CRIMINAL PROCEDURE—CONFESSIONS—WAIVER OF FIFTH AMENDMENT RIGHTS HELD VALID ALTHOUGH POLICE FAILED TO INFORM SUSPECT OF ATTORNEY'S ATTEMPT TO CONTACT HIM—*Moran v. Burbine*, 106 S. Ct. 1135 (1986).

Recognition of the inherently intimidating atmosphere of instation police interrogation prompted the United States Supreme Court, in *Miranda v. Arizona*,[1] to establish rules designed to protect a suspect's fifth amendment privilege against self-incrimination.[2] These guidelines require that police officers, prior to questioning a suspect in custody, inform him of his right to remain silent and his right to have a lawyer present during questioning.[3] The *Miranda* Court emphasized that a suspect's waiver of these rights would be legitimate only if "knowingly and intelligently made."[4] In *Moran v. Burbine*,[5] the Supreme Court restricted the scope of *Miranda* by upholding the admissibility of a confession made after a suspect in custody waived his rights, unaware that an attorney had attempted to contact him.[6]

On June 29, 1977, at approximately 3:00 p.m., the Cranston, Rhode Island police arrested Brian Burbine along with two other suspects, DiOrio and Sparks.[7] Upon arrival at the Cranston Police Headquarters, the three were charged with breaking and entering and then were placed in separate rooms.[8] A Cranston police detective, Ferranti, quickly realized that Burbine's address matched the address disclosed by an informant who had provided information regarding the murder of a woman in Providence, Rhode Island.[9] Suspicious that Burbine was responsible

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1 384 U.S. 436 (1966).

2 U.S. CONST. amend. V provides in pertinent part that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself. . . ."

3 *Miranda*, 384 U.S. at 479. The *Miranda* Court stated that when an individual is subject to custodial interrogation, the following warnings are required:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id.

4 *Id.* at 475.

5 106 S. Ct. 1135 (1986).

6 *Id.* at 1140.

7 *Id.* at 1154 (Stevens, J., dissenting).

8 *Id.*

9 *Id.* at 1138. Mary Jo Hickey was found in a parking lot in the city of Providence, Rhode Island on March 3, 1977. *Id.* She suffered injuries to her skull, presumably inflicted by a metal pipe recovered at the scene. *Id.* These wounds

for this killing, Detective Ferranti administered the *Miranda* warnings to him.[10] Although he was unable to obtain a statement from Burbine, Detective Ferranti subsequently obtained statements from both DiOrio and Sparks that connected Burbine to the Providence killing.[11] Detective Ferranti subsequently contacted the Providence police and conveyed the incriminating information to them.[12] At approximately 7:00 p.m., three Providence officers arrived at the Cranston headquarters and met briefly with Detective Ferranti before questioning Sparks and DiOrio.[13]

Shortly thereafter, Burbine's sister telephoned the Office of the Public Defender in an attempt to contact Richard Casparian, an attorney who had represented Burbine on a previous unrelated charge.[14] Burbine's sister, unaware that her brother was suspected of murder, sought to obtain representation for him regarding the breaking and entering charge.[15] The attorney who received her call was unsuccessful in reaching Mr. Casparian but contacted another public defender, Allegra Munson.[16] Ms. Munson telephoned the Cranston police detective division at about 8:15 p.m.,[17] and stated that she would be available to represent Burbine should the police wish to interrogate him or place him in a lineup.[18] An unidentified person told her that the police officers had finished questioning Burbine for the evening.[19]

Later that evening, the police led Burbine into an interroga-

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resulted in her death three weeks later. *Id.* Detective Ferranti had been told that the person responsible for Ms. Hickey's murder was known as "Butch" and subsequently learned that Burbine used that nickname. *Id.*

10 *Id.* at 1138.

11 *Id.*

12 *Id.*

13 Burbine v. Moran, 753 F.2d 178, 180 (1st Cir. 1985), *rev'd*, 106 S. Ct. 1135 (1986).

14 *Burbine*, 106 S. Ct. at 1139.

15 *Id.*

16 *Id.*

17 State v. Burbine, 451 A.2d 22, 23 (R.I. 1982), *petition for habeas corpus denied sub nom.* Burbine v. Moran, 589 F. Supp. 1245 (D.R.I. 1984), *rev'd*, 753 F.2d 178 (1st Cir. 1985), *rev'd*, 106 S. Ct. 1135 (1986). Justice Stevens pointed out that at the time Ms. Munson's call was received at the Cranston station, both the Cranston and Providence police were questioning Sparks and DiOrio about Burbine's involvement in the Hickey murder. *Burbine*, 106 S. Ct. at 1154 (Stevens, J., dissenting).

18 *Burbine*, 451 A.2d at 23-24.

19 *Id.* at 24. The Supreme Court of Rhode Island summarized that conversation as follows:

> The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the

tion room, again advised him of his rights, and proceeded to question him about the murder.[20] Burbine remained unaware of both his sister's attempt to obtain counsel and Ms. Munson's conversation with the police.[21] Burbine denied involvement in the crime and was returned to another holding room.[22] Approximately ten minutes later, Burbine summoned the police and explained that he wished to make a statement.[23] After executing a written waiver of his rights, Burbine signed a four page statement in which he confessed to the murder.[24] Burbine was again advised of his rights and he signed a second statement.[25] Burbine then signed a third inculpatory statement at approximately noon the following day.[26]

Burbine brought a pre-trial motion to suppress his confessions, contending that the statements were obtained in violation of his privilege against self-incrimination and right to counsel.[27] Noting that the *Miranda* warnings were explained to Burbine and that he had "knowingly, intelligently, and voluntarily waived his privilege[s]. . .," the trial judge refused to exclude the confessions.[28] In addition, the trial court viewed Burbine's right to request an attorney as personal and concluded that his attorney

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> Providence police were at the Cranston police station or that Burbine was a suspect in [Hickey's] murder.

Id.

20 *Burbine*, 753 F.2d at 180.

