Duquesne Law Review

Volume 18 | Number 4 Article 11

1980

Constitutional Law - Sixth Amendment - Waiver of the Right to Counsel

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CONSTITUTIONAL LAW—SIXTH AMENDMENT—WAIVER OF THE RIGHT TO COUNSEL—The Supreme Court of the United States has held that an explicit statement of waiver is not necessary to support a finding that a defendant waived the right to remain silent or the right to counsel guaranteed by *Miranda v. Arizona.*

North Carolina v. Butler, 441 U.S. 369 (1979).

Willie Thomas Butler was arrested in New York City on a North Carolina fugitive warrant for kidnapping, armed robbery, and felonious assault. At the time of his arrest, Butler was fully informed of his rights as delineated in *Miranda v. Arizona.*[1] After being taken to the office of the Federal Bureau of Investigation (F.B.I.), Butler was handed an "Advice of Rights" form to read.[2] Butler affirmatively stated that he understood his rights, but refused to sign the waiver at the bottom of the form. The agents told Butler that they wanted to talk to him, but also told him that he did not have to speak or sign any form. He subsequently made an inculpatory statement that was admitted over objection at his trial.[3] Butler was found guilty of each offense as charged.

On appeal to the Supreme Court of North Carolina, Butler assigned as error the admission of his inculpatory statement made to agents of the F.B.I.[4] He argued that he had not waived his right to remain silent and to have an attorney present during questioning as guaranteed by *Miranda.* The North Carolina Supreme Court reversed the convictions, holding that a relinquishment of the right to counsel during interrogation will not be recognized unless a waiver is specifically made after the *Miranda* warnings have been given.[5] The United States Supreme Court granted certiorari[6] to determine whether the North Carolina decision reflected a proper understanding of the holding in *Miranda.*

Justice Stewart, speaking for a majority of the court, held that the North Carolina Supreme Court erred in its reading of the *Miranda* opinion. He noted that although *Miranda* held that an express statement could constitute a waiver, it did not rule out a finding of waiver when no express statement had been made.[7] Instead, the operative

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1. 384 U.S. 436 (1966).
2. North Carolina v. Butler, 441 U.S. 369, 370-71 (1979).
3. *Id.* Defendant's motion to suppress the statement was denied by the trial court after examination of the interrogating officer on *voir dire.*
4. State v. Butler, 295 N.C. 250, 252, 244 S.E.2d 410, 411 (1978).
5. *Id.* at 254, 244 S.E.2d at 413.
6. 439 U.S. 1046 (1979).
7. 441 U.S. at 373. The *Butler* Court found the applicable portion of *Miranda* to be: If the interrogation continues without the presence of an attorney and a state-

question was said to be whether the waiver was knowingly and intelligently made.[8] The majority recognized that an express written or oral statement of waiver is usually strong proof of waiver, but reasoned that it is not inevitably either necessary or sufficient to establish waiver.[9] Although *Miranda* held that silence alone could not constitute a waiver, the *Butler* Court did not view *Miranda* as ruling out a finding of waiver when the silence of the defendant is coupled with an understanding of his rights and a course of conduct indicating waiver.[10] The majority concluded that courts must presume that a defendant did not waive his rights, but stated that in some cases, a waiver can be inferred from the actions and words of the defendant.[11] Justice Stewart then discussed the purpose and rationale of the *Miranda* decision. To him, the primary concern of the *Miranda* Court was the inherently compelling nature of in-custody interrogation. The pressures brought to bear on a defendant during custodial interrogation often compelled the individual to speak when he would not do so freely.[12] In an effort to combat these pressures and give substance to the privilege against self-incrimination, the *Miranda* Court required the police to fully and effectively disclose to the defendant his constitutional rights.[13] The majority remarked that the per se approach of the North Carolina Supreme Court did not address itself to these concerns, since there was no doubt that the defendant in *Butler* had been informed of his rights. Therefore, the Court perceived the only issue to be whether he had waived his right to have counsel present during the interrogation.[14] In answering this question, the Court saw no valid reason to hold that

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ment is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . .

