Should Unnecessary Warnings Wrap a Suspect in the Panoply of Miranda Protections

Ann F. Walsh
Suffolk University Law School

Follow this and additional works at: https://dc.suffolk.edu/jtaa-suffolk

Part of the Litigation Commons

Recommended Citation
SHOULD UNNECESSARY WARNINGS WRAP A SUSPECT IN THE PANOPLY OF MIRANDA PROTECTIONS?

I. INTRODUCTION

When Alice followed White Rabbit down the rabbit hole, she transported herself to Wonderland, a world peopled by a vanishing Cheshire cat, a tea-drinking Mad Hatter, a murderous Queen of Hearts and a set of incomprehensible laws. Similarly, when a police officer mistakenly gives Miranda warnings, that mistake transports him to “Mirandaland” where he finds himself subject to nuanced rules that shape his freedom to question suspects. To further complicate the officer’s plight, the mistake only transports him to Mirandaland in some jurisdictions. In other jurisdictions, he stays put, and in yet others, the mistaken warnings are just one of many factors used to decide whether he goes to Mirandaland.

An investigating officer is trying to unravel the people enmeshed in a crime, separating victims, witnesses, and bystanders from suspects. In the course of an investigation, the officer crosses a boundary and triggers the need for Miranda rights, which transforms the landscape of his investigation into a minefield littered with danger. The double-barreled trigger

---

1 LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (New American Library 1960) (1865) [hereinafter Alice in Wonderland].

2 See generally Miranda v. Arizona, 384 U.S. 436 (1966) (listing safeguards triggered by combination of custody and interrogation). Before officers interrogate a suspect in custody, they must warn him that he has the right to remain silent; anything he says can be used against him in court; he has the right to a attorney; and if he cannot afford an attorney, one will be provided. Id. at 478-79 [hereinafter Miranda Warnings].

3 See United States v. Harris, 221 F.3d 1048, 1051 (8th Cir. 2000) (explaining circuit split over whether unnecessary Miranda warnings transform non-custodial settings into custodial settings). The Court explained that the Tenth and Eleventh Circuits construed mistaken Miranda warnings as transforming non-custodial settings into custodial settings. Id.

4 Id. The Court further explained that the Fourth, Fifth and Seventh Circuits ignore mistakenly given Miranda warnings. Id. The Seventh Circuit used a totality of the circumstances test to decide if Miranda protections should apply. Id.


6 See Miranda, 384 U.S. at 481 (acknowledging heavy burden police bear). "How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy." Id. at 517 (Harlan, J., dissenting). "The social costs of crime are too great to
for Miranda rights is the intersection of interrogation and custody.\(^7\) Exactly what constitutes either interrogation or custody is as difficult to hit as a moving target; therefore, the officer can be on the wrong side of the boundary and mistakenly give the warnings.\(^8\) Once Miranda rights are triggered, a false step can set off dangers that include the exclusion of the suspect's incriminating statements from trial if any of the four warnings are omitted.\(^9\) For example, Oreste Fulminante confessed that he drove his 11-year-old step-daughter to the desert "where he choked her, sexually assaulted her, and made her beg for her life, before shooting her twice in the head."\(^10\) The confession could not be used at trial.\(^11\) The Fulminante Court excluded the confession and ordered a retrial because the interrogation that produced the incriminating admissions violated Miranda rules.\(^12\)

This note maps the territory surrounding the Miranda boundary, with particular focus on the divergent decisions that circuit courts have made when a police officer gives warnings mistakenly. Our journey begins with the United States Supreme Court decision in Miranda v. Arizona and the availability of the Fifth Amendment privilege against self-incrimination outside a trial.\(^13\) Next on the itinerary is a discussion of interrogation, where the court distinguishes "subtle compulsion" and "strategic deception" from coercion.\(^14\) Because the combination of interrogation call the new rules anything but a hazardous experimentation." \(\text{Id.}\)

\(^7\) See Miranda, 384 U.S. at 467-68 (stating custodial interrogations require warnings).

\(^8\) See Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (defining interrogation as more than express questioning). The Innis Court expanded the definition of interrogation beyond express questioning to any actions by the police "reasonably likely to evoke an incriminating response from a suspect." \(\text{Id.}\) See also Arizona v. Mauro, 481 U.S. 520, 526 (1987) (expanding coercive police conduct to functional equivalent of express questioning). If the conduct subjects the suspect to the will of his examiner, it is legally the same thing as express questioning. \(\text{Id.; see also}\) Stansbury v. California, 511 U.S. 318, 323 (1994) (ruling custody depends on objective circumstances not subjective views of interrogating officers or suspect).

\(^9\) See Miranda, 384 U.S. at 479 (excluding from trial evidence obtained without warnings).


\(^11\) Id. at 302 (ruling coercive nature of questioning rendered confession inadmissible for lack of Miranda warnings).

\(^12\) Id. (holding Fulminante entitled to new trial in which confession excluded).

