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POLICE INTERROGATION OF SUSPECTS: THE COURT VERSUS THE CONGRESS

Since 1936 the United States Supreme Court has considered more than 30 cases in which the defendants have contended that the confessions or admissions they made during police interrogation were involuntary, hence obtained through denials of due process of law, and thus should have been excluded from evidence at their trials. For nearly 30 years the Court looked to the facts of each case, deciding whether the "totality of circumstances" surrounding the giving of a particular confession had made its rendition involuntary.

In 1964 the Court, dissatisfied with the practical and doctrinal results of the evolution of the concept of voluntariness, began to change its approach. In Escobedo v. Illinois the Court found a violation of the sixth amendment right to counsel when the suspect had requested and was denied the opportunity to consult with his lawyer during police interrogation. In 1966 the Court took another step. In Miranda v. Arizona it held that police interrogations must conform to explicit standards designed to protect the suspect's constitutional privilege against self-incrimination.

Chief Justice Warren's Miranda opinion was immediately praised as "a further strengthening of the protections that must govern police interrogation," and as quickly deplored with the lament "How far and how long are the rights of the accused to be considered, with little regard for the rights of the victim?" The decision evoked sharp scholarly comment on its legal and historical validity. Public opinion, concerned both with its effect on the ability of the police to control

2. Id.
6. American Civil Liberties Union spokesman, N.Y. Times, June 14, 1966, at 25, col. 6. The spokesman said, however, that the restrictions did not go far enough.
7. New York City Police Commissioner Leary, N.Y. Times, June 15, 1966, at 1, col. 6. However, a sampling of opinion of other law enforcement officials produced a milder reaction. Id. at 1, col. 7.
crime, and with the need to protect the rights of criminal suspects during police interrogations, echoed the scholarly debate.\(^9\) The effect of *Miranda*, and of the other Supreme Court decisions in the area of criminal procedure, has become perhaps the most elusive aspect of the profound national concern with the problems of crime and criminal justice.

In June, 1968 Congress responded to *Miranda*. Title II of the Omnibus Crime Control and Safe Streets Act of 1968\(^{10}\) enacted section 3501, title 18, United States Code,\(^{11}\) which is intended to

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11. 18 U.S.C.A. § 3501 (Supp. 1969) provides:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such commissioner or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such commissioner or other officer.
restore voluntariness measured by the "totality of circumstances" as the constitutional standard for admission into evidence of police-
adduced confessions and admissions of criminal suspects.\textsuperscript{12}

Part I of this Comment reviews Miranda's protective scheme as it has been applied by the courts. Part II analyzes section 3501 and its legislative history. Part III discusses the constitutional conflict between the Court and the Congress.

I

THE JUDICIAL SCHEME: MIRANDA V. ARIZONA

What Miranda requires of the police can be simply stated. Whenever a person is about to become the object of "custodial interrogation",\textsuperscript{13} the police must inform him that he has a right to remain silent, that anything he says can be used against him, that he has a right to the presence of counsel, and that counsel will be provided by the government if he is indigent.\textsuperscript{14} The suspect must knowingly, intelligently, and voluntarily waive the right to remain silent and have counsel present;\textsuperscript{15} and even after an initial waiver, the police must respect the suspect's expressed desire not to respond further or a request for counsel.\textsuperscript{16} The Court suggested that other schemes might be permissible, but only if they are "fully effective . . . to notify the person of his right of silence and to assure that the

\begin{itemize}
\item[(d)] Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.
\item[(e)] As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.
\end{itemize}

\textsuperscript{13} 384 U.S. at 444.
\textsuperscript{14} Id. at 469-73.
\textsuperscript{15} See id. at 444.
\textsuperscript{16} Id. at 473-74.
exercise of the right will be scrupulously honored . . . ." The sanction for failure to comply with the *Miranda* scheme is clear: both federal and state courts must exclude the incriminating results of police interrogation from a subsequent criminal prosecution of the suspect.18

A. The Miranda Warnings

Although the Court intended to provide a workable scheme, it contains several uncertainties and apparent inconsistencies.19 The first set of problems concerns the adequacy of the warnings and the manner in which they are given. Some courts have held that failure to advise a suspect that free counsel is available does not preclude admission of a confession when the suspect had counsel or could have afforded to provide his own.20 The other warnings, however, must always be given.

The *Miranda* Court was concerned with two compelling influences which it felt are inherent in the interrogation process. The warnings are intended first to dispel "ignorance-compulsion"21 by conveying to every suspect knowledge of the existence and nature of fifth amendment rights and protections, and the knowledge that the police are his adversaries.22 The Court felt that attempts to assess the prior knowledge of a particular suspect could never be more than speculation, and so would be prohibited.23 The Court also sought to have the warnings diminish "coercion-compulsion"24 by making the police demonstrate, even to a suspect abstractly aware of his rights,

17. Id. at 479.
18. *Miranda* is based on the self-incrimination clause of the fifth amendment, and violations are held to require exclusion of evidence so obtained. 384 U.S. at 444. The fifth amendment is applicable to the states through the fourteenth. Malloy v. Hogan, 378 U.S. 1 (1964).
20. *Miranda* impliedly authorized this result. See 384 U.S. at 473 n.43. E.g., United States v. Messina, 388 F.2d 393 (2d Cir. 1968); People v. Gosman, 252 Cal. App. 2d 1004, 60 Cal. Rptr. 921 (1967); Griffith v. State, 223 Ga. 543, 156 S.E.2d 903 (1967).
22. 384 U.S. at 471-72.
23. Id. at 468-69.
that they recognize and must respect such rights at that time and in that place.\textsuperscript{25}

The courts have had difficulty controlling the manner in which warnings are given and their impact on a suspect, beyond demanding that he have a minimal appreciation of what the warnings mean.\textsuperscript{26} The difficulty is not surprising. Although the prosecution may not comment at trial on the fact that a suspect did not respond to questions,\textsuperscript{27} the police are not required to inform a suspect of this rule. Nor does \textit{Miranda} require them to tell a suspect that interrogation must be stopped whenever he wishes, or to articulate the reasons the warnings are given and the practical effect silence or a request for counsel may have.\textsuperscript{28} Even when the police give the warnings, there often remains a desire to attempt exculpation and a psychological urge to confess.\textsuperscript{29}

A second set of problems concerns when the warnings must be given. \textit{Miranda} rejected either formal arrest or arrival at the police station as the appropriate point for the warnings, and chose instead the beginning of "custodial interrogation."\textsuperscript{30} The Court defined

\begin{footnotesize}
\begin{enumerate}
\item "More important [than obviating speculation], whatever the background of the person interrogated, a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." \textsuperscript{25} U.S. at 469.
\item \textsuperscript{27} 384 U.S. at 468 n.37.
\item The suspect's real concern may be what to do about his rights and what the police will do to him if he asserts them. Elsen \\& Rosett, \textit{supra} note 19, at 654-57.
\item An example of the routine—or even subversive—manner in which police may be delivering the warnings is given in \textit{Interrogations in New Haven: The Impact of Miranda}, 76 YALE L.J. 1519, 1531-52 (1967) \textit{[hereinafter New Haven Study]}. The Berkeley, California Police Department provides its officers with a wallet-size laminated card which reads:
\begin{center}
\textbf{MIRANDA WARNING}
\end{center}
\begin{enumerate}
\item You have the right to remain silent.
\item Anything you say can and will be used against you in a court of law.
\item You have the right to talk to a lawyer and have him present with you while you are being questioned.
\item If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
\end{enumerate}
\begin{center}
There is some indication, however, that the police may be required to explain the warnings clearly and fully. \textit{See} Commonwealth v. Taper, 3 CRIM. L. REP. 2143 (Pa. 1968); Lloyd v. State, 3 CRIM. L. REP. 2145 (Tenn. Crim. App. 1968).
\item The force of the urge to confess is strong. \textit{See} T. REIK, \textit{THE COMPULSION TO CONFESS} 347-56 (1959); Driver, \textit{Confessions and the Social Psychology of Coercion}, 82 HARV. L. REV. 42 (1968); Sterling, \textit{Police Interrogation and the Psychology of Confession}, 14 J. PUB. L. 25, 26-29 (1965). Police are well aware of the strength of this urge, and use it with success. \textit{See} id. at 64-65 (table 28). Professor Driver expresses the view that from a psychological standpoint \textit{Miranda} warnings provide only limited benefit to a suspect. Driver, \textit{supra}.
\item "By custodial interrogation, we mean questioning initiated by law enforcement officers
\end{enumerate}
\end{footnotesize}
custody as the state in which one is "deprived of his freedom of action in any significant way." In applying this standard, a number of lower courts have looked to objective factors such as physical restraint, the absence of neutral persons, and the unfamiliarity of the surroundings. Other courts have also considered the defendant's subjective feeling of restraint, asking whether he reasonably believed he was deprived of his freedom of action. Whether a court uses the reasonable belief of the suspect approach or looks only to objective

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factors the police should be able to determine when the warnings become necessary. They apparently must repeat the warnings only when there is a significant break in the interrogation process; at least warnings need not be given before each question.

If a person confesses or makes an admission without being questioned, it is admissible in evidence even if he was in custody and had not been warned. The rationale is that custody alone is not inherently compelling; compulsion arises from the joint influence of custody and an authoritative demand for an answer. The police may ask routine questions of the suspect without first giving the warnings. What questions are only routine may be doubtful in some situations, but for the most part the line is clear enough. If there is no custody, or if the questioning is merely part of a "general-on-the-scene" investigation, warnings are not necessary. It should be noted

36. The objective test requires some judgment, but in nearly all cases the line should be fairly clear. If the police are reasonable men, accustomed to the reactions of persons with whom they come in contact, they should be able to gauge whether a suspect reasonably believes he is restrained in a significant way.

An important, and unresolved, problem concerns the power of the police to stop, frisk, and question suspicious persons. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02 (Tent. Draft No. 1, 1966); Schwartz, Stop and Frisk, 58 J. CRIM. L.C. & P.S. 433, 458-60 (1967); Note, 43 Wash. L. Rev. 844 (1968).

37. See, e.g., Gorman v. United States, 380 F.2d 158 (1st Cir. 1967) (warning at beginning of interrogation carried over to consent to search given a few minutes later); Davis v. State, ___ Ala. App. ___, 204 So. 2d 490 (1967) (warning given before first interrogation, but not before subsequent sessions extending over several days; confession held inadmissible); Heard v. State, 244 Ark. 44, 424 S.W.2d 179 (1968) (no need to repeat warnings before questions concerning different crimes since there were only brief interruptions in the session); People v. Lewis, 262 Adv. Cal. App. 622, 68 Cal. Rptr. 790 (1968) (at first interrogation defendant refused to answer and the interrogation ceased, next day another officer repeated warnings without knowledge of previous refusal and the defendant confessed; held admissible); State v. Davis, ___ Iowa ___, 157 N.W.2d 907 (1968) (warning not repeated one and one-half hours after arrest; statement held admissible).