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.

384 U.S. at 475 (citations omitted).

8. 441 U.S. at 373.

9. *Id.*

10. *Id.*

11. The *Butler* Court attempted to reconcile its holding with the decision in Carnley v. Cochran, 369 U.S. 506 (1962), where the Court refused to allow a presumption of waiver from a *silent* record, *i.e.*, the absence of any evidence that the accused was offered counsel but intelligently and understandingly rejected the offer. In contrast, the Court found *Butler* to be a case in which there existed some action or words on the part of the defendant sufficient to support a finding of waiver. 441 U.S. at 373-73 & n.4.

12. *Id.* at 374.

13. Miranda v. Arizona, 384 U.S. at 467.

14. 441 U.S. at 374.

the defendant had not waived this right simply because he had not made an express waiver. To the Court, resolution of the waiver issue required an examination of the totality of the circumstances, and not resort to an inflexible rule.[15] The Court concluded that a flexible approach should not be discarded in favor of a per se rule, especially since every court to consider the issue has held that an express waiver is not always necessary in order to find that the defendant waived his *Miranda* rights.[16] Because the state court had added to the requirements of the Federal Constitution, the Court vacated judgment and remanded the case to the North Carolina Supreme Court.[17]

Justice Blackmun, in a concurring opinion,[18] joined the majority decision to the extent it was understood that, by reference to *Johnson v. Zerbst*,[19] the majority did not mean to imply that the test for a waiver of *Miranda* rights was the same as the test for waiver of fundamental constitutional rights.[20]

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15. In support of an implied waiver standard, the Court cited Johnson v. Zerbst, 304 U.S. 458 (1938), which held that, even when so fundamental a right as that to counsel at trial is involved, the question of waiver is determined on "the particular facts and circumstances surrounding that case, including the backgrounds, experience, and conduct of the accused." *Id.* at 464.

16. 441 U.S. at 375-76 & n.6. Among the cases cited by the Court was the decision of the Pennsylvania Supreme Court in Commonwealth v. Garnett, 458 Pa. 4, 326 A.2d 335 (1974). Although *Garnett* did adopt an implied waiver standard based on the totality of the circumstances, a later decision by the Pennsylvania Supreme Court has overruled the holding in that case by requiring an explicit waiver as a matter of state constitutional law, even though no reference is made to their previous decision in *Garnett*. *See* Commonwealth v. Bussey, 486 Pa. 221, 404 A.2d 1309 (1979). The *Bussey* decision rejected the *Butler* rationale as promoting uncertainity in knowing whether an accused had waived his rights. By its decision, the Pennsylvania Supreme Court hoped to avoid the mountain of litigation which would result from trying to determine what went on in the accused's mind. *Id.* at 231, 404 A.2d at 1314. The *Bussey* decision is perplexing, however, because Pennsylvania has never recognized the rights espoused in *Miranda* as a matter of state law. *See* Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 195 n.14, 220 A.2d 859, 867 N.14 (1966); Commonwealth *ex rel.* Rowles v. Myers, 422 Pa. 196, 197 n.2, 220 A.2d 891, 892 n.2 (1966); Commonwealth *ex rel.* Bell v. Russell, 422 Pa. 232, 234 n.2, 220 A.2d 632, 633 n.2 (1966). The Court stated in *Bussey*, however, that the decision was "pursuant to our supervisory powers and interpretation of the Pennsylvania Constitution." 486 Pa. at 230-31, 404 A.2d at 1314. Since the United States Supreme Court would have jurisdiction to review a decision of a state court on certiorari only if a federal ground were the sole basis for the decision or if the state constitution were interpreted under what was deemed compulsion of the Federal Constitution, federal review of the *Bussey* decision is doubtful. *See* California v Braeseke, 100 S. Ct. 742 (1980) (Rehnquist, Circuit Justice) (staying judgment of California Supreme Court); Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965).

17. 441 U.S. at 376.

18. *Id.* (Blackmun, J., concurring).

19. 304 U.S. 458 (1938) (waiver of fundamental constitutional rights can be shown only if there has been the intentional relinquishment or abandonment of a known right).

