The Reformer

The Magazine of the MSLAW Community

Summer 2010

The Reformer

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Features

The Reformer is published by the Massachusetts School of Law for students, alumni, and the legal community.

Submissions are welcome and encouraged. Please send an electronic version of your submission to holly@mslaw.edu or rudnick@mslaw.edu.

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Message from the Alumni Bar Association

Dear Members of the MSLAW Community,

Thank you once again for all of your continued updates to the alumni office. We love to hear of your success, new ventures, and personal accomplishments. If you have any news you would like to share with your fellow MSLAW graduates—even if it's as mundane as what kind of practice you have—please forward a note to Professor Rudnick at rudnick@mslaw.edu.

Please join the Alumni Office and the MSLAW golf committee in participating in the Fourth Annual Massachusetts School of Law Alumni Golf Tournament. The proceeds of this tournament will benefit The Shadow Fund. The Shadow Fund is a non-profit organization established in 2007 by Associate Dean Coyne and Assistant Dean Sullivan. The purpose of The Shadow Fund is to provide financial assistance to destitute pet owners who cannot afford treatment for life threatening injuries to and diseases of their cherished pets.

The tournament will be held on Monday, October 11, 2010 at Stow Acres Country Club in Stow, MA. If you would like to play or sponsor a tee sign, please contact the Alumni Office at mhebert@mslaw.edu .

Next year's Law Day Dinner will be held on Saturday, May 7th, 2011. Please mark your calendars now! Watch your e-mail for details.

Very truly yours,

Michelle M. Hebert, Esq.
Director of Alumni Relations
978-681-0800 ext 62
mhebert@mslaw.edu

SBA News

Dear MSLAW Students, Faculty, Administration, and Alumni:

The Student Bar Association (SBA) is very excited about this new school year. We have already started planning events and are eager to welcome the incoming students. The board would love to hear from anyone who is interested in the SBA or has any suggestions to help make this year unforgettable.

Last year was very successful in that we held a variety of events on and off campus to bring the MSLAW community together. As we have done in past years, we are planning to have monthly speakers at MSLAWwho will address the students, faculty, and alumni on subjects of concern and interest to the MSLAW community.

Last Christmas, the SBA raised money to buy presents and host a Christmas party at the law school for children residing in a local caregiving facility and school. It was a great success and we look forward to continuing that tradition this winter.

The Law Day Dinner Dance was also a great success. Our keynote speaker was the Honorable Deborah A. Capuano ('93), who was confirmed as Associate Justice of the Worcester Juvenile Court on July 8, 2009. It was great to see alumni, students, faculty, and staff come together to celebrate our achievements. We are working hard to make this year's Law Day event just as fun and memorable. This year's Law Day event will be held May 7, 2011, and we look forward to seeing all of you there.

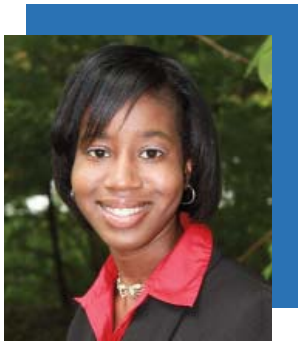
New this year is a recycling program set up to make our law school more eco-friendly. Recycling saves energy and reduces the need for land filling and incineration. This will be an opportunity for our school to help maintain the environment for future generations and ourselves. Look for information throughout the building.

We are very motivated for the year ahead of us—the SBA is made up of a group of determined students, and we have complete faith that we will once again have an amazing year. We hope that alumni will continue to participate in the events this year. If anyone would like to get involved or has any suggestions, please contact the SBA at sba@mslaw.edu.

Sincerely,

Chantelle Hashem & Donovan Boyle
Co-Presidents, Student Bar Association

BLSA News



Greetings MSLAW Family:

As always, the Black Law Students' Association (BLSA) is on the move, continuing to effect change needed within our community and world. For those not yet acquainted with BLSA, it is an organization formed to articulate and promote the needs and goals of black law students and effect change in the legal community. This organization is here to Lead, Educate, and Serve its community, while embracing its legacy of empowerment; it is open to all. Each year, members of BLSA compete in the National Thurgood Marshall Mock Trial Competition, a competition to develop future lawyers with strong courtroom skills as they prepare for various components of a trial. A hearty congratulations is extended to all participants of the 2010 Thurgood Marshall Mock Trial Team, especially our National Finalists!

As the new school year approaches, BLSA is looking to continue traditional events, implement new initiatives, and encourage the MSLAW community to get involved. This year, we plan to work closely with the Academic Support Office in supporting first-year students through our 1L Survival Program. BLSA will also team up with Open Arms Foundation International of Cambridge, a non-profit organization which provides relief to the most vulnerable, underserved, and underprivileged Haitians, Americans, and others across the world. We will be kicking off the fall semester with a "Back to School and Medicine Drive for Haiti." Open Arms and BLSA members will be traveling to Haiti in September to distribute supplies. Other events this fall include the Annual Black & White Soiree Social, involvement in an adult and youth literacy program with the City of Lawrence, a car wash fundraiser, and the First Annual Adopt-A-Family Program for Thanksgiving. BLSA will also introduce Project IMPACT, a new initiative that assists in implementing community programs geared to solving problems within the black community.

In the spring, BLSA looks forward to hosting "High School Drop-Ins," a day in which local high school students interested in becoming future lawyers or members of the legal profession visit MSLAW, shadow students, ask professors questions, and get a feel for what law school is really about. Additionally, we will celebrate MLK Day of Service and Black History Month, have a Valentine's Day Bake Sale and Alumni BBQ, and participate in Mock Trial and Relay for Life, among other activities.

This is a most ambitious calendar, and we will need the involvement of the entire MSLAW community to succeed. On behalf of the Black Law Students' Association, I extend many thanks to the MSLAW community for its gracious support, welcome first-year and returning students, and invite alumni to remain involved. If interested in participating, please contact me at felicea.robinson@gmail.com, Vice-President Morjieta Dorisier at morjietad@yahoo, Professor Rudnick at rudnick@mslaw.edu or Dan Harayda at harayda@mslaw.edu. Upcoming events can be found on www.facebook.com/MSL-BLSA. Once again, thank you for your continued support.

Sincerely,
Felicea Robinson,
Black Law Students' Association President, 2010-2011

An Administrator, a Prosecutor, and a Talk Show Host

Three MSLAW alumni use their skills in a variety of ways, behind and in front of the bench and in front of the camera

Tina LaFranchi, Esq.

Dean Coyne says of Tina LaFranchi ('00): "There are few alumni who have done more for MSLAW's image over the last few years than Tina." As a former law clerk to Chief Justice Phillip Rapoza of the Appeals Court, and current Administrative Attorney for that court, Tina has been instrumental in securing Chief Justice Rapoza as our commencement speaker, encouraging qualified MSLAW students in their quests for internships in the Superior and Appeals Courts, scheduling sessions of the Appeals Court at MSLAW, where our students watched oral arguments and had an opportunity to talk to the justices about what they had just seen, and other things too numerous to mention.

As the Administrative Attorney, Tina compares her main duties to those generally assumed by in-house counsel for private companies. She is also responsible for "oversight of our statewide public outreach program (bringing the court to various law schools, college campuses, and courthouses around the Commonwealth to hear oral arguments); web site maintenance; and editing the court's internal newsletter. I also serve as the contact person for the SJC Public Information Office, fielding media requests and preparing press releases as needed."

Before assuming her current position in November 2007, Tina served as a law clerk to Justice Rapoza, both when he was an Associate Justice and after he was named Chief Justice. She says that her landing a position in the Appeals Court was largely fortuitous. (Tina is too modest to say her intelligence had something to do with it!) "In September 2000, I began a judicial clerkship at the Superior Court. I applied for and was accepted for a second year; however, during that clerkship budgetary issues resulted in furloughs and other cost-cutting measures short of lay offs," she noted. "Superior Court administrators strongly encouraged us to seek positions elsewhere before the end of our contracts. I was hired by then Associate Justice Phillip Rapoza, whose law clerk of three years was relocating to the West Coast. During his sabbatical leave that took him to East Timor in 2003 and 2004 to serve on a war crimes tribunal, I stayed on as a 'floater,' which allowed me to work for and get to know a number of other justices on the court. I continued with him after he became Chief Justice in 2006."

Tina had not envisioned herself in a legal administrative role, but she was looking for a change from clerking after seven years. Jokingly, she says, "I suppose my life experiences managing a household with three boys and volunteering in various non-profits gave me the skills and confidence I needed to take on more of an administrative role here [in the Appeals Court] when the opportunity arose."

The most rewarding part of Tina's current job is the Court's Community Outreach Program. "Last year alone, we had close to 900 high school students come to observe our sittings in several counties. Coordinating a meaningful program for them with the justices, local bar members, teachers, and professors at law schools where we sit has been very gratifying. Historically, the courts have not been very good at communicating to the public about what we do. It's not surprising that pub-

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lic trust is at an all time low. I'm so glad that MSLAW has become an important partner in this program and look forward to arranging for another sitting there in November."

Tina considers herself fortunate to have had clerking experiences in both the Superior and Appeals Courts. She still misses the challenges of clerking in a trial court, where the pace is fast and there are new issues to research every day. But, clerking in the Appeals Court had its positive aspects. "I was especially happy to work for just one judge and to have the luxury of time to research and reflect, at least that's the way it seemed compared to the trial court. I am fortunate to have worked with judges and staff on both courts who work hard to deliver justice in a timely manner without sacrificing quality. It's a really tough balance to strike, especially with dwindling resources."

Tina says she might have gone to law school right after college if she had understood the vast array of things lawyers do. Thinking they were all litigators, and being afraid of speaking in public, she followed a totally different path, getting married, having children, managing a household, and becoming active in community non-profit and political activities. Then, at age 40, she decided to ease her way into the law. She obtained a paralegal certificate, and, six years later, entered MSLAW. Tina chose MSLAW for a variety of reasons. She had three children, two still at home in Andover, a husband who traveled for work, and a job as a paralegal. She didn't know how she would balance her family obligations, a job, and law school. Someone suggested she go to an open house at MSLAW. Although she was initially disappointed she could not just take a couple of courses here and there, her husband encouraged her to jump in and "go for it." And the reasonable tuition would not be an inordinate drain on the family's resources. "Four years later, I was 50 years old and starting a new career while my friends were contemplating the joys of early retirement."

The decision to attend MSLAW "was the right one for me. Its rigorous writing and research classes as well as the opportunities for internships were just what I needed to succeed professionally. MSLAW certainly helped me discover a love of the legal field and the niche that suited me best." She likes to think she kept a low profile while at MSLAW, and that, when chosen to be a student speaker at graduation because of her extraordinarily high GPA (she graduated *magna cum laude*), many of her classmates looked at each other and said, "Tina who?" But it was her academic success that qualified her for a position in the Superior Court as part of Professor Rudnick's Judicial Internship program that paved the way for a career she has loved.

Tina's children are all grown now. Her husband changed jobs and became a consultant to start up green energy companies, and they moved from Andover to Winthrop. She is looking forward to becoming a grandmother someday, and to retirement and travel with her husband Larry when the time is right. ■

George Papachristos, Esq.

George Papachristos ('04) has been an Assistant District Attorney in the Norfolk District Attorney's Office since 2005. Actually, he started there while still at MSLAW, as an intern in 2004. He has worked his way from an ADA in the Stoughton District Court, Brookline District Court, and Dedham District Court, to supervisor of the Dedham and Brookline District Courts, to his current assignment in the major felonies unit of the Superior Court. George's present responsibilities include being Deputy Chief of the Motor Vehicle Homicide Unit. In that capacity, George oversees investigations

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of accidents resulting in death from the ground up. He is frequently called to go to the scene of the accident, work with local and state police investigating whether criminal charges should be brought, and if so, taking the case himself, or supervising the matter through prosecution to judgment. He estimates that he has responded to more than 20 fatalities, resulting in more than 10 cases in which criminal charges were brought. He has handled several high-profile cases, including a triple fatal accident in which the driver was also charged with OUI.

George has distinguished himself not only as a prosecutor in that office, but also as a trainer. In 2006, he led a training seminar for new police officers finishing the police academy by conducting a mock OUI trial, and then a two-hour open question-and-answer session. In 2007, George prepared two training videos used by his office for new ADAs, on how to try both an OUI prosecution and a school zone drug distribution case.

He is especially proud of the cases in which he has represented the Commonwealth in the Appeals Court and SJC.

George cites one of Dean Coyne's criminal procedure classes as the moment when he decided to become an ADA. He was particularly taken by the presentation of a criminal defense attorney. He realized during the class that he identified not with the lawyer defending the accused, but with the prosecutor and the police officers putting their lives on the line to keep gun-carrying drug dealers off the street. He took the lawyer's cynical "suggestion" (one seriously supported and encouraged by Dean Coyne) to become a DA. And, as George says, "I have not looked back."

The job is a difficult one, George says. Money is not a motivating factor. Dealing with victims and their families is troubling. It may sound trite, but the most rewarding part of the job is "getting some sort of justice for them, or for the loved ones of deceased victims when dealing with my homicide cases. Knowing that someone is fighting for them makes my job worthwhile, even very well knowing that no matter what I do, it won't fill the void they are experiencing from losing their loved ones. Just hearing that 'thank you for caring,' although making me sad, reinforces my belief that my dedication to this job is making a difference."

George adds: "I take very seriously the responsibility that comes with being in charge of a particular case. Whenever I have authority to influence what charges are brought or what sentence is recommended on a plea or after trial, I try very hard to take into account that the accused is a human being too, that there are frequently explanations or mitigating factors that influence a person's conduct, and I exercise discretion to give someone who deserves it a second chance at becoming a productive member of society."

George has wanted to be a lawyer since his junior year in college. "I decided to take some law-related courses after prompting from both my cousin and resident advisor, and I found my niche. My grades improved dramatically. I liked the idea of being involved in the very basis of a functioning society. You can't escape the fact that the law influences our everyday lives. What better way to shape my future by expanding my knowledge in that area?" He learned about MSLAW from a pamphlet he received in the mail, while considering other law schools. "I liked very much what MSLAW had to say, including its 'totality of circumstances' approach to ascertaining an individual's capacity to undertake the practice of law, rather than merely considering numeric qualifications, such as the LSAT. In fact, after taking my LSATs, a law professor from another law school told me I should choose another profession, as he didn't think I would be able to pass the Massachusetts Bar Exam. I was appalled, and even more driven to become a lawyer. That's one thing I never heard from MSLAW. It did not base its criterion on one exam or test." So he enrolled at MSLAW. At the end of orientation, he was hooked. He credits his MSLAW education with giving him a good foundation for the practice of law, stressing how important the practical side of MSLAW's curriculum was for him, learning how the "legal world outside the four corners of a law school really works. I don't believe I could have received that type of education anywhere else. When I started to practice, I was way ahead of my colleagues who had attended other law schools." George also is quick to mention that the Comparison Course was of particular value in helping him pass the bar on the first attempt.

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George is so enthusiastic about his MSLAW education, that he recently recommended that a colleague from the DA's office attend MSLAW, too, and his co-worker should be entering this fall.

George recommends a career as a lawyer to anyone who is "prepared to work long hours, get little to no sleep, and get yelled at a lot in the first couple of years while you are still learning your way around. If you are ready to do that, and find that in order to do what you love, you have to face those things, then it is worth it. I think for the most part, doing what you love may be more important than what you make. I know it is a cliché, but it is true. Many of my friends make a lot more money than I do but are not happy, and half our time is spent with questions about new things that I went through at work."

Whatever the future holds for George, he plans on staying on the prosecution side of the system. He recently applied for and was accepted into the Judge Advocate General (JAG) program but turned it down, hoping for a position with the DEA, FBI, or in a US Attorney's office. Whatever spare time he has is spent becoming more fluent in his native Greek and working out to stay in shape. George is single and lives in Boston's South End. ■

Mara Dolan, Esq.

Mara Dolan ('03) is balancing a career as a lawyer, talk show host, political activist and mother of a 20-year-old. Since graduation from MSLAW, Mara has had her own solo practice emphasizing criminal and civil litigation, including probate and family law. Mara has wanted to be a lawyer for so long, she cannot remember what actually triggered her desire to pursue law as a profession. She went to social work school, had a career as a social worker following college, and has always been "deeply committed to doing what I can to make society and government work better. The best part of the job [being a lawyer] is when I know that I have made a difference for the better in the lives of my clients, and how they understand that it is the United States Constitution that gave them the right to the lawyer who helped them make their lives better," she said.

Clearly, getting involved in politics suits Mara's goals and personality well. In 2008, she was elected a member of the Massachusetts State Democratic Committee and recently became chair of the Concord (Mass.) Democratic Committee. The Massachusetts Democratic State and Concord Town Committees work to educate voters about democratic candidates for office.

This year, she began hosting a talk show on local Concord cable TV, entitled *Right Here, Right Now*, currently shown in Boston, Cambridge, Somerville, Lawrence, Methuen, North Andover, North Reading, Chelmsford, Concord, Sudbury, Bedford, and Carlisle; Lowell will soon be added. Among her recent guests are U.S. Rep. Niki Tsongas, Massachusetts Republican State Committee Chair Jennifer Nassour, former DNC Chair Steve Grossman, political consultant Michael Goldman, Suffolk University pollster David Paleologos, libertarian economist Jeffrey Miron, and Conscious Capitalism co-founder Timothy Henry. The show is aired at various times on various stations. Mara looks for guests who are "intelligent and doing interesting work related to making government, business, and non-profits work better."

Mara decided to come to MSLAW because of its location, flexible class schedule, and small class size. "I was raising my daughter at the time, who was 10 when I started law school," she explained. "I needed a program that would still let me be the kind of mother I wanted to be. I brought her to school with me a few times, and I was able to be home much more than I would have been at

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other programs. Single mothers have a perspective that is critical, and so it's vitally important that law schools provide programs that make it possible for them to get through."

Once Mara came to MSLAW, she found not only was it a hospitable situation for single mothers, but "there are truly gifted professors at MSLAW, and the quality of instruction was extraordinary," she noted. "In addition, the small class size made it possible to participate. I'm the kind of student who needs to participate in order to learn. I would have been miserable sitting in a huge classroom just taking notes."

