranda*. See Part IV.

103. This concern over a subject's ignorance is very real; one commentator has noted that early confession cases "almost invariably concerned situations in which police questioned relatively unsophisticated suspects." White, 39 Vand. L. Rev. at 7 (cited in note 14). He further states that "if the suspect is not aware of his right to remain silent, then at least from the suspect's perspective, his answers would be compelled because he might believe that his only altornative was to answer the questions asked by the police." Id. at 5. Another commentator has stated that "the heart of the problem is the suspect who does not know his rights, who believes that the police are entitled to make him talk. . . . [S]ince such a suspect thinks he is *obliged* to respond, his answers are 'compelled' in violation of the fifth amendment privilege." Schulhofer, 54 U. Chi. L. Rev. at 454-55 (cited in note 9) (emphasis in original). Finally, the Supreme Court has cited with approval the assertion that "a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity." *Escobedo v. Illinois*, 378 U.S. 478, 490 n.13 (1964) (citing the Report of Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 10-11 (1963)).

Although the *Miranda* decision did not provide a subject with an opportunity to make a rational choice,[104] it deliberately and conspicuously encouraged the states to do so. Lines must be drawn in all areas of the law, and the *Miranda* Court chose to draw its line at the point of informing the subject that he has the right to an attorney. The Court, however, expressly noted that the states have the power and authority to draw their own lines, and New York has done precisely that, drawing its line at a point that fully recognizes the underlying goals of *Miranda*.[105] Therefore, all states, both those that have never before addressed the issue as well as those that have attempted but failed to create rules that effect the goals of *Miranda*, should adopt the New York rule because it strikes the ideal balance envisioned by *Miranda*.

### *B. Policy Concerns in Adopting the New York Rule*

#### 1. A Vague and Unworkable Standard

The *Burbine* majority expressed concern that adopting any rule that requires the police to inform a subject of the presence of an attorney would be unworkable and undesirable because it would muddy *Miranda*'s clear waters.[106] Twenty-five years of experience, however,

---

104. The Court in *Miranda* did express, however, its belief in the importance of a rational decision. In discussing *Escobedo v. Illinois*, the Court stated that "[t]he entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional stato as to impair his capacity for rational judgment." *Miranda*, 384 U.S. at 465.

105. There is, however, a potontial slippery slope concern that could hopelessly blur the line that New York has drawn. A brief examination of the competing concerns that function to counterbalance the rule, however, clarifies this potential blur. Because a rational decision is an essential component of an uncoercod decision, it may be necessary for a subject to be provided with *all* possible options and strategies by the most qualified attorney available to ensure that the decision is truly rational. Although this approach clearly is an impractical, if not impossible, rule, the ultimato rationale of *Miranda* and the New York rule would seem to require this result. However, one must recognize that both *Miranda* and *Arthur* struck their balances as they did in consideration of the competing interest of effective law enforcement. If protection of the subject's constitutional rights was the sole concern of our society, New York logically could require that the best attorney provide each subject with every possible option available. Effective enforcement of our laws, however, is as essential as protecting the rights of those accused of violating them. Thus, the New York ceurt simply has drawn its line further in favor of the subject and still preserved a sensible and workable limit to the protection.

106. See notes 49-50 and accompanying text. The dissent in *Burbine* remarked, "For a police officer with a printed card containing the exact text that he is supposed to read, perhaps the rule is clear." *Burbine*, 475 U.S. at 461 (Stevens, J., dissenting). In addition, several commentators have noted a contradiction within the opinion regarding this concern over clarity. One scholar has suggested that the Court's rationale that such a rule will muddy *Miranda*'s clear waters

> should be contrasted with the Court's analysis of the fourteenth amendment due process clause, in which it was apparently less concerned with developing a standard that clearly specified interrogation procedures. . . . [I]n order to conduct an intorrogation consistent

have proven that the New York rule is no muddier than *Miranda* has proven to be. *Miranda* generated litigation surrounding the definitions of custody and interrogation, as well as the manner and language of a valid waiver.[107] The New York rule also has created litigation surrounding the meaning and scope of some of its terms, but courts have found resolutions to these issues.