\(^13\) See Miranda, 384 U.S. at 467 (stating availability of Fifth Amendment privilege outside of court proceedings). The "privilege" embodied in the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

\(^14\) See Innis, 446 U.S. at 303 (finding interrogation where police actions elicit incriminating responses but not where police use subtle compulsion); see also Illinois v. Perkins, 496 U.S. 292, 297-98 (1990) (explaining deceptive tactic employed to elicit voluntary confession not violative of Self-Incrimination Clause).
and custody triggers the need for Miranda warnings, this paper visits the meaning of “custody” and unravels the apparent contradictions of a prison inmate, who is not in custody, while a suspect questioned in his own home is in custody. With the foundation laid, the paper explores the circuit courts’ reasoning for divergent results, including the court-imposed consequences when an officer gives gratuitous warnings. This paper concludes that mistaken warnings should be ignored, because police officers are bombarded by enough danger to preclude hair-splitting decisions. That leaves everyone back where they started, like Alice waking from her dream.

II. MIRANDA

“Oh my dear paws! Oh my fur and whiskers! She’ll get me executed, as sure as ferrets are ferrets.” said the White Rabbit.

Most people would recognize the White Rabbit’s exclamations as fear of the Queen of Heart’s penchant for lopping off heads. Even more people would recognize and can even chant the four-warning mantra of Miranda by heart. In fact, Miranda warnings are so ingrained in American culture that it is difficult to recapture the immense controversy that the original five-to-four ruling engendered. Justice Harlan’s vehement dissent reproached the majority, saying these new rules are being “imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.” The controversy has withstood the test of time and nearly forty years later still rages for Justice Scalia, who described the ruling in Miranda as “objectionable,” the reasoning as “prepos-

---

16 See United States v. Harris, 221 F.3d 1048, 1051 (8th Cir. 2000) (listing divergent decisions in different circuits in response to unnecessary warnings).
17 Alice in Wonderland, supra note 1, at 115.
18 Alice in Wonderland, supra note 1, at 38.
19 Alice in Wonderland, supra note 1, at 77.
20 Miranda Warnings, supra note 2.
21 See Dickerson v. United States, 530 U.S. 428, 443 (2000) (striking down federal law in part because Miranda warnings are embedded in our culture). “Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.” Id.; see also Mitchell v. United States, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting) (acknowledging doctrines with “wide acceptance in the legal culture” provide reason not to overrule cases).
terous” and the presumptions as without support in “history, precedent, or common sense.”

Despite Justice Harlan’s past protests, Justice Scalia’s present objections and the United States Congress’ attempts to supersede the ruling by federal law, *Miranda* is still with us.

The best way to understand the failure of the opposition in the *Miranda* debate is to focus on the goals of the majority: to eradicate physical force as a tool of in-custody interrogation and to eliminate the psychological coercion brought on by isolation and intimidation. The Court intended that the warnings and waiver regimen protect witnesses and suspects during questioning because, in its words, this nation cherishes the principle that “the individual may not be compelled to incriminate himself.” To demonstrate the potential for abuse, the *Miranda* majority quoted police interrogation manuals that instructed investigators: “the principal psychological factor contributing to a successful interrogation is privacy — being alone with the person under interrogation.” Because interrogations are as private as “black boxes,” the inside workings of which the public and juries never see, the Court imposed a severe penalty to ensure that the suspect is warned that he can sit silently and refuse to answer questions. If the police deviate from the straight and narrow and withhold

---

23 See *Dickerson*, 530 U.S. at 448 (Scalia, J., dissenting) (stating objections to ruling in *Miranda*). “*Miranda* was objectionable for innumerable reasons, not least the fact that cases spanning more than 70 years had rejected its core premise . . . . Moreover, history and precedent aside, the decision in *Miranda*, if read as an explication of what the Constitution requires, is preposterous.” *Id.* The idea that *Miranda*- violative admissions are necessarily involuntary “can claim no support in history, precedent, or common sense, and as a result would at least presumptively be worth reconsidering even at this late date.” *Id.* at 450.

24 See *id.* at 432 (explaining Acts of Congress cannot effectively overrule Supreme Court decisions on Constitutional matters). Congress enacted 18 U.S.C. § 3501 (2003) in 1968, which made voluntary statements admissible even if they were elicited without *Miranda* warnings. *Id.* The *Dickerson* Court invalidated the law. *Id.* “Whether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.” *Id.* at 443 (upholding *Miranda* decision).

25 *Miranda*, 384 U.S. at 446 (describing brutality in which police beat, kicked and burned witness with cigarette butts); *id.* at 448 (recognizing coercion can be mental as well as physical).

26 *Id.* at 457-58 (describing incommunicado interrogation at odds with protection from self-incrimination); see also George C. Thomas III, *The End of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 9 (2000) (replacing voluntariness test with warnings and waiver) [hereinafter *End of the Road*].

27 *Miranda*, 384 U.S. at 449 (quoting INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (1962)) (condemning instructions from police manuals as coercive).

