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This article's title poses two questions. The answer to the first question is "Yes!" The answer to what may be the more significant second question is "No!" Thus, contrary to popular, judicial and academic contentions, *Miranda v. Arizona*,[1] which was 40 years old on June 13, 2006, does *not* require police to advise suspects of their rights to silence and counsel, to *not* conduct custodial interrogations without first giving *Miranda* warnings and obtaining a valid waiver, or to terminate questioning once a suspect requests that it end.[2]

This article discusses each of the two questions posed in the title, and in that order. The article considers the four most important and most recent United States Supreme Court decisions affirming the constitutional basis of the *Miranda* warnings.

Also discussed is the significance of those holdings that predicate the validity of *Miranda* on the Fifth Amendment rather than the Fourth Amendment. It remains the law that even if a confession is inadmissible under *Miranda*, if it was voluntary, the defendant can be impeached with it[3]; the "fruits" doctrine of the Fourth Amendment does not apply, so evidence obtained as a result of a voluntary but *Miranda*-faulty confession will be admissible[4]; and, there will be no personal liability to a police officer for failing to give *Miranda* warnings and getting a proper waiver or, for that matter, continuing to question a subject who has invoked his rights.[5] A number of police officers and departments in recent years have chosen to deliberately violate *Miranda* because of these evidentiary incentives.[6]

Finally, the Inbau[7] manual is discussed. This text is considered the most influential police interrogation manual, and it provides a glimpse into modern police interrogation tactics. These tactics are frankly aimed at gaining a confession by minimizing the impact of *Miranda* warnings, most of which tactics are undoubtedly legally permissible.

Difference Between the Fifth Amendment and *Miranda*

Before proceeding, there is a difference between the Fifth Amendment privilege against self-incrimination[8] and the *Miranda* doctrine, rules or warnings (hereafter usually just *Miranda*).

The former protects against the use of compelled statements in judicial, administrative and congressional proceedings as well as before other investigative bodies.[9] The latter contains specific rules governing in-custody interrogations.[10]

Miranda is required by and enforced under the Fifth Amendment, but is only part of it.[11] The Fifth Amendment is broader than *Miranda*, as the Amendment is also the basis for the right of a defendant or witness not to testify as well as other constitutional mandates, and both differ from the Sixth Amendment's concerns.[12]

The *Miranda* Warnings

Miranda consists of four warnings and sets forth the order in which the warnings are to be given to help alleviate the pressure of the interrogation room.[13] The *Miranda* decision requires that, before custodial questioning commences, a suspect who is in custody (not free to leave) must be told that: You have the right to remain silent; anything you say can be used against you in a court of law; you have the right to an attorney at the interrogation; and, if you can not afford an attorney one will be appointed for you.[14] The police should then obtain a valid waiver of these rights by the suspect or terminate question-

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ing upon a suspect's request.

Difference Between *Miranda* and Voluntariness

There is a difference between the issues presented by whether *Miranda* warnings were properly given and the voluntariness of a confession in a criminal prosecution.

In the latter situation the question is whether under the circumstances the statements were given voluntarily, consistent with the requirements of the Due Process Clause. To be admissible a statement must be voluntary, not obtained by coercion or improper inducement.[15] Confessions are presumed to be involuntary.[16] The burden is on the state to make a *prima facie* showing that the defendant's statements were made voluntarily.[17]

Miranda Based on Fifth Amendment/ Voluntariness on Fourteenth

As noted and to be more fully explained, preclusion of evidence obtained in violation of *Miranda* is based on the Fifth Amendment privilege against self-incrimination. Preclusion of an involuntary confession, on the other hand, is based on the Due Process Clause of the Fourteenth Amendment and applies to confessions that are the product of coercion or other methods offensive to due process.[18] Prior to *Miranda*, decided in 1966, no warnings were given, and the voluntariness of any statement was litigated in most instances.[19]