38. "The fundamental import of the privilege [against self-incrimination] while an individual is in custody is not whether he is allowed to talk to the police without the benefits of warnings and counsel, but whether he can be interrogated." 384 U.S. at 478. E.g., Pitman v. United States, 380 F.2d 368 (9th Cir. 1967); People v. Hines, 66 Cal. 2d 348, 425 P.2d 557, 57 Cal. Rptr. 757 (1967); State v. Gallicchio, 51 N.J. 313, 240 A.2d 166 (1968).


40. See 384 U.S. at 477. The rationale is that routine questions are not "interrogation." Whether interrogation means the Escobedo "process . . . that lends itself to eliciting incriminating statements . . . .", 378 U.S. at 491, is not clear. The Court wanted to avoid the narrow reading lower courts had given Escobedo, but did not articulate a different test. See 384 U.S. at 440-45.

41. E.g., State v. Persinger, ___ Wash. 2d ___, 433 P.2d 867 (1967) (prisoner on prison roof after escape attempt, guard "routinely" asked him why he had not gotten away).

42. See, e.g., Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968); People v. Walters, 252 Cal. App. 2d 336, 60 Cal. Rptr. 374 (1967) (asking name and address).

43. 384 U.S. at 477-78. What will be considered merely "on-the-scene" investigation is
that the Court has not extended fifth amendment protections to nontestimonial police-adduced evidence, and that custodial interrogations by persons other than law enforcement officers are beyond Miranda's purview.

The old problem of conflicting versions of what occurred prior to and during interrogation remains, and the defendant is still likely to lose any "swearing contest" to the police. Even if the police can document their claim to have given the warnings, the suspect may contend that they were not timely given. Since the production of this evidence is within the power of the prosecution alone, the state bears the consequence of failure of adequate proof.

B. Waiver

Even the theoretical possibility of a valid waiver seems illogical to some commentators, who argue that a waiver of constitutional rights can never be "intelligent," nor can it be "knowing" without a full understanding of one's position—virtually impossible unless counsel is actually present. While these objections can be at least partially answered, the argument that the same elements of compulsion inherent in custodial interrogation which necessitate warnings will compel waivers is more troublesome. However, if a

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46. 384 U.S. at 534 n.3 (dissenting opinion of White, J.).
47. E.g., United States v. Hensley, 374 F.2d 341 (6th Cir. 1967); Blash v. People, ___ Colo. ___, 426 P.2d 966 (1967); Manuel v. State, 190 So. 2d 19, 225 N.E.2d 16 (1967).
48. 384 U.S. at 475.
50. It may not be unintelligent to speak, if a suspect can—or believes he can—exculpate himself, or if he feels the police have enough other evidence to convict him and that a confession will make it easier on him. At least a suspect has the knowledge of his rights given by the warnings, and knows that the police recognize them, too. Cf. People v. Lux, 56 Misc. 2d 561, 289 N.Y.S.2d 66 (Co. Ct. 1967) (the intelligence required is only that of a reasonable man; the Court's use of the word is an "amiable fiction" in the absence of an attorney).
51. E.g., 384 U.S. at 536 (dissenting opinion of White, J.). However, an initial waiver does not end the matter—interrogation must cease whenever the suspect requests, and the Court has placed the burden on the prosecution to show that the waiver was continuous. 384 U.S. at 475-76.
suspect not only knows his rights, but also sees that the police recognize that they need his consent to proceed further, police domination at least diminishes, and a decision to speak is more a matter of free choice. A minimum level of mental and emotional competence is necessary, but distress due to the extrinsic forces of the circumstances will not preclude waiver. Of course, the police cannot procure a waiver with the sort of psychological or physical pressures which the Court has previously held to make resulting statements involuntary and inadmissible.

The courts are faced with the more pragmatic difficulty of determining whether a waiver was made and if so, whether it was voluntary. Miranda places a heavy burden on the prosecution and requires affirmative evidence of waiver to meet that burden. However, courts have had to make the sort of ad hoc determinations of the voluntariness of a waiver, based on the surrounding circumstances, which are no longer permissible for finding the statement itself admissible. Nevertheless, if the warnings have

52. Compare Harvey v. State, 207 So. 2d 108 (Miss. 1968) (mentally retarded boy’s ability to function decreased even further under stress; confession inadmissible as he could neither know of nor waive his rights) and People v. Lux, 56 Misc. 2d 561, 289 N.Y.S.2d 66 (Co. Ct. 1967) (although properly warned, suspect had abnormal psychological desire to please interrogators and low level understanding of words; confession not admissible), with People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967) (court recognized the importance of age and emotional and intellectual capacity in determining validity of waiver but found confession admissible where suspect, although a juvenile, suffering from lack of sleep and excessive drinking, appeared able to understand warnings and waive rights) and Bass v. State, 115 Ga. App. 461, 154 S.E.2d 770 (1967) (although suspect was in a state of shock it was not shown that she did not comprehend the full import of her words) and People v. Schompert, 19 N.Y.2d 300, 226 N.E.2d 305, 279 N.Y.S.2d 515 (1967) (suspect voluntarily intoxicated, but not to the extent that he was unable to appreciate the nature and consequences of his statements).

53. See Barton v. State, 193 So. 2d 618 (Fla. App. 1966) (apprehension due to situation in which suspect found himself); State v. Nolan, 423 S.W.2d 815 (Mo. 1968) (although warned that any statement could be used against him, suspect did not realize that an oral statement had legal effect). But see In re Cameron, 68 Cal. 2d 487, 439 P.2d 633, 67 Cal. Rptr. 529 (1968) (suspect’s will to resist overborne because of intoxication and sedation; involuntary although emotional distress not a result of police pressures).

54. 384 U.S. at 476; see, e.g., Coyote v. United States, 380 F.2d 305 (10th Cir. 1967); State v. La Fernier, 37 Wis. 2d 365, 155 N.W.2d 93 (1967).

55. 384 U.S. at 475-76. However, the way in which the police secure an affirmative waiver may be as “routinized” as the manner in which warnings are given. The Berkeley police “Miranda card”, see note 28 supra, gives the following instructions for getting a waiver:

WAIVER

After the warning and in order to secure a waiver, the following questions should be asked and an affirmative reply secured to each question.

1. Do you understand each of these rights I have explained to you?
2. Having these rights in mind, do you wish to talk to us now?

56. Id. at 468-69; see Narro v. United States, 370 F.2d 329 (5th Cir. 1966) (waiver is a matter for ad hoc determination).
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diminished police domination, and the remaining pressures for cooperating with the police are not compelling in the constitutional sense, the inconsistency between demanding warnings and allowing waivers decreases. A waiver following the warnings is more likely to be voluntary, and a court able to so determine with less danger of speculation. Of course, when a suspect claims to have demanded, after an initial waiver, that the interrogation cease or that he have counsel present, the problem of conflicting testimony is the same as that arising from a conflict over whether warnings were given.

In addition to the standards it establishes for warnings and waivers, the Miranda scheme incorporates two important corollaries. The nontestimonial fruits of an inadmissible statement are also inadmissible. Nor may the prosecution use a second incriminating statement, although it followed a warning and waiver, if the suspect had made an earlier confession or admission without warnings and a waiver.

Miranda's scheme is not perfect. It provides neither complete assurance that a suspect will have a free and rational choice of whether to make a statement to the police, nor totally clear and consistent guidance to law enforcement officers and the judiciary. But the police at least have direct guidance, and the judiciary has explicit standards for regulating police conduct and for protecting the suspect's rights.

II

THE CONGRESSIONAL SCHEME: SECTION 3501

Section 3501 applies to "any criminal prosecution brought by the United States or by the District of Columbia ...." The states are still bound by the requirements of Miranda. If the federal statute is upheld by the Court, however, a state court which in fact complied

57. "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today," 384 U.S. at 478 (emphasis added).
58. See 384 U.S. at 468-69.
59. See notes 21-25 supra and accompanying text.
60. "But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used [against the defendant.""] 384 U.S. at 479 (footnote omitted). See Developments in the Law, supra note 1, at 1024-25, 1028-29. But see People v. Chapman, 261 Cal. App. 2d 149, 67 Cal. Rptr. 601 (1968); Dowlut v. State, ___ Ind. ___, 235 N.E.2d 173 (1968) (evidence clearly independently obtained).
with the requirements of the section could not logically be reversed for failure to comply with *Miranda*, since the federal standard should certainly not be lower than the standard for the states.\(^3\)

### A. Elements Consistent with *Miranda*

Parts of section 3501\(^4\) in effect codify certain aspects of *Miranda*, leaving its protections—and problems—intact. The section does not purport to declare that there are no longer rights to remain silent, to be informed that anything a suspect says can be used against him, and to assistance of counsel prior to and during questioning.\(^6\) The critical period remains the time between "arrest or other detention"\(^6\) and the initial appearance before a commissioner.\(^6\) Voluntariness—not trustworthiness—is the standard,\(^6\) and exclusion remains the sanction.\(^6\)

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63. See 384 U.S. at 463-64; Malloy v. Hogan, 378 U.S. 1, 6-8, 10-11 (1964).

64. Reproduced in note 11 supra.

65. 18 U.S.C.A. § 3501(b) (Supp. 1969) provides: The trial judge ... shall take into consideration all the circumstances ... including ... (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The rights are apparently meant to be incidents of due process, but could as well arise from the self-incrimination clause, as it is arguable that the self-incrimination clause could apply to custodial interrogation, yet not demand the protections *Miranda* requires. See 384 U.S. at 526-37 (dissenting opinion of White, J.); cf. Developments in the Law, supra note 1, at 996-1007.

66. 18 U.S.C.A. § 3501(d) (Supp. 1969). The formulation is no clearer than *Miranda*'s: thus the problem of determining when the section becomes important is similar to the problems of determining when warnings must be given under *Miranda*. See notes 30-48 supra and accompanying text.

67. The requirements for proceedings before a United States Commissioner are not changed. The commissioner must inform the defendant of, *inter alia*, the right to counsel, including appointed counsel, and of the fact that "he is not required to make a statement and that any statement made by him may be used against him." FED. R. CRIM. P. 5(b).