21 *Id.*

22 *Id.* Although Burbine had at least two chances to use a telephone, he apparently did not avail himself of the opportunity. *Burbine*, 106 S. Ct. at 1139 (citing Transcript of Suppression Hearing 23, 85). In his dissenting opinion, Justice Stevens observed that the state court record contained no finding that Burbine in fact had access to a phone. *Id.* at 1154 n.25 (Stevens, J., dissenting). Justice Stevens added that no evidence on the record indicated whether the police had made an outside phone line available or whether Burbine knew that he could use a phone. *Id.*

23 *Burbine*, 753 F.2d at 180. Justice Stevens questioned the Supreme Court's assumption that Burbine initiated this conversation with the police. *Burbine*, 106 S. Ct. at 1155 (Stevens, J., dissenting). Justice Stevens pointed out that the state court had made no such finding and that the police officers' testimony regarding Burbine's initiation of the conversation was inconsistent. *Id.*

24 *Burbine*, 753 F.2d at 180-81.

25 *Id.* at 181.

26 *Id.*

27 *Burbine*, 106 S.Ct. at 1139. U.S. CONST. amend. VI provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . .and have the Assistance of Counsel for his defence [sic]." *See generally* Gideon v. Wainright, 372 U.S. 335 (1963) (right to counsel incorporated into state criminal prosecutions); Johnson v. Zerbst, 304 U.S. 458 (1938) (defendants have right to retained or appointed counsel in federal criminal prosecutions).

28 State v. Burbine, 451 A.2d 22, 24 (R.I. 1982), *petition for habeas corpus denied sub*

could not assert that right.[29] The case was subsequently tried before a jury, and Burbine was convicted of first degree murder.[30]

On appeal to the Supreme Court of Rhode Island, a divided court rejected Burbine's fifth and fourteenth amendment[31] claims and affirmed the conviction.[32] The state supreme court repudiated Burbine's contention that he was unable to judiciously waive his rights without the knowledge that an attorney had attempted to contact him.[33] The court also denounced the proposition that questioning a suspect must cease once an attorney requests that interrogation only proceed with the attorney present.[34]

The United States District Court for the District of Rhode Island denied Burbine's petition for a writ of habeas corpus.[35] On appeal, however, the Court of Appeals for the First Circuit reversed Burbine's conviction.[36] The court stated that Burbine's waiver of his fifth and sixth amendment rights was tainted by the police officers' irresponsibility in failing to inform him that an attorney had called.[37] In reversing the district court, the First Circuit also considered the police officers' misrepresentation to the attorney that Burbine would not be subject to further interro-

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nom. Burbine v. Moran, 589 F. Supp. 1245 (D.R.I. 1984), *rev'd*, 753 F.2d 178 (1st Cir. 1985), *rev'd*, 106 S. Ct. 1135 (1986).

29 *Burbine*, 106 S. Ct. at 1139.

30 *Id.* at 1140.

31 U.S. CONST. amend XIV, § 1 provides in part that no state "shall deprive any person of life, liberty, or property, without due process of law." Due process requires reversal of any conviction resulting from police conduct that "shocks the conscience" or "offend[s] a sense of justice." Rochin v. California, 342 U.S. 165, 172-73 (1952).

32 *Burbine*, 451 A.2d at 31.

33 *Id.* at 29.

34 *Id.*

35 Burbine v. Moran, 589 F. Supp. 1245 (D.R.I. 1984), *rev'd*, 753 F.2d 178 (1st Cir. 1985), *rev'd*, 106 S. Ct. 1135 (1986). The writ of habeas corpus is designed to provide a "prompt and efficacious remedy for whatever society deems to be intolerable restraints." Fay v. Noia, 372 U.S. 391, 401-02 (1963). In *Fay*, the Supreme Court stated that, "in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Id.* at 402.

In denying Burbine's petition for habeas corpus, the district court considered his fifth, sixth, and fourteenth amendment arguments and concluded that no constitutional violations had occurred. *Burbine*, 589 F. Supp. at 1253-54.

36 Burbine v. Moran, 753 F.2d 178, 187-88 (1st Cir. 1985), *rev'd*, 106 S. Ct. 1135 (1986).

37 *Id.* at 184-85.

gation until the following day.[38]

The United States Supreme Court granted the government's petition for certiorari[39] to decide whether a misrepresentation to an attorney seeking information regarding a suspect, or the failure to inform a suspect of an attorney's attempt to contact him, should result in the suppression of an otherwise valid pre-arraignment confession.[40] In reversing the court of appeals, the Supreme Court held that a suspect's ability to intelligently waive his constitutional rights was not affected by incidents occurring outside of his presence and unknown to him.[41] The Court further recognized that *Miranda* warnings are designed to protect the *suspect's* fifth and sixth amendment rights and that any misinformation conveyed to an attorney is, therefore, irrelevant to a fifth amendment analysis.[42] The majority rejected Burbine's claim that a criminal suspect's right to counsel attaches once a relationship with an attorney is established.[43] Accordingly, the Court emphasized that sixth amendment rights are triggered only after the defendant is formally charged.[44] Finally, the Court was unconvinced that the police department's misconduct rose to the level of a fourteenth amendment due process violation.[45]

Early common law courts viewed a defendant's confession admissible at trial without regard to the methods used in procuring the statement.[46] By the late nineteenth century, however, the United States Supreme Court recognized that confessions obtained under circumstances which affected their reliability could be excluded.[47] Confessions made in response to inducements, threats, or promises by one in an authoritative position were deemed involuntary and, consequently, unreliable.[48]

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38 *Id.* at 185.

39 Moran v. Burbine, 105 S. Ct. 2319 (1985).

40 *Burbine*, 106 S. Ct. at 1140.

41 *Id.*

42 *Id.* at 1143.

43 *Id.* at 1145.

44 *Id.* at 1146.

45 *Id.* at 1147-48.

46 *See generally* Note, *Developments in the Law-Confessions*, 79 HARV. L. REV. 935 (1966) [hereinafter *Confessions*] (discussing the applicability of suspect's fifth amendment rights during police questioning); Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 452-58 (1964) (discussing development of confession law prior to *Miranda*).

47 *See* Wilson v. United States, 162 U.S. 613, 622-23 (1896); Pierce v. United States, 160 U.S. 355, 357 (1896); Sparf v. United States, 156 U.S. 51, 55 (1895); Hopt v. Utah, 110 U.S. 574, 584-85 (1884).