Miranda Still Law But No Requirement To Comply

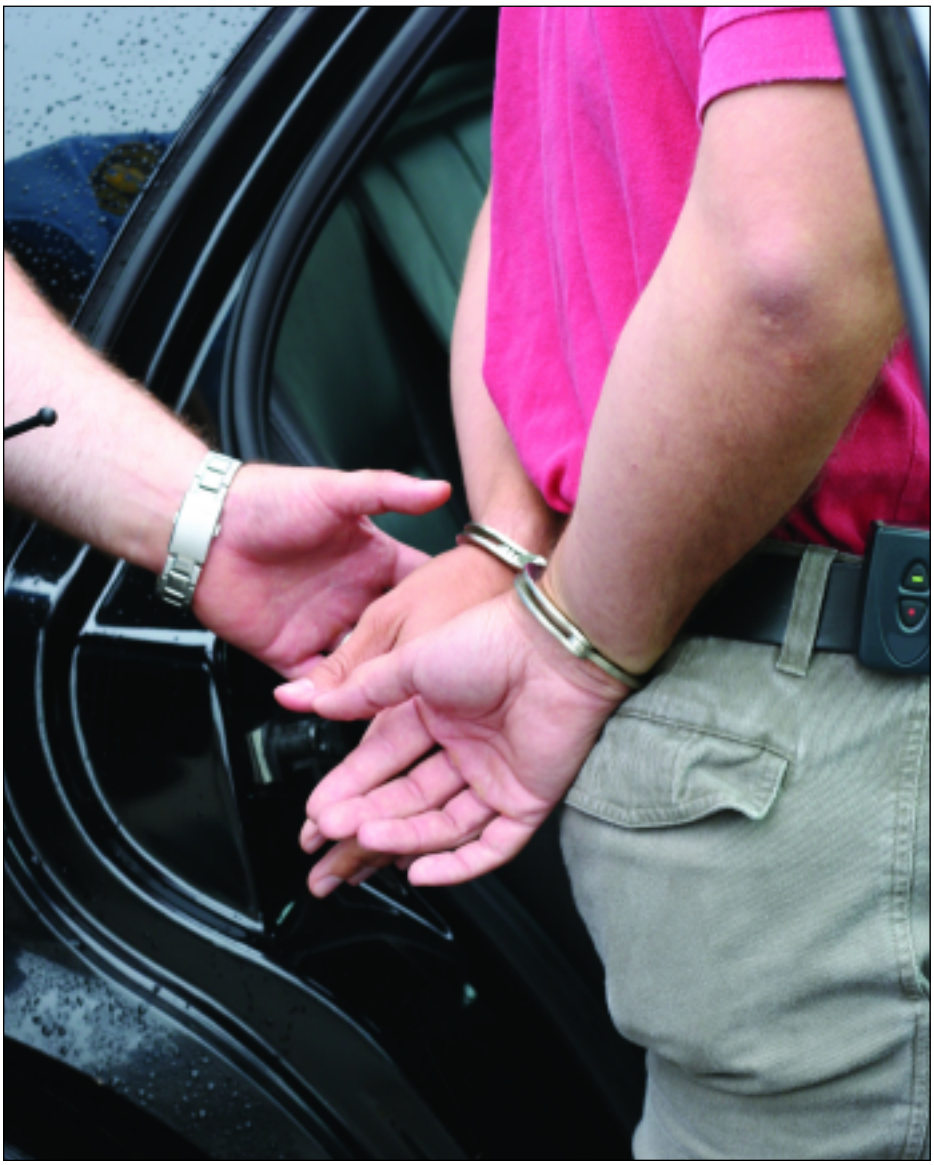
In four recent cases the United States Supreme Court has let it be known that *Miranda*, at least for now, is here to stay. Those cases, in their order of decision, are *Dickerson v. United States*,[20] *Chavez v. Martinez*,[21] and two cases decided the same day, *Missouri v. Seibert*[22] and *United States v. Patane*.[23]

After the *Miranda* decision in 1966, a 5–4 decision authored by Chief Justice Warren, Congress enacted 18 U.S.C. § 3501 in 1968 in an effort to overrule *Miranda*.[24] This statute permitted the introduction of voluntary confessions in federal courts even absent compliance with the *Miranda* rules. A failure to advise an arrested suspect of his rights was a factor to be considered when assessing voluntariness but did not require suppression.[25] The Department of Justice position when Edwin Meese was Attorney General was that *Miranda* was wrong and an improper exercise of judicial power.[26] However, as one commentator has noted, "The government rarely invoked § 3501 or challenged *Miranda* in court during this period."[27]

Dickerson

This position changed during Janet Reno's tenure as Attorney General.

In 2000, when *Dickerson v. United States*



was argued, the Department of Justice urged the Court to uphold *Miranda*.[28] Charles Dickerson was charged with conspiracy to commit bank robbery and other offenses. He moved to suppress a statement made to the FBI on the basis that he had not received *Miranda* warnings prior to interrogation. The district court granted his motion, but the Fourth Circuit, relying on § 3501, reversed, finding it voluntary and admissible.