68. In United States v. Schipani, 289 F. Supp. 43 (E.D.N.Y. 1968) the court stated in dictum that section 3501 dealt only with the "reliability components" of confessions. *Id.* at 59. This interpretation seems erroneous.

"Voluntariness" generally refers to the pressures brought to bear on a suspect before he confessed—whether his statement, however accurate, was a product of his free will. The criterion of "trustworthiness" is whether the confession is reliable, and "voluntariness" is only a factor, albeit a most significant one, in this determination. "Voluntariness" as used today of course means to protect against the use of false confessions as well as true but involuntary ones. See Developments in the Law, supra note 1, at 954-61. The Supreme Court apparently started to use the modern voluntariness concept as the measure of admissibility when, in *Brown v. Mississippi*, 297 U.S. 278 (1936), it began to use due process as a basic limitation on admissibility of confessions. See Developments in the Law, supra note 1, at 961-68. In recent years the Court has explicitly recognized the distinction between the two concepts. See *id.* at 968-69. The language of section 3501 clearly implements the concept of voluntariness. For example, section 3501(a) speaks of confessions "voluntarily given, ... voluntarily made . . . ."

69. "If the trial judge determines that the confession was voluntarily made it shall be
Subsection (a) codifies a constitutionally permissible procedure for judicial determination of voluntariness. It directs the judge to make a preliminary determination — out of the jury’s presence — admitting the statement only if he finds it to have been voluntarily given. He must then instruct the jury to give the statement the weight they feel it deserves, considering the evidence on voluntariness. Subsection (d) essentially codifies *Miranda*’s requirement that there be both custody and interrogation in order for the protections to apply. Subsection (e) makes the scheme applicable to self-incriminating statements, presumably, as in *Miranda*, whether they are inculpatory or attempts at exculpation.

Subsection (b) provides that “The trial judge . . . shall take into consideration all the circumstances surrounding the giving of the [statement] . . . .” to determine voluntariness. Five specific factors are then enumerated. The first is “the time elapsing between arrest and arraignment . . . if [the statement] was made after arrest and before arraignment . . . .” This is a traditional factor, not specifically dealt with by the majority in *Miranda*. Its inclusion in subsection (b) seems superfluous in view of subsection (c), which provides that at least a six-hour delay cannot be dispositive, and that a longer delay not due to mechanical problems will preclude the admissibility of any statement obtained during the delay.

The second factor apparently was derived either from Article 31 of the Uniform Code of Military Justice, which provides, *inter alia*, that before interrogation a suspect must be informed of “the nature admitted in evidence . . . .” 18 U.S.C.A. § 3501(a) (Supp. 1969) (emphasis added). Presumably, the exclusionary rule concerning the fruits of an involuntary statement is not changed.


70. This procedure is a codification of the “Massachusetts rule,” tacitly approved in *Jackson v. Denno*, 378 U.S. 368, 378-80 (1964). In *Pinto v. Pierce*, 389 U.S. 31 (1967), the Court allowed a determination of voluntariness to stand where the judge found the confession voluntary, although the jury heard the evidence with the judge. For further discussion of the procedural problems, see *Developments in the Law, supra* note 1, at 1058-63, 1066-69.

71. “Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily . . . without interrogation by anyone, or at any time [the defendant] was not under arrest or other detention.” 18 U.S.C.A. § 3501(d) (Supp. 1969).


74. 384 U.S. at 534 (dissenting opinion of White, J.).
of the accusation," or from Federal Rules of Criminal Procedure rule 5(b), which directs the commissioner to inform a suspect of the charges against him. There is no comparable requirement in Miranda.

B. Elements Inconsistent with Miranda

The congressional challenge to Miranda's scheme is contained in the last three provisions of subsection (b). The statutory language parallels the Miranda warnings, and while the judge is directed to consider the factors contained therein, the last paragraph of subsection (b) states that "The presence or absence of any of the above-mentioned factors . . . need not be conclusive on the issue of voluntariness of the confession." Since it is this same "voluntariness" which is, under the section, to be the sole criterion of admissibility, the "totality of circumstances" standard is substituted for Miranda's absolute requirement that the warnings be given. The judge must also consider the presence or absence of other, unnamed factors, but they also "need not be conclusive." The enumerated factors are apparently those which Congress felt the courts have applied too rigidly—it was apparently satisfied with the judicial treatment of others. The named factors are thus singled out as those which explicitly must be considered but paradoxically those which explicitly "need not be conclusive."

The third provision makes it not necessarily conclusive that the police did not warn a suspect of his right to remain silent and that any statement can be used against him. This clause also makes it not necessarily conclusive that a suspect did not have such knowledge independent of a warning. This language does more than negate the

77. 10 U.S.C. § 831(b) (1964). The second provision of section 3501(b) reads: "(2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession . . . ."

78. See State v. Clough, 259 Iowa 1351, 147 N.W.2d 847 (1967). The Court of Military Appeals has not applied the Article 31 requirement rigorously. It has held the provision satisfied if the suspect was "clearly oriented" even though he was not told the specific accusation. United States v. Davis, 8 U.S.C.M.A. 196, 198, 24 C.M.R. 6, 8 (1957).


82. "The trial judge . . . shall take into consideration all the circumstances surrounding the giving of the confession . . . ." 18 U.S.C.A. § 3501(b) (Supp. 1969) (emphasis added).

83. See REPORT, supra note 81, at 48-50.

The others are apparently those the Court had held to bear on the issue—physical force and psychological force of various sorts and degrees—during the pre-Escobedo evolution of the voluntariness standard. See Developments in the Law, supra note 1, at 969-84.

84. "... (3) whether or not such defendant was advised or knew . . . ." (emphasis added).
Miranda warning’s function as a device to insure that a suspect knows that the police recognize his right to silence, since it also allows a judge to find voluntariness when a suspect is ignorant as well as unwarned.

The fourth provision makes it not necessarily conclusive that a suspect was not “advised prior to questioning of his right to the assistance of counsel.” The contrast between this language and that of the third provision raises the possibility that a statement could not be voluntary if an unwarned suspect did not have independent knowledge of this right. The difference in result seems illogical and in conflict with the apparent intent, but the difference in language is glaring. However, because there was no discussion during the hearings or the debate on section 3501 of the specific language of subsection (b), it is difficult to interpret the words used.

What the “right to the assistance of counsel” is meant to include is unclear in view of the fifth provision, which makes the absence of counsel when the suspect is questioned or when giving a statement not necessarily conclusive. Apparently an absolute right to some sort of assistance of counsel is contemplated, but since a lawyer’s absence during interrogation might not preclude admission of a statement, the right is limited to consultation at other times. This does not just mean that presence of counsel may be waived, since in the Miranda scheme if presence is waived, absence is not a factor at all. Congress apparently intended to emasculate Miranda’s requirement that counsel be present unless waived by making it at least possible to exclude even requested counsel during questioning. There is no mention of the Miranda requirement that a suspect be advised that counsel will be provided for him prior to interrogation if he is indigent. It is arguable that the right mentioned in the fourth provision includes a right to appointed counsel. The fifth clause, however, obviates the absolute necessity of his presence absent waiver during interrogation.

Section 3501 does not mention waiver. The intent is apparently to obviate the need for the prosecution to prove that an affirmative waiver was made by the suspect. If it is not necessarily conclusive that

85. 384 U.S. at 468-69.
86. See the commentary on title 11 cited note 12 supra.
87. 384 U.S. at 469-73; notes 49-59 supra and accompanying text.
88. See, e.g., REPORT, supra note 81, at 47; Hearings, supra note 9, at 255-56.
89. 384 U.S. at 473.
a suspect was ignorant of his right to silence it would be illogical for courts to insist on a knowing suspect's affirmative waiver. A judge could thus find a statement voluntary even after an expression of a desire to remain silent.\textsuperscript{91} Similarly, an implied waiver could rescind a request for counsel.\textsuperscript{92}

The effect of section 3501 seems to be twofold: If the police fail to give the \textit{Miranda} warnings through inadvertence or an incorrect determination of when they must be given, the error might not preclude admission of the result of their interrogation. Similarly, a failure to secure or prove an affirmative waiver may not lead to a confession's exclusion. More importantly, the section may encourage the police not to give warnings and secure affirmative waivers, if they feel this will enhance the likelihood of a successful interrogation. For the same reason the police may be encouraged to exclude counsel from the interrogation room. These are clearly the ends Congress sought to achieve through section 3501.\textsuperscript{93} The police are not, however, free to refuse deliberately to give warnings and exclude counsel from interrogations in their unlimited discretion, just as they are not free to prolong interrogation until the suspect breaks down or to use physical or psychological coercion. They must be aware that the courts may review their conduct, and that the absence of one or more \textit{Miranda} requirements might be conclusive.

\section*{C. Legislative History}

Earlier Congresses had twice attempted to modify the Supreme Court's construction of Federal Rules of Criminal Procedure 5(a), relating to the exclusion of confessions obtained during the delay between arrest and arraignment.\textsuperscript{94} However, both measures required the police to deliver warnings to suspects. The first proposed enactment did not include the \textit{Miranda} requirement for advice


\textsuperscript{92} See notes 86-88 \textit{supra} and accompanying text.

\textsuperscript{93} \textit{See} \textit{REPORT}, \textit{supra} note 81, at 38-51.

\textsuperscript{94} See note 12 \textit{supra}. The earliest effort was in 1958, as part of a series of congressional responses to several Supreme Court decisions most of which concerned political offenders and congressional investigations. \textit{See} W. MURPHY, \textit{CONGRESS AND THE COURT} 154-223 (1962). The bill was H.R. 11477, 85th Cong., 2d Sess. (1958). It passed the House, then the Senate in amended form. The conference reported it with language different from either version. This set the stage for a defeat in the Senate on a point of order in the dying minutes of the session. \textit{See} W. MURPHY, \textit{supra} at 219-23.

In 1966 another bill, H.R. 5688, 89th Cong., 2d Sess. (1966), passed both houses but was pocket-vetoed by President Johnson. 112 \textit{CONG. REC.} 28903 (1966).
concerning counsel, while the second only omitted advice concerning free counsel for indigents, and specifically required waiver. Thus, previous Congresses apparently disagreed with the 90th about the desirability of warning suspects prior to interrogation, at least in the federal system.

The Johnson Administration's version of the Crime Control Act was sent to Congress in February 1967. The House passed it without substantial change in August. In the Senate the Administration bill was heard with several other measures before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary. S. 674, authored by Senator McClellan of Arkansas, was the forerunner of section 3501. The Committee on the Judiciary incorporated another bill, S. 1194, into section 3501. It would have removed the jurisdiction of federal courts to review state court determinations of voluntariness. The full Senate, however, deleted this provision. The author of S. 1194, Senator Ervin of North Carolina, also made an unsuccessful attempt to make section 3501 directly applicable to state courts, through the power of Congress to enforce the fourteenth amendment.