20. *See* notes 15 & 19 and accompanying text *supra*.

Justice Brennan, speaking for the dissenters,[21] agreed with the North Carolina Supreme Court that the question was whether a specific waiver had been made after the *Miranda* warnings were given.[22] He found support for this position in the decision of *Carnely v. Cochran*,[23] where the Court had held that in the absence of an allegation of an "affirmative waiver" there was no factual dispute requiring a hearing. Justice Brennan noted that an allegation of affirmative waiver could not be made in *Butler*, since the defendant had refused to sign the waiver form and was silent when advised of his right to a lawyer. In the absence of an "affirmative waiver," the dissent concluded that the Supreme Court of North Carolina had properly granted a new trial.

Justice Brennan criticized the majority for permitting courts to infer a waiver from ambiguous words and gestures. The dissent reasoned that a faithful reading of *Miranda* would require any ambiguity to be interpreted against the interrogator, since the central premise of *Miranda* is that compulsion is inherent in all in-custody interrogations. Given this premise, Justice Brennan reasoned that only the most explicit of waivers could be considered to have been knowingly and freely given.[24] The dissent stated that *Butler* presented a clear example of why an express waiver should be required, since it was unclear whether Butler had been orally advised of his rights and could read. Therefore, Justice Brennan questioned whether there could be any basis upon which to conclude that Butler had knowingly waived his rights.[25]

The dissent contended that an implied waiver standard not only failed to protect constitutional rights, but also failed to enchance society's interest in effective law enforcement. Justice Brennan reasoned that a judge interpreting ambiguous actions and words would often find a waiver where none occurred, or conversely, not find a waiver where in fact one had been made. In the former case, the defendant's rights are violated, while in the latter instance, society's interest in effective law enforcement is frustrated.[26] The dissent concluded that a simple prophylactic rule requiring an express waiver of the right to counsel would eliminate these difficulties. And since the majority did not question that *Miranda* required the police to obtain some kind of waiver,

21. 441 U.S. at 377 (Brennan, J., dissenting). Justices Marshall and Stevens joined Justice Brennan's dissenting opinion.

22. *Id.*

23. 369 U.S. 506 (1962). *But see* note 11 *supra*.

24. 441 U.S. at 378 (Brennan, J., dissenting).

25. *Id.*

26. *Id.* at 378-79 (Brennan, J., dissenting).

the dissent contended that an express waiver requirement would only make an already existing burden more explicit.[27]

The first constitutional barrier to the admissibility of confessions was set forth in *Brown v. Mississippi*.[28] There, the Supreme Court, speaking through Chief Justice Hughes, stated that a criminal conviction based solely upon a confession procured by violence and brutality was constitutionally invalid under the due process clause of the fourteenth amendment.[29] *Brown* constitutionalized the common-law principle that the primary reason for the exclusion of the coerced confessions was their patently untrustworthy nature.[30] By 1961, however, the Court had disregarded its focus on the reliability of a confession and had turned to a newly formulated "voluntariness test,"[31] which looked to the "totality of the circumstances" surrounding the confession.[32] The factors comprising the totality of the circumstances included the length and condition of detention, the attitude of the police officers, the defendant's mental and physical state, and the various pressures which stay or sustain one's powers of resistance and self-control.[33] No single litmus test was developed and few guidelines or standards were established for determining whether a given statement was voluntarily made.[34] The absence of clear guidelines vested law enforcement officials with freedom to approach the constitutional limits in each interrogation.[35] In fact, police investigatory tactics often resulted in a criminal suspect having his will overcome by actual physical abuse or by psychological pressure.[36] The inadequacies inherent in the volun-

27. *Id.* at 379 (Brennan, J., dissenting).

28. 297 U.S. 278 (1936).

29. *Id.* at 286.

30. *See* Bram v. United States, 168 U.S. 532, 542-43 (1897). *See also* J. MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE 150 (2d rev. ed. 1907); 3 J. WIGMORE, EVIDENCE §§ 832-839 (Chadbourn rev. 1970) (providing an exhaustive survey of cases); Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 442-43 (1948).