If the Supreme Court permitted the overruling of *Miranda* by legislation, it "would have wiped out more than three decades of *Miranda* jurisprudence—nearly 60 cases," and moreover, "The police seemed to be living comfortably with it."[29]

In an opinion written by Chief Justice Rehnquist joined by six other justices, the Court in *Dickerson* held that *Miranda* was constitutional, based on the Fifth Amendment privilege, and that § 3501 was unconstitutional and beyond the power of Congress.[30] Justice Scalia, joined by Justice Thomas, dissented, severely criticizing both the *Miranda* decision and the majority opinion, finding that *Miranda* prevents a suspect from "foolishly" confessing; that *Miranda* sets forth a "palpable hostility" toward the act of confessing and the warnings themselves represent an "illegitimate exercise" of the Court's authority to overturn state criminal convictions.[31]

Various commentators have pointed out that *Dickerson*, notwithstanding its result and although it made clear that *Miranda* was a legitimate constitutionally based rule, was not an enthusiastic endorsement of *Miranda*.[32] The majority opinion made a point of emphasizing, "Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance"[33] and kept referring to the "tenets" described by the *Miranda* Court without expressing agreement with the rules. It described *Miranda* as the rule governing police conduct but, as will be seen, it does not do so as a practical matter.

In defense of the Chief Justice, it also has been pointed out that it must have been quite a feat to get six Justices with different views of *Miranda* to join his opinion and that he probably could not have retained all six if he had written extensively about the rules.[34]

The *Dickerson* decision also reaffirmed the notion that a Fifth Amendment *Miranda* violation will not be subject to the fruit-of-the-poisonous-tree doctrine, unlike Fourth Amendment violations.[35] The confession will be suppressed where *Miranda* is technically violated but, absent coercion, any other evidence derived from a voluntary confession will be admitted.

Chavez

The Supreme Court's unenthusiastic endorsement of the *Miranda* decision in *Dickerson* made it uncertain what the Court would do when next presented with a *Miranda* issue. The uncertainty was resolved in 2003 in *Chavez v. Martinez*,[36] and *Dickerson* had implicitly foreshadowed its holding and practical effect.

On November 28, 1997, Oliverio Martinez was shot five times by Oxnard, California, police, was arrested and taken to a hospital emergency room. He was rendered blind, his legs were paralyzed and his injuries were life-threatening. Police Sergeant Ben Chavez relentlessly questioned Martinez while he was receiving treatment and although asked to leave several times he returned each time and tape-recorded the questioning. Although some of the answers given by Martinez were incriminating, they never were introduced against Martinez in a criminal proceeding.

Martinez brought a 42 U.S.C. § 1983 action against Sergeant Chavez, alleging that his constitutional rights were violated by subjecting him to coercive interrogation after he had been shot by another police officer. The district court denied *Chavez*'s defense of qualified immunity and entered summary judgment in favor of Martinez. The Ninth Circuit affirmed.

The United States Supreme Court reversed, holding that a suspect's Fifth Amendment constitutional rights are not violated by the conduct of police during a coercive interrogation, but they are violated in the event an incriminating statement is taken and introduced against him in a trial or other criminal proceeding.[37]

Thus *Chavez*, as did *Dickerson*, upheld *Miranda* as a viable constitutional doctrine, but, as in *Dickerson*, the Court was not willing to put any teeth behind the doctrine. *Dickerson*'s only sanction is the exclusion of the improperly obtained or compelled confession, but other evidence obtained from a voluntary confession will be admitted. The *Chavez* mandate is that police officers do not commit a Fifth Amendment violation if the compelled confession is never introduced in evidence. Thus, police officers who fail to follow the *Miranda* warnings are not liable in civil actions under 42 U.S.C. § 1983 for violating a suspect's constitutional rights.[38]

Martinez, who was never prosecuted for a crime, filed suit on the basis of both a due process and Fifth Amendment constitutional violation. Though it denied the Fifth Amendment claim, a majority of the Supreme Court was willing to permit Martinez to pursue his due process claim.[39] It was noted in *Dickerson*[40] that a suspect may bring a federal cause of action under the Due Process Clause for egregious police misconduct during custodial interrogation.

Then came *United States v. Patane*[41] and *Missouri v. Seibert*,[42] both decided on June 28, 2004.

Patane

As noted in *Dickerson*,[43] a Fifth Amendment *Miranda* violation is not subject to a "fruits" analysis, unlike Fourth Amendment violations. This was reaffirmed in *Patane*, where the defendant was indicted for being a felon in possession of a firearm based on seizure of the weapon at defendant's home on his arrest for violating a restraining order. A federal agent had told the police that defendant illegally possessed a pistol. When a detective attempted to advise defendant of his rights, the defendant interrupted, asserting he knew his rights. In response to the detective's inquiry about the pistol, the defendant then admitted possessing it, and it was seized.