48 *Hopt*, 110 U.S. at 585.

In 1897, the Supreme Court, in *Bram v. United States*,[49] utilized the fifth amendment's bar against self-incrimination to exclude a confession in federal court.[50] In *Bram*, the Court combined fifth amendment scrutiny with the voluntariness approach traditionally used at common law.[51] The *Bram* decision thus initiated an expansion of the common law exclusionary rule.[52] Rather than focusing only on the statement's reliability, federal courts began to inquire into whether a confession was truly voluntary.[53] Eventually, the voluntariness approach was superseded by the adoption of rule 5(a) of the Federal Rules of Criminal Procedure[54] which requires that an arrested person be brought before a judicial officer without unnecessary delay.[55] The Supreme Court enforced this requirement through the *McNabb-Mallory* rule,[56] which mandated the exclusion of confessions

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49 168 U.S. 532 (1897).

50 *Id.* at 542-44.

51 *Id.* Writing for the Court, Justice White stated that:

> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment. . ., commanding that no person "shall be compelled in any criminal case to be a witness against himself."

Id. at 542.

52 *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 264-65 (1985) [hereinafter W. LAFAVE AND J. ISRAEL]; Note, *The Soap Box Exception to the Miranda Rule: Fifth Amendment Protections Slip Down the Drain*, 15 SETON HALL L. REV. 685 (1985) (discussing development of confession law through Quarles v. New York, 105 S. Ct. 2626 (1984)).

53 W. LAFAVE & J. ISRAEL, *supra* note 52, at 264-65 (quoting Ziang Sung Wan v. United States, 266 U.S. 1, 55 (1924)). *See also* Miranda v. Arizona, 384 U.S. 436, 462 (1966) (quoting *Ziang Sung Wan*) (describing requirements of voluntary confession).

54 *See* FED. R. CRIM. P. 5(a).

55 *Miranda*, 384 U.S. at 463.

56 *See* Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). In *McNabb*, several bootleggers were arrested late at night in connection with the murder of a federal revenue agent. *McNabb*, 318 U.S. at 334. Federal authorities did not bring the defendants before a judicial officer, but nonetheless questioned them for several days before they confessed. *Id.* at 335-38. The Court held that the defendants' confessions were inadmissible because they were procured through improper law enforcement procedures. *Id.* at 345-47.

In *Mallory*, a rape suspect was arrested at about 2:30 p.m. and intermittently questioned until approximately 9:30 p.m., at which time he confessed. *Mallory*, 354 U.S. at 450-51. The defendant was not arraigned before a magistrate until the following morning. *Id.* at 451. Noting the ease with which the police could have provided for arraignment prior to questioning the defendant, the Court held the confessions inadmissible. *Id.* at 455-56. *See also* Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958) (providing detailed analysis of *McNabb-Mallory* rule).

produced during a period of unnecessarily long detention.[57]

The United States Supreme Court also held a coerced confession inadmissible in the case of *Brown v. Mississippi*.[58] Significantly, this was the first case in which the Court used the fourteenth amendment due process clause to hold a confession in state court inadmissible.[59] In *Brown*, a police deputy, together with a mob of white men, whipped and tortured three black defendants until they confessed to the details of a murder as narrated by the mob.[60] The Court recognized that the state action involved in acquiring a conviction was subject to the standards of the fourteenth amendment due process clause and that due process was violated when a state compelled a confession.[61]

In later cases involving potential fourteenth amendment violations, the Supreme Court evaluated the "totality of the circumstances" in which a confession was made.[62] This analysis required consideration of factors such as the conditions and length of custody, the suspect's mental state and physical condition, the officer's conduct toward the suspect, and any other factors that might affect the suspect's ability to resist police pressure.[63] If such factors were deemed to have influenced the suspect's decision to confess to a crime, the confession was held to be involuntary and thus inadmissible.[64] The Supreme Court has recognized, therefore, that the fourteenth amendment due process standard was intended not only to ensure the voluntariness of confessions but also to deter police misconduct.[65]

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57 *See* Miranda v. Arizona, 384 U.S. 436, 463 (1966) (citing Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943)).

58 297 U.S. 278 (1936).

59 *See* W. LAFAVE & J. ISRAEL, *supra* note 52, at 265.

60 *Brown*, 297 U.S. at 281.

61 *Id.* at 286. The fifth amendment was not applicable in state court confession cases until 1964. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

62 *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513-15 (1963) (scrutinizing voluntariness of confession by examination of all attendant circumstances); Culombe v. Connecticut, 367 U.S. 568, 601-02 (1961) (outlining factors to be considered in totality of circumstance scrutiny).

63 *See Culombe*, 367 U.S. at 602.

64 *See* Lynumn v. Illinois, 372 U.S. 528, 534 (1963).

65 *See* Rogers v. Richmond, 365 U.S. 534, 541 (1961). *See also Lynumn*, 372 U.S. at 528 (police told defendant she would lose welfare benefits and child custody if she failed to cooperate); Spano v. New York, 360 U.S. 315 (1959) (police officer, a long time acquaintance of defendant, told defendant his police position would be jeopardized if defendant refused to talk); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (police interrogated defendant for 36 hours).

The due process voluntariness standard was criticized on several grounds: the impreciseness of the term "voluntary" left the police with little guidance concern-

In the 1959 case of *Spano v. New York*,[66] the Supreme Court recognized that a defendant's access to counsel was an important factor to be taken into account when analyzing the circumstances surrounding a confession.[67] In *Spano*, a defendant charged with murder was continuously interrogated despite his repeated requests to have his attorney present.[68] In addition, the police directed officer Bruno, a close friend of the defendant, to try to elicit a confession from him.[69] After several questioning sessions, in which Bruno used false inducements, defendant Spano finally agreed to make a statement.[70] This statement was instrumental in obtaining his conviction.[71] Although the defendant's conviction was reversed on fourteenth amendment grounds,[72] four justices concurred in opinions that specifically addressed the officers' failure to honor the defendant's requests for counsel.[73] In one concurring opinion, Justice Douglas stated that when a person formally charged with a crime is deprived of counsel prior to trial, the results may be more detrimental than denial of representation during trial.[74] Justice Stewart, in a separate concurring opinion, stated that the police officers' failure to provide the defendant with counsel was sufficient to bar admissibility of the confession under the fourteenth amendment.[75]

Five years after *Spano*, the Court departed from its traditional scrutiny of the "totality of the circumstances" test under the fourteenth amendment in *Massiah v. United States*.[76] In *Massiah*, federal narcotics agents obtained inculpatory statements from the defendant subsequent to his indictment and in the absence of counsel.[77] Writing for the Court, Justice Stewart de-

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ing interrogation procedure; the standard was ambiguous and not amenable to easy judicial review; and it provided insufficient defendant protection and resulted in courtroom "swearing contests." *See* W. LAFAVE & J. ISRAEL, *supra* note 52, at 268-69.