Mara strongly believes that her MSLAW education prepared her well for the practice of law. "MSLAW gave me a very realistic view of what it's like to practice law," she remarked. "When I was an intern, I was shocked at what other students' [from different law schools] perspectives were. One 2L didn't know what the Massachusetts Reporters were! Another said that at her law school, the students were told in advance when they would be called on in class. At MSLAW I had to be prepared absolutely every single day, and that's what a real law practice is like. It was a great law school for me. I had extraordinary professors, small classes, and a friendly environment where I felt supported. I wasn't just a number. I also believe very strongly in the mission of the school."

Although Mara loves being a lawyer, she recognizes that being good at it still requires a lot of hard work, even after seven years. As to any advice she has for those considering going to law school and becoming a lawyer, she says: "I still think what I thought while I was at MSLAW: getting through is tremendously hard work, but if you have a passion for it, it's worth it. If you don't, you won't make it through. The law is not for the weak of heart. Knowing the law gives you an extraordinary power, and it is not to be taken lightly. If you want to make money, go to business school. But if you love our system of government, and want to be a part of making it work better, then go to law school."

Mara and her daughter, who is a junior in college, still live in Concord. In her free time, she enjoys reading, keeping up on current events, spending time with friends and family, doing yoga, and riding her bike. ■

MSLAW Alum Seeks Help for Vets

When he is not running his own practice doing estate planning, elder law, mediation, collaborative law and divorce, and veterans benefits, Dan Tremblay ('06) volunteers at Veterans, Inc. in Worcester once a week, to help homeless veterans in need of legal services. As a disabled veteran himself, Dan learned through an acquaintance about the program, which at the time provided everything but legal services. So he offered his help, which was so greatly needed that he alone cannot keep up with the demand. He enlisted the help of local bar groups and Volunteers for Justice, but he still needs attorneys, especially in the areas of criminal law and taxation. "I triage the need of the veteran and try to find a resource to help," he explained. "I have gotten some attorneys to take cases, but the need is greater than my small network. So I am appealing to MSLAW alumni who would be willing to take a case once in awhile—or even just answer questions over the phone."

Veterans, Inc. provides services to New England veterans and their families. Supporting veterans with job training and employment, transportation, and health and wellness services, it has one of the highest rates in the nation (at 85%) for transitioning veterans out of homelessness. The organization has helped more than 40,000 veterans and hopes to expand beyond New England.

"The vets in the area are seeing that they are getting real help and someone who cares, whom they can trust," said Dan. "But the program is growing, and I cannot do everything they need myself."

If you are interested in being included on an e-mail list of attorneys willing to help, please contact Dan at dantrematlaw@lawyer.com, or call 978-779-2236. ■

Bob Carp ('09) is the dean of the newly renamed California Midland (formerly Aristotle) School of Law. It is both an online school and has a small classroom center in San Diego. Bob purchased it recently and already sees a growth in enrollment. In the meantime, he is handling two high-profile class actions involving suits against Apple (for defective design of its iPhone, that allows signals to drop if you hold it a particular way) and Google (for intercepting and retaining wifi data while taking photos for its "street view" software) . . . **Stan Helinski** ('99) is in private practice, handling primarily litigation matters, is on the board of the Massachusetts Association of Trial Attorneys, and serves on many committees of its national affiliate, the American Association of Justice . . . **Joe Finn** ('03) has a private practice in Lynn . . . **Todd Prevett** ('99) is still practicing law with his father Peter ('91) in Amherst, NH . . . **David Haynes** ('06) has opened an office in Andover but is still flying big jets for American Airlines . . . **Paul Anthony** ('97) does civil and criminal litigation and real estate law in Stoneham. His daughter, Shealyn, who was born in '94, is now a junior at Austin Prep, where his daughter, Mairi will also be enrolled. Paul also has a son, Aiden . . . **Dave Chenelle** ('95) practices bankruptcy and business law at D'Amico and Chenelle in Worcester . . . **Carol Eliadi** ('00) was named Dean of the School of Nursing and Chief Nursing Officer at Massachusetts College of Pharmacy and Health Sciences . . . **Adam** (formerly Aime) **Cook** ('03) is now an attorney with the Human Rights Defense Center in Brattleboro (VT), which does prisoners' rights law. Adam was previously an attorney with the Sisti Law Offices in NH . . . **Jason Ebacher** ('05) and his wife, Genny, had a second child, another boy, in April . . . **Coleen Hayes Holding** ('00) had a third child in June, Grant, to join his two big sisters . . . **Chris Wojtowicz** ('02) opened a family law mediation firm in Worcester . . . .**Brian St. Onge** ('03) was sworn in as Clerk-Magistrate for the Palmer District Court. He has been acting Clerk-Magistrate in the Uxbridge District Court and First Assistant Clerk-Magistrate of the East Brookfield District Court . . . **Nicole Reilly** ('04) currently is practicing primarily criminal defense law from her office in Salisbury (MA), though she appears in courts throughout Essex County . . . **Ian Ryan** ('09) has opened an office in South Dennis, upstairs from **Carmel Gilberti** ('95). His practice emphasizes immigration and family law. He is also serving as a volunteer mediator and doing extensive pro bono work. He recently appeared in a production of the Cape Repertory Theater in Brewster . . . **Trista Cone Worthley** ('95) was the 2009 recipient of the Pro Bono Attorney of the Year by Neighborhood Legal Services in Lynn, recognizing her commitment to various organizations, particularly advising low income individuals who have issues in Bankruptcy and Probate and Family Courts. Trista's office is in Salem, MA . . . **Laura Bryll** ('09) is working for the Connecticut judiciary as a mediator and a negotiator in family court. She deals with all kinds of family law issues, including domestic violence cases, and acts as a guardian ad litem.

Bronwyn Ford ('07) met President Obama in Nashua (NH) when he was in town to speak about healthcare reform. Ford currently battles cancer and sought help from her Congressman with her disability claim.

In Memoriam

Dale Jenkins ('97), former Massachusetts Undersecretary of Public Safety, passed away in May . . . **Bob Battles** ('95), a lawyer in Exeter, NH, and husband of MSLAW alum, **Kerry Battles** ('95), died in March. ■

Case Note: Supreme Court Holds That NFL is Subject to Sherman Act

What Does the American Needle Decision Mean for Professional Sports' Antitrust Immunity?

By Holly Vietzke, Esq.

American Needle, Inc. v. NFL, 560 U.S. ___, 130 S. Ct. 2201 (2010).

Antitrust lawsuits pertaining to sports are not uncommon, and most of the time, the sports league or organization prevails, thanks to the "single entity" status or exemptions carved out of the Sherman Act.[1] That's why, when the U.S. Supreme Court granted *certiorari* to hear *American Needle, Inc. v. NFL*,[2] it sent a few waves through the sports law world: could this small (by today's "supersize" standards), family-owned hat manufacturer really take down the giant NFL? The case was deemed the "most important case in sports history"[3] and quite possibly "the most significant legal turning point in the history of American sports."[4] And in a unanimous decision that surprised relatively few, David did, in fact, put a dent in Goliath's thick antitrust armor, holding that the NFL's licensing activities are subject to the Sherman Act and must be decided under a "rule of reason" analysis.[5] Because the Court, however, stopped short of deciding the legality of the licensing activities at issue, the question remains whether this dent will have any significant impact—either on the consumer or on professional sports.

Background

Prior to 2001, the petitioner, American Needle, held one of several license agreements granted by

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[1] *See Wood v. NBA*, 809 F.2d 954 (2d Cir. 1986)(salary cap and player draft provisions do not violate § 1 of the Sherman Act); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996)(NFL's maximum salary for practice squad players is protected by nonstatutory labor exemption); *Flood v. Kuhn*, 407 U.S. 258 (1972)(MLB's reserve clause is not subject to antitrust laws); *St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851 (8th Cir. 1998)(plaintiff could not prove that any conspiratorial act contributed to its inability to attract a team to St. Louis); *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989)(nonstatutory labor exemption applies even when parties have reached an impasse in collective bargaining agreement negotiations); *Seattle Totems Hockey Club, Inc. v. NHL*, 783 F.2d 1347 (9th Cir. 1986)(defendant's refusal to allow plaintiff to join league did not injure competition); *Fraser v. MLS*, 97 F. Supp. 2d 130 (D. Mass. 2000)(defendant is a single entity incapable of violating § 1 of the Sherman Act); and *Minnesota Twins Partnership v. State*, 592 N.W.2d 847 (Minn. 1999)(franchise sale and relocation is an integral part of the business of baseball and thus exempt from antitrust laws). *But see Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356 (9th Cir. 1986)(defendant is not a single entity but a group of individual competitors) and *USFL v. NFL*, 842 F. 2d 1335 (2d Cir. 1988)(defendant violated § 2 of the Sherman Act in monopolizing professional football market).

[2] 557 U.S. ___, 129 S. Ct. 2859 (2009).

[3] Michael McCann, *Why American Needle-NFL is most important case in sports history*, http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/12/american-needlev.nfl/index.html (last updated Jan. 12, 2010).

[4] Lester Munson, *Antitrust case could be Armageddon*, http://sports.espn.go.com/espn/columns/story?columnist=munson_lester&id=4336261 (last updated July 17, 2009).

[5] 560 U.S. ___ , 130 S. Ct. 2201, 2216.

NFL Properties ("NFLP"), a joint venture created by the individual NFL teams in 1963 for the purpose of controlling the NFL's and the teams' intellectual property.[6] In 2000, however, the teams voted to grant a 10-year exclusive license to Reebok, thereby ending its agreement with the petitioner.[7] American Needle sued the NFL in district court for violations of Sections 1 and 2 of the Sherman Act.[8] The Northern District of Illinois granted summary judgment for the NFL on the basis that the NFL teams are a single entity[9] and are therefore not multiple entities conspiring together in violation of antitrust laws. On appeal, the Seventh Circuit affirmed, holding that for the licensing of intellectual property, the NFL is a single source of ecomonic power and immune from Section 1 review.[10]

While the lower courts relied on the holding of *Copperweld Corp. v. Independence Tube Corp.* (agreements between a parent company and its wholly owned subsidiary do not violate the Sherman Act because they have "complete unity of interest"),[11] the Supreme Court decided that a more analogous case is *United States v. Sealy, Inc.*, which held that a licensing agreement between individual mattress manufacturers and Sealy, Inc. violated Section 1 because the manufacturers were competitors.[12] Just as the *Sealy* Court found that Sealy, Inc. was not a single entity but an "instrumentality of the individual manufacturers,"[13] the *American Needle* Court held that NFLP is likewise "'an instrumentality' of the teams."[14] In reaching this conclusion, the Court had to necessarily find that the indvidual NFL teams are competitors, not only on the field, but also for the purpose of marketing their team logos and merchandise. This issue prompted some discussion during oral arguments when Justice Breyer remarked that he didn't know"a Red Sox fan who would take a Yankees sweatshirt if you gave it away."[15] But the Court ultimately held that "[a]lthough NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."[16] The Court emphasized that the teams are separately owned and controlled and noted that NFL team decisions "to license their separately owned trademarks collectively and to only one vendor are decisions that 'depriv[e] the marketplace of independent centers of decisionmaking,' and therefore of actual or potential competition."[17] It also rejected the respondent's argument that in forming NFLP, the NFL created a single outlet for all of its marketing actitivities and has operated this way since 1963. "An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label," the Court ruled.[18]

Economic Implications

Although the Court reversed the Seventh Circuit's decision by finding that NFLP decisions pertaining to the teams' "separately owned intellectual property constitute concerted action,"[19] it stopped short of holding that the concerted action was a Sherman Act violation, instead remanding that question back to the lower courts to decide using a Rule of Reason analysis.[20] This analysis is appropriate when the concerted action may be justifiable to maintain a competitive balance.[21] But the Court did note that absent the teams' agreement with NFLP to market their individual intellectual property, "there would be nothing to prevent each of the teams from making its own market deci-

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[6] M. Scott LeBlanc, *American Needle, Inc. v. NFL: Professional Sports Leagues and "Single-Entity" Antitrust Exemption*, 5 Duke J. Const. Law & PP Sidebar 148, 149-50 (2010).

[7] *Id.* at 150.

[8] *American Needle vs. New Orleans Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007).

[9] *Id.* at 943.

[10] *American Needle*, 130 S. Ct. at 2207.

[11] 467 U.S. 752, 771 (1984).

[12] 388 U.S. 350, 355 (1967).

[13] *American Needle,* 130 S. Ct. at, 2210, quoting *Sealy*, 388 U.S. at 356.

[14] *Id.* at 2215.

[15] Oral argument transcript at 16, *American Needle, Inc. v. NFL*, 130 S. Ct. 2201 (No. 06-881).

[16] *American Needle,* 130 S. Ct. at 2213.

[17] *Id.* at 2214, quoting *NCAA v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 109 (1984).

[18] *Id.* at 2209.

[19] *Id.* at 2215.

[20] *Id.* at 2217.

[21] *Id.*

sions relating to purchases of apparel and headwear . . .."[22]

If the lower court finds that the exclusive license is an unreasonable restraint of trade, the teams would, in theory, be free to grant their own licenses for the promotion of their intellectual property. According to Vermont Law School Sports Law Professor Michael McCann, that result would likely benefit the consumer, "not only with lower prices but with different styles consistent with the different companies enjoying the license."[23] But the critical question is what is the relevant market. Is the market for New England Patriots merchandise as opposed to New York Jets, or are the Patriots competing with Red Sox and Celtics licensed apparel? "I imagine the league would argue that prices won't drop since the relevant market should be seen not as NFL licensed apparel but all sports apparel, meaning the market impact of multiple companies instead of one company enjoying an NFL license may not be significant," McCann added.[24]

But the likelihood of American Needle ultimately prevailing on the merits is questionable. Over the last decade, more than 99 percent of Rule of Reason analyses have been decided for the defendants.[25] Further, the NFL could argue that a leaguewide licensing scheme actually helps the consumer, because it reduces transaction costs.[26] McCann believes that even if the NFL loses, it will still be able to "exert significant control" over the individual licensees' "design, production, and distribution" of the merchandise.[27] "I think the League is stronger as a business entity than it was during the '90s, so that would help it ensure product quality," he added.[28]

Another potential economic effect on the consumer as a result of this decision is less often mentioned but of arguably greater importance. Had the Supreme Court found that the NFL, for purposes of licensing, was a single entity immune from Section 1 violations, the banks that govern the joint venture activities of Visa and MasterCard might also enjoy that immunity, to the detriment of the hundreds of thousands of merchants who pay an interchange fee for the ability to accept Visa and MasterCard at their establishments.[29] These fees are not insignificant. Reports estimate that merchants pay "tens of billions of dollars annually to Visa and MasterCard issuing banks," and these costs in many cases are as high as one's rent and payroll expenses.[30] It stands to reason that these costs are ultimately passed on to the consumers, as the anti-competitive nature of the banks' agreements with Visa and MasterCard prevents the merchants from encouraging cardholders to use "lower-cost forms of payment."[31] Instead, this decision likely means that any horizontal agreement between the banks issuing the credit cards would also be subject to a Rule of Reason analysis, in which the harm to competition and effects on the consumer will be heavily considered.

Impact on Other Professional Sports

The *American Needle* decision could very well extend to the NBA and NHL as well. In rejecting the NFL's single-entity argument, the Court repeatedly noted that each of the NFL teams is independently owned and managed,[32] and the same is true of the NBA and NHL. While the Southern District of New York refused to rule on the single-entity status of the NHL,[33] the NBA currently has case law in its favor (albeit from the same Seventh Circuit), with a 1996 decision holding that much like General Motors is one firm, with different, distinguishable products such as a

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[22] *Id.* at 2215.

[23] E-mail from Michael McCann, Professor of Law, Vermont L. Sch., to Holly Vietzke, Dir. Writing & Legal Reasoning, Mass. Sch. of L., *American Needle thoughts on ecomonic impact* (June 7, 2010, 12:12 p.m. EST (on file with author)).

[24] *Id.*

[25] Marc Edelman, *Ruling may have impact in other areas of sports business*, 13:7 Sports Bus. J. 20 (May 31, 2010).

[26] *Id.*

[27] McCann, *supra* note 23.

[28] *Id.*

[29] Brief of Amici Curiae, *American Needle Inc. v. NFL, et al*, 130 S. Ct. 2201 (2010).

[30] *Id.* at 4.

[31] *Id.*

[32] *American Needle,* 130 S. Ct. at 2205.

[33] *Madison Square Garden, L.P. v. NHL*, WL4547518 (Oct. 10, 2008).

Corvette and a Chevy, the NBA too is "one product from a single source."[34] Considering that that decision also dealt with licensing (although it was broadcast licenses rather than intellectual property), it is unlikely that the single-entity holding would prevail today in light of the *American Needle* Court's ruling. Professional soccer also currently enjoys a single-entity status that could fall, since it was tenuous to begin with (the First Circuit held that even if the district court erred in its single-entity ruling, the error was harmless in light of the jury verdict regarding the plaintiffs' failure to prove relevant market).[35] Major League Baseball will remain unaffected because of its unique antitrust exemption carved out by Congress.[36]

The Court's rejection of the single-entity defense is important to the players in all the major sports because it maintains their leverage in collective bargainging matters. Had the Court upheld the NFL's single-entity status, the players would not be able to sue for antitrust violations if the league unilaterally changed terms of the collective bargaining agreement after it expires at the end of the upcoming season.[37] Now, however, the unions have the ability to decertify if the league imposes any adverse restrictions upon the players.

Conclusion

While the *American Needle* decision is not in and of itself ground-breaking, to rule otherwise would have given the NFL (and other sports leagues) an inordinate amount of power, both against the consumer and against the players. And although Reebok's exclusive license could still be found not to violate the Sherman Act, courts will now analyze these and other agreements under the Rule of Reason, instead of just categorically dismissing such claims as protected under the single-entity umbrella. The lower court may also strike down the Reebok agreement and leave the licensing decisions up to each of the 32 teams, who may still all contract with Reebok anyway, leaving the prices charged to consumers the same. But the decision does leave the NFL and other leagues vulnerable to certain antitrust challenges and removes its all-encompassing single-entity shield that it used to hide behind. ■

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[34] *Chicago Professional Sports Ltd. Partnership v. NBA*, 95 F.3d 593, 599 (7th Cir. 1996).

[35] *Fraser v. MLS, LLC*, 284 F.3d 47 (1st Cir. 2002).