The language of section 3501(b) is the same as that of the corresponding part of S. 674 as it was originally introduced. There was no consideration of alternative language or other means to the

95. 113 Cong. Rec. 2902 (1967). The bills were S. 917, 90th Cong., 1st Sess. (1967) and H.R. 5037, 90th Cong., 1st Sess. (1967). These measures became title I of the Act, which provides for federal financial and technical assistance to state and local law enforcement agencies.
96. 113 Cong. Rec. 21812.
99. 114 Cong. Rec. S6039, S6045 (daily ed. May 21, 1968). Since the conflict with Court decisions of these provisions was, at least in the minds of some senators, see, e.g., 114 Cong. Rec. S6037 (daily ed. May 21, 1968) (remarks of Senator Gore), far less clear than direct action against Miranda and Wade, it is apparent that discomfort with the policy of restrictions on federal jurisdiction made the difference to the senators who voted against these provisions but voted for what became title II.


100. S. 1333, 90th Cong., 1st Sess. (1967). The scope of this power is unclear. See Katzenbach v. Morgan, 384 U.S. 641 (1966). See note 154 infra. The Attorney General opposed this bill on the ground that Morgan did not give Congress the power to restrict constitutional definitions. Hearings, supra note 9, at 109-10. See 384 U.S. at 651 n.10. S. 1333 was not reported by the Judiciary Committee.

101. See Hearings, supra note 9, at 74 for the text of the original bill.
intended end of returning to the pre-Escobedo totality of circumstances standard. However, Thomas C. Lynch, Attorney General of California suggested—and the author accepted—the addition of the critical language which concludes subsection (b), directing that the "presence or absence of any of the above-mentioned factors . . . need not be conclusive."

During several days of subcommittee hearings the witnesses included senators, judges, and law enforcement officers. The issues to which the committee members and the witnesses addressed themselves were whether the Miranda scheme had damaged law enforcement efforts and whether the bills intended to "redress the balance" were constitutional. There was no attempt to make any factual analysis of what the Court in Miranda had called the "inherently compelling" nature of custodial interrogation.

The full Committee on the Judiciary consolidated the various measures with the Administration bill. The bill was favorably reported, but title II passed only on an eight to eight vote. The bill reached the Senate floor more than a year after it has gone to committee. The House had long before passed its version of the Crime Control Act and there was strong pressure on the Senate to get an aid-to-law-enforcement bill out of Congress.

102. Mr. Lynch suggested the addition to avoid the possibility of courts finding the language to be only a codification of Miranda; that is, to insure that the section was a clear change from the judicial scheme. Hearings, supra note 9, at 925 (statement of Thomas C. Lynch). See notes 79-83 supra and accompanying text.

103. March 7, 8, 9; April 18, 19, 20; May 9; July 10. 11, 12, 1967. Apart from the subcommittee members (Senators McClellan, Ervin, Hart, Eastland, Kennedy of Massachusetts, Hruska, Scott and Thurmond), the witnesses whose testimony concerned section 3501 included four senators, six judges, seven prosecutors, and five police officials. Many more submitted written views. Hearings, supra note 9, at v-x.

104. E.g., Hearings, supra note 9, at 251-57.

105. 384 U.S. at 467. The subcommittee did hear evidence indicating that the "third degree" is not a common feature of police interrogation, and that, in the view of the police, interrogation practices are fair. The subcommittee heard the opinions of many witnesses who felt that the "totality of circumstances" standard provided suspects adequate protection. See Report, supra note 81, at 50-51. However, this is not responsive to the Court's contention that the very fact of custodial interrogation is, without protections, compelling. There was no attempt to assess the forces which might bear on suspects during interrogation. See notes 166-75 infra and accompanying text.

106. Report, supra note 81, at 1, 27-29.

107. The Committee initially voted seven to six to reject title II, but three senators were absent. N.Y. Times, April 5, 1968, at 40, col. 1. The final eight to eight vote came on April 6th. N.Y. Times, April 7, 1968, at 60, col. 3.


109. Id. at S4754 (remarks of Senator McClellan). "Law and order" was emerging as a major issue of the election year. Time, Oct. 4, 1968, at 21. Washington had recently been swept by several days of violence following the assassination of Dr. Martin Luther King, Jr.
Senator McClellan, who brought a large chart illustrating the rising crime rate into the Senate chamber, put the argument for passage of title II in its most direct form: Supreme Court decisions in the field of criminal procedure were wrecking the morale and effectiveness of American law enforcement and destroying the faith of citizens in the ability of their governments to protect them from crime. Financial aid and police training—as provided for in title I—would not help fast enough, or at all if the courts continued to free the “obviously guilty” on “dubious and minor technicalities.” It was, the Senator argued, the duty of Congress to remedy the situation and return to law enforcement the ability to obtain statements from an accused. In response to the argument that title II was contrary to the constitutional requirements of Miranda, Senator McClellan answered that it was Miranda which was unconstitutional. He argued that a mere five Justices had “changed” the Constitution, and that Congress was therefore acting within the Constitution. The legislative record behind the bill would, its


112. 114 Cong. Rec. S5198 (daily ed. May 9, 1968); see Report, supra note 81, at 37.
114. 114 Cong. Rec. S4859 (daily ed. May 2, 1968); Report, supra note 81, at 37, 41.
116. E.g., 114 Cong. Rec. S6007-08 (daily ed. May 21, 1968). The requirement of a warning concerning the right to remain silent is not something conjured up by the Court in Miranda. Justice Harlan argued that, in contrast to the existing state of law and practice before such decisions as Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applied to illegal searches and seizures) and Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel), the Miranda scheme was something new, and had been opposed by the attorneys general of 27 states apart from the parties to the cases. 384 U.S. at 519-21 (dissenting opinion of Harlan, J.). However, the FBI had been giving warnings for years, see 384 U.S. at 484, and the military had given warnings since 1951 (the date of the Uniform Code of Military Justice), see 10 U.S.C. § 831(b) (1964). A researcher sent questionnaires to law enforcement officials in 15 states in 1965. Replies from 10 states indicated that suspects were given warnings. Sterling, supra note 29, at 58. In fact, the Miranda dissenter themselves seem to indicate that a warning may be a prerequisite to voluntariness:

1 see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife . . . at least where he has been plainly advised that he may remain completely silent . . .

384 U.S. at 538 (dissenting opinion of White, J.) (emphasis added).
proponents hoped, convince "at least one member" of the Court to change his mind and uphold the section.\textsuperscript{117}

Senator Tydings of Maryland led the fight against title II. He cited the opposition of the Attorney General,\textsuperscript{118} the Judicial Conference of the United States,\textsuperscript{119} the American Bar Association,\textsuperscript{120} 212 law school deans and professors,\textsuperscript{121} and a few law enforcement officials.\textsuperscript{122} The thrust of the opposition was that title II conflicts with the Court's interpretation of the Constitution, that the conclusion that the decisions had a serious negative impact on law enforcement is without factual basis, and that, as a matter of policy, title II is contrary to the national interests of abiding by the Court's interpretations of the Constitution and of protecting the accused.\textsuperscript{123}

After three weeks of debate, the Senate passed title II, minus the limitation of federal review provisions.\textsuperscript{124} Although the House version

\textsuperscript{117} One of the \textit{Miranda} dissenters, Justice Clark, has since retired, and his seat has been taken by Justice Marshall. Other changes in the membership of the Court undoubtedly will have taken place before the Court rules on section 3501.


\textsuperscript{119} 1967 \textit{JUDICIAL CONF. ANN. REP.} 80; 1968 \textit{JUDICIAL CONF. ANN. REP.} 28.

\textsuperscript{120} The Criminal Law Section of the ABA adopted a resolution condemning title II, see 114 \textit{CONG. REC.} S5830 (daily ed. May 17, 1968), which was unanimously accepted by the Board of Governors. \textit{N.Y. Times}, May 21, 1968, at 20, col. 5.

\textsuperscript{121} Letters from 212 deans and professors, from 43 law schools, arc printed in 114 \textit{CONG. REC.} S5831-47 (daily ed. May 17, 1968).

\textsuperscript{122} Principally, Police Commissioner Giardin of Detroit, Evelle Younger, Los Angeles district attorney, and Michael Dillon, district attorney in Buffalo. See notes 193-97 \textit{infra} and accompanying text. Senator Tydings had been United States Attorney for Maryland. Senator Brooke, another active opponent of the bill, had been the Massachusetts attorney general. Justice Mosk of the California supreme court, formerly California attorney general, stated that \textit{Miranda} had not had an adverse effect on law enforcement in California, pointing to a rise in conviction and guilty plea rates. Letter from Stanley Mosk to Senator Tydings, May 9, 1968, printed in 114 \textit{CONG. REC.} S5700 (daily ed. May 16, 1968). The Chief Deputy Attorney General of California has since said of the Act, "If this is what we may expect of a legislative response to high court action we arc in for a humorous if hardly enlightening period." O'Brien, \textit{Dilemmas of Criminal Justice in a Democratic Society}, 3 \textit{U. SAN FRANCISCO L. REV.} 1, 5 (1968).

\textsuperscript{123} \textit{E.g.}, 114 \textit{CONG. REC.} S5883-85 (daily ed. May 20, 1968) (remarks of Senator Tydings); \textit{REPORT}, supra note 81, at 150 (minority views). Senator Kennedy of Massachusetts was particularly eloquent on the latter point, arguing that it was not only a question of protecting the innocent from unjust conviction, but also of assuring that even the guilty are protected by the Bill of Rights. 114 \textit{CONG. REC.} S6008-09 (daily ed. May 20, 1968).

\textsuperscript{124} The vote was 72 to 4. 114 \textit{CONG. REC.} S6292 (daily ed. May 23, 1968). \textit{H.R. 5037
of the Act was now quite unrecognizable, the House refused to send it to conference, and concurred with the Senate measure.

President Johnson delayed until a few hours before the Act would have become law without his signature before signing it. He expressed doubts about the wisdom of title II, but stated that the Attorney General had advised him it could be interpreted "in harmony" with the Constitution. He said, however, that federal authorities in his Administration would continue to give "full and fair warnings" prior to interrogation.

III

SECTION 3501, MIRANDA, AND THE CONSTITUTION

This part will discuss whether it is possible for section 3501 and Miranda to exist together, and, if they cannot, which should prevail.