66 360 U.S. 315 (1959).

67 *Id.* at 325 (Douglas, J., concurring).

68 *Id.* at 318.

69 *Id.* at 318-19.

70 *Id.* at 319. Officer Bruno falsely told the defendant that he (Bruno) was in a great deal of trouble with his supervisors because of a telephone call the defendant had made to him. *Id.* Bruno added that the situation could result in Bruno losing his job causing severe detriment to his family. *Id.* at 323.

71 *Id.* at 319-20.

72 *Id.* at 323-24.

73 *Id.* at 324 (Douglas, J., concurring), 326 (Stewart, J., concurring).

74 *Id.* at 325 (Douglas, J., concurring).

75 *Id.* at 326 (Stewart, J., concurring).

76 377 U.S. 201 (1964).

77 *Id.* at 204.

clared that the defendant's sixth amendment right to counsel was violated when incriminating post indictment statements were elicited from him without counsel present.[78] Justice Stewart viewed the indictment as the critical point at which the defendant's right to an attorney ripened.[79]

Later that year, in *Escobedo v. Illinois*,[80] the Supreme Court stated that the right to counsel was triggered pre-indictment, once the police focused their investigation upon a particular defendant.[81] In *Escobedo*, the defendant was taken into custody and questioned about the murder of his brother-in-law.[82] Although the defendant's attorney was present at the station house, the police would not permit him to communicate with the defendant until the interrogation was completed.[83] Writing for the majority, Justice Goldberg could find no meaningful distinction between a defendant's need for counsel before or after indictment.[84] Justice Goldberg recognized that once a police investigation was directed at a particular defendant, a true adversarial atmosphere was created in which a defendant had a right to consult with his attorney.[85] Although *Escobedo* presented a unique factual situation, it appeared that the Court was heading toward a general station house right to counsel.[86]

In 1966, however, the Supreme Court renewed its reliance on the fifth amendment to determine the admissibility of confessions offered in state court prosecutions in *Miranda v. Arizona*.[87]

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78 *Id.* at 204-06.

79 *Id.* at 204.

80 378 U.S. 478 (1964).

81 *Id.* at 492.

82 *Id.* at 479.

83 *Id.* at 480-81. During the course of interrogation, the police told Escobedo that a codefendant had blamed him for the murder. *Id.* at 482. In a subsequent confrontation with the codefendant, Escobedo made a statement that indicated his complicity in the killing. *Id.* at 483.

84 *Id.* at 485. Justice Goldberg stated that "[i]t would exalt form over substance to make the right to counsel . . . depend on whether at the time of the interrogation, the authorities had secured a formal indictment." *Id.* at 486.

85 *Id.* at 492.

86 W. LAFAVE & J. ISRAEL, *supra* note 52, at 274. In holding that Escobedo was denied assistance of counsel, the Court noted that the investigation had focused on Escobedo, that he was in police custody, that he had requested access to his attorney, and that the police had not informed him of his right to remain silent. *Escobedo*, 378 U.S. at 491.

87 384 U.S. 436, 467 (1966). *Miranda* was a compilation of four cases in which statements were obtained from defendants during a period of custodial interrogation: Miranda v. Arizona, Vignera v. New York, Westover v. United States, and California v. Stewart. *See id.* at 456-57.

The *Miranda* Court examined the admissibility of statements obtained during police custodial interrogation and formulated procedural safeguards designed to protect a suspect's privilege against self-incrimination.[88] In an opinion by Chief Justice Warren, the Court stated that custodial interrogation created "inherently compelling pressures" which may force an individual to speak when he otherwise would not.[89] In order to dispel those pressures, the Court enunciated procedural safeguards for mandatory implementation in all police dominated custodial interrogations.[90] The Court also stated that the prosecution would be precluded from using statements obtained from a defendant unless he was informed of his constitutional rights prior to questioning.[91] Finally, the majority pointed out that once warned, the suspect could choose to waive his rights if the waiver was made "voluntarily, knowingly, and intelligently."[92]

After the *Miranda* decision, it remained unclear whether the police were forever barred from questioning a suspect once he had invoked his fifth amendment rights.[93] In *Michigan v. Mosley*,[94] the Supreme Court held that the admissibility of a suspect's statement depended upon whether his *Miranda* right to terminate questioning was scrupulously honored.[95] In *Mosley*, the defendant was arrested in connection with two local robberies.[96] After being fully advised of his *Miranda* rights, Mosley indicated to the arresting officer that he did not wish to answer any questions

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88 *See id.* at 439.

89 *Id.* at 467.

90 *Id.* at 444-45. *See also supra* note 3 for summary of warnings read to a defendant prior to custodial interrogation. The Court also defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. In a subsequent decision, the Court later explained that express questioning or its functional equivalent constituted interrogation under *Miranda*. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).

91 *See Miranda*, 384 U.S. at 479.

92 *Id.* at 444. A waiver is deemed "knowingly and intelligently" made when a suspect is fully cognizant of the nature of his rights and the ramifications of relinquishing those rights. *See* Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938).

93 *See generally* W. LAFAVE & J. ISRAEL, *supra* note 52, at 312-14 (discussing validity of waiver subsequent to invocation of rights).

94 423 U.S. 96 (1975).

95 *Id.* at 103-04. Quoting *Miranda*, the *Mosley* Court noted that "[o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease." *Id.* at 100 (quoting *Miranda*, 384 U.S. at 473-74).