28 *Miranda*, 384 U.S. at 478-79 (describing necessary procedural safeguards including warning of right to remain silent). The Court stated, “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 him.” *Id.*
warnings, the prosecutor can not use the final goal of the interrogation, a confession or incriminating statement, at trial.\textsuperscript{29}

While the underpinnings of \textit{Miranda} are found in the Fifth Amendment privilege against self-incrimination, even a yawning stretch will not find the right to an attorney in the Constitutional wording: no person “shall be compelled in any criminal case to be a witness against himself.”\textsuperscript{30} Stretching yet again is required to expand the meaning of “criminal case” (which is normally confined to formal, adversarial proceedings such as a bail hearing, arraignment or trial) to include so preliminary a process as the interrogation of a witness.\textsuperscript{31} While the police depend on that very interrogation to scoop the ultimate defendant out of the pool of possibilities, the scooped individual is a hooked fish, with his every movement the focus of intense scrutiny, his freedom reduced to being hauled down to a police station and his dignity subjected to the shame and horror of arrest and custody.\textsuperscript{32} And there’s the rub: balancing the sanity and security derived from getting the bad guys off the streets against our historic love of and commitment to freedom and justice.\textsuperscript{33} So the \textit{Miranda} Court drew a line in the sand with custody; if the person being questioned is not in custody, then \textit{Miranda} requires no warnings.\textsuperscript{34}

III. INTERROGATION

“And who are these?” said the Queen, pointing to the three gardeners . . .

\textsuperscript{29} \textit{Id.} at 479 (excluding evidence obtained without warnings and waiver).

\textsuperscript{30} U.S. \textit{CONST.}, amend. V; \textit{see also Miranda}, 384 \textit{U.S.} at 474 (requiring questioning to stop if individual requests counsel). The Sixth Amendment only requires the assistance of counsel in criminal prosecutions. U.S. \textit{CONST.}, amend. VI. “In all criminal prosecutions, the accused shall enjoy . . . the assistance of counsel for his defense.” \textit{Id.}

\textsuperscript{31} \textit{See Miranda}, 384 \textit{U.S.} at 510-11 (Harlan, J., dissenting) (exposing linguistic difficulties with enlarging protection against self-incrimination to police station confessions). “While the Court finds no pertinent difference between judicial proceedings and police interrogation, I believe the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases.” \textit{Id.} at 513-14.

\textsuperscript{32} \textit{End of the Road}, supra note 26, at 1 (describing suspect being jacked up and hauled down to police station).

\textsuperscript{33} \textit{See Miranda}, 384 \textit{U.S.} at 499-500 (Clark, J., dissenting) (praising police and disputing majority’s derisive reference to police manuals). “The police agencies – all the way from municipal and state forces to the federal bureaus – are responsible for law enforcement and public safety in this country. I am proud of their efforts, which in my view are not fairly characterized by the Court’s opinion.” \textit{Id.} at 500. \textit{But see id.} at 439 (explaining necessity for procedures to protect individuals in custody from self-incrimination). “The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence.” \textit{Id.}

\textsuperscript{34} \textit{Id.} at 477 (marking custody as beginning of adversarial proceedings and point where \textit{Miranda} safeguards become necessary).
“How should I know?” said Alice, surprised at her own courage. “It’s no business of mine.” The Queen turned crimson with fury, and, after glaring at her for a moment like a wild beast, began screaming “Off with her head!”\[35\]

The beheading of Alice as penalty for an unresponsive answer was only a tad excessive by Wonderland standards but stands in stark contrast to the suspect-protective definition of interrogation the Court handed down in *Rhode Island v. Innis.*\[36\] In that case, police officers were escorting Thomas Innis to the police station in a squad car after arresting him for murder.\[37\] Innis had blown off the back of a cab driver’s head with a sawed-off shotgun.\[38\] Concerned because the weapon had not been recovered, one officer said to the other that there was a school for handicapped children nearby and “God forbid one of them might find a weapon with shells and they might hurt themselves.”\[39\] Innis interrupted to say he would show them where he had hidden the shotgun.\[40\] In its ruling, the *Innis* Court expanded the meaning of interrogation beyond express questioning to include police behavior that is “reasonably likely to elicit an incriminating response,” such as playing on the sympathies or religious beliefs of the suspect.\[41\] Then, in what caused consternation for the dissent, the Court characterized the officer’s remark as brief and offhand, amounting to “subtle compulsion” but not interrogation.\[42\] Justice Stevens found this to be a hair-splitting distinction and complained the majority needed a question mark at the end of a sentence to recognize it as a question.\[43\]

To further muddy the waters, the police in *Illinois v. Perkins* not only asked Lloyd Perkins, a prison inmate, questions without first giving *Miranda* warnings, but also lied to him.\[44\] Based on a reliable tip from an informant that Perkins had committed an unsolved murder, the police placed an undercover agent in Perkins’ cell to goad him into bragging.\[45\]

---

35 *Alice in Wonderland*, supra note 1, at 77.
36 *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980) (defining interrogation as more than just express questioning).
37 *Id.* at 293-94.
38 *Id.*
39 *Id.* at 294-95.
40 *Innis*, 446 U.S. at 295.
41 *Id.* at 301-02.
42 *Id.*
43 See *id.* at 303 (concluding Innis was not interrogated). *But see id.* at 311-13 (Stevens, J., dissenting) (demonstrating phrases that are not questions can elicit responses and amount to interrogation).
45 *Id.* at 294 (explaining Perkins’ incarceration for unrelated crime).
Though the agent clearly elicited the confession by playing on Perkins' arrogance, the Court distinguished this "strategic deception" from the Innis definition of interrogation on the grounds that Perkins did not know that he was talking to an officer and, therefore, could not have been coerced. So, it seems Miranda forbids the police from plucking at a suspect's heart strings, but allows them to play him for the fool.