A. Miranda Versus Section 3501

Senator Ervin, a leading proponent of section 3501, correctly argued that the fifth amendment does not protect against the use of voluntary statements. He felt that Miranda demands more than voluntariness, and thus regardless of what the Court said, the decision is not constitutionally premised. Nevertheless, voluntariness is the basis of Miranda. The Court's reasoning is that just as the threat or use of physical force makes a statement involuntary, so too does the...
use of psychological force. Although police and prosecutors cannot punish a suspect for contempt if he refuses to answer their questions, their psychological power can compel self-incrimination in much the same manner. Therefore the fifth amendment, although originally intended to protect against the contempt power, applies also to custodial interrogation. If the police do not follow Miranda's protective scheme or a "fully effective" alternative, custodial interrogation is compelling and any self-incriminating results are inadmissible in a criminal prosecution of the suspect.

The Constitution does not require all the specifics of the Miranda scheme; the Court itself recognized the possibility of an alternative. Any alternative must, however, insure that the suspect has knowledge of his right to remain silent and that he has the continuous ability to exercise it. Miranda holds that the Constitution demands at least this much.

The question, then, is whether section 3501 is a "fully effective alternative." The answer is that it clearly is not. Even proponents of the section did not seriously contend that it is. Whereas Miranda intended to obviate speculation about whether a suspect had prior knowledge of his rights section 3501 demands it. Furthermore, the section allows a judge to find the statement of an ignorant as well as

133. See id. at 457-58, 460-66; Kamisar, supra note 8, at 66-67. But see Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 CALIF. L. REV. 929, 931-33, 947-48 (1965). Judge Friendly's disagreement with the concept that the power of the state against which the Bill of Rights originally sought to protect the individual has, with the advent of professional police, moved back from the trial to the police-citizen contact is that the argument stresses the development of the police but overlooks the reason for it—the inability of eighteenth century investigative procedures to deal with crime, especially organized crime, in an urbanized and heterogeneous society. One cannot simply assume the founders would have wished precisely the same protections to prevail at the police station, and even on the street where there is by no means always an "amassing" of state power, as they were at pains to provide at trial.

Id. at 947.
134. 384 U.S. at 467.
135. Id.
136. Id.
137. Id. See note 17 supra and accompanying text.
138. 384 U.S. at 478-79. The problem with Miranda, as far as Congress is concerned, is not that the Court applies the self-incrimination clause to police interrogation, but that the Court's interpretation of the Constitution requires the police to follow the Miranda scheme. If the Court had held that the scheme was necessitated by due process, the conflict would still have arisen.

139. See REPORT, supra note 81, at 50-51.
140. "Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation . . . ." 384 U.S. at 468-69.
an unwarned suspect voluntary. While *Miranda* demands presence of counsel during interrogation, unless waived, to protect the right to remain silent, section 3501 emasculates this protection and provides no alternative protective device. The section destroys the value of the *Miranda* warnings as a protection against "coercion-compulsion" because it does not require that the police deliver any warnings. Congress apparently desired this change from *Miranda* to avoid encouraging a suspect's reluctance to cooperate with the police. Finally, section 3501 provides no assurance that the suspect will have a continuing opportunity to remain silent.

Courts could ignore congressional intent by paying lip service to the section's directive that the factors need not be conclusive while in fact following *Miranda* by requiring the presence of all the factors. Congress obviously intended that a judge might do so in any given case, but bringing *Miranda* in the back door by finding the lack of warnings dispositive in every case would be directly contrary to the history and intent of section 3501.

B. The Court Versus the Congress

Section 3501 and *Miranda* cannot exist together if the courts give each its correct interpretation. *Miranda* is the Supreme Court's interpretation of the Constitution and section 3501 is an act of Congress which clearly and intentionally conflicts with that interpretation. There is a temptation to end the discussion at this point, unless one is willing to deny the Court's power to invalidate a

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141. See notes 84-85 supra and accompanying text.
142. See notes 86-92 supra and accompanying text.
143. See notes 24-25 supra and accompanying text.
144. See notes 84-93 supra and accompanying text.
145. See, e.g., *Hearings*, supra note 9, at 255-57.
146. This is so because of the possibility of implied waiver. Even if a suspect said that he did not wish to answer further questions, or requested that counsel be present, the fact that thereafter he did make a statement is evidence that he waived his rights. The police are therefore encouraged to convince a suspect to speak. In contrast, at least the theory of the *Miranda* scheme is that the police may not press a suspect when he has indicated a desire not to respond, or to have counsel. See notes 16, 49-59 supra and accompanying text.
147. In United States v. Schipani, 289 F. Supp. 43 (E.D.N.Y. 1968) the court in dictum stated that section 3501 "does not foreclose [consideration of the factors in subsection (b)] by the court on separable constitutional issues." *Id.* at 60. The court felt that the section goes only to the "reliability components . . . not to the extrinsic policy components. *Id.* at 59.
148. All the factors must be considered, and the absence of one only "need not" be conclusive. See notes 79-93 supra and accompanying text.
149. See notes 101-29 supra and accompanying text. However, it is possible that President Johnson's legal advisers may have suggested this approach as a way to avoid conflict between section 3501 and *Miranda*. See notes 128-29 supra and accompanying text.
federal statute. The proponents of the section, however, recognized and accepted the Court's power to declare the statute unconstitutional, and that if this occurred the only recourse would be constitutional amendment.

Title II, therefore, is not an attack on the Court's power to interpret the Constitution; it is rather an expression of how Congress feels the Constitution should be interpreted. The section is intended to codify the constitutional standards in effect before the Court, the section's proponents contend, "changed [the Constitution] in a few 5-4 decisions." As any other advocate, Congress is attempting to convince the Court that it was wrong in Miranda. If litigants can

150. There is continuing controversy over the desirability of judicial review. It is generally recognized that the judiciary has a limited competence in gathering data which is not presented to it. See, e.g., Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 YALE L.J. 319, 361 (1957). The Court has recognized the superiority of Congress in gathering and evaluating empirical data on which to base public policy. E.g., Dennis v. United States, 341 U.S. 494, 539-42 (1951) (concurring opinion of Frankfurter, J.); see Richardson, Freedom of Expression and the Function of Courts, 65 HARV. L. REV. 1, 43-54 (1951). Also see note 154 infra. For a political scientist's recent view that judicial review is undemocratic, see McClesky, Judicial Review in a Democracy: A Dissenting Opinion, 3 HOUSTON L. REV. 354 (1966). The debate of legal scholars is reviewed in Choper, On the Warren Court and Judicial Review, 17 CATH. U.L. REV. 20, 36-42 (1967).

151. E.g., Hearings, supra note 9, at 185 (statement by Senator McClellan).

152. See, e.g., id.


It seems possible that Congress at least wanted to put pressure on the Court not to extend Miranda, by, for example, demanding presence of counsel for valid waiver, narrowing the "on-the-scene" power of the police, or making Mallory a constitutional rule. In Terry v. Ohio, 392 U.S. 1 (1968), and Sibron v. New York, 392 U.S. 40 (1968), the Court avoided the problem of interrogation when the police "stop and frisk" a suspicious person on the street. In Russell v. United States, 4 CRIM. L. REP. 2349 (D.C. Cir. 1969) the court refused to extend the applicability of the Wade protections for witness identification procedures to on-the-scene identifications. At least one member of the court was influenced by 18 U.S.C.A. § 3502 (Supp. 1969), the other section in title II. Id. at 2350 (concurring opinion of Danaher, J.).

154. There is no doubt that congressional action can and should influence the Court. A recent example is section 10 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(h) (Supp. III, 1965-67) which authorized the Attorney General to bring suit to seek an injunction against the enforcement of poll tax requirements for voting in state and local elections. Although the issue did not reach the Court under the section, the Court undoubtedly was influenced by the section's findings that poll taxes are not related to a legitimate state interest when, in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), it held the Virginia requirement a denial of equal protection, overruling Butler v. Thompson, 341 U.S. 937 (1951) and Breedlove v. Suttles, 302 U.S. 277 (1937).

Another part of the Voting Rights Act, section 4(e), 42 U.S.C. § 1973b(c) (Supp. III, 1965-67), involved the congressional power under section five of the fourteenth amendment. Section 4(e) provides that no person who has attended an American-flag non-English language school for a period equivalent to that after which a state presumes one who attended an English language school to be literate for the purpose of voting could be denied the vote on literacy grounds. Earlier, in Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), the Court held an English literacy requirement constitutional. The constitutionality of the section was
forcefully—and often successfully—argue that they should prevail notwithstanding the need to overrule prior decisions, why cannot Congress do the same?

Congress has overcome the Court’s interpretation of what the Constitution permits in areas in which the Constitution gives Congress the power to do so, and has wedged at least one law into the interstices of a decision whose constitutional basis was unclear. Some members of Congress have proposed laws conflicting with the Court’s interpretation of the Constitution in areas where the Court is the final arbiter, but title II is the first time such a measure has become law.

Section 3501’s threat to the Court and its position as interpreter of the Constitution is less serious than measures Congress might have challenged in Katzenbach v. Morgan, 384 U.S. 641 (1966). Justice Brennan, for the Court, upheld the section as within Congress’ power, and in very broad language stated that congressional determinations were to be upheld where Congress could have had a factual basis for resolving the question, in this case whether the state requirement denied equal protection. See 384 U.S. at 649-56. But the Court carefully pointed out that the issue was not overruling Lassiter but rather the extent of Congress’ power regardless of whether the Court would hold the requirement unconstitutional: “Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies [the requirement], could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?” 384 U.S. at 649 (emphasis added).

Thus, Congress’ interpretations of the constitution will influence the Court, as in Harper, and may well be dispositive, if “appropriate” (see 384 U.S. at 650-56); when Congress’ constitutional power permits its determination to stand alongside a possibly contrary holding of the Court. However, this congressional power is no support for a power to override the factual basis of a constitutional interpretation merely by passing a law which might have made contrary factual determinations. When Congress seeks to overturn a constitutional interpretation, it, as any other advocate, should present a case based on more than what it might have found to be the facts. See 384 U.S. at 651 n.10; Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 102-08 (1966).

155. One need go no further than Escobedo, which effectively overruled Crooker v. California, 357 U.S. 433 (1958), and Cicenia v. Lagay, 357 U.S. 504 (1958), which had held that it did not violate due process to refuse a request for counsel during interrogation. Another obvious example is Malloy v. Hogan, 378 U.S. 1 (1964), holding the fifth amendment applicable to the states through the fourteenth, overruling Adamson v. California, 332 U.S. 46 (1947), and Twining v. New Jersey, 211 U.S. 78 (1908).