The district court had granted defendant's motion to suppress the firearm because he was not given *Miranda* warnings in conjunction with the arrest. The Supreme Court reversed (Justice Thomas) in a 5–4 decision (Justices Souter, Stevens, Ginsberg and Breyer dissenting), holding that the failure to give *Miranda* warnings does not require suppression of the physical fruits of a suspect's unwarned but voluntary statements.[44] The weapon was recovered based on defendant's voluntary statement to a detective's question about the weapon.

As was the case with *Dickerson* and *Chavez*, *Patane* thus continues the incentive for police officers to violate *Miranda*. These cases

advise in no uncertain language that *Miranda* is a rule solely governing admissibility and does not purport to curtail improper police conduct. The question is whether this view is perpetuated in *Seibert* or if it announces a position attempting to change government behavior.

Does *Seibert* Attempt To Change Police Behavior?

Unlike the three prior decisions, *Seibert* directly addresses police conduct, at least with respect to midstream *Miranda* warnings.

Patrice Seibert was convicted of second-degree murder. Her conviction was based on a confession that outlined bizarre circumstances to cover up the death of her son, Jonathan, age 12, who had cerebral palsy and died in his sleep. Afraid she would be charged with neglect because of bedsores on his body, she, two of her teenage sons and two of their friends set fire to the family's mobile home while leaving Donald Rector, a mentally ill teenager living with the family, in the trailer to show that Jonathan was not unattended.

Donald died in the fire, and Patrice Seibert was awakened at 3:00 a.m. a few days later and interrogated at the station house without being given *Miranda* warnings. After questioning for 20 minutes, she admitted that Donald was to die in the fire. After a break in the questioning, the tape recorder was turned on and she was give her *Miranda* warnings and signed a waiver of rights.

Justice Souter, writing for the Court in *Missouri v. Seibert,* affirmed the reversal of the conviction by the Supreme Court of Missouri in a 5–4 decision (Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined). The Court held that midstream *Miranda* warnings, given after a prior interrogation, produced an unwarned confession and did not pass constitutional muster. Statements made prewarning as well as post-warning were inadmissible "because the earlier and later statements are realistically seen as parts of a single unwarned sequence of questioning."[45] Such interrogations that are "close in time and similar in content"[46] are thus likely to mislead a suspect, depriving her of the knowledge needed to fully understand

The Man Behind the Warning

Ernesto Arthur Miranda was arrested in 1963 in connection with a series of sexual assaults. This was not his first police contact. He had been committed to the custody of the juvenile authorities on burglary, attempted rape and assault charges. He had previously been arrested in California on suspicion of armed robbery and had a conviction for violation of the Dyer Act.[1]

Interrogated at Phoenix police headquarters, he confessed to two attempted sexual assaults, one rape, one attempted robbery and one robbery with the use of a small knife, involving three young women.[2] He was convicted of robbery, kidnapping and rape in back-to-back trials involving two of the women. He was sentenced to 20 to 25 years on the robbery charge, to run consecutively to two 20- to 30-year convictions on the kidnapping and rape convictions.[3]

Miranda had made his confession in the absence of counsel and without knowing he had a right to an attorney and to remain silent. Most of the evidence used to convict him came out of his own mouth. The police had not used torture or undue trickery. They had not manipulated him into admitting guilt, which was given quite freely.[4] There is no doubt the police had acted in accordance with the standards and norms then existing.[5]

The Arizona Supreme Court affirmed the robbery conviction and the kidnapping and rape convictions. Miranda contended that the admission into evidence of his written confession was error because he did not have an attorney at the time the statement was made and signed.[6] The Court disagreed, the confession was admissible as it was voluntarily given, he was advised it could be used against him, he did not request an attorney and one had not yet been appointed for him and no threats or use of force or coercion were employed or promises of immunity made.[7]

This determination of the Arizona Supreme Court in the kidnapping and rape case (the robbery conviction was not appealed) was reversed by the United States Supreme Court in *Miranda v. Arizona,*[8] which held that Miranda should have been apprised of his right to consult with an attorney and to have one present during his interrogation.[9]

Miranda was retried for rape in 1967[10] and convicted. After a new trial was ordered in the robbery case, he was retried for robbery in 1971[11] and convicted.