[36] 15 U.S.C. § 27(a) (2002).

37 Michael McCann, What the Supreme Court's antitrust ruling means to the NFL, SI.com, http://www.si.com (May 24, 2010).

The Future of *Miranda*

By Peter W. Agnes, Jr.[1]

Miranda has exerted a civilizing effect on police behavior and in so doing has professionalized the interrogation process in America . . . [T]he Miranda decision has transformed the culture – the shared norms, values, and attitudes – of police detecting in America by fundamentally reframing how police talk about and think about the process of custodial interrogation . . . In the world of modern policing, Miranda constitutes the moral and legal standard by which interrogators are judged and evaluated . . . Indeed, virtually all police officers and detectives today have known no other law than Miranda.[2]

I. Introduction

In *Miranda v. Arizona*,[3] the Supreme Court charted a new course in American criminal procedure. "*Miranda*, for the first time, expressly declared that the Self-Incrimination Clause[4] was applicable to state interrogations at a police station,[5] and that a defendant's statements might be excluded at trial despite their voluntary character under traditional Principles."[6] By declaring that custodial interrogation[7] was compulsion, *Miranda* established a uniform, national rule that "a statement made during a custodial interrogation may be introduced as proof of a defendant's guilt only if the prosecution demonstrates that the defendant knowingly and intelligently waived his constitutional rights before making the statement."[8]

Miranda was controversial from the moment

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[2] Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. Crim. L. & Criminology 621, 670-71 (1996), quoted in Yale Kamisar, *On the Fortieth Anniversary of the Case: Why We Needed It, How We Got It – And What happened To It?*, 5 Ohio St. J. Crim. L. 163, 195 (2007) [hereinafter Kamisar].

[3] *Miranda v. Arizona*, 384 U.S. 366, 467-68 (1966). "The privilege against self-incrimination, under both Federal and State law, protects only against the compelled production of communications or testimony by the government. *See Bellin v. Kelley*, 48 Mass. App. Ct. 573, 581 n.13 (2000), and cases cited." Mass. G. Evid. § 511(a)(2), note at 129 (2010 ed.). "[E]vidence is testimonial or communicative in nature when it reveals the subjective knowledge or thought processes of the subject." *Commonwealth v. Brennan*, 386 Mass. 772, 777 (1982). The protections afforded by the Fifth Amendment and article 12 of the Massachusetts Declaration of Rights, in turn, apply only where a witness is the source of real or physical evidence. *See Schmerber v. California,* 384 U.S. 757, 765 (1966); *Commonwealth v. Martin*, 444 Mass. 213, 220 (2005).

[4] "[N]or shall [any person] be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

[5] The Fifth Amendment applies to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

[6] *Michigan v. Tucker*, 417 U.S. 433, 443 (1974).

[7] *Miranda* 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. The Court also explained that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." *Id.* at 477-78.

[8] *New York v. Quarles*, 467 U.S. 649, 683 (1984)

the decision was announced. The law enforcement community believed it would cripple their efforts to successfully investigate and prosecute crime.[9] There were calls for the impeachment of *Miranda*'s author, Chief Justice Earl Warren.[10] In 1968, Congress passed legislation, 18 U.S.C. § 3501, designed to repeal *Miranda*.[11] Since *Miranda*, there has been a vigorous debate in legal circles, including among the Justices of the Supreme Court, over its legitimacy.[12] By the mid-'80s, however, an equilibrium had been reached: *Miranda* had become a stable ingredient of American criminal procedure.[13] Despite a number of Supreme Court decisions since 1966 that have recognized exceptions to or limited the reach of the *Miranda* doctrine,[14] until this term, much of the core of the *Miranda* doctrine remained intact. In most instances, before the government was allowed to offer evidence during its case-in-chief at trial of statements made during custodial interrogation, it was required to prove that the defendant was not only aware of her Fifth Amendment rights, but that she had knowingly and intelligently waived those rights. However, with its decision in *Berghuis v. Thompkins*,[15] the Roberts Court has blurred this vital distinction between awareness of one's rights and a waiver of one's rights, and significantly diminished the capacity of the *Miranda* doctrine, at the federal level, to safeguard the Privilege Against Self-Incrimination.

(Marshall, J., dissenting). The Supreme Judicial Court has not adopted *Miranda* as a matter of state law, but has observed that the *Miranda* doctrine protects state constitutional rights. *See Commonwealth v. Smith*, 412 Mass. 823, 836 (1992). *See also Commonwealth v. Haas,* 373 Mass. 545, 554 (1977)(characterizing unwarned custodial interrogation as "illegal").

9 *See* Gary L. Stuart, MIRANDA: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT 101-04 (2004) [hereinafter Stuart]; Liva Baker, MIRANDA: CRIME, LAW AND POLITICS 200-201 (1983).

10 *See, e.g.*, Archibold Cox, *Chief Justice Earl Warren*, 83 Harv. L. Rev. 1, 4-5 (1969); Alden Whitman, *Earl Warren, 83, Who Led High Court In Time of Vast Social Change, Is Dead*, N.Y. Times, July 10, 1974.

11 *See* Stuart, *supra* note 9, at 109-110, 112-113. This legislation was struck down as unconstitutional by the Supreme Court in *Dickerson v. United States*, 530 U.S. 428 (2000).

12 For example, in *New York v. Quarles,* then Justice Rehnquist, writing for the majority, observed that "[t]he prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" 467 U.S. 649, 654 (1984) (quoting *Michigan v. Tucker,* 417 U.S. 433, 444 (1974)). Sixteen years later, in *Dickerson v. United States,* 530 U.S. 428, 437-40 (2000), Chief Justice Rehnquist, again writing for the majority, stated without qualification that *Miranda* was a decision based on the Constitution and that it established constitutional rights. *But see id*. at 450 (Scalia, J., dissenting) ("[A]ny conclusion that a violation of the *Miranda* rules necessarily amounts to a violation of the privilege against compelled self-incrimination 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. But that is unnecessary, since the Court has (thankfully) long since abandoned the notion that failure to comply with *Miranda*'s rules is itself a violation of the Constitution."). Even after *Dickerson*, the debate continues. *See, e.g., United States v. Patane*, 542 U.S. 630, 639 (2004) (plurality opinion of Thomas, J.) (describing *Miranda* warnings as prophylactic rules that "necessarily sweep beyond the actual protections of the Self-incrimination Clause"). *See also* Edwin A. Meese, III, *A Republic, If you Can Keep It,* 10 Chapman L. Rev. 539, 542 (2007) (Former Attorney General Meese who has been one of *Miranda*'s most vocal and forceful critics writes that "the original *Miranda* decision was based on policy grounds rather than constitutional grounds.").

The Supreme Judicial Court's view is that "[a]lthough no precise form of words is constitutionally required, the substance of the *Miranda* warnings is of constitutional dimension." *Commonwealth v. Simon*, 456 Mass. 280, 287 (2010). However, the SJC has also observed that custodial interrogation without *Miranda* warnings is improper police conduct. *See Commonwealth v. Smith*, 412 Mass. 823, 833 (1992).

13 "[W]e think that [*Miranda*] as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights . . . ." *Moran v. Burbine*, 475 U.S. 412, 424 (1986) (O'Connor, J.). "It is now widely accepted that Justice O'Connor (and the other five justices for whom she spoke) was quite right." Kamisar, *supra* note 2, at 195.

14 *See generally* Kamisar, *supra* note 2. Many of these cases are discussed in the text and in footnotes of this article.

15 _ U.S. _, 130 S. Ct. 2250 (2010).

II. The Origins of *Miranda*

Miranda was a response to several factors. There were shortcomings in the "totality of the circumstances" test used by courts to evaluate the voluntariness of confessions. "As a theoretical matter, the law was clear. In practice, however, the courts found it exceedingly difficult to determine whether a given confession had been coerced. Difficulties of proof and subtleties of interrogation technique made it impossible in most cases for the judiciary to decide with confidence whether the defendant had voluntarily confessed his guilt or whether his testimony had been unconstitutionally compelled. Courts around the country were spending countless hours reviewing the facts of individual custodial interrogations."[16] The Warren Court also was prescient in recognizing the capacity of modern, psychological methods of police interrogation to break an individual's resistance and to persuade the individual to confess.[17] In addition, the Court faced mounting criticism over its decision two years earlier in *Escobedo v. Illinois*,[18] which, like *Miranda,* sought to ensure that a person could exercise his right to remain silent during custodial interrogation. The right in *Escobedo* was grounded in the Sixth Amendment right to counsel,[19] but imprecise about when that right would attach.[20] Finally, and most controversially, a majority of the Warren Court was persuaded that our Nation's reliance on confessions

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[16] *New York v. Quarles*, 467 U.S. 649, 683 (1984) (Marshall, J. dissenting). *See Miranda*, 384 U.S. at 457 ("[A]n interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."). *See generally* Kamisar, *supra* note 2, at 168 ("In the thirty years preceding *Miranda*, two-thirds of all the state confession cases the Supreme Court chose to review were death penalty cases. Even then, only one condemned person out of four had his case reviewed by the highest court in the land and only one out of eight obtained a reversal. How many non-capital defendants whose involuntary confession claims failed below were likely to survive the winnowing process above? Virtually none.").

The "voluntariness" test remains a separate and distinct requirement from *Miranda* for the admission of confessions. *See Commonwealth v. Hensley,* 454 Mass. 721, 730 (2009). For example, in *Commonwealth v. Hilton*, 443 Mass. 597 (2005), the Supreme Judicial Court held that a defendant's mental illness supported the judge's finding that there was not a waiver of *Miranda*, but noted that the defendant's statements were voluntary under the traditional Due Process test. *Accord, Mincey v. Arizona,* 437 U.S. 385, 401 (1978) (statements made after a valid waiver of *Miranda* by a defendant who was weakened by pain and shock were not voluntary and were properly suppressed). Although in Massachusetts, the "totality of the circumstances" approach is used to assess both compliance with *Miranda* and voluntariness, *see Hensley*, 454 Mass. at 730, when both issues are raised by the defendant the trial judge must consider each question independently make findings of fact and rulings of law on both questions. *See Commonwealth v. Melkebeke,* 48 Mass. App. Ct. 364, 366 (1999).

Any problem with the voluntariness test is due in large measure to uncertainty over what it means to say that a statement is voluntary. "The notion of 'voluntariness' is itself an amphibian." *Columbe v. Connecticut*, 367 U.S. 568, 604-05 (1961). The definitional problem is complex because "[h]istorically, the requirement that admissible confessions be 'voluntary' reflected a variety of values; these included deterring coercion, assuring reliability of confessions, and protecting the suspect's free choice whether to confess." *United States v. Byram*, 145 F.3d 405, 407 (1st Cir. 1998). The current federal test is based exclusively on whether there was any coercion by the police. *See Colorado v. Connelly*, 479 U.S. 157, 164-65, 167 n.6 (1986). The Massachusetts test for voluntariness, on the other hand, includes consideration of any evidence of coercion by the police or by private parties, *see Commonwealth v. Mahnke*, 368 Mass. 662 (1975), and requires courts to assess the defendant's capacity to make a free and rational choice independent of any evidence of coercion. *See, e.g., Commonwealth v. Hooks*, 375 Mass. 284, 289 (1978).

[17] *See Miranda*, 384 U.S. at 448-50. *See also* Charles D. Weisselberg, *Mourning Miranda*, 96 Cal. L. Rev. 1519, 1537-38 (2008) ("[I]nterrogation, we now know, is a carefully designed, guilt-presumptive process. It works by increasing suspects' anxiety, instilling a feeling of hopelessness, and distorting suspects' perceptions of their choices by leading them to believe that they will benefit by making a statement.") [hereinafter "*Mourning Miranda*").

[18] 378 U.S. 478 (1964).

[19] *See Johnson v. New Jersey*, 384 U.S. 719, 729 (1966).

[20] *See* Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 117 (1998) [hereinafter "*Saving Miranda*"].

threatened the integrity of our accusatorial system of criminal prosecution.[21]

In *Miranda*, the majority acknowledged that in none of the four cases that were before the Court was it clear that the resulting confessions would have been suppressed as involuntary under the traditional Due Process test. Nonetheless, the Court reasoned that the atmosphere of custodial interrogation itself

> carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial interrogation, no statement obtained from the defendant can truly be the product of his free choice.[22]

Having equated custodial interrogation with compulsion for purposes of the Fifth Amendment privilege, the challenge faced by the Court in *Miranda* was to establish procedures that would insure that a person held in police custody, isolated from family, friends and familiar surroundings, and subjected to modern, psychologically-based interrogation techniques would not feel any greater degree of compulsion to speak than a person called before a court. As Chief Justice Warren observed for the majority, the Fifth Amendment privilege is fulfilled only when an individual is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."[23]

III. The *Miranda* Doctrine

The *Miranda* doctrine requires that a person in

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[21] *See Escobedo v. Illinois,* 378 U.S. 478, 488-89 (1964) ("We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.'"). *See also Malloy v. Hogan*, 378 U.S. 1, 7 (1964); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). *But see Dickerson v. United States*, 530 U.S. 428, 450 (2000) (Scalia, J. dissenting) ("The Constitution is not, unlike the *Miranda* majority, offended by a criminal's commendable qualm of conscience or fortunate fit of stupidity."). In *In re Gault*, 387 U.S. 1, 44 (1987), the Court observed that there was a distrust of confessions at common law based on " judicial experience" that they often proved to be unreliable.

Professor Weisselberg has observed that in *Miranda*, the Court "described the privilege against self-incrimination as 'founded on a complex of values.' Justice Goldberg cataloged some of these values in *Murphy v. Waterfront Commission*, including the following: 'our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play . . .; our respect for the inviolability of the human personality . . .; [and] our distrust of self-deprecatory statements.' In a later decision, the Court underscored the notion that the Fifth Amendment protects the right to autonomy, stating that the privilege against self-incrimination secures 'values reflecting the concern of our society for the right of each individual to be left alone.' The importance that our criminal justice system places upon these values only has increased in the decades since the Court decided *Miranda*. The original vision of *Miranda* provides the minimum level of protection necessary to preserve these still-vital values." (footnotes and citations omitted). *Saving Miranda*, *supra* note 20, at 140-141. The history of the Fifth Amendment, moreover, suggests that "[t]he privilege developed in opposition to systems of law enforcement that relied on self-incrimination for the prosecution of crime." *United States v. Gegas*, 120 F.3d 1419, 1456 (11th Cir. 1997)(en banc), *cert. denied*, 524 U.S. 951 (1998).

The *Miranda* Court did not outlaw the use of psychological interrogation methods or even outright deception by police interrogators. *Colorado v. Spring*, 479 U.S. 564, 576 (1987) (cited in *Commonwealth v. Raymond,* 424 Mass. 382, 392, 396 n.11 (1997)). American legal doctrine accommodates these techniques thereby avoiding the moral questions raised by any system which permits the use of confession evidence: "What value should we place on confession evidence and what means should we permit police to use to elicit and shape it? How appellate courts and lawmakers answer these two questions will ultimately determine how the legal system confronts the inherent contradictions of psychological interrogation in the adversary system." Richard A. Leo, *Police Interrogation and American Justice* 40 (2008) [*hereinafter "Police Interrogation"*].

[22] *Miranda*, 384 U.S. at 457.

[23] *Miranda*, 384 U.S. at 460 (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)). *See also Connecticut*

custody must be warned, prior to police interrogation: "[1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[24] The *Miranda* doctrine also requires that the police insure that an individual has the opportunity to assert these rights at any time prior to or during an interview, even after having previously waived his or her rights.[25] However, in *Miranda,* the Court explained that the police were free to question persons not in custody without the need for any warnings.[26]

The Supreme Court summarized its holding as follows:

> [W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures 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. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.[27]

IV. Waiver of Rights: the Linchpin of the *Miranda* Doctrine

In *Miranda*, the Court made it unmistakably clear that the duty of the police to administer the protective warnings before custodial interrogation is separate and distinct from their duty to obtain from the suspect a valid waiver of the privilege against self-incrimination. "The requirement of warnings *and* waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."[28] The Court also was unmistakably clear that the government shouldered a "heavy burden" to prove that the defendant made a valid waiver before custodial interrogation began, and that mere silence was inadequate to meet the burden. "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventu-

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v. Barrett, 479 U.S. 523, 528 (1987)(quoting *Miranda*, 384 U.S. at 469.)

[24] *Id*. at 479.

[25] *Id*. at 473, 474.

[26] *Id.* at 477-78. In fact, unless the police engage in custodial interrogation, they have no obligation to administer *Miranda* warnings at all. *See Commonwealth v. Becla*, 74 Mass. App. Ct. 142, 144 (2009), and cases cited.

[27] *Id*. at 478-79. The right to remain silent is protected by the Fifth Amendment. *Id.* at 467-68. The right to have an attorney present during custodial interrogation under *Miranda* is also based on the Fifth Amendment, not the Sixth Amendment. *See, e.g., McNeil v. Wisconsin,* 501 U.S. 171, 176 (1991). "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence . . . There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda*, 384 U.S. at 478.

[28] *Miranda*, 384 U.S. at 475. Elsewhere in the case, the Court stated that "[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Id.* at 444. Also, at another point in its decision, the Court explained that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequi-

ally obtained."[29] Important, the *Miranda* Court added that "where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated."[30]

The function of a waiver, therefore, is to insure that in the compelling, intimidating atmosphere of custodial interrogation, a person's decision to speak to the police is voluntary. *Miranda* rests on an interpretation of the Fifth Amendment that mere knowledge of one's rights, even access to legal advice about one's rights, is by itself not enough to overcome the compulsion that is inherent in custodial interrogation. Instead, *Miranda* requires that, in order for a statement made by a person in police custody to be voluntary, it must be the product of a knowing and intelligent waiver of the privilege. Moreover, the government bears a "heavy burden" to demonstrate a waiver, i.e., that the individual's decision to speak was the person's "unfettered choice."[31]

In order to appreciate the critical importance of the distinction between an individual's awareness of her Fifth Amendment privilege and her waiver of that privilege it is necessary to understand the distinction between a police interview and a police interrogation. According to the leading American instructional text on police interrogations, Fred E. Inbau et al., CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001), "[a]n interview . . . is a nonaccusatory information gathering exercise that may take place at the beginning of an investigation and in a variety of environments. The interview . . . should be 'free flowing and relatively unstructured' in order to allow the interviewer to collect unanticipated information and make a credibility determination by evaluating the suspect's behavioral responses. Along the way, the examiner should also 'establish a level of rapport and trust with the suspect that cannot be accomplished during an accusatory interrogation.'"[32] "By contrast, an interrogation takes place 'only when the investigator is reasonably certain of the suspect's guilt,' which certainty

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sites to the admissibility of any statement made by a defendant." *Id.* at 476. In his dissenting opinion, Justice Harlan also made it clear that the majority had imposed a dual obligation on the police both to administer warnings and to secure a waiver of rights. *Id.* at 516-17 (Harlan, J. dissenting).