*a. When an Attorney Has "Entered the Proceeding"*

First, although the New York rule is quite broad on its face, the courts have imposed reasonable limits on the meaning of its language. For instance, in *People v. Kaye*,[108] the defendant's attorney surrendered the defendant to the police.[109] While the attorney was standing only thirty feet away, the police placed the defendant in the squad car; the defendant then immediately blurted out incriminating statements without having been asked a single question.[110] Although an attorney clearly had entered the proceeding, the New York rule simply did not apply to freely volunteered statements because *Miranda* only was concerned with interrogation.[111] Therefore, despite the potentially broad language of the New York rule, the courts have imposed limitations on its ability to impede effective law enforcement.[112]

The New York courts have been confronted with, and resolved, other gray areas about when an attorney may be considered to have entered the proceeding for purposes of invoking the New York rule. For instance, in *People v. Castro*,[113] the court held that when a juvenile

---

> with due process, the Court requires both the police and prosecutors to act in a manner that will not "shock the sensibilities of civilized society." After the Court developed this nebulous standard, it failed to establish guidelines which would more clearly define conduct that shocks society's sensibilities.
>
> It is unrealistic to expect police investigators to determine which methods of interrogation conform to such an abstract standard.

Lynch, Note, 34 Wayne L. Rev. at 352-53 (footnote omitted) (citod in note 54). Another commentator has observed that, in *Burbine*, "no indication was given as to the type of conduct that might cause such an abridgment [of due process]." Laura Antonelli, Note, Moran v. Burbine: *The Decline of Defense Counsel's "Vital" Role in the Criminal Justice System*, 36 Cath. U. L. Rev. 253, 284 (1986).

107. See notes 55-57 and accompanying toxt.

108. 25 N.Y.2d 139, 250 N.E.2d 329 (1969).

109. The defendant's atterney telephoned the police station and directed them te the location of the murder victim's body. Id. at 329. The police then proceeded to a hospital where both the defendant's father and attorney surrendered the defendant to the officers. Id.

110. Id. at 330.

111. Id. at 331-32.

112. The court therefore recognized and gave deference to its statement that "[t]ruly voluntary confessions constitute a highly trustworthy type of evidence." Id. at 332.

113. 462 N.Y.S.2d 369 (N.Y. Crim. Ct. 1983).

subject attempts to contact his parents, the officer should interpret those attempts as a request to consult with his parents, which for a juvenile is the equivalent of requesting counsel.[114] Therefore, under these circumstances, the New York rule applies.[115]

Furthermore, in *People v. Lee*,[116] the court held that the right to counsel, and therefore the New York rule, is invoked if a request for, or statement of intent to obtain, an attorney is made to a third party and overheard by the police.[117] Finally, in *People v. Stroh*[118] and *People v. Hodge*,[119] New York courts held that unless the subject has declined unequivocally the assistance of counsel, a subject's request for a priest may be the functional equivalent of invoking the right to counsel and, consequently, the New York rule.[120] Therefore, although the parameters of the requirement that an attorney "enter the proceeding" are not clear from the language alone, it has proven a workable standard; the New York courts have resolved many difficult issues surrounding the meaning of the term.

*b. Period of Time the Police Are Required to Wait*

The New York rule raises the question of how long the officers are required to cease questioning and wait for the attorney to arrive at the station. In *People v. Lee*, the police overheard a suspect's statement made to a third party of his intent to obtain an attorney; because this functions as an invocation of the right to counsel and of the New York rule, the police were required to wait a "reasonable"

114. Id. at 371, 377.

115. In *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360 (1980), the court held that once a subject has invoked his right to counsel, the New York rule applies, and he may not subsequently waive that right in the absence of counsel. Id. at 364.

116. 589 N.Y.S.2d 263 (N.Y. Crim. Ct. 1992).

117. Police arrested the seventeen-year-old on the premises of his high school in the presence of his parents and the principal. Id. at 264-65. The principal told the parents in both the subject's and officers' presence that the subject had the right to an attorney and that they should be sure to obtain one. Id. This exchange conveyed to the officers that while they were taking the subject to the police station, the parents would be obtaining an attorney to join them at the station. Id. at 265.

118. 408 N.Y.S.2d 77 (N.Y. App. Div. 1978).