156. Congress has the constitutional power to regulate interstate commerce, and so what the Court decides is constitutionally permissible state regulation is subject to congressional change. See Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946). For example, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), was restricted by 73 Stat. 555 (1959), 15 U.S.C. §§ 381-84 (1964) (relating to collection of use taxes from an out of state seller). See also note 154 supra.


158. See generally W. Murphy, supra note 94, at 7-65.
taken. Direct advocacy seems preferable to attempts to alter the nature of the Court, such as "Court-packing," restricting its jurisdiction, or ordering it not to meet. Yet there is something disturbing about what Congress has done in section 3501. Perhaps the basic objection is that an Act of Congress is too powerful an advocate. It cannot be ignored, as it creates a second interpretation of the Constitution where there can only be one. While the Court certainly should not be insulated from criticism, a statute intentionally in conflict with a constitutional interpretation puts a dangerous burden on the capacity of the Court to withstand political pressure. The Court can hold to its interpretations of the Constitution only when they have the respect and allegiance of most of the people. Yet it should not be swayed by the popular will when it is acting to protect those individuals—such as persons accused of crimes—who are not able to protect themselves through political action yet whose rights must be constitutionally protected.

However, there are other voices to which the Court must listen. There is little doubt about the need to alleviate the pervasive problems

159. Accounts of the famous 1937 "Court-packing" attempt can be found in, e.g., J. ROOSEVELT: THE LION AND THE FOX (1956); A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956); R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

160. See notes 98-99 supra and accompanying text.

161. In April 1802, Congress provided that the Court miss its August term, in effect ordering the Court not to meet until 1803. An Act to Amend the Judicial System of the United States, 1802, ch. 31, § 1, 2 Stat. 156. The motives were strictly political. See W. MURPHY, supra note 94, at 8-10.

162. The primary example of the Court's adaptation to the majority will remain the New Deal era. See sources cited note 159 supra. For a broader view, see A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); W. MURPHY, supra note 94.

There is evidence that current decisions concerning criminal procedure are not being accepted. The passage of title II is certainly a manifestation of the public's reluctance to accept what the Court says the Constitution demands. See Comment, Title II of the Omnibus Crime Bill: A Study of the Interaction of Law and Politics, 48 Neb. L. Rev. 193 (1968). An even more recent Gallup Poll found that 75 percent of those interviewed felt that courts do not deal "harshly enough" with criminals. S.F. Chronicle, Feb. 17, 1969, at 10, col. 1.


[Society is now characterized by] the creation of massive institutions in the form of huge government, huge industry and huge labor. The long shadows of these structures have fallen upon the lonely and often helpless individual. At no time in our history has the need for constitutional protections been greater . . . .


However, there is the danger Justice Harlan noted, "of watering down protections against the Federal Government embodied in the Bill of Rights so as not unduly to restrict the powers
of crime. In *Miranda*, the Court increased the restrictions on the police to enhance protection of the accused during custodial interrogation. Even apart from legal analysis, perhaps it should not have done so. If custodial interrogation is not inherently dangerous to fifth amendment rights, perhaps *Miranda* is unnecessary. If *Miranda* puts too heavy a burden on the efforts to decrease crime, perhaps it is unwarranted—no matter what the loss of protection of the accused.

1. Is Custodial Interrogation Inherently Compelling?

The argument can be made that custodial interrogation is not inherently compelling of self-incrimination, and so the Constitution does not require the *Miranda* protections. In *Miranda* the Court relied heavily on police interrogation manuals for the conclusion that it is. Police testimony and observation of police practices indicate that the sophisticated techniques of the manuals are far from universally employed. The Court’s conclusion, however, did not rest on the manuals alone, and the Court’s critics have not effectively refuted it.

Law enforcement officials’ dislike of *Miranda* is primarily based on its impairment of the opportunity to convince a suspect that he...
should talk.\textsuperscript{172} While the police usually do not rely on the third degree, they regard police domination of the situation and isolation of the suspect as crucial.\textsuperscript{173} That the forces the police are able to bring to bear do affect a suspect's behavior seems apparent from police concern over their impairment.\textsuperscript{174} Whether these forces are compelling remains a matter for conjecture, but Congress did not gather evidence on this issue. Miranda's conclusion need not yield unless there is evidence, not yet produced, that police practices are something less than inherently compelling.\textsuperscript{175}

Some critics of Miranda believe that whatever forces may exist in custodial interrogation, pre-Escobedo doctrine affords adequate protection to suspects.\textsuperscript{176} This argument seems to ignore the fact that under the totality of circumstances standard, courts admitted into evidence many confessions whose voluntariness under any definition was dubious.\textsuperscript{177} Furthermore, appellate courts generally, and the Supreme Court in particular, are unlikely ever to see more than a few of the cases of abuse.\textsuperscript{178}

2. How Much Does Miranda Impair Law Enforcement?

If the self-incrimination clause of the fifth amendment does apply

\textsuperscript{172} See, e.g., Hearings, supra note 9, at 256 (testimony of James Wilkinson, Richmond, Va. commonwealth attorney), 263-64 (testimony of Alexander Holtzoff, Judge, United States District Court, District of the District of Columbia).

\textsuperscript{173} See, e.g., id. at 552-55 (testimony of Cecil Hegarty, county attorney, Anoka, Minn.).

\textsuperscript{174} See, e.g., id. at 200-02 (testimony of Arlen Specter, Philadelphia district attorney).

\textsuperscript{175} See Pye, in Symposium, supra note 8, at 204-07. See note 154 supra.

\textsuperscript{176} E.g., 384 U.S. at 508-09 (dissenting opinion of Harlan, J.); 114 Cong. Rec. S4872 (daily ed. May 2, 1968) (remarks of Senator Thurmond).

\textsuperscript{177} See note 216 infra.

\textsuperscript{178} See Kadish, supra note 150, passim; Kamisar, supra note 8, at 102-03. See notes 215-16 infra and accompanying text.
to custodial interrogation, and if it requires the *Miranda* protections, the framers of the Constitution have made the judgment that law enforcement not only may but shall suffer some loss of efficiency and success as the cost of protecting individual rights.\(^{170}\) Nevertheless, the Court in *Miranda* made an effort to explain that the scheme would not significantly impair law enforcement.\(^{180}\) The opposite conclusion was the basis of the three dissenting opinions\(^{181}\) and of Congress' action.\(^{182}\) Since it is arguable that custodial interrogation—which is not the rack or even the contempt power—is not compelling, the strength of the harm-to-law-enforcement argument does bear on the question of which scheme should prevail. It is likely, and perhaps desirable, therefore, that the Court will be influenced by the degree of such harm. If *Miranda* has contributed substantially to increased crime,\(^{183}\) to the losses of life and property which crime causes, and to the fear of crime which seems to be warping the quality of society,\(^{184}\) the moral order articulated by the Court should perhaps yield to more immediate social needs.\(^{185}\)

a. *Miranda and the Conviction Rate*

The most important criticism of the *Miranda* scheme is that it has caused a decrease in confessions and admissions by suspects,

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179. This is, after all, a purpose of the Bill of Rights. As the *Miranda* Court put it, "the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself." 384 U.S. at 479. See note 162 *supra* and accompanying text.

180. 384 U.S. at 479-91.

181. 384 U.S. at 516-24 (dissenting opinion of Harlan, J.); *id.* at 537-45 (dissenting opinion of White, J.); *id.* at 500-04 (dissenting opinion of Clark, J.). It is worth noting that retired Justice Clark now feels that *Miranda* has not lived up to his foreboding that "such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient." *Id.* at 500. "I dissented in both Escobedo and *Miranda*, but I confess error in my appraisal of their effect upon the successful detection and prosecution of crime." Clark, *Criminal Justice in America*, 46 Tex. L. Rev. 742, 745 (1968).

182. See notes 111-14 *supra* and accompanying text. Even Senator Tydings conceded that if section 3501 really were a "law enforcement measure" he would have supported it. 114 Cong. Rec. S6013 (daily ed. May 21, 1968).

183. *See*, e.g., 114 Cong. Rec. S6008 (daily ed. May 21, 1968). The argument is not that Court decisions themselves encourage people to commit crimes, but rather that if criminals are less likely to be convicted, deterrence suffers, and at least calculated criminal acts are encouraged. Compare the views of former Attorney General Katzenbach, who feels that this argument is a "cruel hoax." Katzenbach, *Law and Order: Has the Supreme Court Gone Too Far?,* Look, Oct. 29, 1968, at 27, 29.


185. The conflict has been described as a clash between a moral order, which views the matter as one of values and norms, and a system of law enforcement, designed to control behavior—"law and order." Reiss & Black, *Interrogation and the Criminal Process*, 374 Annals 47, 48-50 (1967).
resulting in fewer convictions. The Court certainly does not want the guilty to go free. The value in not convicting one who seems undeniably guilty is not in his relase, but rather in putting meaning into constitutional, statutory, or judicial limitations on police conduct. While the prosecution cannot obtain some convictions unless the suspect talks, Miranda may save some innocent suspects from being compelled to give false confessions.

The Senate subcommittee gathered opinions from many judges, prosecutors, and police, most of whom concluded that Miranda had diminished the police's ability to obtain statements. New York City prosecutors presented statistical evidence indicating a decrease in the incidence of confessions, and, more relevant, an apparent need for them to secure convictions. Arlen Specter, Philadelphia district attorney, gave statistical evidence showing a marked decrease in the response of suspects to questioning and offered his strong opinion that the decrease would "result in improper acquittals." Charles Moylan, state's attorney in Baltimore, testified to a sharp decrease in the incidence of confessions since Miranda.

Most such opinions, however, were not based on statistics. Furthermore, officials from three large cities expressed the opinion that Miranda had not hurt their efforts. Los Angeles district attorney

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189. Aaron Koota, district attorney in Brooklyn, stated that of 316 suspects interrogated during a study period, 130 refused to make a statement. He was of the opinion that there was enough other evidence to secure convictions of only 30 of them. Hearings, supra note 9, at 223.
190. Hearings, supra note 9, at 200-01. His data showed that after Miranda, 59 percent of arrestees refused to give a statement, while even under Escobedo and the United States ex rel. Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965) (requiring advice that the suspect could consult counsel before making a statement), only 32 percent had refused. Before Escobedo, only 10 percent had refused. Id.
191. Hearings, supra note 9, at 622. He stated that before Miranda confessions had been obtained in 25 percent of criminal cases, and that after Miranda only two percent had confessed. Id.