[29] *Miranda*, 384 U.S. at 475.

[30] *Id.* at 475-76.

[31] In *Colorado v. Connelly*, the Court held that the government's "'heavy' burden" to prove a waiver of a person's *Miranda* rights equated to the preponderance of the evidence standard. 479 U.S. 157, 168 (1986). Under Massachusetts law, however, the Commonwealth must prove a person waived his *Miranda* rights by a standard of proof beyond a reasonable doubt. *See Commonwealth v. Vao Sok*, 435 Mass. 743, 751 (2002); Commonwealth v. Edwards, 420 Mass. 666, 669 (1995); *Commonwealth v. Day*, 387 Mass. 915, 921 (1983).

[32] Brian R. Gallini, *Police Science in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 Hastings L.J. 529, 537 (2010) (footnotes omitted) [*hereinafter,* "*Police Science*"]. The so-called Reid-Inbau technique or method of police interrogation, though still in widespread use as a result of the popularity of their book, see Fred E. Inbau et al., CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001), has been discredited. "The totality of the discussion of Inbau and Reid's lifelong work in polygraph and interrogation techniques should unequivocally demonstrate one thing: all of their 'scientific' and 'psychological' work is collectively based on nothing more than the mere observations—rather than experimental data—of two people who possessed only law degrees." *Id.*, at 566. "Like the polygraph or lie-detector technique, the Reid method of interrogation is designed to detect deception. And, like studies reflecting that the polygraph is about as accurate as flipping a coin, other studies reflect similar rates of accurate guilt or innocence assessments by interrogators trained in the Reid method. Yet, unlike the judiciary's unwillingness to admit polygraph evidence, judges routinely admit confessions taken pursuant to the Reid method, without inquiring into the basis for Reid and Inbau's claim that their methods introduced 'science' into the interrogation room." *Id.* at 573. "Amazingly, notwithstanding the absence of any material change in the Reid technique (and the absence of credentials from its authors), the modern Supreme Court has cited the Manual with approval at least twice. *See Missouri v. Seibert*, 542 U.S. 600, 610 n.2 (2004) ('It is not the case, of course, that law enforcement educators en masse are urging that *Miranda* be honored only in the breach.') (citing Inbau, Reid & Buckley, CRIMINAL INTERROGATION 3d ed., at 221); *Stansbury v. California*, 511 U.S. 318, 324 (1994) ('It is well settled, then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*.') (citing Inbau, Reid & Buckley, CRIMINAL INTERROGATION 3d ed.at 232, 236, 297-98). Those citations are indeed unfortunate; the website for John E. Reid and Associates cur-

may arise from 'the suspect's behavior during an interview.' The interrogation itself must occur in a controlled environment, during which the interrogator displays an air of unwavering confidence in the suspect's guilt . . .. The moment when a police officer elects to conclude an interview and commence an interrogation is critical. Given that interrogation is a 'guilt-presumptive process,' the investigators should make a determination during the Behavior Analysis Interview about the suspect's credibility before commencing a formal interrogation."[33]

The purpose of custodial interrogation "is therefore not to discern the truth, determine if the suspect committed the crime, or evaluate his or her denials. Rather, police are trained to interrogate only those suspects whose culpability they 'establish' on the basis of their initial investigation."[34] In view of the purpose of and the techniques employed by police during custodial interrogation, it is understandable why the *Miranda* Court was adamant about the difference between police compliance with the duty to inform a suspect of her rights and their duty to establish at the outset and throughout the interrogation that the suspect understood her rights and wished to speak. When a suspect speaks during a custodial interrogation, the expectation of the police is that, except for the possibility of having to tie up some loose ends, the case will be closed by an admission of guilt. On the other hand, there may be many reasons why a suspect speaks while in custody that have nothing at all to do with a confession of guilt.

V. *Berghuis v. Thompkins*[35]

A. The Presumption of Waiver Doctrine

In *Berghuis v. Thompkins*, the defendant was in police custody in Ohio when he was interviewed by two Michigan police officers about a murder he was suspected of committing in Michigan. The interview took place in a small room beginning at about 1:30 p.m. The defendant was asked to read to himself a written *Miranda* notice of rights form and to read aloud one section that stated he could assert his right to remain silent and request to speak to an attorney at any time. The defendant complied. One of the officers read the other four sections of the warning aloud as well. When asked to sign the form acknowledging he was aware of his rights, the defendant refused to sign it.

A police interrogation began which lasted for three hours. According to the Supreme Court's account:

> At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Thompkins was "[l]argely" silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard."
>
> About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away.[36]

The interrogation ended about 15 minutes later without Thompkins confessing or making any further admissions. At trial, the defendant was convicted of murder in the first degree and

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rently references the cites and boasts that the Supreme Court believes the *Reid technique* exemplifies 'proper training.'" *Police Science*, *supra*, at 563 n.278.

[33] *Police Science*, *supra* note 32, at 538 (footnotes omitted).

[34] Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo, & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law and Human Behavior 3, (2009)[*hereinafter "Police-Induced Confessions"*].

[35] *Berghuis v. Thompkins*, _ U.S. _, 130 S. Ct. 2250 (2010).

[36] *Id*. at 2257-57 (appendix citations omitted). In her dissenting opinion, Justice Sotomayor added that the interrogating police officer added significantly that it was a "very, very one-sided" interview, "nearly a monologue," and that the defendant was "peculiar," "sullen," and "generally quiet." *Id*. at 2267.

sentenced to life imprisonment without parole.

Putting aside the procedural issues raised by *Berghuis*, the case presents a straightforward question: having been properly advised of his *Miranda* rights while in police custody, did the government carry its burden of proving the defendant waived his rights? In *Miranda*, the Court considered only an express waiver of rights, i.e., a statement by the individual following the receipt of the warnings that she wishes to speak. However, in *North Carolina v. Butler*, the Court held that in the absence of an express waiver, the "actions and words of the person interrogated" may enable the government to meet its burden to prove a valid waiver.[37] In *Butler*, the defendant received his *Miranda* warnings, but refused to sign a written waiver form. The defendant stated, "I will talk to you but I am not signing any form." He did not request counsel, and there was no evidence that the police coerced him into answering their questions.[38] The Supreme Court held that an express waiver was not required, and the question of waiver would turn on the totality of the circumstances.[39]

In *Berghuis*, Justice Kennedy's majority opinion for five justices (Roberts, C.J., and Scalia, Thomas, and Alito, JJ.) passed over the waiver issue, and first addressed whether the defendant had asserted his right to remain silent. The majority reasoned that just as a defendant's ambiguous request for counsel during custodial interrogation will not be deemed an invocation of the right to counsel,[40] a person undergoing custodial interrogation must unambiguously assert the right to remain silent to trigger *Miranda*'s safeguards. "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression if they guess wrong. Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity."[41] The Court concluded that because the defendant did not use the magic words, that is, he neither said he wanted to remain silent nor end questioning, he did not assert his right to remain silent.[42]

The majority then addressed the issue of whether Thompkins had waived his right to self-incrimination. The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[43] The majority is certainly correct that *Butler* forecloses a reading of *Miranda* that a waiver of rights should not be found, or only rarely so, absent a written document or express formal statement. However, the majority stretches the *Butler* doctrine of implied waiver beyond recognition by holding that while the invocation of the right against self-incrimination must be express and explicit, a waiver of the right can be indistinct and implicit.[44]

In her dissenting opinion, Justice Sotomayor also recognized a distinction among invocation of the right to remain silent, the right against self incrimination, and the government's burden of proof establishing a knowing and intelligent waiver of rights. "The question whether a suspect has validly waived his right is 'entirely distinct' as a matter of law from whether he invoked that right."[45] This is the heart of the *Miranda* doctrine because it insures a proper allocation of the burden of proof. It may be the defendant's burden to assert his rights, but *Miranda* was unmistakably clear that it is the government's "heavy burden" to prove a valid waiver of rights. Moreover, the *Berghuis* dissenters pointed out that the doctrine of implied waiver is not as elastic as the majority assumed.

Together, Miranda and Butler establish that a

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[37] 441 U.S. 369, 372 (1979).

[38] *Id.* at 371-72.

[39] *Id.* at 372.

[40] *See Davis v. United States*, 512 U.S. 452, 459 (1994).

[41] *Berghuis*, 130 S. Ct. at 2260 (citations and quotations omitted).

[42] *Id.* at 2262-63.

[43] *Moran*, 475 U.S. at 421.

[44] *Berghuis*, 130 S. Ct. at 2264.

[45] *Id.* at 2268 (Sotomayor, J. dissenting) (quoting *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam)).

> court "must presume that a defendant did not waive his right[s]"; the prosecution bears a "heavy burden" in attempting to demonstrate waiver; the fact of a "lengthy interrogation" prior to obtaining statements is "strong evidence" against a finding of valid waiver; "mere silence" in response to questioning is "not enough"; and waiver may not be presumed "simply from the fact that a confession was in fact eventually obtained."[46]

Pointing out that both Michigan and the United States conceded that no waiver existed before the accused responded "Yes" to the leading question whether he was praying for forgiveness for committing the murder, Justice Sotomayor opined that the utterance of this single word could not reasonably support the long-standing "heavy burden" that had existed prior to this case. Therefore, she concluded that the majority's holding repudiates prior case law, and establishes a new standard for finding waiver of this right.[47]

To conclude, as the *Berghuis* majority does, that a person who refuses to sign a written waiver of rights form, who "largely remained silent" during three hours of police questioning which his interrogators describe as "nearly a monologue," and who makes a one word incriminatory response to a question appealing to his religious beliefs has impliedly waived his rights contravenes the standard established by the Court in *Miranda*, namely that "a valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained."[48] As Professor Charles Weisselberg has observed "[t]here can be no legitimate justification for a warning and waiver regime unless we administer warnings in a way that suspects understand, and unless we provide a meaningful opportunity for suspects to exercise free will in the stationhouse."[49]

Therefore, the only fair reading of *Berghuis* is that the Court has fundamentally altered the *Miranda* doctrine and the law of implied waiver by creating a presumption in favor of a waiver of rights based simply on evidence that a person in custody, who was advised of and understood his rights, answers at least one question put by the police.[50] "Requiring proof of a course of conduct beyond the inculpatory statements themselves is critical to ensuring that those statements are voluntary admissions and not the dubious product of an overborne will."[51] The presumed waiver doctrine engineered by the *Berghuis* majority threatens the central premise of *Miranda*—that statements made during custodial interrogation are compelled in violation of the Fifth Amendment.[52]

B. A Defendant Must Speak to Remain Silent

In *Berghuis*, the dissent also correctly, in my view, criticized the majority for holding that a person in police custody must affirmatively speak certain

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[46] *Id*. at 2269 (Sotomayor, J., dissenting) (quoting *Miranda*, 384 U.S. at 475-76 and *Butler,* 441 U.S. at 372-73).

[47] *Id*. at 2278.

[48] *Miranda*, 384 U.S. at 475.

[49] *Mourning Miranda*, *supra* note 17, at 1590.

[50] The majority opinion describes what I refer to as a presumption of waiver doctrine when it states that "[a]s a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Berghuis*, 130 S. Ct. at 2262. However, as Justice Sotomayor observed, "Michigan and the United States concede that no waiver occurred in this case until Thompkins responded 'yes' to the questions about God. I believe it is objectively unreasonable under our clearly established precedents to conclude the prosecution met its 'heavy burden' of proof on a record consisting of three one word answers, following 2 hours and 45 minutes of silence punctuated by a few largely nonverbal responses to unidentified questions." *Id*. at 2271 (references to record omitted). The majority hung its hat on language from *North Carolina v. Butler*, 441 U.S. 369, 373 (1979), that a *Miranda* waiver may be based on "'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'" *Id.* at 2261. Yet, as Justice Sotomayor rejoined, "the evidence of implied waiver in *Butler* was worlds apart from the evidence in this case, because Butler unequivocally said 'I will talk to you' after having been read *Miranda* warnings. Thompkins, of course, made no such statement." *Id.* at 2272 (Sotomayor, J., dissenting).

[51] *Berghuis*, 130 S. Ct. at 2273 (Sotomayor, J., dissenting).

[52] "At best, the Court today creates an unworkable and conflicting set of presumptions that will undermine *Miranda*'s goal of providing 'concrete constitutional guidelines for law enforcement agencies and courts to follow,' 384 U.S. at 442. At worst, it over-

words in order to assert his right to remain silent. The defendant argued that his refusal to answer police questions for nearly three hours was an invocation of his right to remain silent. His position would likely have been correct under *Miranda* and *Michigan v. Mosley*.[53] In *Mosley*, the Court cited with approval language in *Miranda* 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."[54] "The admissibility of statements made by the defendant thereafter depends on whether the police scrupulously observed the defendant's rights."[55] In attempting to reconcile the frequently contrary positions that law enforcement and the accused occupy in the course of criminal investigations, the majority in *Berghuis* has exalted the value of a confession over the long-standing constitutionally protected right of a suspect not to incriminate herself. Thus, the majority opinion complicates, confuses, and confounds this aspect of the *Miranda* doctrine by imposing a new burden on the defendant to unambiguously assert that he wishes to remain silent.[56]

Moreover, the majority's holding rests on a false symmetry between the assertion of the right to remain silent and the right to counsel. A person who is advised of his *Miranda* warnings has no reason to believe anything other than silence itself is required to assert the right against self-incrimination.[57] On the other hand, *Miranda* warnings are phrased in terms that suggest to the person in police custody that if she wants the advice of counsel she must ask for it. As the *Berghuis* dissent noted, an ambiguous reference to the right to remain silent can easily be addressed by the police during the interrogation. "It is hardly an unreasonable burden for police to ask a suspect, for instance, 'Do you want to talk to us?' The majority in *Davis v. United States*, itself approved of this approach as protecting suspects' rights while 'minimiz[ing] the chance of a confession [later] being suppressed.'"[58] An even more fundamental reason why the clear statement rule was not appropriate in *Berghuis* is that in *Davis,* the defendant had waived his *Miranda* rights when the subject of an attorney came up. "The Court ignores this aspect of *Davis*, as well as the decisions of numerous federal and state courts declining to apply a clear-statement rule when a suspect has not previously given an express waiver of rights."[59]

VI. The Future of *Miranda*

A. Federal Law

There is no hyperbole in the observation by the dissenters in *Berghuis v. Thompkins* that "[t]oday's decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, oxymoronically, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so."[60] It is fair to say that, at the federal level, *Berghuis* and other recent

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rules sub silentio an essential aspect of the protections *Miranda* has long provided for the constitutional guarantee against self-incrimination." *Berghuis*, 130 S. Ct. at 2271-72 (2010) (Sotomayor, J., dissenting).

[53] 423 U.S. 96 (1975).

[54] *Miranda*, 384 U.S. at 473-474 (quoted in *Mosley*, 423 U.S. at 101 (emphasis added)).

[55] *Mosley*, 423 U.S. at 104.

[56] *Compare Davis v. United States*, 512 U.S. 452, 459 (1994) (holding that defendant must make a clear and unambiguous request for counsel in order to invoke the right to counsel during police interrogation).

[57] Indeed, the warning itself requires the police to engage in, as the majority in *Berghuis* confirms, a formalistic recitation. *Berghuis*, 130 S. Ct. at 2262. The warnings are more than familiar. "You have the right to remain silent . . . ." Nowhere in the approved warnings are the police required to say, "however, you must invoke this right by an affirmative and unequivocal assertion."

[58] *Berghuis*, 130 S. Ct. at 2276-77 (Sotomayor, J. dissenting) (quoting *Davis*, 512 U.S. at 461).

[59] *Id*. at 2275 (Sotomayor, J. dissenting) (footnote omitted). Moreover, in *Davis*, after the defendant said "[m]aybe I should talk to a lawyer,?" The police took the time to tell him that they would not violate his rights and would stop questioning if he wanted a lawyer. The defendant replied by twice indicating that he did not want a lawyer. *See Davis*, 512 U.S. at 455.

[60] *Berghuis*, 130 S. Ct. at 2278 (Sotomayor, J., dissenting).

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MSLAW Events

45 Runners Hit the Slick Pavement in Inaugural MSLAW Road Race

MSLAW entered the road racing scene in May with the inaugural (and aptly named) Race Judicata. Named after their "favorite" civil procedure topic, Race Judicata is the brainstorm of recent graduate Tom O'Donohue and 3L Jennifer Ward, who first came up with the idea one night two years ago after class. But they dropped it, until last summer, when Jennifer mentioned it again, and they agreed to pursue it. "We approached Dean Coyne, who was all for it, right from the outset," said Tom. Coyne also helped them with the 5K race route, as Tom's original idea encompassed crossing into Lawrence, which would have required securing permission from two towns, a process that took longer than expected. "We started the town approval process in November," Tom explained. "But we couldn't get permission until the Board of Selectmen had an opportunity to address our request at the end of January, so we actually finally got our approval in early February."

Jack O'Donohue (MSLAW '09), Denise Donovan (MSLAW '10), Barry and Linda Brodette, and Jennifer O'Donohue

"The planning was insane," noted Jennifer. "There are so many little details you don't think of: permission from the town, insurance, bibs, web and print advertising, and certifying the course." In addition to those tasks, Tom and Jennifer enlisted the help of many staff members before race day even arrived. "Mick [Coyne] designed the graphic on the T-shirt, and Rosa [Figueiredo] ordered the T-shirts," added Tom. "Laura [Lussier] and Jeannie [Landers] took all the registrations, Michelle [Hebert] sent the announcements out, and Kathy Villare helped with the posters and graphic designs." But the help didn't stop there. "The hardest part for me was having enough course volunteers," said Jennifer. "Thankfully, my family stepped up. I had my husband, in-laws, best friend, her son, and both of my sons volunteering. Shane Rodriguez (MSLAW '10) manned the grill, and Tom's wife and Elizabeth Trask yelled out course times. And of course, Kevin McQuade was an excellent emcee."