31. Rogers v. Richmond, 365 U.S. 534 (1961).

32. Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Haley v. Ohio, 332 U.S. 596 (1948). *But see* Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U.L.Q. 275 (1975) (state courts treated the question as one of state law and based decisions on the common law trustworthiness doctrine).

33. *See* Picou, *Miranda and Escobedo: Warren v. Burger Court Decisions on 5th Amendment Rights*, 4 S.U.L. REV. 175, 177 (1978).

34. *See* Mueller, *The Law Relating to Police Interrogation Privileges and Limitations*, in POLICE POWER AND INDIVIDUAL FREEDOM 139 (C. SOWLE ed. 1962).

35. Note, *Deceptive Interrogation Techniques and the Relinquishment of Constitutional Rights*, 10 RUT.-CAM. L.J. 109 (1978).

36. *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963) (defendant held incommunicado for sixteen hours in order to obtain confession); Lynumn v. Illinois, 372 U.S. 528 (1963) (defendant told that her children would be taken from her); Reck v. Pate, 367 U.S. 433 (1961) (sick suspect held incommunicado and poorly fed for four days.

tariness approach led to a new constitutional basis for determining the admissibility of confessions. This new constitutional basis was established by the Court's decisions in *Escobedo v. Illinois*[37] and *Miranda v. Arizona*,[38] under the sixth[39] and fifth[40] amendments to the Constitution.

In *Escobedo*, the Court held that a denial of a request for counsel during in-custody police interrogation is a violation of the sixth amendment right to assistance of counsel, and that statements elicited from the accused during such an interrogation are inadmissible.[41] Two years later, in *Miranda v. Arizona*, the Court established another basis for admissibility of confessions under the fifth amendment's prohibition against compulsory self-incrimination and also gave substance to the sixth amendment right to the assistance of counsel by establishing a set of procedural rules designed to apprise suspects of their rights.[42] The Court held that a failure to inform a defendant of the enumerated rights would result in automatic exclusion of the confession,[43] even if the confession was voluntary in the traditional sense.[44] The Court also held that a valid waiver of these constitutional rights could be found if the defendant "knowingly and intelligently" relinquished his rights.[45]

Miranda's major departure from the voluntariness standard was the recognition that only when one is fully advised of his rights can the question of waiver be reached.[46] Noting that a valid waiver would not be presumed from the silence of the accused or because a confession was eventually obtained, the Court held that a heavy burden rested on the prosecution to demonstrate that the accused had knowingly and intelligently waived his rights.[47]

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37. 378 U.S. 478 (1964).

38. 384 U.S. 436 (1966).

39. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

40. The fifth amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . . U.S. CONST. amend. V.

41. 378 U.S. at 491.

42. Specifically, the accused must be informed of his right to remain silent, that any statement can be used against him, and that he has the right to have an attorney, either retained or appointed, present during questioning. *Id.* at 444.

43. *Id.*

44. *Id.* at 473-74. *See generally* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capitol: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1969); Rothblatt & Pitler, *Police Interrogation: Warnings and Waivers—Where Do We Go From Here?*, 42 NOTRE DAME LAW. 479 (1967).

45. 384 U.S. at 444.

46. *Id.* at 467.

47. *Id.* at 444. *See* note 7 *supra*.

Butler effectively destroys the specificity of the waiver requirement as contemplated by the *Miranda* Court. The *Miranda* Court spoke as though four elements were required before a valid waiver could be found. Specifically, the Court stated that a valid waiver could be found if the defendant had 1) expressly waived 2) the right against self-incrimination and 3) the right to the assistance of counsel, and 4) had made a statement.[48] Of these elements, the requirement that a statement in fact be obtained goes primarily to the question of whether it is even necessary to address the waiver issue at all. In fact, the Court in *Miranda* specifically held that a waiver would not be presumed simply because a confession had been obtained.[49] The majority in *Butler*, however, has interpreted the language in *Miranda* in a manner which effectively requires only that a confession be obtained.