The American Law Institute has pointed to the possibility that Miranda may hamper the flow of information to the police needed for purposes apart from the problem of gathering
Evelle Younger presented statistics which indicated a minimal impact on convictions.\textsuperscript{192} Police Commissioner Girardin of Detroit expressed the same view. His conclusion was reinforced by a police department study which, although it was conducted before \textit{Miranda}, showed that warnings had not been detrimental.\textsuperscript{193} Michael Dillon, district attorney in Buffalo, New York stated that \textit{Miranda} indeed had an impact on cases in which the statement was obtained under pre-\textit{Miranda} rules, but was excluded in post-\textit{Miranda} trials because the police had not complied with the \textit{Miranda} requirements.\textsuperscript{194} His opinion was that \textit{Miranda} had not been detrimental after this period of retroactive application.\textsuperscript{195} He suggested that much of the adverse reaction of police officials was the result of an emotional frustration over the imposition of stringent rules by a distant and seemingly hostile Court.\textsuperscript{196} The hostile reaction might indicate that the police are not

\begin{footnotesize}
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\item \textit{Hearings, supra} note 9, at 341-52. However, this survey has been criticized for its lack of correlation with the results of pre-\textit{Escobedo} cases. \textit{Study Draft, supra} note 191, at 146-47. But while the incidence of confessions may have decreased, the vital conclusion that "[c]onfessions are essential to a successful prosecution in only a small percentage of criminal cases" seems to retain its importance. Even though police may be screening out some cases without confessions (that is, never requesting that complaints be issued), the overall volume of prosecutions has not decreased. See \textit{Hearings, supra} note 9, at 345.
\item \textit{Hearings, supra} note 9, at 311-26. The study compared interrogation successes and the need for their results to secure convictions before and after warnings were administratively required. The data is subject to the criticism that the warnings given lacked free-counsel advice, that there was little control of factors other than the warning, and that the method of determining the need for confessions did not take adequate account of police screening. \textit{Study Draft, supra} note 191, at 140-42.
\item \textit{Hearings, supra} note 9, at 871-75. The "pipeline" cases arose as a result of Johnson v. New Jersey, 384 U.S. 719 (1966), which applied the \textit{Miranda} scheme only to those cases in which trials commenced after June 13, 1966, the date of the \textit{Miranda} decision. Hence, a number of cases in which statements may have been "voluntarily" made according to pre-\textit{Miranda} doctrine were left with statements no longer admissible in post-\textit{Miranda} trials. Much of the police and congressional distaste for \textit{Miranda} is based on the more glaring instances of this sort. See, e.g., \textit{Hearings, supra} note 9, at 225-26, 619-25.
\item \textit{Hearings, supra} note 9, at 871-74.
\item \textit{Id.} Mr. Dillon is not alone in his assessment of law enforcement reactions to judicially imposed restrictions on their efforts. Kamisar, \textit{supra} note 164, at 471-77. Former Los Angeles Chief of Police Thomas Reddin mentions a "self-pity syndrome:"
\end{enumerate}
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fully complying with *Miranda*, although the evidence seems to show that they are, at least when an admissible statement is important to them.\(^\text{197}\)

Several independent organizations have conducted surveys approaching the problem of *Miranda*'s effect on law enforcement from different aspects.\(^\text{198}\) According to one study, *Miranda* had no effect on the ability of the police to take a suspect into custody for further investigation or questioning, as enough evidence for arrest was virtually always available apart from a suspect's statement.\(^\text{199}\) Even after warnings, suspects do make statements.\(^\text{200}\) The reasons apparently are that they fear the consequences of silence or request for counsel, do not feel that counsel can be helpful, do not realize that the police may be unable to convict them without their testimony, or desire to make a statement anyway, either to attempt exculpation or to confess.\(^\text{201}\)

The impact of *Miranda* in the federal system is most relevant to the need for section 3501.\(^\text{202}\) The Justice Department's prosecutions

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\(^\text{197}\) Reddin, *quoted in Morris*, supra note 163, at 8.


The *New Haven Study* was based on direct observation of station house interrogations. The *Field Survey* was based on observation of field interrogations. The *Georgetown Study* was drawn from defendant and attorney interviews. The *D.C. Study* and the *Pittsburgh Study* were based on statistical data. Each is therefore less than a complete analysis of the possible impact from the time of field contact to trial.

\(^\text{199.}^\text{200}\) Reiss & Black, *supra* note 185, at 54-57 (a summary of the *Field Survey*, *supra* note 198); *Pittsburgh Study*, supra note 198, at 14.

\(^\text{200}\) See, e.g., *Pittsburgh Study*, supra note 198, at 9-14; *New Haven Study*, supra note 27, at 1578-93, 1613-14. See notes 189-93 *supra* and accompanying text.

\(^\text{201}\) See *Georgetown Study*, supra note 198, at 1372-78; *New Haven Study*, supra note 28, at 1572. Apparently few suspects avail themselves of their right to counsel at this stage. The volunteer attorney program set up in Washington, D.C. was abandoned after a year, primarily for lack of demand. See *Georgetown Study* at 1383-85.

\(^\text{202}\) This is so because the section applies to United States and District of Columbia prosecutions, so the needs of state and local law enforcement are not directly relevant to the necessity for section 3501. But see note 63 *supra* and accompanying text.
apparently have not been significantly hampered, but the crimes with which the FBI or the Internal Revenue Service deal are generally different from the sorts of criminal activity about which the critics of *Miranda* are concerned.204

The experience in the District of Columbia is directly relevant to the crime problem section 3501 is intended to alleviate.205 Two independent studies found that even with both *Mallory* and *Miranda* restrictions, police interrogations in the District are successful in most instances.206 The *D.C. Study* found that conviction of those refusing to speak was no less likely than conviction of those giving statements.208

While there is little doubt that *Miranda* has caused some decrease in the number of suspects who respond to police

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203. Attorney General Clark in his testimony before the subcommittee did not mention any impairment of federal law enforcement. In the fiscal year ending June 30, 1967, the first full year after *Miranda*, the cases of 38,162 federal defendants were terminated, with 27,643 found guilty. 1967 ATT'Y GEN. ANN. REP. 68 (table V). In the fiscal year ending June 30, 1966, the figures were 39,557 and 29,606 respectively. 1966 ATT'Y GEN. ANN. REP. 85 (table V). For a pre-*Escobedo* fiscal year, that ending June 30, 1962, the figures are 39,289 and 31,098. 1962 ATT'Y GEN. ANN. REP. 76 (table V).

204. See 384 U.S. at 521 (dissenting opinion of Harlan, J.). The most important crimes, from the standpoint of the need for confessions, are said to be those which often leave no physical evidence or witnesses—primarily crimes of violence such as assault, rape, robbery, and homicide. See *A Forum on the Interrogation of the Accused*, 49 CORN. L.Q. 382, 387-89 (1964) (remarks of Professor Inbau).

205. J. Edgar Hoover, Director of the FBI, did not testify before or submit his views to the Senate subcommittee. His official report for 1967 contains no mention of any impairment of the ability of the FBI to apprehend suspects and present evidence for the successful prosecution of federal law violators. Indeed, he was able to introduce his report with the statement that the FBI, "Surpassing notable past achievements throughout the broad but precise range of its responsibilities, . . . reached new summits of achievement in the 1967 fiscal year. Heralding a new age of law enforcement proficiency and performance, FBI accomplishments stand bold and confident before the enervating influence of crime and subversion." 1967 ATT'Y GEN. ANN. REP. 373 (Report of Director of the Federal Bureau of Investigation).

206. It is a large city with a significant "street crime" problem. See *President's Comm'n on Crime in the District of Columbia*, REPORT 20-23 (1966).

207. *D.C. Study*, supra note 198, at 1420 (table E-9); *D.C. Study*, supra note 198, at 601-05.

208. *D.C. Study*, supra note 198, at 610-13, 615. The study concluded that "confessions are not essential to the successful prosecution of the vast majority of cases." *Id.* at 612, 607 (table 11).
questioning, the crucial conclusion which can be drawn from several jurisdictions is that the ability to obtain convictions has not decreased. If this is generally true then Miranda is working well: Suspects are being given a rational choice, and while many choose to remain silent, the police are still able to gather sufficient evidence to convict the guilty.

There is, then, a conflict in the evidence. Independent surveys and the federal experience seem to indicate that Miranda has not handicapped law enforcement, but the surveys may not reflect the total impact on law enforcement functions and are based on relatively small samples. Law enforcement data suffers, however, from similar limitations. Other police opinions are not documented, and some may be colored by emotion. There are evident differences in Miranda’s effect among jurisdictions with similar police problems, indicating that some are taking Miranda in stride while others are not. It is difficult to blame Miranda for this phenomenon.

b. Other Considerations

There are, however, considerations other than the direct effect of Miranda on conviction rates. One is the police need for clear and certain guidance. Police and congressional proponents of section 3501

209. This is apparently the case in New York City, see note 189 supra and accompanying text, Philadelphia, see note 190 supra and accompanying text, Baltimore, see note 191 supra and accompanying text, and Pittsburgh, where the Pittsburgh Study, supra note 198, at 9-14, reported a 20 percent decrease. A decrease does not appear to have occurred in New Haven, where the New Haven Study, supra note 28, found there was actually a negative correlation between warnings and refusals to speak. Id. at 1563-70. The reason may well be that there was apparently a very low level of comprehension of what the warnings meant. Id. at 1571-72. This hypothesis is borne out by the Georgetown Study, supra note 198, which found a fairly high level of understanding of the warnings—and a high positive correlation between understanding and not making a statement. Id. at 1377 (tables 10 and 11).

210. This is most striking in Pittsburgh, where it is reported that even with a nearly 20 percent decrease in statements, the conviction rate declined only 1 percent from the year before Miranda and actually rose from the year before that. Pittsburgh Study, supra note 198, at 18 (table 7). This rate, however, is based on those cases going beyond arraignment or indictment, and grand jury indictments did fall after Miranda, although by less than 3 percent. Id. at 24. As in Los Angeles, see note 192 supra, many cases may have been screened out by the police because of the failure to get a statement. Pittsburgh Study, supra note 198, at 24. But at least in the police Detective Bureau, 73 of 74 of those who refused to talk were nevertheless held for arraignment. Id. at 13 (table 3).