119. 44 N.Y.2d 553, 378 N.E.2d 99 (1978).

120. In *Stroh*, the subject stated, "Hold it, I would like to either have an attorney or a priest to talk to, to have present." *Stroh*, 408 N.Y.S.2d at 78. When the officer asked, "Who do you want?," the subject replied, "Contact a priest down in the Parish, in Beacon." Id. The court expressed concern that the subject may have believed from this exchange that, unless he knew of a specific attorney, his only option was to ask for a priest with whom he was acquainted. Id. at 80. In *Hodge*, the court cited with approval the lower court's suppression of the defendant's statement made during an interrogation that had proceeded wrongly without the summoning of a priest whom the defendant had requested. *Hodge*, 378 N.E.2d at 101.

period of time for an attorney to arrive at the station.[121] Although "reasonable" is always a vague and manipulable standard, New York courts, and other state courts that follow the New York rule, should use the factors that Connecticut uses under its totality-of-the-circumstances test to determine what time period is reasonable.[122] These factors include the exact behavior and words of both the attorney and suspect, the nature of the relationship between the attorney and suspect, and the extent to which the police had notice of the subject's request for an attorney.[123] For example, in *Lee*, the fact that the officer who overheard the statement regarding counsel provided the subject's father with the precinct's telephone number to enable the attorney to call could weigh in favor of a broad interpretation of reasonableness.[124] Conversely, the opposite interpretation might result when the subject possesses a dishonest motive.[125] These factors appear to be practical and relevant to determine what is reasonable when attempting to balance society's interest in efficient law enforcement with the subject's interest in having an attorney present during the interrogation.

#### c. *Procedure Regarding a Separate, Unrelated Charge*

Finally, one of the questions that troubled the *Burbine* majority and contributed to its refusal to adopt a rule like New York's was whether police may question a subject on a charge for which no attorney has entered the proceeding if they know that he is represented by counsel on a pending but unrelated charge.[126] For nearly fifteen years, the courts of New York have answered that question "no."[127] The courts first were confronted with the issue in *People v. Rogers*.[128] The *Rogers* court held that the police may not

121. *Lee*, 589 N.Y.S.2d at 267.

122. See note 83 and accompanying text. In *State v. Stoddard*, 206 Conn. 157, 537 A.2d 446 (1988), the court held that if the police fail to inform a subject that a retained attorney is requesting access to him, the subject's waiver of his rights and subsequent confession will not be excluded per se, but rather the determination will be based on the outcome of a totality-of-the-circumstances test. Id. at 456.

123. Id.

124. *Lee*, 589 N.Y.S.2d at 265.

125. See, for example, *People v. San Souci*, 260 N.Y.S.2d 967 (N.Y. App. Div. 1965). At the defendant's sentencing hearing, he claimed that he was represented by a new attorney. Id. at 969. The judge presiding over the hearing attempted to reach the new counsel's office and waited over an hour for an attorney to appear. Id. The court found that the defendant was engaging in a delay tactic and held that a one-hour wait was reasonable. Id. at 970.

126. See note 49 and accompanying text.

127. The dissenters in *Burbine* agreed with this position, noting that it was a "quite simple question[ ]." *Burbine*, 475 U.S. at 460-61 & n.46.

128. 48 N.Y.2d 167, 397 N.E.2d 709 (1979).

question a subject on a charge for which he is not officially represented if the police are aware that he is represented on another charge.[129] The court expanded its rule only two years later in *People v. Bartolomeo*.[130] In *Bartolomeo* the court held that when the police are aware of the prior charge, they have an obligation to inquire whether the subject is represented on that charge and will be held accountable for whatever knowledge they would have obtained through this inquiry.[131] Therefore, the New York courts have confronted and resolved many of the issues, both specific and general, that troubled the *Burbine* Court, successfully striking the balance in a manner that demonstrates that this rule is neither unmanageable nor hopelessly vague.

### 2. Burdening Law Enforcement

Another likely criticism of the New York rule is that it strikes the balance teo much in favor of the subject, thereby hampering law enforcement efforts. In fact, many of *Miranda*'s critics have argued that the *Miranda* decision's costs are far too great to justify the decision's rule, let alone a broad expansion of it. Their primary allegation is that *Miranda* has led to a decrease in the number of confessions that police obtain,[132] resulting in the loss of an invaluable tool without which many cases will remain forever unsolved; therefore, many critics have called for the decision to be overruled.[133] There are several reasons, however, why *Miranda* should remain intact and the broader New York rule be adopted universally.