The *Butler* Court eliminated the first three elements of a *Miranda* waiver by reading the specificity language as merely suggesting a way by which one could waive his rights.[50] But if the *Miranda* Court was merely postulating ways that a defendant could waive his rights, it seems incongruous that the Court spoke only in terms of an express specific waiver, since they surely considered whether an implied waiver could pass constitutional requirements. A more plausible reading of *Miranda*, and one which comports with the concerns of the Court in that opinion, leads to the conclusion that the *Miranda* Court meant that there could be no argument about waiver unless it had been at least expressly and specifically made.[51]

Now that an implied waiver standard has been adopted, a waiver of fifth amendment rights will also serve to waive sixth amendment rights, even though the defendant will usually have said nothing about his right to counsel. It may be that an implied waiver of fifth amendment rights does not offend *Miranda's* concern with the inherent compulsion of the interrogation process. However, it is impossible to reconcile the application of an implied waiver to the defendant's sixth amendment rights if, as the *Miranda* Court held, the waiver must be specific. It is difficult to conceive of any type of evidence which would independently support a finding that the defendant impliedly waived his sixth amendment right to counsel. The defendant will either say

48. The exact language used by the *Miranda* Court in specifying the requirements for waiver was as follows: "An *express* statement that the individual is willing to make a statement *and* does not want an attorney followed closely by a statement *could* constitute a waiver." 384 U.S. at 475 (emphasis added).

49. *Id.*

50. 441 U.S. at 373.

51. The Court in *Miranda* definitively stated that "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." 384 U.S. at 470.

that he does waive the right to counsel, in which case the waiver is express, or he will say nothing, in which case there is no evidence specifically expressing his desire to waive his right to counsel. As such, a waiver of sixth amendment rights, at least as envisioned by *Miranda*, could not be specifically made unless it was expressly made. Faced with this dilemma, the *Butler* Court chose to ignore the specificity language of *Miranda* as it applied to waiver of the right to counsel.[52] Instead, the Court is now of the opinion that a waiver of fifth amendment rights also operates as a waiver of sixth amendment rights. The majority of the United States Courts of Appeal are in accord with *Butler*,[53] but one court has recognized that such an approach inherently conflicts with *Miranda's* requirement that both rights be specifically waived.[54]

By rejecting *Miranda's* requirement of an express waiver, the Supreme Court has given new life to the pre-*Miranda* "voluntariness—totality of the circumstances approach"[55] once used to determine the validity of confessions.[56] *Butler* recognizes the continuing merit and vitality of the educational function of warnings under *Miranda* and in no way implies that the prosecution may use a statement obtained dur-

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52. *See* notes 50 & 53 and accompanying text *supra*.

53. *See* Blackmon v. Blackledge, 541 F.2d 1070 (4th Cir. 1976) (suspect's submission to questioning without objection and without requesting a lawyer is a waiver of the right to counsel); United States v. Marchildon, 519 F.2d 337 (8th Cir. 1975) (waiver of all *Miranda* rights inferred from circumstances surrounding the giving of an inculpatory statement); United States v. Cavallino, 498 F.2d 1200 (5th Cir. 1974) (waiver of the right to have counsel present does not require an express statement of disavowal, even where the defendant had earlier expressed his desire to have a lawyer); United States v. Montos, 421 F.2d 215 (5th Cir.), *cert. denied*, 397 U.S. 1022 (1970) (an express statement is not required to show that an individual waived his right to have an attorney present).

54. *See* Sullins v. United States, 389 F.2d 985 (10th Cir. 1968) (inculpatory statements of an accused cannot be admitted unless the accused specifically declined consultation with a lawyer before answering questions). The decision in *Sullins* was later impliedly overruled in Bond v. United States, 397 F.2d 162 (10th Cir. 1968), *cert. denied*, 393 U.S. 1035 (1969), with the court stating that it did not "'read Miranda to hold that an express declination of the right to counsel is an absolute from which, and only which, a valid waiver can flow.'" *Id.* at 165 (footnote omitted).

55. *See* notes 31-35 and accompanying text *supra*.