96 *Id.* at 97.

concerning the robberies.[97] A few hours later, Mosley was approached by a different officer who sought to question him about an unrelated murder.[98] After a second set of *Miranda* warnings, Mosley made a statement that implicated him in the murder.[99] In determining whether the police had abided by *Miranda's* guidelines, the Court asserted that the suspect's right to terminate interrogation mitigated any compulsion inherent in the custodial setting.[100] In their view, Mosley's rights were strictly honored: he was fully apprised of his rights prior to questioning; his request to suspend interrogation was immediately respected; and the second interrogation in no way undercut his decision not to answer questions regarding the robberies.[101]

In a case similar to *Mosley*, the Court decided on the admissibility of a statement made by a defendant after he had expressly invoked his right to have counsel present during questioning.[102] In *Edwards v. Arizona*,[103] decided in 1981, the defendant indicated his interest in arranging a plea negotiation, but stated that he wanted counsel present before speaking with the prosecutor.[104] The next morning, a detention officer told the defendant that he had to speak with the police.[105] Consequently, the defendant made an incriminating statement without his attorney present.[106] In holding the defendant's confession inadmissible, the Court was unpersuaded by the state's argument that the defendant had waived his right to counsel once he responded to further interrogation.[107] The Court stated that when an accused manifests his desire to have counsel present, additional safeguards are neces-

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97 *Id.*

98 *Id.* at 98.

99 *Id.*

100 *Id.* at 104.

101 *Id.* at 104-05. In a dissenting opinion, Justice Brennan described the majority's decision as a step in the erosion of *Miranda's* principles. *Id.* at 112 (Brennan, J., dissenting). Justice Brennan was unconvinced that a suspect's ability to control the timing of questioning dissipated the compulsion inherent in custodial interrogation. *Id.* at 115 (Brennan, J., dissenting). Justice Brennan thus favored a rule which would require that either the suspect be arraigned or, alternatively, be provided counsel before questioning is resumed. *Id.* at 116 (Brennan, J., dissenting).

102 *See* Edwards v. Arizona, 451 U.S. 477, 478 (1981).

103 *Id.*

104 *Id.* at 479.

105 *Id.*

106 *Id.*

107 *Id.* at 484-85. Reiterating its previous decisions, the Court stated that "waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege. . . ." *Id.* at 482 (citations omitted).

sary.[108] Writing for the Court, Justice White asserted that the accused cannot be interrogated further until either counsel is made available or the accused himself initiates a discussion with the authorities.[109]

Two years after the *Edwards* decision, the Supreme Court announced a two-stage test of admissibility in *Oregon v. Bradshaw*.[110] The defendant in *Bradshaw* was suspected of involvement in a traffic accident that resulted in the death of a minor.[111] After being advised of his rights, the defendant was questioned about the circumstances surrounding the accident.[112] Although the defendant denied involvement in the crash, he admitted that he had furnished liquor to the minor and as a result was arrested.[113] The defendant requested counsel at which point all questioning ceased.[114] While en route to the jail, the defendant inquired as to what procedures would follow.[115] In the ensuing conversation, the defendant agreed to submit to a polygraph examination in which he ultimately confessed that he had been the driver of the vehicle that had crashed.[116] The Court explained that a statement made by a defendant who had previously asserted his right to counsel was admissible only when the defendant initiated further discussions with the authorities and, according to the "totality of the circumstances" test, the defendant's waiver was "knowingly and intelligently" made.[117] The Court concluded

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108 *Id.* at 484-85.

109 *Id.* The Court noted that had the defendant initiated the conversation with the police, nothing would have prevented the police from listening to the defendant's volunteered statements. *Id.* at 485. *See also* Rhode Island v. Innis, 446 U.S. 291 (1980) (defendant invoked right to counsel but subsequently initiated conversation with police and volunteered incriminating information).

One author notes that the holding in *Edwards* limits *Mosley's* rationale to those cases in which the defendant has indicated his desire to remain silent, but has not requested the presence of an attorney. *See* W. LAFAVE & J. ISRAEL, *supra* note 52, at 314.

110 462 U.S. 1039 (1983).

111 *Id.* at 1041. The body of a young boy was discovered in a pickup truck that had left the road and struck a tree. *Id.*

112 *Id.*

113 *Id.*

114 *Id.* at 1041-42.

115 *Id.* at 1042. The officer explained to the defendant that he was under no obligation to speak unless he so desired; the defendant responded that he understood. *Id.*

116 *Id.*

117 *Id.* at 1045-46. In determining the validity of a waiver according to the "totality of the circumstances" test, the Court considers the "particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." North Carolina v. Butler, 441 U.S. 369, 374-75 (1979) (quoting

that the defendant, while fully aware of his fifth and sixth amendment rights, had initiated discussions with the police and that the subsequent statements made by him to the polygraph examiner were the product of a valid wavier of his rights.[118]

It was against this backdrop that the Court decided *Moran v. Burbine*.[119] In that case, the Court employed *Bradshaw's* rationale in examining Burbine's assertion that a knowledgeable waiver of fifth amendment rights was not possible absent the information that an attorney had attempted to contact him.[120] Writing for the majority,[121] Justice O'Connor stated that a suspect's ignorance of events occurring outside his presence has no effect upon his ability to knowingly abandon constitutional safeguards.[122] Justice O'Connor thought it anomalous that a defendant in Burbine's situation would have validly waived his rights had an attorney not called the police station.[123] As further evidence that the defendant had made a valid waiver, Justice O'Connor observed that the defendant had initiated the conversation in which he confessed.[124]

The majority also addressed the First Circuit's conclusion that the police had acted recklessly and irresponsibly in misleading an attorney and in failing to inform Burbine that an attorney had tried to contact him.[125] Justice O'Connor stated that police misconduct is irrelevant to a suspect's decision to waive his

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Johnson v. Zerbst, 304 U.S. 458, 464 (1937)). *See also* Fare v. Michael C., 442 U.S. 707, 725 (1979) (totality of circumstances approach used to determine validity of waiver in juvenile case).