211. “Most of the reports are of . . . limited scope and make . . . little serious attempt at careful control of variables or analysis of data . . . the reports do not fit together in method, depth or coverage and thus comparative or cumulative conclusions are impossible. The most significant lesson of the work to date is how difficult it is to design research that will provide a firm basis for legislative action.” Study Draft, supra note 191, at 148-49. The Study Draft’s criticism applies as well to the law enforcement studies considered supra, and thus to the basis of the action of Congress.
POLICE INTERROGATION

feel that *Miranda*, in contrast to previous doctrine, is confusing and makes the police uncertain of a statement’s admissibility and unsure of how to act in particular situations.\(^{212}\) *Miranda* does not give a policeman totally clear guidance for the critical decisions he must make—when to warn, what warning will suffice, whether a waiver is valid. But as experience with *Miranda* has accumulated in police stations and courts, the problems of applying it have diminished.\(^{213}\) Furthermore, if police rely on section 3501 they will face uncertainty concerning the effect a suspect’s ignorance, an intentional failure to warn, or a denial of a request for counsel will have on the courts’ determinations of voluntariness. Some police may feel the safest thing to do is to follow *Miranda* even if it is no longer required.\(^{214}\) In *Davis v. North Carolina*\(^{215}\) the Supreme Court stated that the *Miranda* requirements, although not directly applicable to pre-*Miranda* trials, should enter into the consideration of voluntariness—an approach strikingly similar to the effect of section 3501. Yet it was not able to decide unanimously that Davis’ confession had been involuntary although he had been held incommunicado for sixteen days for the conceded purpose of getting him to talk. Certainty was hardly the hallmark of the good old days.\(^{216}\) Charges of coercion and brutality

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\(^{212}\) E.g., *Hearings*, supra note 9, at 224-25 (testimony of Aaron Koota), 552-53 (testimony of Cecil Hegarty).

\(^{213}\) See notes 19-61 supra and accompanying text.

\(^{214}\) The United States Attorney for the District of Columbia advised the Metropolitan Police Department to follow *Miranda* rather than section 3501 at least “until adequate case law guidance has been developed for Title II.” Letter from John B. Layton, Chief of Police, to author, Nov. 14, 1968 (on file with the *California Law Review*).

The Nixon Administration at first continued the previous Department of Justice policy of not using section 3501 (see note 129 supra and accompanying text), in accordance with Attorney General Mitchell’s statement that “it is our intention to review that entire matter, the principles involved and the question of the statutory provisions and the constitutionality of the enactment. It is our intention to make every effort to sustain the same.” A Department spokesman further stated that it was “premature to predict a change in policy or the direction a change would take should it come about.” Letter from Harold D. Koffsky, Chief, Legislation and Special Projects Section, Criminal Division, United States Department of Justice, to author, Feb. 26, 1969 (on file with the *California Law Review*). On June 11, 1969, however, The Department of Justice decided that it would offer confessions into evidence even if the *Miranda* requirements had not been met. Federal law enforcement officers have been instructed to continue to give the *Miranda* warnings; but if they have not been given the government will nevertheless seek to have a confession introduced under the authority of section 3501. N.Y. Times, July 28, 1969, at 1, col. 4.

In *United States v. Tchack*, 4 CRIM. L. REP. 2413 (S.D.N.Y. Jan. 31, 1969), the court strongly suggested that it would use section 3501 in lieu of *Miranda* when the issue was squarely presented to it. In *Tchack*, neither party had presented the issue.

\(^{215}\) 384 U.S. 737 (1966) (7-2 decision).

\(^{216}\) See Kamisar, supra note 8, at 99-102. Since *Miranda*, the Court has reversed several convictions in confessions cases, using the pre-*Miranda* standards. *Clewis v. Texas*, 386 U.S.
are far less plausible if the police can show that the first thing they did was advise a suspect of his rights, and thereafter proceeded only if he consented.\textsuperscript{217}

The problem of police and public morale is more elusive. \textit{Miranda} has created a real, if perhaps largely irrational, feeling that the police are being handcuffed: that the Court is wildly freeing criminals on "dubious and minor technicalities."\textsuperscript{218} Police seem to feel

\begin{enumerate}
\item \textit{Miranda} and the Court's decisions have been criticized for being more technical than practical. See, e.g., Green, \textit{The Sixth Amendment and the Fourth Amendment}, 114 CONG. REC. S4750 (daily ed. May 1, 1968) (remarks of Senator McClellan). A technicality is that which is immaterial, without substance, not affecting substantial rights. BLACK'S LAW DICTIONARY 1632 (4th ed. 1951). But the \textit{Miranda} scheme is intended to protect the substantial right not to be compelled to be a witness against one's self. It is only if the context—custodial interrogation—needs no such protection that the scheme degenerates to a technicality. That is the question, not the conclusion. See notes 166-78 \textit{supra} and accompanying text.
\item In \textit{Miranda}, a factor in the decision to require the warnings was the low visibility of actual police practices. See 384 U.S. at 448.
\item 114 CONG. REC. S4750 (daily ed. May 1, 1968) (remarks of Senator McClellan). A technicality is that which is immaterial, without substance, not affecting substantial rights. BLACK'S LAW DICTIONARY 1632 (4th ed. 1951). But the \textit{Miranda} scheme is intended to protect the substantial right not to be compelled to be a witness against one's self. It is only if the context—custodial interrogation—needs no such protection that the scheme degenerates to a technicality. That is the question, not the conclusion. See notes 166-78 \textit{supra} and accompanying text.
\end{enumerate}
that their hard and often dangerous efforts are negated at every turn by courts overly protective of criminals. The public fear of crime grows as the police articulate their feelings of helplessness. However, most of these fears would seem eradicable—to the extent they are not based in fact—through education of the police and the public and continued experience. The Court should not retreat from \textit{Miranda} if it is in fact a better standard than section 3501. In addition, it is arguable that in the long run the concern for individual protection embodied in \textit{Miranda} will create more respect for the law and for the police, making their job easier, not more difficult.

The final question is whether, from the suspect's point of view, \textit{Miranda} is worth any more than section 3501. Under the section, the knowledgeable, strongwilled suspect will fare as well as ever. Ignorance-compulsion is absent, coercion-compulsion is unimportant short of pressures surely remaining unlawful. It will be the ignorant and weak who must take their chances with a system which is capable of spawning cases like \textit{Davis}. If the \textit{Miranda} scheme insures at least a minimal level of knowledge and freedom of choice, it is clearly preferable to section 3501.

\textbf{CONCLUSION}

Police interrogation of a criminal suspect involves the state in one of its most authoritative roles. The Court and the Congress have

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  \item \textbf{220.} See, e.g., 114 CONG. REC. S5320-27 (daily ed. May 10, 1968) (a compilation of newspaper articles and letters from citizens to Senator McClellan with his comments on them).
  \item A judicial retreat from \textit{Miranda} would be welcomed by large segments of the public (see, e.g., \textit{id.;} Gallup Poll cited note 162 \textit{supra}), perhaps blunting the often virulent criticism of recent years.
  \item \textbf{221.} Police outcries against judicial decisions felt to be unduly restrictive of law enforcement are of course nothing new. \textit{See, e.g.,} Edwards, in \textit{Symposium, supra} note 8, at 169, 182; Kamisar, \textit{supra} note 164, at 454-71. The prospect of public education often seems discouraging. An anthropology class at Sacramento State College circulated a petition titled "Americans in Support of Civil Liberties" which asked support for the proposition that all government officials be made to swear to abide by certain listed principles which capsulized the Bill of Rights and the fourteenth amendment. Almost no one would sign, and the comments ranged from expression of approval, but fear of getting into trouble, to disgust at such communist, un-American ideas. McGinn, \textit{Looking Around}, Sacramento Bee, Nov. 15, 1968, at D1, col. 1.
  \item \textbf{223.} \textit{See note 21 supra and accompanying text.}
  \item \textbf{224.} \textit{See note 24 supra and accompanying text.}
  \item \textbf{225.} \textit{See notes 215-16 supra and accompanying text.}
\end{itemize}
collided on the question of what restrictions on police conduct and what protections for the suspect the Constitution requires in this context. Such a collision is not healthy, but neither, of course, is a situation in which law enforcement is unduly hampered in its ability to control crime. If *Miranda* is “a strict constitutional specific inserted at the nerve center of crime detection [which] may well kill the patient,” then perhaps even a force which is “inherently compelling” of self-incrimination must be given freer reign. However, while it seems that the Court correctly defined the character of police interrogation, it is not clear that the *Miranda* requirements have materially impaired the ability of law enforcement to perform its functions. If this is the case *Miranda* should prevail over section 3501.

The matter may not, however, end there. *Miranda* invited an alternative scheme consistent with the present fifth amendment, and if such an alternative cannot be found, the Constitution can always be amended. If the political processes are not satisfied with the inevitable judicial resolution of the conflict between *Miranda* and section 3501 one approach or the other may be followed.

If a “fully effective” alternative to *Miranda* is to be found, careful analysis will have to be made of what the “inherently compelling” forces in police interrogation are, and how they might be neutralized by procedures other than those in *Miranda*. Police domination and suspect isolation, joining to deprive the suspect of free choice and the ability to prove what occurred seem to be the Court’s central concerns about custodial interrogation. Opening the process up to direct judicial scrutiny might fit within the terms of the Court’s invitation.

If the Court cannot be satisfied, or if an alternative satisfactory to the Court does not meet with the approval of law enforcement, the fifth amendment might be amended. One such proposal specifically directed at, *inter alia*, *Miranda* has already been put forward. Perhaps the primary advantage of an attempt to amend the Constitution is that it would focus national attention on the pros and cons and the proper scope of the privilege against self-incrimination.

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226. 384 U.S. at 500 (dissenting opinion of Clark, J.).
227. See 384 U.S. at 467-79. See notes 132-38 *supra* and accompanying text.
229. The proposed amendment would allow comment at trial on a suspect’s refusal to answer questions during an interrogation presided over by a judicial officer, if the suspect had assistance of counsel and had been warned that he need not answer, and that silence could be commented on. Address by Judge Henry J. Friendly, at the University of Cincinnati Law School, Nov. 6, 7, 8, 1968, as reported in *N.Y. Times*, Nov. 10, 1968, at 73, col. 1.
230. See generally E. Griswold, *The Fifth Amendment Today* (1955); S. Hook,
The principal danger is that articulated by Dean Griswold: "If we are not willing to let the Amendment be invoked, where, over time, are we going to stop when police, prosecutors, or chairmen want to get people to talk? Lurking in the background here are really ugly dangers which might transform our whole system of free government. In this light, the frustrations caused by the Amendment are a small price to pay for the fundamental protection it provides."  

Thornton Robison

Common Sense and the Fifth Amendment (1957); L. Mayers, Shall We Amend the Fifth Amendment? (1959); Schaefer, Police Interrogation and the Privilege Against Self-Incrimination, 61 NW. U. L. REV. 506 (1966).

231. E. Griswold, supra note 230, at 75.