Ten years after the United States Supreme Court decision in *Miranda* and a little more than a month after his final release from prison in 1976, he was murdered in a knife fight at a Phoenix bar.[12] He was 35 years old. The suspect was given his rights, but he denied any involvement.[13] By the time a murder complaint was issued for the suspect and another individual involved in the fight, they had disappeared and have not been apprehended to this day.[14]

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1. See Gary L. Stuart, *Miranda:* The Story of America's Right to Remain Silent 41 (2004). The author cannot recommend this book more highly, especially for its fascinating and extensive discussion of the prominent players and Arizona attorneys involved in the *Miranda* decision.
2. *Id.* at 4-7.
3. *State v. Miranda,* 401 P.2d 716, 723 (Ariz.) (robbery committed Nov. 27, 1962) and 401 P.2d 721, 724 (Ariz.) (kidnapping and rape committed Mar. 3, 1963), both decided on April 22, 1965.
4. *See* Stuart, *supra* note 1, at 22.
5. *Id.*
6. This was argued in the kidnapping and rape case, 401 P.2d at 728, but he did not contend the admission of his confession was error in the robbery case. *See* 401 P.2d at 722.
7. 401 P.2d at 739.
8. 384 U.S. 436 (1966).
9. *Id.* at 492.
10. *State v. Miranda,* 450 P.2d 364 (1969). *See* Stuart, *supra* note 1, at 92-95.
11. *State v. Miranda,* 509 P.2d 607 (1973).
12. *See* Stuart, *supra* note 1, at 95-99. The author sets forth the circumstances of Miranda's eventual parole violation, his return to prison and the circumstances of his death.
13. *Id.* at 97.
14. *Id.* at 99.

her rights and the consequences of abandoning them.[47] These tactics, said the Court, "by any objective measure reveal a police strategy adopted to undermine the *Miranda* warnings."[48] Its manifest purpose "is to get a confession the suspect would not make if he understood his rights at the outset."[49]

The Court in *Seibert* distinguished *Oregon v. Elstad,*[50] wherein Justice O'Connor, who dissented in *Seibert,* was writing for the Court. *Elstad* held that while an initial inculpatory but voluntary statement given earlier in defendant's home was inadmissible because of failure to give *Miranda* warnings, a subsequent voluntary stationhouse confession, preceded by proper admission and waiver, was admissible. *Seibert* determined that in *Elstad* it was not unreasonable to consider the questioning at the stationhouse as a decidedly different experience from the brief prior at-home conversation. It presented the suspect with a true choice of whether to speak or remain silent.[51]

Without a doubt *Seibert* is specifically addressing police conduct, which the Court did not do in *Dickerson, Chavez* or *Patane*. This can be seen in *Seibert*'s discussion of police interrogation manuals and techniques.

Inbau Manual

Seibert, interestingly and perhaps significantly, sets forth a listing of police interrogation manuals,[52] some of which frankly advise officers not to give *Miranda* warnings until a confession is first obtained.

The majority opinion has harsh words for that type of tract. Advising that "a police strategy adopted to undermine the *Miranda* warnings"[53] or "urging that *Miranda* be honored only in the breach"[54] will not be tolerated. Taking a statement "outside *Miranda*" describes the practice of certain police departments to consciously decide to forego giving *Miranda* at any time. This forfeits the opportunity to use statements in the state's case-in-chief but retains the ability to use statements for investigative leads and for impeachment at trial.

According the *Seibert,* there has to be in every custodial interrogation a real choice given to the suspect between talking and not talking for a confession to be admissible. Giving the warnings and getting a voluntary waiver of rights has an upside, notes the majority opinion (Justice Souter), for that generally produces "a virtual ticket of admissibility" with most litigation over voluntariness ending "with a finding of valid waiver."[55]

Seibert also lists those manuals that properly instruct police to give *Miranda* warnings in all cases.[56] The Inbau manual[57] is prominent among them. Written in 1942 by Fred E. Inbau, a Northwestern University law professor, and revised over the years, the Inbau manual is one of the most influential "how to" textbooks on police interrogation techniques.[58]

The manual sets forth the most common interrogation techniques to gain a waiver of the *Miranda* warnings, which are undoubtedly legally permissible.[59] As noted in a recent Arizona Supreme Court decision, "Videotaping 'the entire interrogation process' is both good police practice and a profound aid to courts assessing *Miranda* claims."[60] Thus lawyers, judges and those who labor in the trenches of criminal litigation observe these government techniques and practices every day.

We are familiar with those strategies for inducing *Miranda* waivers that police use when initially confronting suspects in an interrogation room.[61] Such tactics are employed as:

- delivering *Miranda* warnings in a neutral manner (deliver the warnings in as simple a fashion as possible before engaging in any conversation)
- de-emphasizing their significance (engage in rapport-building with small talk and portray them as a necessary ritual—"Oh, by the way, I have to read this thing before we start")
- telling the suspect that by waiving his rights he will get *to tell his side* of what happened
- convincing the suspect that the interrogator is a *non-adversary or a friend* who is acting in his best interests.

A disturbing tactic is to not ask the suspect for a waiver after he has been properly read his *Miranda* rights. Beginning the questioning on the assumption that his silence means a waiver is really contrary to the *Miranda* holding.