118 *Id.* at 1046. In a dissenting opinion, Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, disagreed with the majority's conclusion that the defendant had initiated further communications with the police. *Id.* at 1053 (Marshall, J., dissenting). Justice Marshall stated that the question posed by the defendant was not the kind of initiation contemplated by the *Edwards* Court. *Id.* at 1055 (Marshall, J., dissenting). Justice Marshall believed that the defendant's question could be expected under the circumstances and that "[t]o allow the authorities to recommence an interrogation based on such a question is to permit them to capitalize on the custodial setting." *Id.* at 1056 (Marshall, J., dissenting).

119 106 S. Ct. 1135.

120 *Id.* at 1141.

121 *Id.* at 1138. Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist joined Justice O'Connor in the majority opinion. *Id.* Justice Stevens filed a dissenting opinion in which Justices Brennan and Marshall joined. *Id.*

122 *Id.* at 1141-42. The Court stated that the Constitution does not "require that the police supply a suspect with a flow of information to help him calibrate his self interest in deciding whether to speak or stand by his rights." *Id.* at 1142 (citations omitted).

123 *Id.* at 1141-42.

124 *Id.* at 1141 (citing Burbine v. Moran, 453 F.2d 178, 180 (1st Cir. 1985)).

125 *Id.* at 1142-43.

rights, unless such misconduct actually deprives the suspect of information necessary to an understanding of those rights.[126] Justice O'Connor further reasoned that the *Miranda* warnings are not rights, but merely a prophylaxis against self-incrimination and that any reversal based upon a police department's deception of an attorney would constitute an unjustifiable expansion of the *Miranda* decision.[127] The Court observed that *Miranda* accurately balances society's interest in law enforcement against the protection of a suspect's rights.[128] The *Burbine* Court was unwilling to disturb this balance by mandating a rule that would require the police to inform a suspect of an attorney's attempt to contact him.[129] In the Court's view, the adoption of such a rule would have the effect of "muddying *Miranda's* otherwise relatively clear waters."[130]

Justice O'Connor next examined Burbine's theory that the sixth amendment protects an attorney-client relationship at the moment that relationship is formed, or alternatively, once custodial interrogation commences.[131] The majority agreed that absent a waiver, a defendant has a right to a lawyer at questioning.[132] The Court pointed out, however, that this right vests in a defendant only after the initiation of adversarial proceedings.[133] The Court noted that in the instant case, the ques-

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126 *Id.*

127 *Id.* at 1143 (citing Beckwith v. United States, 425 U.S. 341, 345 (1976)).

128 *Id.*

129 *Id.* at 1144. The Court noted that confessions are essential to effective law enforcement, but also recognized that the coerciveness inherent in the interrogation process must be tempered by constitutional safeguards. *Id.* The Court stated that construing *Miranda* as a mandate, by requiring police to inform a suspect of counsel's attempts to contact him, would marginally add to a defendant's constitutional protection while significantly hampering society's interest in law enforcement. *Id.*

130 *Id.* at 1143. The Court expressed concern that the legal questions raised in enforcing such a police disclosure rule would be unmanageable. *Id.*

131 *Id.* at 1145-47. Relying on dicta in *Escobedo*, Burbine argued that custodial interrogation is the point at which suspects often proffer the most damaging information; therefore, the need to protect the attorney-client privilege is paramount. *Id.*

132 *Id.* at 1145.

133 *Id.* *See* Kirby v. Illinois, 406 U.S. 682 (1972). The "initiation of adversarial judicial proceedings" is the point at which the government becomes formally obligated to prosecute a defendant; for example, arraignment, preliminary hearing, information, or indictment. *Id.* at 689. *See also* Maine v. Moulton, 106 S. Ct. 477 (1985) (conviction based on statements received from defendant post-indictment and without counsel present reversed on sixth amendment grounds); United States v. Gouveia, 467 U.S. 180 (1984) (inmates suspected of murdering convict were not entitled to counsel until initiation of adversarial judicial proceedings).

tioning session in which Burbine confessed took place prior to formal charging.[134] Rejecting Burbine's proposed interpretation of the sixth amendment, the majority stated that the point at which the right to counsel attaches should not be contingent upon whether a suspect, or his family, obtained counsel prior to questioning.[135] The Court emphasized that the sixth amendment's function is to assist a defendant facing prosecution by an organized society rather than to protect the attorney-client privilege.[136] Although it recognized that the results of custodial interrogation may drastically affect the outcome of a trial, the Court nonetheless concluded that any potential harmful effects were insufficient to trigger sixth amendment rights.[137]

In rejecting Burbine's final contention that the behavior of the police deprived him of his fourteenth amendment due process rights, the Court stated that the police officers' conduct *sub judice* fell "short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States."[138] The Court implied, however, that if the officers' conduct had been more egregious than evidenced by the facts presented, a due process violation may well have been recognized.[139]

In a lengthy dissent, Justices Stevens, Marshall, and Brennan strongly criticized the majority for misinterpreting the scope of the *Miranda* decision and ignoring the well-settled principles of an entire body of case law.[140] Writing for the dissent, Justice Ste-

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134 *Burbine*, 106 S. Ct. at 1145.

135 *Id.* at 1146. The *Burbine* Court stated that *Escobedo* was not intended to justify a broad reading of the sixth amendment, but merely intended " 'to guarantee full effectuation of the privilege against self-incrimination. . . .' " *Id.* at 1145-46 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

136 *Id.* at 1146 (citing *Moulton*, 106 S. Ct. at 484).

137 *Id.* at 1147.

138 *Id.* at 1147-48.

139 *Id.* at 1147.