First, if fewer subjects are providing confessions with *Miranda* in place, it is highly likely that the *Miranda* Court's concerns were well-founded and its solution well-crafted. The compulsion to confess, identified by the *Miranda* Court, likely has been dispelled successfully to some degree by the provision of the *Miranda* warnings. Therefore, this data suggests not that *Miranda* should be overruled but rather

---

129. The court reasoned that "[a]n attorney is charged with protecting the rights of his client and it would be to ignore reality to deny the role of counsel when the particular episode of questioning does not concern the pending charge." Id. at 713. This protection has been limited to the situation in which the subject is represented on a pending charge only because the court's concern is that the subject could incriminate himself on the pending charge, for which he is represented, although the questions supposedly are directed only toward the unrelated charge. Once the subject has been tried and convicted and is represented only for purposes of appeal, however, the state simply does not have the same motivation te gather incriminating evidence. *People v. Colwell*, 65 N.Y.2d 883, 482 N.E.2d 1214, 1215 (1985).

130. 53 N.Y.2d 225, 423 N.E.2d 371 (1981).

131. Id. at 373, 375.

132. See, for example, Markman, 54 U. Chi. L. Rev. at 946 (cited in note 5).

133. See id. at 948-49.

that it is functioning precisely as intended: to protect a subject's constitutional rights. Therefore, because *Miranda* appears to have identified a real concern and taken the first step toward addressing it, the extension of *Miranda* through the New York rule is simply a greater step in that same direction. The *Miranda* Court perceived the greatest coercion to be inherent in the incommunicado nature of most interrogations but created a rule that stopped short of eliminating this incommunicado nature. Therefore, the New York rule, which requires that an attorney be present in the interrogation room before a subject validly may waive his rights or make a statement, appears to be a logical next step toward dispelling the coercion that the *Miranda* Court correctly identified.

Second, although reliable confessions are undeniably beneficial to effective law enforcement, and it is politically and socially unpalatable to support a rule that demonstrably reduces the number of criminals who admit guilt, the Fifth Amendment dictates that result. Its plain, unambiguous language prohibits the state from compelling an individual to be a witness against himself.[134] An individual cannot truly incriminate himself unless he is guilty; therefore, the Fifth Amendment operates from the perspective of a guilty subject. It makes the value judgment that the state may not force a guilty subject to speak against himself, regardless of the resulting effect upon law enforcement. Thus, neither *Miranda* nor the New York rule is intended to provide a vehicle for freeing criminals; rather, they both simply carry out the Fifth Amendment's commands.

Furthermore, *Miranda*'s supporters dispute the accuracy of the data showing an alleged decrease in confessions and its interpretation. Additionally, their own interpretations and explanations of the data favor adopting the New York rule. First, some have cited studies showing little decrease, or none at all, in the number of confessions obtained by police since *Miranda*.[135] If these studies are accurate, then states certainly should adopt the New York rule because the studies indicate that *Miranda* in its present form is not achieving its goal of reducing the coercion to confess. If this is the case, perhaps providing the *Miranda* warnings is no longer a means to an end but instead has become an end in itself, a duty perfunctorily discharged in a monotone, void of any sense of the constitutional

134. See note 2.

135. See White, 39 Vand. L. Rev. at 19 n.99 (cited in note 14), for examples of post-*Miranda* studies showing little or no decrease in the confession rate. Another supporter has explained that, although there may have been decreases in confessions immediately following *Miranda*, they were all very short-lived and the rates have returned to their pre-*Miranda* levels. Schulhofer, 54 U. Chi. L. Rev. at 456 (cited in note 9).

import of the words.[136] If so, then a rule consisting only of conveying information to the subject cannot succeed in a mission to protect his constitutional rights; a rule that requires concrete action, like the New York rule, should be adopted to ensure the use of a method that will succeed in dispelling coercion.[137]

Second, some *Miranda* supporters have acknowledged that it has led to a reduction in the number of confessions but argue that this reduction has had no impact on law enforcement because the conviction rate has remained steady.[138] This position implicates a conclusion identical to that discussed above in response to allegations by *Miranda's* critics that the decision has decreased the number of confessions: *Miranda* has dispelled successfully some of the coercion it identified and should be expanded further to dispel the compulsion a subject may feel that might cause a violation of his Fifth Amendment right.