To investigate yet another avenue of possible police shenanigans, using a suspect's wife as a dupe to interrogate without questioning, the Court granted certiorari in Arizona v. Mauro. The facts:

Mauro and his family were eating breakfast when appellant's seven-year-old son David began crying and screaming. David was in the bathroom where he had been imprisoned for several days by his father. Mauro told his wife that he would make the boy be quiet. Mauro went into the bathroom and forced a rolled child's sock and two cloths down the boy's throat, thus suffocating the child. Mauro then went to a bedroom and returned with a suitcase in which he placed the child's body. As he left the family trailer with the suitcase, he told his wife to "pray."

Mauro pleaded not guilty by way of insanity, and testimony revealed that he had a long history of mental problems, that his mother was a manic depressive, and that he had been hospitalized at least ten times. The state rebutted the insanity defense by playing a tape made at the police station after his arrest in which he tried to comfort his wife and silence her until they had an attorney, generally demonstrating sanity through his clear and reasonable self-interest. Mauro wanted the tape suppressed. He accused the police of allowing the meeting in order to elicit the incriminating words and behavior by playing on his tender feelings for his wife (a remarkable idea considering his treatment of their 7 year-old son), a subter-

46 Id. at 305-06 (Marshall, J., dissenting) (defining police questioning as interrogation and pointing to likelihood of evoking incriminating response as in Innis). But see id. at 297 (excluding ploys and deception from Miranda protection as neither compulsion nor coercion).

47 Id. at 301 (Brennan, J., concurring) (renouncing police conduct as deceptive and manipulative but upholding ruling). But see id. at 304 (Marshall, J., dissenting) (disagreeing with ruling on several scores). "Because Lloyd Perkins received no Miranda warnings before he was subjected to custodial interrogation, his confession was not admissible." Id.


50 Id. at 396.

51 Mauro, 481 U.S. at 523 (detailing prosecution's position).

52 Id. at 523.
The Court ruled against Mauro because he insisted on talking to his wife despite police advice. The fact that the Arizona Supreme Court agreed with him and the fact that the Supreme Court granted certiorari underscore the difficulty the average police officer faces trying to decide whether he is interrogating a suspect.

IV. CUSTODY

Accused of stealing tarts, the Knave stood "before them, in chains, with a soldier on each side to guard him; and near the King was the White Rabbit, with a trumpet in one hand, and a scroll of parchment in the other." Although Miranda never promised suspects a trumpeting White Rabbit flourishing parchment scrolls, it does require procedural safeguards (the warnings) when interrogation combines with custody, because that recipe contains inherently coercive pressures that undermine the suspect's "will to resist." For example, when the police questioned Reyes Orozco in his own home about a fatal shooting following a bar fight, he succumbed to the pressure of the interrogation and directed the police to the murder weapon hidden in a washing machine. Orozco claimed that although the questioning occurred in familiar surroundings while he was sitting on his own bed, he was nonetheless "in custody" and appealed his conviction on the grounds that his custodial interrogation required Miranda warnings. That definition of custody was a far cry from the Miranda Court's images of an isolated inquisition in the bowels of the police station. Nonetheless,

---

53 Id. at 523-25 (detailing lower court's finding where Mauro and wife's meeting amounted to interrogation); see also Innis, 446 U.S. at 300-01 (expanding definition of interrogation to include behavior "reasonably likely to elicit an incriminating response").
54 Mauro, 481 U.S. at 527 (ruling Mauro was not interrogated).
55 Id. at 524 (discussing Arizona Supreme Court ruling); id. at 521 (explaining underlying issue in case).
56 Alice in Wonderland, supra note 1, at 101.
57 See Miranda v. Arizona, 384 U.S. 436, 467 (1966); see also Miranda Warnings, supra note 2.
59 Id. at 326 (describing state's argument and Miranda view of coerciveness when custody and interrogation intersect); see also Miranda, 384 U.S. at 449-50 (describing procedures from police manuals). "In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover, his family and other friends are nearby, their presence lending moral support." Id.
60 Miranda, 384 U.S. at 456 (describing coercive effect of "incommunicado police-dominated atmosphere").
Orozco succeeded. The Court agreed that four police officers crowded into his bedroom in the wee hours of the morning created the requisite intimidation and, together with his arrest, constituted custody. Orozco’s custodial interrogation in his home triggered the full protection of *Miranda* warnings, which were not given; the lack of warnings forced the exclusion of the garnered evidence, including the murder weapon, and the case collapsed. The dissent bemoaned extending *Miranda* beyond the station house, but *Orozco v. Texas* is good law today and the first step on the journey to shape the boundaries of “custody.”