An avid runner, Tom has been running for

3L Dan Murphy, also an official Lexington Minuteman who plays the role of American Patriot Joseph Mason, not only fired the starting gun, he also jumped in the race after shedding his militia garb and musket

more years than Jennifer has been alive. Jennifer, on the other hand, took up the sport only three years ago, on the advice of her doctor. "My doctor told me I needed to exercise. I said that I didn't have the money for a gym. She said, 'Well, buy a pair of sneakers and start running.' I told her she was nuts and that I wasn't running unless whatever was chasing me was bigger than I thought I could take out," she reported. "I bought the sneakers. At my first attempt, I ran 25 feet and thought I was going to die. But I kept at it, I eventually got bitten by the running bug, and I love running now."

Although poor weather kept many would-be racers away (they fell 30 runners short of Tom's goal of 75), the event ran smoothly, and all participants had a great time. Awards were given out for overall and age-group winners, as well as for categories such as first faculty/staff, alumni, and student, the latter of which was won by none other than Tom himself, at age 61. "It's a bit crazy that I was the first student finisher," Tom added. "We have some good runners who were unable to be here. I look forward to competing with them next year in the alumni division."

Tom O'Donohue, Ursula Furi-Perry, and Kevin McQuade

Race Judicata winners Jim MacPhee (2nd place) and Thor Kirleis (1st place) and Jim's parents

Next year, Tom also hopes to increase the number of runners in order to raise enough money to give scholarships to local high school runners. "Even if it is just book money, it's essential to help kids get an education, and remaining focused on fitness is so important," he commented. "There are a lot of events for other great causes, but those events also get lots of support. So let's use Race Judicata to put an MSLAW brand on another way that lawyers

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and law students can make a difference for these kids not only from this town, but also the kids from Lawrence, Haverhill, and Methuen." Tom also has two other goals that he hopes to achieve next year: "I want to raise awareness of MSLAW, and I want there to be enough runners in my age group to have a legitimate age group competition." ■

Tom and Jennifer would like to acknowledge the following volunteers, who deserve a huge thanks for making the event possible:

- Associate Dean Coyne for supporting this plan wholeheartedly, standing in the rain to give Dan Murphy the firing instructions, then cheering on the runners at the finish line, and for endorsing an annual Race Judicata
- Mick Coyne for bringing Lady Justice to life on the race shirts
- Rosa Figueiredo for printing our shirts
- Michelle Hebert for all of the e-mail blasts and support at check-in on race day and finish line cheering. Thank you also to Taylor!
- Professor Wolfe for her photography and delivering drinks and cheers to the runners at the finish line
- Professor Malaguti for his work securing the permission of the Federal Street property owners
- Jeannie Landers and Laura Lussier for handling our walk-in and mail-in registration forms
- Kathy Villare for her race day photos and graphic design and poster production help
- Professor Sullivan for her work recruiting runners
- Kelly Ward for creating the signs; supplying the course markers, orange vests, and water jugs; directing the runners back onto Federal Street; and cleaning up the course
- Frank Ward for supplying orange vests and water, directing the runners at the intersections, and cleaning up the course
- Steven Roberts for supplying water and tables, directing runners, and cleaning up the course
- Judy Harris for supplying Reliv Energize drinks to the runners at the finish line

3L Kevin McQuade and first-place female Jennifer O'Donohue

- Nicholas Ward for delivering drinks to the runners at the finish line
- Sherri Clark, Alex Ward, and Tyler Clark for helping at the water station
- Karen O'Donohue and Elizabeth Trask for calling times at the mile marks
- Shane Rodriguez and his crew for supplying all the food and beverages and cooking it all
- Kevin McQuade for cleaning up the off-road trails before the race and serving as emcee at the awards ceremony
- Mercy Saigbah for her work recruiting volunteers, runners, and walkers
- Dan Murphy for clearing the Federal Street trail and giving the runners a revolutionary start!

The Winners

Male	**Thor Kirleis, 18:13**
Female	**Jennifer O'Donohue, 20:58**
Faculty/Staff	**Holly Vietzke, 24:21**
Alumni	**Jeff Maher, 19:44**
	Ursula Furi-Perry, 25:39
Student	**Tom O'Donohue, 24:24**
	Holly Lindgren, 30:22
Male 1-29	**Korey Wilson, 19:24**
Female 1-29	**Jennifer O'Donohue, 20:58**
Male 30 -39	**Jeff Maher, 19:44**
Female 30-39	**Holly Vietzke, 24:21**
Male 40-49	**Jim MacPhee, 18:44**
Female 40-49	**Linda Brodette, 22:15**

Law Day 2010

On May 8, 2010, faculty, staff, students and guests again gathered at the Wyndham Hotel in Andover to celebrate Law Day. As in years past, attendees were entertained by the wit of Professor Anthony Copani, who targeted both students and faculty alike with his humor. The guest speaker, and recipient of the Thurgood Marshall Award, was Hon. Deborah Capuano, Associate Justice of the Juvenile Court. Judge Capuano (MSLAW '93) is the first alumnus to be appointed to the bench, and she was quick to praise MSLAW, and what it contributed to her success, as well her family, including her husband, who joined her for dinner at the Dean's table.

Dean's Award winners Amy Dmitriadis and Clynnetta Neely

The SBA, who hosted the annual event, paid special tribute to MSLAW's trial advocacy teams and their faculty advisors. Among other awards given: Clynetta Neely and Amy Dmitriatis won the Dean's Award, Ed Becker, Katharine Dudich and Victoria Dickinson won awards for their work with MSLAW's writing program; and Ursula Furi-Perry was honored for her academic support program. Cathy Hall was awarded the Kleinman Prize, for her outstanding essay on professional ethics, and Shane Rodriguez, received the School Spirit Award for his extraordinary support of MSLAW as the Student Trustee, organizer of the Barristers, and Member of MSLAW's BLSA Trial Team. ■

Shalaigh Kennedy, Amy Dmitriadis, and Neil Judd

MSLAW Graduation an Internationa

MSLAW held its 21st graduation in June with an international flavor, as commencement speaker Chief Justice P speaker Aurora Terpollari lauded the graduates and discussed their own unique experiences. Rapoza, Chief Ju Appeals Court, is the grandson of Portuguese immigrants and Terpollari, who graduated *magna cum laude*, e years ago. Rapoza also served as chief international judge on the Special Panels for Serious Crimes and is curre International Penal and Penitentiary Foundation and on the Advisory Board of the International Expert Fra Criminal Procedure. "Like many of you, I am the first in my immediate family to go to college, the first to g today, I can say that I am the first to speak at a law school commencement ceremony," he told the graduates land of opportunity." Opthalmological surgeon Adam Beck. M.D., who also graduated *magna cum laude*, was a

Andrew Nickerson, Clynnetta Neely, and Edward Mota

Neil Judd and Amy Dimitriad

Joshua Burnett

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Arthur Langford and Marcus Scott

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Congratulations to the 21st Graduating Class

Daniel J. Abraham
Laura Kay Alley
Samantha Ambroise
Jo-Ann Andaloro
James Crawford Anderson
Amy Elizabeth Annis
Rachel Mary Antoniello
Sandra R. Austin
Pamela A. Baker
Richard Moulton Balano
Lisa A. Baratta
Adam P. Beck, M.D.
Karin O. Bischoff
Patricia Henry Bodenstab
Christine E. Boncore
Danilo J. Brack
Spencer James Breunig
Thomas P. Browne
Joshua Burnett
Richard J. Butts
Jennifer Cameron
Ida Rosaria Candreva
Kevin R. Carr, Jr.
Charlene Carroll
Andre Cayo
David Harris Colby
Christopher S. Cook
David J. Coppola
F. Reed Cutting, Jr.
Diana Dafa
Paola D'Alessandro
Craig M. DiBella
Leandro DiFilipo
Artemis Dimitriadis
Gary Dolan
Denise M. Donovan
Thomas Doherty Doyle
Lisa Michele Berry Driscoll
Rhonda L. Duddy
Edobor Sunday Egbe
Justin Chidi Egeolu
Sara Fannon
Diane R. Faucon
Jessica Marie Fernandes
Donald James Fournier
Paolo Franzese
Glenn Arthur Frederick
Joel Gagne
Gordon T. Gainty
Emily Ann Gauthier
Michael L. Gelormini
Lindsay Elena Girolamo

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Timothy J. Goulden
Joseph A. Gregory
Anne Grenier
William M. Griffin, Jr.
Alicia Lynn Hamblett
Sherri L. Hannan
Maura J. Harrington
William Lance Harrington, Jr.
Geoffrey Healy
Patrick Hoey
Michele M. Hoven
Richard David Howe
Kenny Antoine Howell
Leonard F. Inzitari
Kevin Andrew Jourdain
Neil Joseph Judd
Jennifer Kamorowski
David P. Karasic
John T. Katsirebas, Jr.
Peter A. Kelly
Anya L. Kennedy
Amir Khan
Kara Jean Kinnally
Achsa Kate Klug
Robert F. Knapp
Jonelle Kusminsky
Deborah Rose LaCamera
Sheila M. Lally
James F. Landergan
Arthur Langford III
Diana Laurent
Sharon A. Legall
Anthony James Low
Philip Madell
Lynn G. Mandella
Michael Mangano
Melinda J. Markvan
Shannon Lynn Martin
Alyssa McCarthy
Nicole Marie McKinnon
Sandra Diaz McNabb
Kevin James McQuade
Anthony Hunger Melia
Christopher Merwin
Jeffrey Allan Miller
Denise Molina
Amsi Morales
Toni Moreschi
Brett Andrew Morton
Alex Moskovsky
Edward Manuel Mota
Jill Murphy
Clynnetta Kimberly Patricia Neely
Debora T. Newman
Andrew Nickerson
Diane Lee Nolli
Thomas E. O'Donohue
Christian Okonkwo
Joseph M. Orlando, Jr.
Mark O. Ozimek
Justine D. Soriero Paul
Rinal Ramesh Patel
Steven Pellerin
Justin L. Peltier
Elizabeth Ioanna Pesirides
Brian T. Pupa
Patrick J. Rahilly
Jan Joseph Rajchel
Maria del Carmen Reyes
Gregory Paul Richardson
Nanci Roby
Shane Rodriguez
James Romano
Daniel E. Rosquete
Joseph Ruotolo
Caroline Lindstrom Ruscak
Gerald Russo
Andrew Francis Sabourin
Mercy Saigbah
Matthew Joseph Sanders
Michele Rose Sanna
Nelson Luz Santos
Marcus Lloyd Scott
Brina B. Sette
Sonya Shaffaval
Mark Joseph Silva
Gary S. Sinclair
Dana L. Skehan
Edward Smith
Juala Smythe
Lance Aaron Sobelman
Prinya Sommala
William Spellane
Tracy Steele
Craig Charles Stern
Susan Ann Stritter
Anthony J. Takis
Timothy J. Tanner
Aurora Terpollari
Daniel Terpollari
Gregory J. Turner
Irina Vaglica
Jeremy E.E. Wilkins
Julie Ann Williams
Anthony T. Winn
Marcin Zegunia

Craigh Stern, Tom O'Donohue, Kevin McQuade, and Dan Terpollari

It's Another Gracie for MSLAW

The third time is a charm—but so were the first and second—for MSLAW, which won its third consecutive Gracie Award. Professor Diane Sullivan and Media Director Kathryn Villare took top honors for their television show "The Girls Come Marching Home" in the category of Outstanding Talk Show. Created and presented by the Foundation of American Women in Radio & Television, Inc., which celebrates outstanding programs about women, produced by women, the Gracie Awards honor realistic portrayals of women in various media formats. Other 2010 winners included Barbara Walters, Amy Poehler, Andrea Mitchell, Glenn Close, Gayle King, and Jada Pinkett Smith. The show appeared on MSLAW's *Educational Forum*, seen on Comcast SportsNet and MyTV. Sullivan and Villare were honored in Los Angeles at a luncheon at the Beverly Hilton Hotel in May. ■

Professor Diane Sullivan and Media Director Kathy Villare collected their award at the Beverly Hilton Hotel in Los Angeles

MSLAW Awards Keep Piling Up

2010 is picking up right where 2009 left off, with MSLAW accumulating more hardware for its media efforts:

Accolade Awards

Books of Our Time: *Mr. Gatling's Terrible Marvel*
Books of Our Time: *The Cult of the Presidency**
MSLAW Educational Forum: *Longshot: The Adventures of a Deaf Fundamentalist Mormon Kid and His Journey to the NBA**

Communicator Awards

Books of Our Time: *The Girl I Left Behind: A Personal History of the 1960s**
Books of Our Time: *Lessons in Disaster: McGeorge Bundy and the Path to War in Vietnam**

Hermes Awards

Books of Our Time: *So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government**
Books of Our Time: *The Limits of Power: The End of American Exceptionalism**
MSLAW Educational Forum: *Longshot: The Adventures of a Deaf Fundamentalist Mormon Kid and His Journey to the NBA*
MSLAW Educational Forum: Minor League Baseball
Books of Our Time: *Too Good to Be True: The Rise and Fall of Bernie Madoff**
MSLAW Educational Forum: Pursuing a Dream*
MSLAW Educational Forum: Women in Government
MSLAW Educational Forum: *The Girls Come Marching Home: The Saga of Women Returning from the War in Iraq**

Telly Awards

Books of Our Time: *I.Q.: A Smart History of a Failed Idea*
MSLAW Educational Forum: *Longshot: The Adventures of a Deaf Fundamentalist Mormon Kid and His Journey to the NBA*
MSLAW Educational Forum: *The Girls Come Marching Home: The Saga of Women Returning from the War in Iraq*

*These programs, along with Books of Our Time: *The Price of Defiance: James Meredith and the Integration of Ole Miss* and MSLAW Educational Forum: Successful women in the Corporate and Business World, also won **Videographer Awards**.

MSLAW Says "We Care" to Haitian School

L'Ecole Notre Dame du Perpetual Secours, a school in Plaisance, Haiti, was virtually leveled as a result of the devastating earthquake that hit the island nation in January. The 400 students ranging from 5 to 16 years of age who attend the school are now meeting in tents in the courtyard as the rainy season has begun—far from a ideal educational environment.

Now, thanks to MSLAW, Notre Dame apparently has brighter days ahead. Our goal is to support the educational needs of these students by providing supplies and whatever else is needed to rebuild. So we are calling upon the MSLAW community to assist us in this worthy cause. Every cent of the money donated will go directly towards paper, pencils, and other classroom supplies, as well as everything necessary to repair the existing structures.

To kick off the fundraising effort, MSLAW held an event on May 8 called "MSL to Haiti: We Care." The event featured music, food, dance, and poetry, and included performances from law students Denison George, ŕLevits Desronvil, Teddy Linley, Jason Prokowiew, and Felicea Robinson, her brother Lamar Nokomis, Professor Carmen Corsaro, Mick Coyne and his band, and Larry the Island Rocka!

Please donate to this worthy cause by sending your check payable to Massachusetts School of Law, attention Professor Paula Kaldis, 500 Federal Street, Andover, MA 01810. ■

MSLAW students enjoy the beat as Professor Mary Kilpatrick and her daughter Annikiya look on

1L Denison George entertains the crowd

Recent graduate Andre Cayo and cut a rug...or tile floor, anyway

Professor Carmen Corsaro displays his guitar skills with Mick Coyne's band The Ringer

Should Lawyers Take Credit Cards?

By Andrea Goldman, Esq. and John Marshall, Esq.[1]

Many of us have been debating whether we should take credit cards for quite some time. On the one hand, there's a stigma attached to accepting credit cards. For lawyers, it does not feel entirely professional or dignified to reduce one's payment to such an obvious process. Most of us do not like asking for money. It's more comfortable to work on retainer or send out a bill with the hope of getting paid. There's also the issue of ethics. How does one handle credit card payments when processing them through IOLTA and/or operating accounts? What is the proper procedure? How does one avoid running afoul of ethics rules?

While it is natural to want to avoid the distasteful notion of commercializing the profession, it is time to realize that the world has changed. We do not blink an eye when the doctor's office expects our co-pay before treatment, and yet, as attorneys, many of us still end up working without getting paid. The longer I practice, the tougher I get about money. It took the experience of reviewing my books and realizing that my receivables had skyrocketed before I started taking a stand with clients and making sure that I was getting paid.

It is hard to get used to getting the money up front, but in this economy, it is quite possible that the amount you collect at the beginning of a matter may be all the money that is ever collected. Even though my engagement letter includes an Evergreen retainer and the clients agree to replenish once the retainer drops below a certain amount, the truth is, they rarely do. They frequently just start paying their bills as they arrive, and most clients do not rush to get the check in the mail. Shame on me.

When the ABA Techshow came to Boston, Jim Calloway, a noted law practice management advisor, said he believes that all lawyers should start taking credit cards. He felt that in this economy that is the only way to ensure that one would get paid. After suing my first client for fees, I now agree. As they say on the ABA's Solosez, "you get more value from cleaning your own toilet than from working for free."

For some reason, clients do not view legal services as a commodity for which they should pay. It is our job to provide clients with detailed bills and clear explanations that reflect the value that we are providing. Despite the fact that I know that none of my clients would steal a turkey from the supermarket, many do not hesitate to "steal" my time. It is important to manage expectations, ask for big enough retainers, and include a credit card provision in your engagement letter. If payment is not forthcoming, you have the right to run the credit card for the amount due.

Can Lawyers Take Retainers On Credit Cards?

Here is the viewpoint from the Board of Bar Overseers: Credit cards are here to stay, and it is generally considered acceptable to take payment of earned fees by credit card. But can a lawyer take a retainer—an advance against unearned fees—on a credit card? Ethics opinions across the country are divided on this question, and neither the Massachusetts Rules of Professional Conduct nor any decisions by the Board of Bar Overseers or the Supreme Judicial Court provide a direct answer. The Office of Bar Counsel strongly discourages accepting payment of retainers by credit card for the following reason.

In Massachusetts, unearned retainers must go into an IOLTA or other trust account until earned. Credit card agreements generally permit the issuer to "charge back" any payments subsequently disputed by the cardholder and require that the issuer's chargeback rights attach to the account where the funds were deposited.

