> "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture".[1]

General

The Fifth Amendment of the United States Constitution contains numerous, seemingly unrelated commands, "probably [the US Constitution's] most schizophrenic amendment".[2] Among other things, it holds that "[n]o person shall be … compelled in any criminal case to be a witness against himself…" Like the Fourth Amendment, the Fifth Amendment is silent about the appropriate remedy for violations of any of its commands. The privilege against self-incrimination, however, specifically forbids the use of any compelled self-incriminatory evidence in a criminal trial. In other words, the *use* of such evidence in itself constitutes a violation of the Constitution. And, unlike the Fourth Amendment, infringements cannot be justified by showing reasonableness.

Miranda v Arizona

In *Massiah v United States*[3] and *Escobedo v Illinois*,[4] the Supreme Court extended the Sixth Amendment right to counsel to the pre-trial and pre-indictment phases, respectively. This led to the decision in *Miranda v Arizona*.[5] However, instead of settling the Sixth Amendment right-to-counsel issue, the Supreme Court created a different right to counsel as a means of protecting the privilege against compelled self-incrimination.[6] After *Miranda*, the Supreme Court held that the motivation for the *Escobedo* decision was "not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination...'"[7] The Supreme Court apparently approved the

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[1] Rehnquist CJ in *Dickerson v United States supra* 443.
[2] Schulhofer "Some Kind Words for the Privilege Against Self-Incrimination" 1991 *Val U LR* 311.
[3] 377 US 201 (1964).
[4] 378 US 478 (1964).
[5] *Supra*.
[6] Throughout this work, it is illustrated that there is considerable disagreement within the US Supreme Court whether the rights identified in *Miranda* are in fact constitutional rights. In South Africa, rights essentially similar to those identified in *Miranda* are included in s 35 of the Constitution, effectively preventing any dispute as to their constitutionality and consequently simplifying the inquiry whether constitutional rights had in fact been violated. See ch 4 *infra*.
[7] *Kirby v Illinois* 406 US 682 (1972) 689, citing *Johnson v New Jersey* 384 US 719 (1966) 733, in which the *Escobedo* judgement was restricted to its facts.

Miranda court's shift in focus from the right-to-counsel issue to the privilege against self-incrimination.

Traditionally, the confessions obtained in the four cases before the *Miranda* court would have been deemed voluntary,[8] but the Supreme Court was concerned about the protection of the accused's Fifth Amendment right not to be witnesses against themselves. The accused all found themselves in unfamiliar, police dominated surroundings, confronted with menacing interrogation methods, the sole purpose of which was to enforce the will of the interrogator on his subject. This might not have been through physical intimidation, or actual violence, but the court was of the opinion that the psychological pressures exerted on the suspects were nonetheless equally coercive. The Supreme Court was concerned about the lack of procedural safeguards to ensure that the statements were indeed the product of free choice.

The essence of the *Miranda* judgment is as follows: No statement by the accused, whether inculpatory or exculpatory, may be used against him in court if such a statement resulted from a custodial interrogation, unless the prosecution can show the use of effective procedural safeguards to secure the accused's privilege against compelled self-incrimination as guaranteed by the Fifth Amendment.

In *Escobedo*, the Supreme Court held that the right to counsel[9] attaches when the adversarial process begins. According to the Supreme Court's holding in that case, the adversarial process begins as soon as the "focus" of an investigation is on a suspect and the purpose of the interrogation is to get a confession. The *Miranda* court equated "focus" to custodial interrogation.[10]

Although not constitutionally required as such, the procedural safeguards, as minimum requirements ensure the protection of the privilege against compelled self-incrimination, which *is* constitutionally required. The *Miranda* judgment left the possibility for the states and Congress to devise their own means of ensuring the protection of the privilege against self-incrimination. The Supreme Court however made it clear that without procedural

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[8] See §§ 2 2 3 2 & 3 2 3 8 2 *infra*. The Supreme Court applies the new (bright-line) standard only to *Miranda* violations and reverts to the traditional voluntariness standard for impeachment purposes. See *Harris v New York* 401 US 222 (1971); *Dickerson v United States supra*.

[9] At the time, the court seemed to refer to the 6th Amendment right, but in *Kirby v Illinois supra*, the court held that the focus was on the protection of the privilege against self-incrimination instead.