While Orozco extended the meaning of custody, interrogation in a police station remained the benchmark until the Court in *Mathiason v. Oregon* moved the bench and rejected the notion that questioning at the station is always custodial. Carl Mathiason came voluntarily to the police station, shook the investigating officer’s hand, sat at a desk in an office, confessed to a burglary five minutes later, and then left for home with the officer’s permission. The Court found that throughout the questioning Mathiason was at liberty to leave, and therefore, not in custody. The omission of warnings did not violate his rights and the conviction was valid. An interesting tangent in *Mathiason* is the fact that the police lied to him, falsely claiming they found his fingerprints at the scene of the crime. According to the Court, the deception was irrelevant to the question of custody, in apparent contradiction of the *Miranda* Court’s exposition and abhorrence of police trickery.

---

61 *Orozco*, 394 U.S. at 327 (reversing decision below).
62 *Id.* (repeating testimony of police detailing arrest of Orozco).
63 *Id.* at 326 (stating necessity of warnings for custodial interrogations; see also *Miranda*, 384 U.S. at 479 (explaining exclusion of evidence as penalty for omitted warnings)).
64 *Orozco*, 394 U.S. at 329-30 (White, J., dissenting) (explaining station house practices result in compelled confessions). “No predicate is laid for believing that practices outside the station house are normally prolonged, carried out in isolation, or often productive of the physical or psychological coercion made so much of in *Miranda*. It is difficult to imagine the police duplicating in a person’s home or on the street those conditions and practices which the Court found prevalent in the station house.” *Id.*
66 *Id.* at 493-95.
67 *Id.* at 495 (concluding no restriction on Mathiason’s freedom to leave).
68 *Id.*
69 *Id.* at 493 (stating police made false claim to Mathiason).
Having visited custody at home and at the police station, the journey toward a clear understanding of custody goes on the road, where Richard McCarty was stopped for driving erratically. McCarty got out of the car, had trouble standing, and actually fell down during the field sobriety test, prompting the officer to ask him if he had been drinking. The simplicity and obviousness of that question mask the fact that with one sentence, the police had subjected McCarty to an interrogation. By now, alarms are going off, alerting for the indicators of custody. If the Court deemed this routine traffic stop "custodial," then McCarty had been interrogated while in custody without the requisite Miranda warnings. The Court began its review by acknowledging that traffic stops significantly curtail the driver's freedom of action and usually impose criminal penalties for driving off without permission. Distinguishing that detention from station house custody, the Court went on to point out that most traffic stops are brief, expose the officer to public scrutiny and typically involve only one or two officers. The Court held those distinctions sufficient to afford drivers the spirit of protection demanded by Miranda and ruled that McCarty was not in custody.

The last port to visit on the custody voyage is the Lorton Penitentiary, where James Conley was questioned in connection with the murder of Otis Peterson, a fellow inmate. Prison officials found Otis Peterson collapsed in his cell from a fatal stabbing, followed a trail of blood, and discovered a blood-stained knife. The subsequent investigation revealed that Conley had a two-inch gouge on his left wrist. Conley went to the

72 Id.
73 Id.; see also New York v. Quarles, 444 N.E.2d 984, 985 (N.Y. 1982) (excluding response based on custodial interrogation without Miranda warnings), rev'd, 467 U.S. 649, 657, 659-60 (1984) (creating public safety exception to Miranda). The Quarles case provides another example of a one sentence interrogation: "After handcuffing him, Officer Kraft asked him where the gun was. Respondent nodded in the direction of some empty cartons and responded, 'the gun is over there.'" Id. The trial judge excluded the response, the gun itself, and records describing its purchase because Miranda warnings were not given. New York v. Quarles, 467 U.S. 649, 652-53 (1984).
74 Orozco v. Texas, 394 U.S. 324, 326 (1969) (referring to Miranda Court's iteration and reiteration of necessity of warnings and definition of custody); Miranda, 384 U.S. at 477 (describing custody as deprivation of freedom of action in any significant way).
75 See Miranda, 384 U.S. at 478-79 (summarizing Court's demand for warnings for custodial interrogations and penalties for omission).
76 McCarty, 468 U.S. at 436-37 (describing traffic stops as seizures even when brief).
77 Id. at 438.
78 Id. at 442.
79 United States v. Conley, 779 F.2d 970, 971 (4th Cir. 1985).
80 Id.
81 Id. (detailing facts of Peterson's murder).
infirmary and upon returning, a corrections officer asked the handcuffed
and fully shackled Conley if “you’re up to your same old shit again.”
82 Reminiscent of “Were you drinking?” for McCarty’s traffic stop, the court
held that Conley had been questioned by an officer, and therefore, interro-
gated.83 Displaying what many saw as immense irony, the court ruled that
Conley was not in custody for 
Miranda purposes.84 The court reasoned
that the entire population of a prison is not free to leave, and reduced the
question of custody for a prisoner to whether he was subjected to more
than usual restraint within the context of his incarceration.85 Because his
restraints were standard procedure for transfer, the court ruled that his in-
criminating responses were not barred for lack of 
Miranda warnings and
could be used against him at trial.86

V. ANALYSIS

“The Queen gasped, and sat down: the rapid journey through
the air had quite taken away her breath, and for a minute or
two she could do nothing but hug the little Lily in silence.”
87