Assume you accept a retainer on a credit card, which is deposited to your IOLTA account. You do the work and pay yourself from the retainer. Your client then contests your charges and the issuer withdraws from your IOLTA account the disputed charges. Since you have already paid

[1]*This article originally appeared in the Massachusetts Bar Association's May 2010 issue of* Lawyers Journal *and volume 12, issue 2 of* Section Review.

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yourself, this chargeback will draw upon funds of other clients held in the account—funds that you are required to safeguard.

The best and possibly only fool-proof solution to this problem would be to limit the issuer's chargeback rights to your operating account. While some ethics opinions from other states suggest taking credit card retainers into an operating account and transferring the unearned portion to a trust account, or holding earned portions of a retainer in a trust account until the issuer's dispute period has ended, these would not be in compliance with the current Massachusetts trust account rules.

There also exist other regulatory, bookkeeping, and confidentiality problems with credit card payments of fees. (See Vecchione, "No Easy Credit," www.mass.gov/obcbbo/credit.htm, on bar counsel's website.) Lawyers taking credit card payments should also be familiar with federal and state consumer credit, truth-in-lending, and consumer protection laws that may apply.

Options for Attorneys

There have been numerous conversations about taking credit cards on Solosez, and the one service that is touted by all is Lawcharge.com. This is not meant to be an advertisement for Law Charge, but as it says on Tracy Griffin's website, "Designed by an Attorney for Attorneys."

These are the types of fees associated with maintaining a credit card account (from the Law Charge website):

- Discount Fee: This is a percentage of the transaction amount. It covers the costs of 'moving the money' from the cardholder's account to your merchant account through the Federal Reserve's Automated Clearing House (ACH). The fee is determined upon the type of processing you choose.

- Transaction Fee: This is the fee charged for obtaining the authorization to deposit the funds to your account. It is usually between 15 and 75 cents per transaction depending on the type of processing you utilize.

- Set-up fees and equipment: Dependent upon the type of processing you choose, you may be charged a set-up fee or be required to purchase or lease equipment or software. Law Charge does not require you to purchase software and highly discourages the leasing of equipment as it is not cost effective.
- Junk Fees: These fees are where the banks and processors make money off you. You may be charged a monthly fee whether you process or not, a statement fee, or a service call fee. Law Charge does not charge any of these junk fees.

The first step in setting up credit card processing is to open a merchant account. This is usually your business operating account. Once your account is established, you can start receiving payments. You do not want the fees and other charges to go through your IOLTA account because this would violate IOLTA rules. One could buy or lease a point of sale terminal, but most attorneys process their payments through the Internet.

Some companies will require you to purchase software, and others have online service. At Law Charge, you log into their secured web site and depending on the username and password you enter, the funds will be deposited to that account. You will have the option of depositing to either your trust/IOLTA account or your operating account. Regardless of which account you deposit to, all fees will be debited from your operating account.

What will it cost? This article is not intended to be a review of all of the various services out there, but at Lawcharge.com, the initial set-up fee is $200 for a virtual terminal to one's IOLTA and operating accounts. This includes a link for clients to go to the attorney's website to make payments. Electronic check conversion from the check writer's account is also included (automatic debit from the client's bank account). There is a $150.00 set-up fee just for a virtual terminal. The set-up fee is payable over time with no interest. There is no monthly minimum payment. If there is activity in a given month, the monthly rate is $10.00. Finally, the discount fee is currently 2.7% for the virtual terminal plus a .19 transaction fee. There is encryption for data privacy.

If clients dispute a bill, they can call Law Charge and ask for a retrieval request. Rather than issue a chargeback to the lawyer's operating account, Law Charge requests that the client and lawyer submit documentation to resolve the dis-

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pute. Law Charge has had one chargeback in ten years. The company also supplies language to insert in one's fee agreement. The cardholder agrees that disputes will be settled through arbitration or the judicial process rather than issuing an automatic chargeback.

A Solosez member uses the following language in her engagement letter:

> **Payment by Credit Card**
>
> All clients may pay their bills via credit card. The X Law Office accepts Visa or MasterCard. If you choose to pay by credit card, please complete the form below:
>
> I authorize the X Law Office, to charge the amount of $_____ on my credit card.
>
> _____
> Credit Card Type
>
> _____
> Credit Card Number
>
> _____ _____
> Verification Code Expiration Date
>
> _____
> Signature
>
> **Billing Address** (Must be provided)
>
> If, after a payment by credit card, you later dispute the charges, unless prohibited by law, you agree not to cancel, revoke, charge back or dispute any previously entered charge on your credit card. If you do so, and it is later determined that the charge was properly authorized, you agree to pay all out of pocket fees and costs incurred by the X Law Office as a result of the improper cancellation, revocation, charge back or dispute
>
> _____
> Client
>
> _____
> Date

Paypal.com has a rate of 2.9% plus $0.30 per transaction, but it is not clear whether there is a monthly minimum. Tracy Griffen suggests that one use Paypal for operating account payments only. The reason for this is that the payment goes first to Paypal and then to the attorney's account. IOLTA rules state that trust money has to go straight to a trust account which is an approved trust account depository. There is no set-up charge or monthly fee. The merchant rate requires a one-time application, qualifying monthly sales volume, and account in good standing.

Costco has an Internet processing rate of 1.99% plus 27¢ per transaction. There is a one time $25 application fee and a $4.95 monthly statement fee, both of which are waived for Executive Members. A monthly minimum charge applies when qualified transaction fees and per-item charges are less than $20 per month.

Given the current economic situation, it is time for all lawyers to seriously consider taking credit cards. After all, you deserve to be paid. ■

Andrea Goldman, Esq., of the Law Offices of Andrea Goldman, is co-chair of the Law Practice Management Counsel. John Marshall, Esq., also a member of the Law Practice Management Counsel, works at the Office of the Bar Counsel.

Should Children Receive Life Sentences?

The Supreme Court says no for non-homicide crimes, but will this ruling have any effect on Massachusetts' mandatory sentencing scheme?

By Paula Kaldis, Esq. and Tiffany Roy

The Changing Juvenile Court: From protection of children by the state to protection of the state from children

When the first Juvenile Court was created in the United States in 1899 in Cook County, Chicago, reformers anticipated that the abuses inherent in treating children as adults in the justice system would be rectified. Rehabilitation and protection of children, rather than punishment and retribution, were the goals. The purpose of the Juvenile Court was to provide guidance and structure for children who committed crimes or status offenses, or who had been abused or neglected, and to assist parents who were unwilling or unable to provide such guidance. This doctrine of rehabilitation and protection of children by the state as a sort of super-parent, called *parens patriae*[1], had its roots in English common law and stemmed from a belief that children did not possess the same control over the mind as adults. All the players in the Juvenile Court, including judges, attorneys, probation, officers, clerks, prosecutors, social workers, were to have the best interest of the children in mind.

A mere 100 years later, the Juvenile Court had changed. Children younger and younger in age were being transferred from the Juvenile Court system to the adult court system. The purpose of the Juvenile Court started shifting away from protection of the child toward protection of society, away from rehabilitation toward punishment. According to Princeton University Political Scientist John Dilulio, "As youth and adult crime rates rose in the late 1980s and early 1990s, politicians and the public feared they were being besieged by 'super-predators'—youth who repeatedly committed violent offenses. In response, states decided to try youth as adults and to send greater numbers of those convicted to adult prison."[2]

This shift in the Juvenile Court began in the '60s, with the landmark cases of *Kent v. United States*[3] in 1966 and *In re Gault*[4] in 1967, in which the Supreme Court began formally recognizing children's rights in juvenile proceedings. Rights previously reserved for the adult adversarial system, such as trial by jury and the right to counsel, were now parts of juvenile proceedings. Generally, there are two schools of thought on the subject of children's constitutional rights in juvenile courts. One school believes that such a serious liberty interest is at stake that constitutional rights ought to apply to children in juvenile proceedings, and that children should have the same due process rights as adults. Those on the other side maintain that affording children the same rights as adults contradicts the philosophy of the Juvenile Court, a system that should remain separate and distinct, as the goals of the two systems are completely different.[5]

In *Kent*, Justice Fortas wrote, "While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of

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1 BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

2. John Dilulio, HOW TO STOP THE COMING CRIME WAVE 1 (1996).

3. *Kent v. United States*, 383 U.S. 541 (1966).

4. *In re Gault*, 387 U.S. 1 (1967).

5 *See, e.g.,* Irene Merker Rosenberg, *The Rights of Delinquents in Juvenile Court: Why Not Equal Protection?*, 45 No. 5 Crim. Law Bulletin (Fall 2009) and Julie J. Kim, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 Wash. U. L. Rev. 843 (2010).

the process from the reach of constitutional guaranties applicable to adults. There is much evidence . . . that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[6] While the intent of the juvenile system was to alleviate the inherent abuses of treating children as adults in adult courts, failing to treat them as adults in juvenile courts gave rise to a whole new set of abuses. The Supreme Court recognized there is no way to ensure that each child in each courtroom in the country is receiving the same level of care and protection that the reformers had in mind when they created the Juvenile Court and so they allowed children some constitutional protections.[7]

In recognizing those constitutional protections, the Supreme Court (and then the states as well) started a trend which seemed to veer juvenile courts from rehabilitation and protection and more toward adult courts, which are more adversarial. Justice Stewart predicted this trend could backfire in his dissenting opinion in *Gault*,

> The inflexible restrictions that the Constitution so wisely made applicable to adversary criminal trials have no inevitable place in the proceedings of those public social agencies known as juvenile or family courts. And to impose the Court's long catalog of requirements upon juvenile proceedings in every area of the country is to invite a long step backwards into the nineteenth century. In that era, there were no juvenile proceedings, and a child was tried in a conventional criminal court with all the trappings of a conventional criminal trial. So it was that a 12-year-old boy named James Guild was tried in New Jersey for killing Catharine Beakes. A jury found him guilty of murder, and he was sentenced to death by hanging. The sentence was executed. It was all very constitutional.[8]

Today, the move continues. Juvenile courts display more and more elements of the adult penal system. As many as 39 states, including Massachusetts, have enacted legislation allowing some form of transfer to adult court. This and other changes have resulted in the trial of more than 200,000 youths in the adult criminal system each year.[9] In Massachusetts, there has been a slow but steady shift from trying juveniles in the juvenile justice system to using the adult penal system. At the inception of the juvenile court system, there was no transfer of juveniles to the criminal justice system. Slowly, the courts began to allow some offenders between the ages of 14 and 17 to be transferred to adult court. This slow criminalization continued when the legislature enacted statutes that made it easier to transfer adolescents from the juvenile system to the adult system, requiring transfer hearings for certain enumerated offenses. Today, many statutes automatically move juveniles between the ages of 14 and 17 charged with first-degree murder to the jurisdiction of the adult criminal justice system.

Mandatory sentencing for certain crimes adds another facet to the problem of treating juveniles as adults in the justice system. In 2005, the Supreme Court held that execution of individuals under 18 at the time the crime was committed violated the Constitution.[10] Many juvenile law advocates have maintained that the Eighth Amendment also prohibits sentencing juveniles to life without parole because this sanction is a death sentence in its own right. Sentences of life without parole amounts to "death by incarceration" since offenders are going to die in prison, making this sanction "our other death penalty."[11] For juveniles, who stand to serve substantially more time in prison than those who are adults at conviction, the sentence is especially harsh. The goals of "retribution and deterrence cannot be achieved by sentencing juveniles to death by incarceration, our other death penalty. Offenders sentenced to death by incarceration experience a civil death, that is

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6. *Kent*, 383 at 556.

7. *Id*.

8 *In re Gault*, 387 U.S. at 80.

9 Mark Hansen, *What's the Matter with Kids Today*, American Bar Association Journal, July 1, 2010, at 54.

10 *Roper v. Simmons*, 543 U.S. 551 (2005).

11 Robert Johnson, Sonia Tabriz, *Death By Incarceration as a Cruel and Unusual Punishment When Applied to Juveniles: Extending Roper to Life Without Parole, Our Other Death Penalty*, 9 U. Md. L.J. Race, Religion, Gender & Class, 241, 242 (2009).

'their freedom—the essential feature of our civil society—has come to a permanent end.'"[12] Recent local cases, such as that of John Odgren, a Sudbury teen convicted of first-degree murder, have called into question what effect recent Supreme Court rulings will have on mandatory minimum sentencing in Massachusetts.

Brain Science: How neuroscience and psychology came together to create the hypothesis "Less Guilty By Reason of Adolescence"

In addition to the sometimes contradictory shifts toward affording juveniles due process and increasing trials in adult-like proceedings, there has been another important development affecting juvenile proceedings. That development is *science*. Some of the most important information relied upon by the courts in their recent decisions regarding juvenile justice are studies regarding the physical and psychological attributes of the adolescent brain. Studies have found that the juvenile brain is different from the adult brain in rationality and maturity.[13] According to Amnesty International, "According to many psychologists, adolescents are less able than adults to perceive and understand long term consequences of their acts, to think autonomously instead of bending to peer pressure or influence of older friends and acquaintances, and control their emotions and act rationally instead of impulsively. All of these tendencies affect a child's ability to make reasoned decisions."[14]

Also, the effects of childhood trauma can alter a child's mental capacity and, consequently, legal culpability. Research shows that while up to 34 percent of children in the United States have experienced at least one traumatic event,[15] between 75 and 93 percent of youth entering the juvenile justice system annually in this country have experienced some degree of trauma.[16] A study in the *Clinical Child and Family Psychological Review* found that most pre-teen and adolescent youth who participated in a homicide offense have histories of severe childhood maltreatment.[17]

Some studies indicate that the child brain is "present-oriented," severely retarding a child's ability to plan and appreciate possible outcomes and consequences of their acts.[18] Children are also more likely than adults to make decisions based on emotions, such as fear or anger, rather than logic and reason.[19] Laurence Steinberg, a Temple University psychology professor who has studied the adolescent brain and its development for 35 years, likens the adolescent mind to a sports car: "The brain of a teenager is like a car with a powerful gas pedal and weak brakes."[20] Within the last 10 years, studies have been done with Magnetic Resonance Imagining or MRI, which evaluate the

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[12] *Id.* at 245.

[13] Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, 45 (2005) , available at http://www.amnestyusa.org/us/clwop/report.pdf.

[14] *Id.*

[15] Erica J. Adams, *Why Investing in Trauma Informed Care Makes Sense*, Justice Policy Institute, 1, 2 (July 2010) (citing Felitti V.J., Anda R.F., Nordenberg D., Williamson D.F., Spitz A.M., Edwards V., Koss M.P., Marks J.S., *Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults: The adverse childhood experiences (ACE) study*, 14 Am. J. of Prev. Med. 245 (1998)).

[16] Adams, *supra* note 12, at 5 (citing Tina Maschi, *Unraveling the link between trauma and male delinquency: the cumulative versus differential risk perspectives*, 51 Social Work 59 (2006); Abram K.M., Teplin L.A., Charles D.R., Longworth S.L., McClelland G.M., Dulcan M.K., *Posttraumatic stress disorder and trauma in youth in juvenile detention*, 61 Archives of General Psychiatry 403 (2004); Arroyo W., *PTSD in children and adolescents in the juvenile justice system, in* REVIEW OF PYSCHIATRY: CHILDREN AND ADOLESCENTS 59 (S. Eth ed. 2001); Cauffman E., Feldman S.S., Waterman J., Steiner H., *Posttraumatic stress disorder among incarcerated females*, 37 J. of the Am. Academy of Child and Adolescent Psychiatry 1209 (1998)).

[17] Adams, *supra* note 12, at 5 (citing Shumaker D.M., Prinz R., *Children who murder: a review*, 3 Clinical Child and Family Psychology Review 97-115 (2000).

[18] William Gardner & Janna Herman, *Adolescent's AIDS Risk Taking: A Rational Choice Perspective, in* ADOLESCENTS IN THE AIDS EPIDEMIC 17, 15,26 (William Gardner, et al., eds. 1990); Marty Beyer, *Recognizing the Child in the Delinquent*, 7 Kentucky Child Rights J. 16-17 (1999).

[19] Thomas Grisso, *What We Know About Youth's Capacities, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 267-269 (Thomas Grisso & Robert G. Schwartz, eds. 2000) (reviewing literature on effects of emotion on children's cognitive capacities).

[20] Hansen, *supra* note 7, at 51.

brain's physiological development during adolescence into young adulthood. Snapshots of children's brains were taken at different ages to note the differences in the development of the brain over time, showing the adolescent brain is physically different than that of an adult.[21]

One area in which the adolescent brain and the adult brain are different is the frontal lobe, specifically a part of the brain called the prefrontal cortex. This area of the brain regulates "aggression, long-range planning, mental flexibility, abstract thinking, the capacity to hold in mind related pieces of information and perhaps moral judgment."[22] Because their frontal lobe functions poorly, adolescents rely on the amygdala (portion of the brain involved in emotions) during their decision-making.[23] This reliance on the amygdala results in impulsive and aggressive behavior, and its dominance over the undeveloped frontal lobe makes adolescents "more prone to react with gut instincts."[24] In adult brains, the frontal lobe helps off set the emotions and impulses originating from the amygdala.[25] These studies support the hypothesis that the actual physical differences noted in the MRI studies indicate that the cellular and neural development of adolescent brains make youth up to age 18 less responsible for criminal acts than adults.

These differences align more with the original reason for creating the juvenile court system, that is, that children are different from adults. So the notion that children do not fit squarely into mental standards used in the adult criminal justice system, while seeming revolutionary, is not new information.

Roper v. Simmons: The death penalty for juveniles is unconstitutional

Christopher Simmons was 17 years old when he tied up his victim and threw her off a bridge. He was subsequently found guilty and sentenced to death.[26] Simmons' attorney appealed unsuccessfully in both the trial courts of Missouri and the Federal courts of the United States.[27]

After these proceedings in Simmons' case had run their course, the United States Supreme Court held in *Atkins v. Virginia* that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person.[28] Simmons then filed a new petition for state post conviction relief, arguing that the reasoning of Atkins established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed. The Missouri Supreme Court agreed, stating,

> a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since Stanford, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.[29]

When the Simmons case went to the Supreme Court, amicus briefs and studies submitted by Simmons' counsel noted the scientific differences between the adult brain and the adolescent brain (so-called "brain science"). The Supreme Court, in holding death sentences for juveniles under 18

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[21] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases,* 32 New England J. on Crim. and Civil Confinement 3 (2006).