56. The Supreme Court expressly recognized its return to the voluntariness-totality of the circumstances approach in the later decision of Fare v. Michael C., 442 U.S. 707 (1979):

> [T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forego his rights to remain silent and to have the assistance of counsel.

Id. at 724-25.

ing interrogation absent such warnings.[57] *Butler* signals a return to the voluntariness of a confession as the test for admissibility, with the only distinction being that the *Miranda* warnings must be given.

The flexible reading given *Miranda* by the *Butler* Court is the latest in a line of cases decided by the Burger Court which have consistently eroded *Miranda*.[58] The Burger Court is marked for its conviction that evidence is to be excluded from trial only where the benefits served by exclusion outweigh society's interest in the effective administration of justice.[59] Since *Butler* has essentially reduced the holding in *Miranda*

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57. The *Miranda* warnings must be given before any "custodial interrogation." 384 U.S. at 478-79. The Court recently defined "interrogation" as occurring whenever a person in custody is subjected to express questioning or its functional equivalent. Rhode Island v. Innis, 100 S. Ct. 1682 (1980). The Court in *Innis* defined the functional equivalent of express questioning as any words or actions on the part of police reasonably expected to elicit an incriminating response. *Id.* at 1689.

The police in *Innis* took a suspect into custody and warned him of his *Miranda* rights. The accused then requested counsel. On the road to the stationhouse, the police engaged in a dialogue about how horrible it would be if a handicapped little girl would find the murder weapon. The defendant then told the police that he would show them where he had hidden the weapon. The *Innis* Court found that the police tactics were not the functional equivalent of express questioning and, therefore, the suspect's *Miranda* rights had not been violated since no interrogation had occurred. *Id.* at 1691. Such an open-ended standard jeopardizes even the educational function of *Miranda*, since the warnings do not have to be given unless a custodial interrogation is undertaken. There is no requirement that the warnings be given when a suspect is simply taken into custody, or volunteers a confession. *See* 384 U.S. at 478.

58. *See* Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam) (refusing to extend the holding of *Miranda* beyond custodial interrogation); Baxter v. Palmigiano, 425 U.S. 308 (1976) (*Miranda* does not apply to prison inmates at prison disciplinary hearings); United States v. Mandujano, 425 U.S. 564 (1976) (*Miranda* does not require suppression in perjury prosecution of statements made to grand jury by one who was not given warnings when called before the grand jury, even if the individual was a "putative" or "virtual" defendant when called before the grand jury); Michigan v. Mosley, 423 U.S. 96 (1975) (the admissibility of statement obtained after the person in custody has decided to remain silent depends on whether his right to cut off questioning was scrupulously honored); Michigan v. Tucker, 417 U.S. 433 (1974) (all evidence derived from statements made without full *Miranda* warnings is not necessarily excluded); Harris v. New York, 401 U.S. 222 (1971) (a statement gained by violating the defendant's *Miranda* rights can be used to impeach the defendant's credibility on cross-examination). *See generally* Schrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona*, 52 S. CAL. L. REV. 1 (1978); Note, *Deceptive Interrogation Techniques and the Relinquishment of Constitutional Rights*, 10 RUT.-CAM. L.J. 109 (1978); Comment, *Miranda v. Arizona: The Emerging Pattern*, 12 U. RICH. L. REV. 409 (1978); Zion, *A Decade of Constitutional Revision*, N.Y. Times, Nov. 11, 1979, § 6 (Magazine), at 27 ("[T]he case has already been so confined by the Court to its basic facts that, some have said, now only Ernesto Miranda himself could take advantage of it. And Ernesto Miranda himself is dead.").

59. The societal interest have been identified as the truth-determining function of the courts and the effective prosecution of criminals. *See* Yarbrough, *The Flexible Exclusionary Rule and the Crime Rate*, 6 AM. J. CRIM. L. 1, 19 (1978).

to the educational function of warnings, the Court has apparently concluded that the benefits, if any, to be derived from an express waiver standard do not outweigh society's interest in the effective enforcement of the law.

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