Finally, one commentator has attempted to dispute the reliability of a study indicating that *Miranda* has decreased the confession rate by asserting that the study was plagued by a sampling bias. A post-*Miranda* study found a significant decrease in the confession rate; however, the authors explained that this result could be attributed to the use of officers who were "particularly conscientious" in complying with *Miranda*.[139] This biased result would appear to be the strongest argument of all for expanding *Miranda's* requirements because it demonstrates that when *Miranda* is adhered to and

---

136. The Court in *Miranda* worried about precisely this situation and advised, "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Miranda*, 384 U.S. at 476.

There is, of course, another possible interpretation of data showing no decrease in the number of confessions sinco *Miranda* that should be addressed. It is possible that there simply never was any coercion for the warnings to dispel and, if that is the case, one may inquire what *Miranda's* purpose is. One commentator has responded:

> The answer is that procedure matters. The fifth amendment does not protect individuals from conviction, but from a certain method of conviction, and the differences in method are important. . . . For those concerned only with the "bottom line," *Miranda* may seem a mere symbol. But the symbolic effects of criminal procedural guarantees are important; they underscore our societal commitment to restraint in an areas in which emotions easily run uncontrolled.

Schulhofer, 54 U. Chi. L. Rev. at 460 (cited in note 9).

The Supreme Court itself appeared te agree with this position, citing with approval the comment that "[t]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." *Miranda*, 384 U.S. at 480 (quoting Comment, Waltor v. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 26 (1956)).

137. One commentator has agreed, stating that "the proper critique of *Miranda* is not that it 'handcuffs' the police but that it does not go quite far enough. *Miranda's* safeguards deserve to be strengthened, not overruled." Schulhofer, 54 U. Chi. L. Rev. at 461 (cited in note 9).

138. See, for example, White, 39 Vand. L. Rev. at 17-18 (cited in note 14).

139. Id. at 19.

respected most closely, it most fully achieves its goal of dispelling the compulsion to speak against oneself. Therefore, those states with officers who are not particularly conscientious in complying with *Miranda* should adopt the New York rule. Because it effects a change in the type of information provided to the suspect, rather than simply increasing the quantity, it is not as easily manipulated into a lower status through careless or indifferent compliance. Similarly, even those areas that have applied *Miranda* conscientiously and have successfully dispelled some coercion should adopt the New York rule because it can only serve to dispel further the coercion prohibited by the Constitution. Thus, the arguments of both the critics and supporters of *Miranda* counsel for widespread adoption of the New York rule because it more fully protects a subject's constitutional rights in a manner that is manageable and does not impose an unacceptable burden on law enforcement.

## VI. CONCLUSION

Although the *Miranda* warnings are a firmly ingrained and accepted aspect of the criminal justice system, taught by television shows to most members of society before they even understand the meaning of the words they have memorized, one must not become content simply to accept *Miranda* in its present form. The Court was concerned primarily with the coercion inherent in incommunicado interrogation; the roadside recital to which one is accustomed falls far short of addressing that concern. *Miranda* created a Fifth Amendment right to counsel and required the police to inform the subject of that right, encouraging states to adopt greater protections if they deemed them necessary. Many states attempted to follow this suggestion but traveled the wrong path, providing a flow of information to the subject that led right up to the interrogation room but never affected the ultimate privacy and secrecy of the interrogation itself. New York is the only state that has adopted a rule that fulfills *Miranda*'s goals; by requiring attorney-subject contact in the interrogation setting, it both protects the right to counsel and eliminates the incommunicado nature of the questioning. Whether the confession rate has decreased or remained the same, and whether *Miranda* is applied conscientiously or has become a meaningless ritual, policy concerns counsel for widespread adoption of the New York rule, which has struck a manageable balance for over twenty-five years.

*Lorraine J. Adler*