[22] Bruce Bower, *Teen Brains On Trial: The Science Of Neural Development Tangles With The Juvenile Death Penalty*, 165 Science News Online 299 (2004).

[23] Jan Glascher & Ralph Adolphs, *Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala*, 23 J. of Neuroscience, 10274 (2003).

[24] American Bar Association, National Juvenile Defender Center, *Adolescent Brain Development and Legal Culpability* 2 (2003), http://www.abanet.org/crimjust/juvjus/Adolescence.pdf (quoting Dr. Deborah Yurgelun-Todd of Harvard Medical School).

[25] Gargi Talukder, *Decision-Making is Still a Work in Progress for Teenagers*, Brain Connection (2000), http://brainconnection.positscience.com/topics/?main=news-in-rev/teen-frontal.

[26] *Roper*, 543 U.S. at 555-557.

[27] *Id.* at 559-560.

[28] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[29] *Roper*, 543 U.S. at 559-560.

unconstitutional, took these studies into consideration: "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[30]

Graham v. Florida: Life without parole for non-homicide crimes is unconstitutional

This past term, in the case of *Graham v. Florida*, the United States Supreme Court held that under the Eighth and Fourteenth Amendments to the United States Constitution, sentences of life in prison without the possibility of parole for non-homicide crimes committed by juveniles is cruel and unusual punishment.[31]

Terrance Jamar Graham was born on January 6, 1987 to crack-addicted parents. His parents continued to use crack cocaine throughout the early years of his life. As a child, he was diagnosed with attention deficit hyperactivity disorder. He began drinking alcohol and using tobacco at age 9, smoking marijuana at age 13, and in July 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbeque restaurant in Jacksonville, Florida. One of Graham's accomplices assaulted the manager with a metal pipe for which he required stitches in his head. The youths fled before taking any money from the restaurant.[32]

Graham was arrested for the robbery attempt and convicted on that charge and previous charges to life in prison without the possibility of parole. Graham's attorney, Bryan S. Gowdy, appealed the sentence as grossly disproportionate to the crime committed, but the Appeals Court affirmed and the Florida Supreme Court denied review. The United States Supreme Court granted certiorari, ultimately finding that a sentence of life without the possibility of parole was unconstitutional for those who commit non-homicide crimes as juveniles. After the decision, Gowdy noted on behalf of the seven amicus briefs submitted on behalf of the state, "not a single one of them was signed by a scientist. All of the science is on our side."[33]

Though the science on which *Roper* and *Graham* were based has rarely been disputed, there are still those who believe that cases should be dealt with on an individual basis. In his dissenting opinion in *Graham*, Justice Clarence Thomas stated that "even if such generalizations of social science are relevant to constitutional rule making, the Court misstates the data on which it relies, . . . which differentiates between adolescents for whom antisocial behavior is a fleeting symptom and those for whom it is a lifelong pattern."[34]

M.G.L. Chapters 119 and 265

Massachusetts General Laws, Chapter 119, sections 52-63, govern delinquency and youthful offender proceedings. The Commonwealth no longer has transfer proceedings, which had provided for transferring a juvenile for trial in adult court under certain circumstances. Under this statute, proceedings against any child between the ages of seven and 17 who has violated a law of the Commonwealth are delinquency proceedings; they are not criminal. If the proceeding results in incarceration, the juvenile will be sent not to an adult jail or prison, but to the Department of Youth Services. Section 53 specifically states that it should be construed liberally, "so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents."[35] The goal of these proceedings most closely mirrors the goals of juvenile justice reformers.

Section 58, a hybrid proceeding, was created by the legislature in 2006. This section defines a "Youthful Offender" as a person between the ages of 14 and 17 who has committed a felony punishable by time in a state prison and who has either previous been committed to the Department of Youth Services or has committed a felony involving violence. These offenders are tried in juvenile

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[30] *Id.*

[31] *Graham v. Florida,* _ U.S. _, 130 S. Ct. 2011, 2018 (2010).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 2054 (Thomas J., dissenting).

[35] Mass. Gen. Laws ch. 119 § 53 (2008).

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Winning is Routine Matter for MSLAW Advocacy Teams

Having turned out numerous successful teams in varied law school advocacy competitions in years past, MSLAW again lived up to its reputation by scoring big at the American Association for Justice ("AAJ," formerly ATLA), Black Law Students Association (BLSA), and American Constitution Society competitions in 2010. At a celebratory reception in April, coaches for teams in all three competitions attributed MSLAW's successes not only to the students' talent, but to their hard work. The coaches noted that team members put in long hours of practice and preparation, in addition to their school work, outside jobs and family obligations for many of the participants.

AAJ

MSLAW's outstanding AAJ teams, comprised of Janine D'Amico, Peter Houston, Neil Judd, Amy Dimitriadis, Margaret Byrnes, Brittany L. Forgues, Tom Horgan, and Becki A. Jacobson, won the New England Region, and went on to compete in the Nationals, held in New Orleans. The AAJ has 14 regions across the United States and only the top team from each region advances to the National Finals. Associate Dean Michael Coyne and Professor Anthony Copani head MSLAW's Trial Advocacy Program. They coached the team along with Professors Dan Harayda and Robert Armano.

The AAJ sponsors the premier trial advocacy competition in the United States. MSLAW's teams only lost once during the entire competition. MSLAW advanced to the semifinals where it played a well-prepared and highly skilled team from Syracuse University Law School. In a tremendous display of advocacy skills, MSLAW beat Syracuse to advance to the finals where they defeated the previously unbeaten Roger Williams University Law School team to win the championship. Teams from law schools throughout New England as well as Syracuse University Law School and Albany Law School competed in the New England regional matches.

MSLAW's teams displayed a mastery of the law and rules of evidence in a trial based on claims of negligence/ medical malpractice/failure to diagnose and treat. MSLAW's teams demonstrated outstanding advocacy skills in presenting both the plaintiff's and defendant's cases throughout the three days of competition. In praising the team's performance, Associate Dean Coyne said that he was "pleased that the team could present such a compelling work of advocacy in representing both the plaintiff and defendant in such a complex case. They made their arguments in a thoughtful and persuasive way. Their mastery of the art of advocacy was impressive. They displayed extraordinary professionalism throughout the three days of competition and should be very proud of their accomplishments. As their professors, we are enormously proud of their advocacy. It is a pleasure to see this team do so well, as I know how hard they worked to achieve success. It is very well deserved."

BLSA

For the third time in four years, a team representing MSLAW placed high enough in the Thurgood Marshall Mock Trial Competition for the Northeast Region of the National Black Law Students Association to go on and compete in the National Competition, held in the Boston area. The Northeast region is made up of 33 law schools in New England, New York, and northern New Jersey. This year, MSLAW's team members were Mirna Diaz, Morjietta Derisier, Jamal Johnson, James Ezeigwe, Shane Rodriguez, Clynetta Neely, Mercy Saigbath, Babatunde Adebayo, Diana Laurent, Sharon Legall, Rasheida Craig, Candice Robinson, Eversley Linsey, Marsha Clarke, Chantelle Hashem, and Nisha Mungroo. Associate Dean Michael Coyne, Professor Dan Harayda, and Attorney and MSLAW Alum Joe Filippetti coached the team to a third place finish in the competition held at Syracuse University.

Throughout the entire competition, MSLAW's top two teams lost only to teams from Harvard University Law School, which went on to win the Trial Competition. MSLAW's students displayed impressive command of the evidence, law and facts while demonstrating great advocacy skills throughout the competition. MSLAW advanced two teams to the Elite 8 along with teams from

Harvard, St. Johns and Syracuse. While teams are not allowed to disclose their school affiliation during the competition, among the teams that MSLAW beat were NYU, St. Johns, Brooklyn and Syracuse to advance to the semifinals where it lost to Harvard in a tight match.

The AAJ Team

These teams also competed in the National Criminal Defense Trial Competition in California, where they placed 9th in the country. Dean Coyne said: "This team displayed great intelligence, command of the law and the rules of Evidence. It is not surprising how much they accomplished. The only surprise is that anyone could do better than they did but there is no shame in losing to an equally talented team as that from Harvard. Both groups of team members are truly among the very best law students in the United States. It was a pleasure to see the team demonstrate their significant knowledge and command of the law. They will be great lawyers who will serve their communities well."

ACS

Participating for only the third time in the American Constitution Society's National Moot Court Competition, MSLAW's appellate moot court teams again brought home some hardware. This year, two of the three teams traveled to San Francisco, where MSLAW's Paul Stewart was named the best advocate in the western United States. Both MSLAW teams competing in San Francisco—one comprised of Paul Stewart and Craig Stern and another comprised of Selena LarMoore and Adam Phipps—won two out of three of their matches, an impressive feat considering that more than 30 prestigious law schools participated in the competition (including Columbia, Michigan, Berkeley, and Wisconsin). Another team—Michele Sanna and Dan Ryan—stayed in Boston to represent MSLAW in the Eastern Region competition. They also performed admirably, winning their first two matches before losing to a Columbia team that would eventually become the national runner up. Professors Malaguti, Rudnick, and Starkis coached the teams, which briefed and argued a Supreme Court case. This year's problem addressed the timely constitutional issue of the detention of alleged terrorists as part of the War on Terror.

Professor Malaguti commended the team members' performance, saying: "With the historic success of MSLAW's mock trial teams, it is heartening to know that members of the MSLAW community are interested and can be successful in a Moot Court competition as well. All these students worked tirelessly in the weeks heading up to the competition to turn out briefs and oral arguments worthy of presentation to the Supreme Court. And to have one of our students named best advocate in a regional competition is icing on the cake. They all have much to be proud of."

In existence for only three years, MSLAW's appellate moot court team has already produced: the best brief in the eastern United States (2008), the fifth best brief in the eastern United States (2009), and the best oral advocate in the western United States (2010).

Indeed, the entire MSLAW community should be proud of all these students and their accomplishments. Their outstanding performances on the "world stage" bring recognition to them, their coaches, and, most important, our school. MSLAW has assumed a prominent place among law schools nation wide in its advocacy program. Kudos to them all. ■

Student Spotlight

Rasheida Craig

Born in Ontario, Canada to parents from Trinidad and Tobago and Jamaica, Rasheida Craig knows a thing or two about different countries and cultures. That is why she was intrigued when she came across MSLAW during an internet search, drawn to the diversity of its students. "I chose MSLAW in part because Massachusetts is known for its superior higher education," Rasheida explained. "But what I like best about the school is that there are people from different backgrounds here. People here are from different countries, from different socio-economic backgrounds, and everyone has different work experiences, too. You get to interact with people from totally different life experiences."

Education has played an important role in Rasheida's background. Originally from the Caribbean, her parents moved to Canada before Rasheida was born for the purpose of attending college. (It was very difficult to get a university degree in Trinidad and Tobago because of the prohibitive cost; most poor or middle-class students could not afford post-secondary education and then would have trouble getting a decent job.) Her mother graduated from Trent University with a B.A. in psychology and then went on to receive two master's degrees in education and theology, after which she became a school principal, the first black elementary school principal in Durham Region, Ontario. She later returned to Trinidad, where she currently resides, to work as a teacher and principal in her "semi-retirement." Rasheida received her undergraduate degree in religious studies from King's College at The University of Western Ontario, where she was placed on the Dean's Honor List. It was there that she decided she wanted to help people ("especially those who have been disadvantaged or have experienced challenges"), and she realized that the best way to do that was to use her research and writing skills, subjects she was better at than math and science.

While Rasheida was definite about wanting to attend law school, she was open about the school—and even the country—where she would achieve her goal. She happened upon MSLAW by chance ("I received an e-mail and decided to pursue it") and decided to give it a shot, without even applying anywhere else. She packed her bags and moved to Andover, without even so much as a visit.

While she admits that she misses Canada, Rasheida enjoys living in the U.S., which she finds quite different from our northern neighbor. "The biggest difference is the political climate," she noted. "This country is much more politically oriented and influenced, and people are much more outspoken about their political views, whereas back home, people are much more private about their political affiliations. Nine times out of 10, they will not say if they are conservative or liberal, for example." And like many Americans do, Rasheida too wants to travel cross-country—but from British Columbia to Nova Scotia—some time after she graduates law school.

As for her post-graduation professional plans, Rasheida would like to practice family law, specifically being an advocate for juveniles."One thing I would like to work on, for example, in terms of divorce law, is making sure that in a child custody issue, the child is with the right guardian," she explained. Other areas of interest include environmental law and information technology law (e.g. "green information technology"). One of her dilemmas, however, will be where to practice. Because of Canada's strict policy regarding foreign-educated lawyers, returning home to practice may prove to be difficult for Rasheida. "I would most likely have to start law school all over again," she explained. "Canada really frowns upon foreign law degrees. The National Committee on Accreditation analyzes foreign law degrees and decides whether you can go straight in, whether you have to take an exam, or whether you need to attend Canadian law school for a number of years. It's the only thing I dislike about my country." If she does remain in the U.S.,

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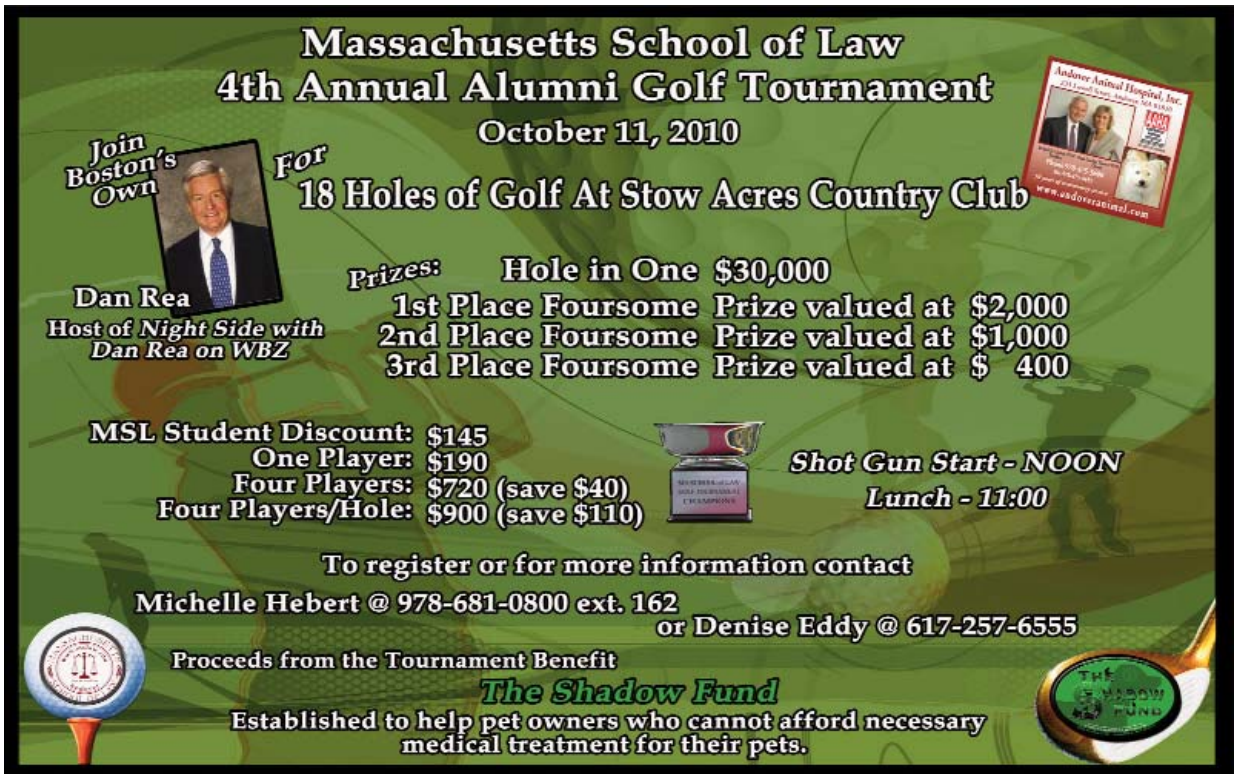
Rasheida would like to find a job with the government or work in a district attorney's office, helping victims of crimes.

Entering her third year, Rasheida has involved herself in many areas at MSLAW. She works part time in the library and is a member of the Thurgood Marshall Trial Advocacy Team. Of the latter, she said she "learned a lot about the rules of evidence. That helped me a lot to understand the course itself. Had I not done trial advocacy, I think it would have been a lot more difficult for me to understand how the rules of evidence apply, especially in court." She also appreciates the fact that she learned how to conduct a trial, from beginning to end, on the off chance that she does do any litigating in the future. "Most lawyers have to learn all the aspects of a trial—how to raise objections, how to submit evidence properly, how to conduct yourself in the proper manner in court—on their own, in practice, whereas this helped to prepare me for that." Rasheida also credits the trial team experience with allowing her to interact with people she might not otherwise have socialized with, "only because we're all so busy," she remarked. She also competed in the California Defense Lawyer's Mock Trial Competition held in San Francisco last fall.

To incoming and first-year students, Rasheida advises them to conduct themselves as if they are already in their legal careers. "Law school is nothing like undergraduate school," she warned."This is a professional degree. If you used to sleep in and miss class in college, you can't do that here. You have spend hours and hours of studying; I suggest setting up a 'study schedule' around your work schedule or other commitments so you're not wasting any time. And every once in awhile, take some time off to rest and do some things that you enjoy."

Some of the activities that Rasheida enjoys include reading (murder mysteries), listening to music (among her favorite groups are Breaking Benjamin and Three Days Grace), and watching sports, particularly rugby: "It's extremely fast-paced," she commented. "You can't get bored while watching a rugby game. It's constant movement for 90 minutes."

While Rasheida is serious about her studies, she admits to having a lighter side and being more outgoing when people take the time to get to know her. "I can joke around and have a good time," she confessed. But only after she has finished all her studying. ■



Upcoming Events

Conferences

MBA/MSLAW Young Lawyer Career Conference
September 16, 4:00 p.m. to 7:00 p.m. (networking reception to follow at 7 p.m.)

Topics will include starting out in law practice; transitioning into your new role as a young lawyer; handling stress, beating burnout, and avoiding substance abuse; increasing productivity; and ethics and professionalism. Contact ursula@mslaw.edu for more information on registering.