[10] In South Africa the position is similar. See n **Error! Bookmark not defined.** *supra*. In *S v Makhathini* D 1997-11-21 Case no CC73/97, Hurt J held that even before as suspect is formally arrested, he must be informed of his rights before he is questioned.

safeguards that are at least equally effective as the measures they proposed, any interrogation is inherently coercive.[11]

The procedural safeguards laid down by the Supreme Court focus on two issues. First, it requires that before any interrogation, the police inform the accused of the privilege against compelled self-incrimination, and the consequences of waiving it.[12] The second aim of the procedural safeguards laid down by the Supreme Court, is to ensure that the accused is continually and effectively able to exercise his privilege throughout the potentially extended and coercive interrogation process. This was achieved by creating a right for the accused to consult with counsel before and *during* the interrogation process.[13] As with the Sixth Amendment right to counsel, the accused has a right to appointed counsel if he is indigent.[14] Therefore, interrogators have a duty to inform the accused of both the right to confer with, and have counsel appointed if necessary.

The decision in *Miranda* was intended to affect only in-custody interrogations, and not to frustrate traditional crime investigation methods. Custody is a situation where "there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest".[15] And, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation".[16] It follows that *Miranda* does not cover on-the-scene questioning of bystanders or "stop-and-frisk" seizures of persons.[17] The impact of the restriction of movement on the person subjected thereto is so brief that a reasonable person would not believe that he is in custody.[18]

Furthermore, *Miranda* is only aimed at interrogations. In *Rhode Island v Innis*[19] and *Brewer v Williams*[20] the Supreme Court held that interrogation could be something other than

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[11] *Miranda v Arizona* 384 US 436 (1966) 458, 467, 468, 524. In *United States v Patane* 159 L Ed 2d 667 (2004) § 2, the court went so far as to say that *Miranda* created a generally rebuttable presumption of coercion.

[12] These rights are deemed so important, that no *ex post facto* assessment of the accused's actual knowledge will be made; no amount of circumstantial evidence of the accused's knowledge at the relevant time will relieve the police of this simple duty.

[13] Since this "right" to counsel is essentially a separate right from the 6th Amendment right to counsel, it follows that if an accused asserts his 6th Amendment right to counsel, he does not by implication assert his *Miranda* right to counsel or *vice versa*.

[14] The 6th Amendment right to appointed counsel for indigents was confirmed in *Gideon v Wainwright* 372 US 335 (1963). The same reasons for supplying indigents with trial-counsel at government expense should apply when the right to counsel is extended to the pre-trial phase.

[15] *California v Beheler* 463 US 1121 (1983) 1125, citing *Oregon v Mathiason* 429 US 492 (1977) 495.

[16] *Berkemer v McCarty* 468 US 420 (1984) 442.

[17] *Terry v Ohio* 392 US 1 (1968). The Supreme Court allowed the police to conduct a "stop-and-frisk" of a person on a lesser ground than probable cause. For a stop-and-frisk, the police need only a reasonable suspicion that criminal activity is afoot.

[18] *United States v Mendenhall* 446 US 544 (1980).

[19] 446 US 291 (1980).

the express questioning of a suspect. It can be "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".[21] The test is objective: Should the officer have known that the suspect might perceive his actions or comments as an interrogation, or not?

Nevertheless, any subjective knowledge that the interrogating officer had of the suspect's particular vulnerabilities also play a role. In *Brewer*, police officers were transporting the accused from one town to another. They agreed with accused's counsel that they would not interrogate the accused during the journey. However, during the journey one of the officers had a lengthy conversation with the accused about various topics, including the crime. He played on certain "weaknesses" in the accused's personality when he referred to the crime and the possibility that the victim's body might not be found in time for a "Christian" burial.[22] The accused responded with incriminating statements and led the officers to the body. The Supreme Court regarded this as an interrogation. Consequently, the evidence was inadmissible.

Lastly, *Miranda* is not applicable if the accused spontaneously confesses. In *Colorado v Connelly*,[23] the accused, suffering from chronic schizophrenia, responded to "the voice of God" ordering him to either confess to the crime, or to commit suicide. He subsequently approached a police officer and confessed to a murder. The Supreme Court held that there was no external compulsion on him to confess and therefore no *Miranda* warnings were necessary.[24] It follows that if the accused is unaware that he is talking to a government agent he can not be under any compulsion to speak either.[25]

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[20] 430 US 387 (1977). The so-called "christian-burial-speech" case.
[21] *Rhode Island v Innis* 446 US 291 (1980) 301. Emphasis added.
[22] The officer knew the accused to be a deeply religious man and a recent escapee from a mental hospital.
[23] 479 US 157 (1986).
[24] But see *R v Harper* (1994) 92 CCC (3d) 423 (SCC).
[25] *Illinois v Perkins* 496 US 292 (1990). See § 2 2 3 3 2 *infra*.