140 *See id.* at 1148-50 (Stevens, J., dissenting). Citing a variety of state court decisions, Justice Stevens pointed out that a majority of those decisions have excluded statements obtained when police had interfered with an attorney's attempts to establish communications with a suspect. *Id.* at 1151 n.10 (Stevens, J., dissenting). Justice Stevens further noted that the Court's holding violated the American Bar Association's Standards for Criminal Justice. *Id.* at 1151-52 (Stevens, J., dissenting). These Standards provide that:

> A person taken into custody or otherwise deprived of liberty should immediately be warned of the right to assistance from a lawyer. This warning should be followed at the earliest opportunity by a formal offer of counsel. . . . At the earliest opportunity a person in custody should be effectively placed in communication with a lawyer. There should be

vens claimed that the majority's holding would elevate incommunicado questioning to "a societal goal of the highest order that justifies police deception of the shabbiest kind."[141] Moreover, Justice Stevens asserted that the majority's adoption of an exceedingly strict construction of the fifth and sixth amendments was an attempt to justify its disregard of the fact that the police deceived an attorney.[142] Analogizing the attorney-client relationship to that of a principal and agent, Justice Stevens reasoned that the deception of an attorney is tantamount to the deception of his client.[143] Reviewing the officers' failure to inform Burbine of an attorney's attempt to contact him, Justice Stevens reiterated *Miranda's* prohibition against the government's use of trickery,[144] and stated that the officers' conduct could not be constitutionally distinguished.[145]

Renouncing the majority's abbreviated analysis regarding the validity of waivers,[146] Justice Stevens emphasized that a strong presumption exists against the waiver of constitutional rights and noted that the government bears the burden of dispel-

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provided for this purpose access to a telephone, the telephone number of the defender or assigned counsel program, and any other means necessary to establish communication with a lawyer.

ABA STANDARDS FOR CRIMINAL JUSTICE, § 5-71 (2d ed. 1986).

The ABA states that a reading of *Miranda* warnings does not satisfy the requirement for a formal offer of counsel. *Id.*, commentary at § 5.71. To ensure that an offer of counsel is stated clearly and fairly, the ABA further recommends that such an offer be made by a defense attorney rather than a police officer or prosecutor. *See id.* at § 5.70.

[141] *Burbine*, 106 S. Ct. at 1151 (Stevens, J., dissenting). Justice Stevens stated that the majority's reasoning "flies in the face of this Court's repeated expressions of deep concern about incommunicado questioning." *Id.* at 1150 (Stevens, J., dissenting).

[142] *Id.* at 1163 (Stevens, J., dissenting). Contrary to the majority's findings that police deception is irrelevant to fifth or sixth amendment rights, Justice Stevens believed that misinformation which prevented a suspect's access to counsel during interrogation had a direct bearing on the effectuation of those rights. *Id.*

[143] *Id.* at 1163 n.49 (Stevens, J., dissenting) (citing Brewer v. Williams, 430 U.S. 387, 405 (1977)).

[144] *Id.* at 1158 (Stevens, J., dissenting) (citing *Miranda*, 384 U.S. at 476). The *Miranda* Court stated that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda*, 384 U.S. at 476.

[145] *See Burbine*, 106 S. Ct. at 1158 (Stevens, J., dissenting).

[146] *Id.* at 1157 (Stevens, J., dissenting) (citing *id.* at 1142). Justice Stevens criticized the majority's analysis, which would validate a waiver once it is established that " 'a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to secure a conviction.' " *Id.* (quoting *id.* at 1142).

ling that presumption.[147] Accordingly, Justice Stevens favored invalidation of any waiver obtained from a suspect after an officer failed to convey information concerning an attorney's communication.[148]

Justice Stevens criticized the way in which the majority balanced society's interests against an individual's constitutional rights.[149] The dissent also recognized the temptation for society to overlook constitutional safeguards when it appears that a suspect is guilty of a crime.[150] Relying on landmark Supreme Court precedent, Justice Stevens stressed that society's interest in obtaining confessions has repeatedly been held subordinate to *Miranda's* goal of reducing the coerciveness present in custodial interrogations.[151] Justice Stevens, therefore, restated the principle that "ours is an accusatorial, not inquisitorial, system"[152] and concluded that the fear that a suspect will exercise his rights is insufficient to justify repression of those rights.[153]

Addressing the majority's concern of maintaining the clarity of the *Miranda* rules, the dissent pointed out that the states have experienced little difficulty in applying a police disclosure rule.[154] Justice Stevens characterized the majority's concern as one-sided and explained that the *Miranda* rules are designed primarily to provide direction not to the police, but to a suspect who is enticed to waive his rights.[155]

With regard to Burbine's fourteenth amendment due process claim, Justice Stevens advocated an analysis less stringent than the traditional "shock the conscience" test espoused by the majority.[156] Believing that due process requires "fairness, integ-

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147 *Id.* at 1157 n.32 (Stevens, J., dissenting) (citing *Brewer*, 430 U.S. at 404 and *Miranda*, 384 U.S. at 475).

148 *Id.* at 1158 (Stevens, J., dissenting). Justice Stevens supported his position by referring to *Miranda*, which invalidated waivers obtained in the absence of the required warnings. *Id.* at 1157-58 (Stevens, J., dissenting).

149 *See id.* at 1160 (Stevens, J., dissenting).

150 *Id.*

151 *Id.* at 1160-62 (Stevens, J., dissenting) (citing Dunaway v. New York, 442 U.S. 200 (1979); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964)). Justice Stevens noted that in cases in which an individual's liberty was jeopardized by incommunicado interrogation, the Supreme Court has employed special procedures to limit the coercive effects of the interrogation and thus protect the individual's liberty. *See id.* at 1162 (Stevens, J., dissenting).

152 *Id.* at 1161 (Stevens, J., dissenting).

153 *Id.*

154 *See id.* at 1162 (Stevens, J., dissenting).

155 *Id.*

156 *See id.* at 1165 (Stevens, J., dissenting).

rity, and honor in the operation of the criminal justice system,"[157] Justice Stevens concluded that the police officers' conduct in the case at bar was demonstrative of exactly the conduct prohibited by the fourteenth amendment.[158]

In conclusion, Justice Stevens stated that this case required a determination of an attorney's true role in our society.[159] Justice Stevens opined that if society views the attorney as an obstacle to the apprehension of criminals, only then would the majority's decision make sense.[160] If society views the attorney as an interpreter and protector of constitutional rights, however, Justice Stevens posited that the majority opinion would be anomalous.[161]

Although Justice O'Connor's use of Supreme Court precedent is convincing, the majority seems to reach its decision much too easily. The *Burbine* Court was satisfied that a waiver is voluntary once it is determined that the waiver was not coerced, the defendant knew he could remain silent and have counsel present, and was aware that his statements could be used against him at trial.[162] This narrow interpretation of the *Miranda* protections violates the very underpinnings upon which that decision is based. The *Miranda* Court recognized that a suspect's fifth amendment rights are paramount to society's interest in obtaining convictions and thus established procedural safeguards to protect the suspect's interests.[163] These safeguards, however, were never intended to act to the exclusion of other constitutional protections available to those suspected of criminal conduct.[164] The spirit of *Miranda* demands that every reasonable precaution be exercised to avoid the surrender of a statement under circumstances that are inherently compelling.[165]

By narrowly construing the language of *Miranda*, the *Burbine* majority ignored the fact that the police wrongfully denied

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157 *Id.*

158 *Id.* at 1165-66 (Stevens, J., dissenting).