Similarly, the rapid journey through 
Miranda, interrogation, and
custody may leave you breathless, but nonetheless, has laid a solid, if ru-
dimentary, foundation from which to launch the next excursion: visiting
several circuits that have split over the consequences of mistakenly given
Miranda warnings.88

The Reverend Eric Harris, pastor of a Baptist Church in Arkansas,
visited his church one night, “lit paper towels with a match,” placed them
against the wall, and then went home to watch a football game.89 The
church burned to the ground.90 Although questioned by federal, state, and
local law enforcement, Harris admitted to nothing and several years later
moved to Oklahoma.91 At the request of the FBI, who had followed his

82 Id. (explaining exchange between corrections officers and Conley).
83 See supra note 71 and accompanying text (discussing McCarty’s interrogation).
84 Conley, 779 F.2d at 974 (finding no custody for prisoner Conley).
85 Id. at 973 (explaining paradigm shift for discussion of custody in prison setting);
see also Cervantes v. Walker, 589 F.2d 424, 428 (9th Cir. 1978) (finding custody relative to
context and requiring added imposition on freedom for prisoner).
86 Conley, 779 F.2d at 973-74 (discussing standard procedures for prisoner transport
and ruling Conley not in custody).
87 LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE
132 (New American Library 1960) (1865) [hereinafter Looking-Glass].
88 United States v. Harris, 221 F.3d 1048, 1051 (8th Cir. 2000) (listing circuit deci-
sions for mistakenly given warnings).
89 Id. at 1049 (describing events leading up to criminal investigation).
90 Id.
91 Id.
movements, Harris agreed to take a polygraph.\textsuperscript{92} When he arrived for the test, the FBI specifically informed him that he was not in custody and could leave at any time.\textsuperscript{93} He signed a \textit{Miranda} waiver, then took and failed the polygraph.\textsuperscript{94} At the end of the hour-and-a-half interrogation, Harris said he would have something for the agents tomorrow but wanted to go home and talk to a lawyer.\textsuperscript{95} In violation of the ban on approaching a suspect after he invokes his \textit{Miranda} right to counsel, but believing that \textit{Miranda} did not apply because Harris was never in custody, the agents called him three hours later and arranged a meeting for the morning.\textsuperscript{96} Harris confessed to arson at that meeting.\textsuperscript{97}

Dubbing the predicament the “transformation” argument, Harris claimed the \textit{Miranda} warnings picked up his interrogation, lock, stock and barrel, and transported it over the line into “Mirandaland.”\textsuperscript{98} He argued that the trip transformed his questioning from one in which he was truly “free to leave,” into a custodial interrogation triggering the full panoply of \textit{Miranda} protections, including freedom from being badgered by the agent’s second call.\textsuperscript{99} If Harris’ argument had succeeded, the court would have suppressed his confession to burning down the church, and the case would collapse.\textsuperscript{100} Neatly sidestepping the issue, the Eighth Circuit extricated the case from the “transformation” pickle and focused on the fact that Harris went home after the first interrogation.\textsuperscript{101} The court noted that pro-

\textsuperscript{92} Harris, 221 F.3d at 1049.
\textsuperscript{93} Id.; see supra notes 35-86 and accompanying text (discussing interrogation combined with custody).
\textsuperscript{94} Harris, 221 F.3d at 1049; see also Miranda v. Arizona, 384 U.S. 436, 475 (1966) (describing waiver requirements). A “heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination.” Id.; see Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964) (requiring waiver to be intelligently and knowingly given).
\textsuperscript{95} Harris, 221 F.3d at 1049; see also Miranda, 384 U.S. at 474 (explaining defendant’s right to cut off questioning and to remain silent until attorney is present).
\textsuperscript{96} Harris, 221 F.3d at 1050; see also Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (laying down bright line rule barring re-approach after defendant invokes right to counsel). “Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” Id.
\textsuperscript{97} Harris, 221 F.3d at 1050 (describing facts of case).
\textsuperscript{98} Id. at 1051 n.14 (explaining warnings transform non-custodial interrogation into custodial) (emphasis in original); see also supra note 2 (listing \textit{Miranda} warnings).
\textsuperscript{99} Id. at 1051 (instructing ban on re-approach accompanies invocation of \textit{Miranda} right to counsel); see also supra note 94 (explaining Edward's ban on re-approach after invoking right to counsel).
\textsuperscript{100} Id. (banning re-approach); see Edwards, 451 U.S at 485 (concluding information from second interrogation could not be used against him).
\textsuperscript{101} Harris, 221 F.3d at 1051-52 (providing lengthy explanation of limitations on Ed-
tection from being re-approached is not without limits and ruled that even if Harris had been in custody (without deciding if he were or not), the three-hour break in that custody defeated his right to suppress the confession.102

Taking an entirely different tack, the Fourth Circuit zeroed right in on the custody issue when elderly Myrtle Wilder was stabbed eight times in the stomach, had her neck broken, her face bruised and scraped and her wrists slashed.103 Several weeks after the murder, James Davis came voluntarily to the station, was questioned, left for a dinner break, and was questioned again a few hours later.104 Davis and the officers talked in a carpeted, air-conditioned conference room, and at both sessions he was given full Miranda warnings and waived his right to silence.105 Shortly after the second session began, Davis said he did not want to talk about the case anymore.106 In violation of Miranda, the detectives persisted, and when they showed him pictures of Mrs. Wilder’s dead body, Davis became visibly upset, started to cry, had to take several bathroom breaks, and told the detectives that he needed to talk about what happened.107 He then gave them a full confession.108