Once there is a valid *Miranda* waiver, police may use deceptive interrogation tactics, and such police gamesmanship is usually not illegal "so long as the games do not overcome a suspect's will and induce a confession not truly voluntary."[62] Familiar tactics include:

- asking questions multiple times to determine if you are getting different stories
- using a ruse, such as insisting there is a fingerprint or an incriminating tape, or statements such as "We know more about the crime than we are telling you," "Your buddies have turned you in," "Someone saw you out there"
- feeding incriminating information to a suspect when they won't provide it to see if it will be stated by the suspect later or the suspect will fill in the gaps in such evidence
- getting firm: "You are holding back," "If we have to stay here all night, we will"
- having the suspect wait alone for periods of time in the questioning room to demonstrate police dominance over the procedure.[63]

Conclusion

It is noted in the literature that the police obtain waivers of *Miranda* rights in the "overwhelming majority"[64] of cases. Once they do, "*Miranda* offers very little, if any, meaningful protection."[65] As a practical matter, if a suspect waives his *Miranda* rights, all his resulting answers are admissible at trial. Moreover, those in the trenches can attest to the fact that while suspects who talk to police may cut off questioning or ask for a lawyer at any time, they "almost never do."[66] Once police comply with *Miranda* and there is a valid waiver, "It is extremely difficult to establish that any resulting confession was 'involuntary."[67] It also "has the effect of minimizing the scrutiny courts give police officer interrogation practices following the waiver."[68]

Although *Miranda* is still the law with a Fifth Amendment underpinning, reaffirmed in the four most recent cases, a Fifth Amendment violation, unlike a Fourth Amendment infraction, does not result in the "fruits" of an improper *Miranda* warning being suppressed. While a confession produced in violation of *Miranda* will be excluded, it can still be used to impeach a testifying defendant, if the con-

fession was voluntary. There is no Fifth Amendment violation until a *Miranda*-less confession is introduced at the trial. If it never is used by the prosecutor, there is no personal liability to police officers under 42 U.S.C. § 1983—though there may be liability under the Due Process Clause for an abusive interrogation.

Perhaps *Seibert* holds out hope that improper police interrogation tactics will be more closely examined in the future and that if they cross a certain line, yet to be determined, the statements of the suspect will not only be inadmissible but perhaps additional sanctions will be applied. It has been cogently argued, for instance, that an interrogation resulting in a confession where *Miranda* has been violated should be considered not only as a Fifth Amendment case but also a Fourth Amendment search and seizure with the application of all sanctions available under that Amendment.[69]

It must be kept in mind, however, that a respectable view can be offered that the present law covering *Miranda* has struck an appropriate balance between individual rights and the needs of law enforcement in keeping the community safe. That is the view of the majority of our Highest Court.