159 *Id.* at 1166 (Stevens, J., dissenting).

160 *Id.*

161 *Id.*

162 *Id.* at 1142.

163 *See Miranda*, 384 U.S. at 467. *See also supra* notes 87-93 and accompanying text.

164 *Miranda*, 384 U.S. at 467. The *Miranda* Court stated that "[o]ur decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform. Nor is it intended to have this effect." *Id.*

165 *Id.* The *Miranda* Court also "encourag[ed] Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." *Id.*

Burbine information required for a knowledgeable waiver. Despite *Miranda's* clear admonishment that any evidence of police trickery would be fatal to the voluntariness of a suspect's waiver,[166] the *Burbine* majority has acknowledged that unethical police conduct will be tolerated. To deny a suspect the opportunity to consult with an attorney prior to making a statement contravenes the multitude of Supreme Court decisions that have disdained society's use of compelled confessions.[167] The majority's holding is also problematic in that it ignores both the criminal justice guidelines established by the American Bar Association and the holdings of a majority of state courts that have decided similar cases.[168] As Justice Stevens queried in his *Burbine* dissent, "one would expect at least some indication why in the majority's view, so many state courts have been so profoundly wrong on this precise issue."[169]

Whether state courts will follow the United States Supreme Court's lead in *Burbine* is questionable. The California Supreme Court recently refused to adopt the *Burbine* holding in *People v. Houston*.[170] Upon facts similar to those in *Burbine*,[171] the *Houston*

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166 *Id.* at 476. *See also supra* note 144 and accompanying text.

167 *Burbine*, 106 S. Ct. at 1150 (Stevens, J., dissenting). In support of this proposition, Justice Stevens cited a lengthy list of Supreme Court decisions reflecting the Court's distrust of the validity of statements obtained through incommunicado questioning. *Id.* at 1150 n.9 (Stevens, J., dissenting). *See, e.g.*, Tague v. Louisiana, 444 U.S. 469, 470 (1980) (heavy burden on state in demonstrating valid waiver of rights during incommunicado interrogation); Beckwith v. United States, 425 U.S. 341, 346 (1976) (police dominated atmosphere requires special safeguards during incommunicado interrogation); Darwin v. Connecticut, 391 U.S. 346, 349 (1968) (confession deemed involuntary after lengthy incommunicado interrogation).

168 *Burbine*, 106 S.Ct. at 1150 (Stevens, J., dissenting). *See supra* note 140 and accompanying text. The majority disregarded the holdings of the state courts by merely stating that "our interpretive duties go well beyond deferring to the numerical preponderance of lower court decisions or to the subconstitutional recommendations of even so esteemed a body as the American Bar Association." *Burbine*, 106 S. Ct. at 1144. Professors LaFave and Israel have stated that a suspect clearly cannot "knowingly and intelligently" waive his right to counsel if the police have not informed him that a lawyer, even if retained by a third party, has attempted to contact him. W. LAFAVE & J. ISRAEL, *supra* note 52, at 309.

169 *Burbine*, 106 S. Ct. at 1159 (Stevens, J., dissenting).

170 42 Cal. 3d 595, 610, 724 P.2d 1166, 1174, 230 Cal. Rptr. 141, 149 (1986).

171 In *Houston*, the defendants were arrested and charged with drug related offenses. *Id.* at 600-01, 724 P.2d at 1168, 230 Cal. Rptr. at 143. Two friends contacted an attorney who agreed to represent the defendants. *Id.* at 601, 724 P.2d at 1168, 230 Cal. Rptr. at 143. The attorney telephoned the police station and requested that nothing further occur until he arrived. *Id.* When he arrived at the station 20 minutes later, police informed the attorney that the defendants were being questioned and that he could not see them. *Id.* The defendants were never informed of the attorney's attempts to intervene. *Id.*

court came to the opposite conclusion.[172] Characterizing the *Burbine* decision as a restrictive interpretation of the federal Constitution, the *Houston* court stated that California provides its citizens more extensive individual rights.[173]

While the *Burbine* majority conceded that more egregious forms of police deception might violate a suspect's right to due process,[174] the Court left unanswered the question of just how much police deception will be tolerated. The effect of the majority's holding therefore remains unclear. It is uncertain whether police departments that have previously regarded deception of a suspect or attorney as improper will perceive this decision as allowing more latitude in police interrogation procedures. Accordingly, courts reviewing future cases will be left with little guidance in determining when the police have crossed the line of propriety. The *Burbine* decision evidences the Court's insensitivity to the fundamental protections guaranteed a suspect through the *Miranda* decision. This insensitivity represents a significant regression to the period when society's thirst for the conviction and punishment of criminals overshadowed the desire to ensure justice and fair treatment for all accused.

Alan W. Clark

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172 *Id.* at 610, 724 P.2d at 1174, 230 Cal. Rptr. at 149. The California Supreme Court held that "whether or not a suspect in custody has previously waived his rights to silence and counsel, the police may not deny him the opportunity, before questioning begins or resumes, to meet with his retained or appointed counsel who has taken diligent steps to come to his aid." *Id.*

173 *Id.* at 609, 724 P.2d at 1174, 230 Cal. Rptr. at 149. The court required the state to show, beyond a reasonable doubt, that the defendant's confession was obtained before the attorney arrived at the station house. *Id.* at 614, 724 P.2d at 1177, 230 Cal. Rptr. at 152. The state was unable to meet this burden. *Id.*

174 *Burbine*, 106 S. Ct. at 1147.