The Davis court acknowledged that Miranda erects a wall of protection around a suspect once he invokes his right to silence.109 It then tackled the bone of contention in this and similar cases: whether Miranda protections were in effect, a question that hinged on whether Davis, and other suspects, were in custody.110 The court noted that Davis came to the station voluntarily, left to eat dinner, talked in the informal and reasonably comfortable conditions of the conference room, and at all times was free to leave.111 Finding Davis was not in custody, and therefore, not protected...
from questioning after invoking silence, the court affirmed his conviction for murder.\footnote{112}

In \textit{United States v. Bautista}, romance turned deadly when David Carrillo invited Michael Bautista to spend the night.\footnote{113} Bautista knew the offer was not a simple act of hospitality and responded to the sexual overture by hitting Carrillo in the head with a beer bottle and stabbing him forty-eight times with an ice pick.\footnote{114} The FBI investigated the incident, brought Bautista to the police station, and, in what is now a familiar sequence of events, interrogated him while telling him he was "free to leave."\footnote{115} At one point in the questioning, the agents gave Bautista his \textit{Miranda} warnings, and in response, he invoked his right to silence and to counsel.\footnote{116} The agent continued in spite of \textit{Miranda}'s ban, and as a result, Bautista claimed his subsequent incriminating statements should be suppressed because the agent's persistence constituted a violation of the protective shield.\footnote{117}

The Tenth Circuit took a course diametrically opposed to the Fourth's focus on custody as the linchpin to decide whether the unnecessary warnings created \textit{Miranda} protection.\footnote{118} Instead, the court honored the spirit of \textit{Miranda} and admonished the police for first warning Bautista and then blatantly ignoring his invocation of the \textit{Miranda} rights.\footnote{119} The court reasoned that a suspect would be at the mercy of his interrogators if the assurance that he could remain silent and have an attorney present were

\begin{small}
\begin{enumerate}
\item\footnote{112} Davis, 778 F.2d at 172.
\item\footnote{113} United States v. Bautista, 145 F.3d 1140, 1143 (10th Cir. 1998).
\item\footnote{114} Id. at 1143-44 (describing Carrillo's injuries and sexual overture of invitation).
\item\footnote{115} "Carrillo said, 'Come on, we'll have a lot of fun,' and made as many as four attempts to grab his crotch." Id. at 1144.
\item\footnote{116} Id. at 1143-44.
\item\footnote{117} Id. at 1144.
\item\footnote{118} Bautista, 145 F.3d at 1145 (describing Bautista's assertion that agent's persistence violated \textit{Miranda}); see also supra note 94 (explaining Edwards' ban on re-approach after invoking right to counsel).
\item\footnote{119} Bautista, 145 F.3d at 1150 (quashing government's assertion that issue centers on custody); see also Tukes v. Dugger, 911 F.2d 508, 516 n.11 (11th Cir. 1990) (describing state's focus on custody as without merit). "The state contends that because Tukes was not in custody when he was read his \textit{Miranda} warnings, had he invoked his right to counsel the police would have been free to ignore that invocation. The state's position is without merit." Id.
\end{enumerate}
\end{small}
just empty promises. Finding the agents’ continued questioning of Bautista amounted to coercion, the court suppressed Bautista’s self-incriminating statements.

Larry Sprosty brought the gratuitous *Miranda* problem to the Seventh Circuit along with his conviction for plying two teen-aged boys with alcohol, molesting them, and then taking pornographic pictures of them. Armed with a search warrant and hoping to find the incriminating pictures, the police converged on Sprosty’s trailer where he lived with his mother. The officers read Sprosty his *Miranda* rights then conducted an exhaustive search of both the inside and outside of the mobile home, and eventually found the photos. Sprosty’s mother claimed at trial that during the melee Sprosty asked her to call his lawyer, but an officer refused to let her. Because the officers continued to interrogate Sprosty after the alleged request for counsel, the questioning that followed was a prohibited re-approach if *Miranda* were in effect. The trial judge explained that to invoke *Miranda* protections, Sprosty’s request for a lawyer had to be made to the officers, and asking his mother was not sufficient. Because Sprosty failed to convince the court that he had informed the officers, the trial judge refused to suppress the photos. Sprosty was convicted and sentenced to five years for sexual assault.