endnotes

1. 384 U.S. 436 (1966).
2. A primary source for this article is Steven D. Clymer, *Are Police Free To Disregard* Miranda*?* 112 YALE L.J. 447, 449-50 (2002). Professor Clymer's wrote a condensed and updated version of this article, Miranda*'s Demise?* CORNELL L.F., Fall/Winter 2003, at 3. *See also* Yale Kamisar, Miranda*'s Reprieve,* ABA J., June 2006, at 48; Roscoe C. Howard, Jr., & Lisa A. Rick, *A History of* Miranda *and Why It Remains Vital Today,* 40 VAL. U. L. REV. 685 (2006); Sandra Guerra Thompson, *Evading* Miranda: *How* Seibert *and* Patane *Failed To "Save"* Miranda, 40 VAL. U. L. REV. 645 (2006); Paul Marcus, *It's Not Just About* Miranda: *Determining the Voluntariness of Confessions in Criminal Prosecutions,* 40 VAL. U. L. REV. 601 (2006); Yale Kamisar, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387 (2001).
3. *Harris v. New York,* 401 U.S. 222 (1971) (impeachment with statement taken without *Miranda* warnings); *Oregon v. Haas,* 420 U.S. 714 (1975) (impeachment with statement taken following assertion of *Miranda* rights); *Walder v. United States,* 347 U.S. 62 (1954) (physical evidence inadmissible in case-in-chief can be used to impeach so as not to condone perjury).
4. Excluding evidence under the doctrine of the "fruit of the poisonous tree" is applicable to Fourth Amendment cases. *Wong Sun v. United States,* 371 U.S. 471 (1963). To discourage future violations evidence otherwise admissible but discovered as the result of an earlier search and seizure violation is excluded as tainted. This doctrine was specifically rejected in Fifth Amendment *Miranda* violation cases by *Oregon v. Elstad,* 470 U.S. 298, 300 (1985), and reaffirmed in *Missouri v. Seibert,* 542 U.S. 600, 612, n.4 (2004). See also *Michigan v. Tucker,* 417 U.S. 433 (1974).
5. Police do not violate the Fifth Amendment's *Miranda* rule or the Due Process Clause by mere failure to warn or continuing to question after a suspect has been arrested and read his *Miranda* rights. The federal courts of appeals have rejected claims for damages or injunctive relief against police and police agencies under 42 U.S.C. § 1983. See discussion in Clymer, *Are Police Free To Disregard*, *supra* note 2, at 486 *et seq.* Although written prior to *Chavez,* this view was reaffirmed in that case. Note that both *Dickerson* and *Chavez* permit a suit against police under the Due Process Clause of the Fifth and Fourteenth Amendments for "extreme forms of compulsion" that "'shocks the conscience' including use of physical force, threats of force, and extreme forms of psychological coercion during interrogation." Clymer, Miranda*'s Demise? supra* note 2, at 7.
6. Clymer, Miranda*'s Demise? supra* note 2, at 5.
7. FRED E. INBAU, JOHN E. REID, & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND INVESTIGATION (7th ed. 2003).
8. In pertinent part, the Fifth Amendment provides, "No person … shall be compelled in any criminal case to be a witness against himself." See Gottsfield, *infra* note 9, at 36-43, for what it literally means to invoke the Fifth Amendment in the context of the two aspects of the privilege: the right of every person to refuse to answer a particular question creating a risk of incrimination and the right of a defendant in a criminal case not to testify at all. The Fifth Amendment also provides for a grand jury in a capital case, grants double jeopardy protection, prohibits the taking of private property for public use without just compensation and contains the language "nor be deprived of life, liberty, or property without due process of law."
9. Robert L. Gottsfield, *Taking The Fifth: Avoiding the Cruel Trilemma,* ARIZ. ATT'Y, Sept. 2004, at 36.
10. There is a two-step analysis to determine whether a person is in police custody thereby triggering *Miranda*. The circumstances surrounding the interrogation are examined and then, given those circumstances, the question is asked whether a reasonable person using an objective test would have felt he was not at liberty to end the interrogation and leave. *Yarborough v. Alvarado,* 541 U.S. 652 (2004). The objective test whether an adult is in custody for purposes of *Miranda* also applies to juveniles but with additional elements that bear on a juvenile's perceptions and vulnerability, including his age, maturity and experience with law enforcement and in some cases whether a parent or supportive adult is present. *In Re Andre M.,* 88 P.3d 552 (Ariz. 2004); *State v. Huerstel,* 75 P.3d 698 (Ariz. 2003). Juveniles are given the same warnings, but they are more fully explained in simple language.
11. *Dickerson v. United States,* 530 U.S. 428, 433, 444 (2000) ("*Miranda* announced a constitutional rule that Congress may not supercede legislatively.")
12. *See supra* note 8 The Sixth Amendment prohibits the use at trial of statements deliberately elicited from a suspect after he has been *indicted* and in the absence of counsel. *Fellers v. United States,* 540 U.S. 519 (2004); *Massiah v. United States,* 377 U.S. 201 (1964).
13. 384 U.S. at 467-472, 479. See the excellent discussion in GARY L. STUART, *MIRANDA*: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT 85-90 (2004).
14. 384 U.S. at 479. *And see Bridgers v. Dretke,* 431 F.3d 853 (5th Cir. 2005), *cert. denied,* 126 S. Ct. 2961 (2006) (conclusion of state appellate court that *Miranda* warnings stating defendant had a right to counsel prior to questioning but did not explicitly state he had such right during questioning was adequate; there is a circuit split whether *Miranda* requires explicitly informing a suspect he has a right to counsel during questioning). The Ninth Circuit requires that the suspect know counsel may be present during questioning. *United States v. Noti,* 731 F. 2d 610 (9th Cir. 1984).
15. *Haynes v. Washington,* 373 U.S. 503, 513-14 (1963). "Promises of benefits or leniency, whether direct or implied even if only slight in value, are impermissibly coercive." *State v. Lopez,* 847 P.2d 1078, 1085 (Ariz. 1992), *cert. denied,* 510 U.S. 894 (1993).
16. *State v. Scott,* 865 P.2d 792 (Ariz. 1993), *cert. denied,* 513 U.S. 842 (1994).
17. *In Re Andre M.,* 88 P.3d at 552.
18. *In Re Jorge D.,* 43 P.3d 605, 609 (Ariz. Ct. App. 2002). A third issue is whether a *Miranda* waiver was voluntary, which involves a different analysis. *See, e.g., Hopkins v. Cockrell,* 325 F.3d 579, 584-85 (5th Cir. 2003) *cert. denied,* 540 U.S. 968 (2003); *State v. Mortley,* 532 N.W.2d 498, 502-03 (Iowa Ct. App. 1995). *And see* Marcus, supra note 2, who reviewed

every reported state and federal appeals decision of the last 20 years for an evaluation of the law on voluntariness.

19. *Missouri v. Seibert,* 542 U.S. 600, 609 (2004).
20. 530 U.S. 428 (2000).
21. 538 U.S. 760 (2003).
22. 542 U.S. 600 (2004).
23. 542 U.S. 630 (2004).
24. *Dickerson,* 530 U.S. at 431-32; Clymer, Miranda*'s Demise? supra* note 2, at 6.
25. *Id.*
26. Clymer, *Are Police Free, supra* note 2, at 455 n.23.
27. *Id.*
28. *Id.*
29. Kamisar, Miranda *Thirty-Five Years Later, supra* note 2, at 397.
30. 530 U.S. at 432, 444.
31. *Id.* at 449, 450, 461. *See* discussion in Kamisar, Miranda *Thirty-Five Years Later, supra* note 2, at 401.
32. Clymer, Miranda*'s Demise? supra* note 2, at 6; Kamisar, Miranda *Thirty-Five Years Later, supra* note 2, at 401 *et seq.*
33. 530 U.S. at 443.
34. Kamisar, Miranda *Thirty-Five Years Later, supra* note 2, at 398.
35. 530 U.S. at 441. *See supra* note 4.
36. 538 U.S. at 760.
37. *Id.* at 767.
38. *See supra* note 5.
39. 538 U.S. at 779-80. And *see supra* note 5.
40. *Dickerson,* 530 U.S. at 442, citing with approval *Wilkins v. May,* 872 F. 2d 190, 194 (7th Cir. 1989), *cert. denied,* 493 U.S. 1026 (1990) (applying *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 389 (1971)).
41. 542 U.S. at 630.
42. 542 U.S. at 600.
43. 530 U.S. at 441.
44. 542 U.S. at 634.
45. *Id.* at 612 n.4.
46. *Id.* at 613.
47. *Id.*
48. *Id.*
49. *Id.* at 616.
50. 470 U.S. 298 (1985).
51. 542 U.S. at 615-16. In *Fellers v. United States,* 540 U.S. at 519, the Court suppressed the initial post-indictment, non-*Mirandized* statements at his home but remanded on the issue whether the subsequent jailhouse *Mirandized* statements should be suppressed as fruits such as under Fourth Amendment cases. The Eight Circuit subsequently concluded statements at the second-stage interrogation were admissible, applying the *Elstad* rule to Sixth Amendment cases. 397 F. 3d 1090 (8th Cir. 2005), *cert. denied,* 126 S. Ct. 415 (2005).
52. 542 U.S. at 609 n. 2.
53. *Id.* at 616.
54. *Id.* at 611 n.2.
55. *Id.* at 609.
56. *Id.* at 611 n.2.
57. INBAU ET AL., *supra* note 7.
58. WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS; POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 25 (2001). Although written before *Chavez, Patane* and *Seibert,* this is a seminal book on police interrogation techniques whose conclusions remain valid. Professor White gives actual scripts of the techniques used.
59. *Id.* at 78 *et seq.* and 99. And *see infra* note 62.
60. *State v. Ellison,* ___ P.3d ___ (Ariz. 2006), citing *State v. Newell,* 132 P.3d 833, 842 n.9 (Ariz. 2006), which quotes *State v. Jones,* 49 P.3d 273, 279 (Ariz. 2002).
61. *See supra* note 58.
62. *State v. Carrillo,* 750 P.2d 883, 894 (Ariz. 1988); *State v. Doody,* 930 P.2d 440, 447-48 (Ariz. Ct. App. 1996), *rev. denied,* Jan. 14, 1997, *cert. denied,* 520 U.S. 1275 (1997). And see discussion by Marcus, *supra* note 2, at 618, that few cases find confessions involuntary because of police lying.
63. Further discussion of police tactics is beyond the scope of this article, but for a comprehensive analysis of the ploys utilized in interrogation see WHITE, *supra* note 58 (especially the chapters on modern police interrogators, chapters 3, 7-13).
64. Kamisar, Miranda *Thirty-Five Years Later, supra* note 2, at 396, quoting Richard A. Leo's then-forthcoming article, since published as *Questioning the Relevance of Miranda in the Twenty-First Century,* 99 MICH. L. REV. 1000 (2001).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 397.
69. Timothy P. O'Neill, *Rethinking* Miranda: *Custodial Interrogation as a Fourth Amendment Search and Seizure,* 37 U.C. Davis L. REV 1025 (2004).