The Seventh Circuit chose the middle ground to decide Sprosty’s appeal. It rejected both that custody was decisive and the notion that mistakenly given warnings create custody and looked to coercion as the portal to “Mirandaland.” Using *McCarty* (previously discussed traffic stop case) as a guide, the court identified factors to use to determine the

---

120 *Bautista,* 145 F.3d at 1151.
121 *Id.* (distinguishing initial questioning from subsequent questioning where proper *Miranda* protection was afforded Bautista).
122 Sprosty v. Buchler, 79 F.3d 635, 638 (7th Cir. 1996) (stating facts of case).
123 *Id.*
124 *Id.* at 639.
125 Sprosty, 79 F.3d at 638 (describing Sprosty’s mother’s alleged attempt to call attorney). Ms. Sprosty asked the officer if she could call her lawyer and he answered: “hang up the phone, shut up and sit down.” *Id.*
126 *Id.*; see also supra note 94 (explaining Edwards’ ban on re-approach after invoking *Miranda* right to counsel).
127 Sprosty, 79 F.3d at 639 (ruling Sprosty, not his mother, needed to request an attorney, and officers had to know of the request); see also Moran v. Burbine, 475 U.S. 412, 422-23 n.1 (1986) (rejecting burden on police to inform defendant of attorney’s phone call). When a suspect has requested counsel, the interrogation must cease . . . [but] Burbine at no point requested the presence of counsel, as was his right under *Miranda* to do.” *Id.* (emphasis in original).
128 Sprosty, 79 F.3d at 638-39.
129 *Id.*
130 *Id.* at 640 (citing underlying purpose of *Miranda* as protection from compelled self-incrimination).
131 *Id.*
limits of custody, with mistakenly given warnings just one of many. The court listed other factors such as a person’s awareness of his freedom to be silent and looked for “prolonged, coercive and accusatory questioning.”

Also important to the finding was the degree to which the police controlled the setting of the interrogation and, in particular, whether the person felt he could interrupt and knew he could leave. Applying these factors, the court evaluated the totality of the circumstances to decide if Sprosty was placed under so much pressure that he could not freely exercise his privilege against self-incrimination. The court weighed the lack of handcuffs, the familiar surroundings, and the presence of his mother and her phone access to the outside world, against the police dominance of the scene with squad cars and several armed officers. The court found Sprosty’s confession was voluntary, and therefore, admissible.

VI. CONCLUSION

“I don’t quite know yet,” Alice said very gently. “I should like to look all round me first, if I might.”

“You may look in front of you, and on both sides, if you like,” said the Sheep; “but you can’t look all round you – unless you’ve got eyes at the back of your head.”

Following Alice’s lead, this paper looks “in front and on both sides” to decide which circuit came up with the best method for dealing with Miranda warnings given by mistake. The Tenth Circuit ruled that the warnings must be honored even when given by mistake so that a suspect is not duped. While this approach protects defendants’ rights, it overlooks the reality of a Miranda setting. The suspect has been warned. He is fully informed that he can remain silent, that he can sit still, do nothing. It is the police who have their hands tied. While abusive station house interrogations still occur, the public’s extensive exposure to the warnings, protec-

---

132 Id. at 641 (listing factors necessary for finding custody); see also Berkemere v. McCarty, 468 U.S. 420, 438-39 (1984) (describing traffic stop atmosphere as substantially less than “police dominated”); supra Section IV, Custody (discussing custody in setting of traffic stop).
133 Sprosty, 79 F.3d at 641.
134 Id.
135 Id.
136 Sprosty, 79 F.3d at 641-42, 647 (discussing issue of custody at length, then ruling confession voluntary).
137 Id.
138 Looking-Glass, supra note 85, at 176.
139 See Bautista, 145 F.3d at 1151 (ruling suspect would believe no requests would be honored).
DO MISTAKEN MIRANDA WARNINGS COUNT?

The Seventh Circuit decision that coercion, not custody, secures protection brings us back to the pre-Miranda 1960’s. This Circuit uses a totality of the circumstances test to discover if the suspect parted with incriminating evidence voluntarily. The strength in this approach is that the trial judge weighs the specific facts of each case. The myriad particularities of each situation are weighed against each other instead of using a rigid, one-size-fits-all rule that does not fit all circumstances. While the approach is flexible, that is precisely its weakness. Neither the police nor the defendants are pre-informed of the rules that govern their interactions. Sometimes that works to the advantage of the police, and other times to the advantage of the defendants, because justice is seen through the variant eyes of the various judges sitting on a given day.

The Eighth Circuit sidestepped the transformation problem because the break in custody in Harris made Miranda warnings unnecessary. The court foreshadowed future rulings as opposed to allowing gratuitous warnings to transform non-custody into custody. The Fourth Circuit agreed and ruled in Davis that without custody there is no need for Miranda protection. While this view is the harshest for the suspect it is also simple and clear, two elements that assist the police and keep them honest. Simplicity also assists the suspect because he knows the scope of his constitutional protection and can predict the outcome of judicial proceedings with more accuracy. Forearmed with knowledge, the suspect can use that knowledge to ward off zealous police efforts in interrogation. This approach provides the best guide for police and defendants who enter Mirandaland.

Ann F. Walsh

---

@140 Sprosty, 79 F.3d at 641-42, 647 (applying factor test to decide whether information was coerced).

@141 United States v. Harris, 221 F.3d 1048, 1051 (8th Cir. 2000) (rejecting transformation when Miranda warnings are unnecessary).

@142 Id. “[W]e are disinclined to adopt the transformation argument as an extension of our Miranda jurisprudence.” Id.

@143 Davis v. Allsbrooks, 778 F.2d 168, 170 (4th Cir. 1985) (concluding non-custodial questioning makes Miranda inapplicable).