Legal Education Seminars

Trying Divorce Cases
September 29, 9:00 a.m. to 4:00 p.m.

Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Estate Planning for Moderate Estates
October 15, 9:00 a.m. to 12:00 p.m.

Contact the MCLE (800-966-6253 or www.mcle.org) for fee schedule and to register.

Other

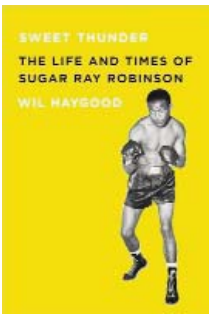
4th Annual Alumni Golf Tournament
October 11, Stow Acres Country Club

See ad on page 47 for more details.

Books of Our Time

MSLAW continues to produce television shows highlighting recently released books on a variety of topics of interest to the general public. Since our last issue, Dean Velvel and Professor Vietzke have hosted a number of shows focusing on sports and sports figures.

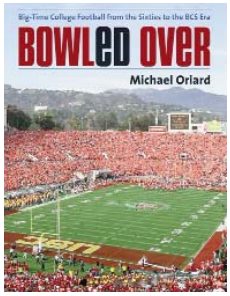
Sweet Thunder: The Life and Times of Sugar Ray Robinson
Wil Haygood



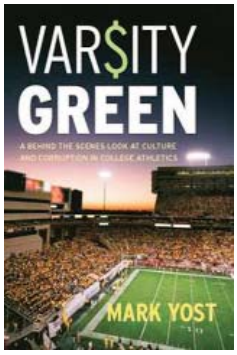
In *Sweet Thunder: The Life and Times of Sugar Ray Robinson*, author Wil Haygood tells the story of how renowned fighter Sugar Ray Robinson, along with singer Nat "King" Cole, trumpeter Miles Davis, were "Esquire Men," named after the men's magazine: fashionable black men who attracted white followers starting in the 1940s because of their style, sophistication, and celebrity status. Haygood's portrayal of Robinson is of a man who is able to manipulate through two different worlds, that of the rough sport of boxing and the cool and glamorous sphere of the Harlem Renaissance.

Bowled Over: Big-Time College Football From the Sixties to the BCS Era
Michael Oriard

Sports historian and former Notre Dame All-American, Michael Oriard, paints a largely dismal picture of college football in *Bowled Over: Big Time College Football from the Sixties to the BCS Era*. Tracing what amounts to the decline and fall of standards—other than athletic prowess—in major college football, Oriard draws upon his experience as a scholar-athlete to compare an era when the football players were students as well, to today's commercialized system, in which academics and a program's financial success cannot coexist. The book focuses on several decisions of the NCAA in the early '70s that irreparably set big-time college football on a collision course with academic and scholastic achievement.

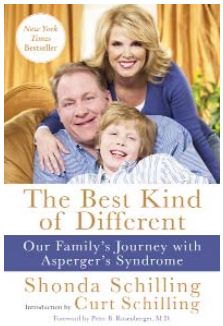


Varsity Green: A Behind the Scenes Look at Corruption and Culture in College Athletics
Mark Yost



In *Varsity Green*, Mark Yost dispels the myth that big-time college football and men's basketball programs turn large profits for their schools; rather, most of the time, they cost the schools money, due to the travel, equipment, and competition costs. He also explains why schools continue to hire coaches with dubious academic and NCAA compliance records, and why schools build lavish practice facilities that far exceed most other schools' competition arenas. *Varsity Green* explores coaches' salary structures, television revenue, the history of college athletics—which was commercial right from the start—and the role that alumni and booster clubs play.

The Best Kind of Different: Our Family's Journey With Asperger's Syndrome
Shonda Schilling



Raising four children while your husband is playing Major League Baseball is challenging enough, but add to the mix a diagnosis of Asperger's Syndrome, and "challenge" doesn't begin to describe the daily events. In a very candid and open account of dealing with her son Grant, Shonda Schilling explains how the diagnosis was a blessing in many ways. *The Best Kind of Different* not only resonates with parents who have a child with a behavioral issue, it also shows all parents what a difference understanding and compassion make in a child's life.

For copies of any of the book shows, call MSLAW at (978) 681-0800. ■

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court, and the Judge, after trial and a sentencing hearing (very much like the old transfer proceedings where both mitigating circumstances as well as the juvenile's history could be taken into account), has three choices available for disposition: a delinquency disposition which would involve only the Department of Youth Services as custodian, a delinquency disposition followed by commitment to the adult Department of Correction (the "combination" sentence), or whatever penalty the law allows for adult offenders (the "sentence required by law").

So, for the most part, the Juvenile Court now has exclusive jurisdiction over children who commit crimes. Youthful Offenders can face adult prison time only after the sentencing hearing where the judge can consider the child's circumstances. But, under Massachusetts General Laws, Chapter 119 section 74, the Juvenile Court has no jurisdiction over cases involving charges of first- or second-degree murder. And, pursuant to Massachusetts General Laws, Chapter 119, section 72B, the Superior Court must sentence a person convicted of first-degree murder, who committed the crime after age 14, to life without parole.

Massachusetts General Laws, Chapter 265, section 2, provides that those who are convicted of first-degree murder face a *mandatory* sentence of life in prison without the possibility of parole. In these cases, once the defendant is found guilty, the judge has no discretion as to what sentence is appropriate. Mitigating factors are not examined. Once a person is convicted of first-degree murder, the judge is required to sentence him or her to life in prison without the chance of parole.

Whether *Graham* will have any significant effect on these proceedings may be seen in the next year or so. As stated, because the only crime in Massachusetts for which a juvenile can be sentenced to life in prison without the chance of parole is first-degree murder, *Graham* is not binding precedent. There are cases ongoing in Massachusetts that may result in the Supreme Judicial Court having to decide the issue based on *Graham*. One of those is John Odgren's.

Commonwealth v. John Odgren: A case study

John Odgren was a 16-year-old boy from affluent Sudbury, Massachusetts. The youngest son of the Odgren family, John lived an upper middle class life and attended high school at Lincoln-Sudbury Regional High School. As a child, he was diagnosed with Asperger's Syndrome, a form of autism, which drastically affected his social skills and isolated him from classmates.[36] His mother estimates he stopped receiving birthday party invitations in the second grade.[37] His mental health only deteriorated over his adolescent years. While he exhibited an IQ of 140 (the average IQ is approximately 100), he lacked the capacity to complete the everyday routine of preparing for school each morning. He was diagnosed with a number of different mental disorders, such as bipolar disorder, anxiety and attention deficit hyperactivity disorder. At age 9, he began having suicidal thoughts.[38]

John began to develop a fascination with the macabre. He became obsessed with Steven King's *The Dark Tower*, violent video game, and bragged in Forensics class that he could plan the perfect murder. He withstood a constant barrage of harassment and teasing. John later described himself as having, "a million bees buzzing in his head."[39]

On the morning of January 19, 2007, John Odgren left for school like any other day. Sometime around 9:00 am, he hid in the bathroom with a 12-inch carving knife and when 15-year-old James Alenson entered the bathroom, John stabbed him eight times in the neck and torso. The two boys had never even met. Following the incident, Odgren confessed to a teacher, saying, "I just snapped."[40]

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[36] Lee Hamel, *It seemed there was nothing we could do*, Worcester Telegram and Gazette, June 27, 2010, http://www.telegram.com/article/20100627/NEWS/6270538.

[37] *Id.*

[38] David Boeri, *At Odgren Trial, Question Isn't What, But Why*, WBUR, Apr. 28, 2010, http://www.wbur.org/2010/04/28/odgren-trial.

[39] *Id.*

[40] Peg Rusconi, *Odgren denies high-school stabbing on tapes*, WBZTV.com/CBS News, Feb. 8, 2010, http://wbztv.com/local/john.odgren.sudbury.2.1479039.html.

Odgren was tried for first-degree murder in Middlesex Superior Court. He was convicted in May 2010 and received the mandatory sentence of life without the possibility of parole. Mitigating factors such as his age, immaturity, and mental health, though considered by the jury, were not considered during sentencing because the judge had no discretion no matter how compelling the factors were. Witnesses say that after the jury found him guilty of murder in the first degree, he wept in his cell holding a stuffed rabbit he called Nicholas.[41]

Under Massachusetts Law Chapter 278, section 33E, the Massachusetts Supreme Judicial Court will review the case. The Court has broad power to review the case as a whole and determine if there should be a new trial, entry of a verdict of a lesser degree of guilt, or reduction of the sentence. The Court can do this if the verdict was against the weight of the evidence, if new evidence has been brought forward, or *for any other reason justice may require*.[42] The standard in this case would be whether there has been a miscarriage of justice. *Graham*, however, is not applicable in this instance because it applies only to non-homicide cases.

The current state of Massachusetts juvenile law is tricky. On the one hand, there is a slow movement toward retribution in the juvenile system. On the other hand, Massachusetts is regarded as a progressive state. Brain science now gives a new reason why juveniles may be less culpable for crimes they have committed, a theory more in accordance with the original *parens patriae* philosophy of the Juvenile Court. The current Massachusetts statutes reflect concordance with this opinion, except in the case of first-degree murder. Massachusetts General Law Chapter 119, section 72B in conjunction with Massachusetts General Law Chapter 265, section 2 seem to be contrary to a growing national consensus on juvenile justice. The appeal on the Odgren case may bring a unique opportunity for the Massachusetts Supreme Judicial Court or the Massachusetts Legislature to bring the Commonwealth up to speed with trends in other states toward recognizing a difference in the proper sentences for juveniles and adults. We may even come full circle back to the original reason for the Juvenile Court: kids are different, and they should be treated that way. ■

Paula Kaldis is a professor of law and assistant dean at MSLAW. She teaches Juvenile Law, Family Law Advocacy class and clinic, Child Welfare Practice, and Writing and Legal Advocacy. She also serves as Director of the Legal Research and Writing program.

Tiffany Roy is a part-time law student at MSLAW, scheduled to graduate in December 2010. She is a DNA Analyst and Criminalist with the Massachusetts State Police Crime Laboratory in Maynard, Massachusetts and previously served as a juvenile law intern.

[41] Laura Crimaldi, *It's The Max For John Odgren: Teen Killer Given Life Without Parole*, The Boston Herald, May 1, 2010, http://www.bostonherald.com/news/regional/view.bg?articleid=1251464.

[42] Mass. Gen. Laws ch. 278, § 33E (2008).

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Supreme Court decisions[61] have weakened the *Miranda* doctrine to such an extent that only the most deliberate and egregious violations by the police of a suspect's Fifth Amendment rights will likely lead to the suppression of evidence.[62] Because *Miranda* warnings are in such widespread use and the question of the decision's constitutional status appears to have been settled, it is unlikely that the Supreme Court will expressly overrule it. But, as a result of decisions such as *Berghuis v. Thompkins*, a majority of the Supreme Court seems determined to leave *Miranda* "twisting slowly in the wind."[63]

B. The Contemporary Nature of Custodial Interrogation

Several important characteristics of police interrogation remain as true and as troubling today as they were in 1966: (1) street encounters and station house questioning between the police and suspects often become custodial even though they may start out as noncustodial; (2) custodial interrogation amounts to compulsion for the purposes of the Constitution; (3) confessions remain the gold standard for clearing crimes and prosecuting criminal cases;[64] (4) police and law enforcement officials are becoming more proficient in the use of sophisticated interrogation techniques designed

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[61] During the 2010 term, the Supreme Court decided two other cases involving an application of *Miranda*. In *Florida v. Powell*, the Court held that advice about the right to counsel that omitted an express reference to the defendant's right to have counsel present during police interrogation was adequate. 559 U.S. __, 130 S. Ct. 1195 (2010). In *Powell*, the defendant was informed that he had the right to talk to a lawyer before questioning and that he could invoke that right "at any time." In writing for a 7-2 majority, Justice Ginsburg concluded that the Florida Supreme Court erred in suppressing the defendant's statements because the "two warnings reasonably conveyed the right to have an attorney present." *Id.* at 1205. In *Maryland v. Shatzer*, the Supreme Court held that a suspect who asserts the right to counsel while in police custody and who then is released from custody may be questioned again by the police without the presence of counsel after the passage of fourteen days. 559 U.S. __, 130 S. Ct. 1213 (2010). "That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." *Id.* at 1223.

[62] Professor Weisselberg has written a thoughtful analysis of the principal decisions of the Supreme Court since *Miranda* and a detailed account of the responses by police trainers in California. *See generally Mourning Miranda*, *supra* note 17.

Of the many post-*Miranda* decisions by the Supreme Court that have established qualifications or limitations on the scope of the original doctrine, several of the decisions prior to *Berghuis* stand out as major retrenchments: (1) *Colorado v. Connelly*, 479 U.S. 157, 168 (1986), and *Lego v. Toomey*, 404 U.S. 477, 487-89 (1972) (holding that the government's burden of proving a waiver of *Miranda* rights is preponderance of the evidence); (2) *Oregon v. Elstad*, 470 U.S. 298, 317-18 (1985) (rejecting doctrine of presumptive taint; holding that in the absence deliberate wrongdoing by the police, the administration of *Miranda* warnings to a suspect who has made an unwarned, but voluntary statement is sufficient to render the second statement the product of a valid waiver); (3) *United States v. Patane*, 542 U.S. 630, 637 (2004) (The failure to advise a suspect of his *Miranda* warnings in circumstances in which the statements made are voluntary does not require the suppression of physical evidence seized as a result of the unwarned statements. The Court reasoned that the failure to give *Miranda* warnings to a person in police custody does not violate the person's constitutional rights.); and *Davis v. United States*, 512 U.S. 452, 459 (1994) (holding that defendant must make a clear and unambiguous request for counsel in order the invoke the right to counsel during police interrogation). *Connelly* and *Lego* were rejected on state law grounds in *Commonwealth v. Day*, 387 Mass. 915, 921 (1983). *Elstad* was rejected on state law grounds in *Commonwealth v. Smith*, 412 Mass. 823, 836-37 (1992). *Patane* was rejected on state law grounds in *Commonwealth v. Martin*, 444 Mass. 213, 215 (2005).

[63] *See* Arthur J. Goldberg, *Escobedo and Miranda Revisited*, 18 Akron L. Rev. 177, 182 (1984). In Massachusetts, most of the original *Miranda* doctrine remains intact as a matter of state common law or constitutional law, along with the traditional Due Process test for voluntariness. *See infra* text accompanying notes 69-73.

[64] *See Hopt v. Utah*, 110 U.S. 574, 585 (1884) ("A deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession."). *See also* Stephen A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-D.N.A. World*, 82 N.C.L. Rev. 891, 923 (2004) ("Confession evidence (regardless of how it was obtained) is so biasing that juries will convict on the basis of confession alone, even when no significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it.").

to elicit confessions with the result that most suspects will submit to police interrogation;[65] and (5) the phenomena of false confessions is an unavoidable byproduct of modern police interrogation.[66] While many factors contribute to this phenomenon, "[u]sually some form of psychological coercion—typically inducements that communicate a promise of benefit or a threat of harm—is necessary."[67] Suggestions have been made to scrap *Miranda* and establish an alternative.[68] However, it is unclear whether there is an alternative approach that will be effective, affordable, and practical. A better approach, it seems to me, is to preserve and strengthen the *Miranda* doctrine. In states like Massachusetts, the *Miranda* doctrine remains a strong component of its criminal procedure, but, as discussed *infra*, steps could be taken to strengthen it.

C. The *Miranda* doctrine in Massachusetts

Massachusetts has not adopted the *Miranda* doctrine as a matter of state law, but the Supreme Judicial Court has strengthened *Miranda*'s safeguards under both the common law and state constitutional law. For example, Massachusetts requires the Commonwealth to prove a valid waiver of *Miranda* rights by the standard of proof beyond a reasonable doubt.[69] Massachusetts requires the police to notify a suspect that an attorney has requested to be present before or during any custodial interrogation, even if the defendant does not make the request, in order for any subsequent waiver of rights to be valid.[70] In *Commonwealth v. A Juvenile*,[71] the Court established an "interested adult" rule that requires that juveniles under the age of 14 cannot waive their *Miranda* rights unless an independent and capable

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[65] "[T]here is general agreement that the 'overwhelming majority' of custodial suspects waive their rights . . . ." Kamisar, *supra* note 2, at 193 (citation omitted). *See also* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 U.C.L.A. L. Rev. 839, 860 table 3 (1996) (observing that 83.7% of the suspects studied waived their *Miranda* rights). Of course, legitimate reasons, apart from coercion, could account for why most people in police custody choose to speak to the police. However, when one considers the extent to which deception and psychological ploys are tolerated under the traditional test for voluntariness, it is reasonable to assume that in many of the cases, the defendant's decision to speak to the police was not an "unfettered choice." This view is reinforced by evidence that many police agencies train their officers to use sophisticated interrogation techniques that are designed to break down the resistance of a subject and to persuade the custodial subject to answer questions. "How are interrogations conducted today? Does the contemporary process of interrogation still support the legal conclusion that custodial interrogations contain inherently compelling pressures that undermine the Fifth Amendment privilege? I believe that, as a general matter, the answer is yes. Present-day investigators are better trained than their 1960s counterparts, but the basic psychological approach to interrogation described in the *Miranda* decision remains prevalent in the United States." *Mourning Miranda, supra* note 17, at 1529 (including an analysis of the psychological methods of police interrogation in widespread use today in California).

[66] *See* Talia Fisher & Issachar Rosen-Zvi, *Symposium: The Future of Self-Incrimination: Fifth Amendment, Confessions and Guilty Pleas*, 30 Cardozo L. Rev. 871, 877 (2008) ("Thus, although it is indeed impossible to accurately quantify the prevalence of false confessions or to assess the exact extent of their effect on wrongful convictions rates, it is quite evident from the numerous studies conducted that the number is high and unsettling. As noted by Drizin and Leo, '[t]he research literature has established that such confessions occur with alarming frequency.'").

[67] *Police Interrogation, supra* note 21, at 236. *See, e.g.*, Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal To Mirandize Miranda*, 100 Harv. L. Rev. 1826. 1830 (1987) (proposing that the Supreme Court or Congress establish "[a]n unambiguous per se rule prohibiting police interrogation without the presence of counsel . . . "). There is substantial research that indicates that some police department interrogators routinely circumvent *Miranda* by employing tactics that do not amount to coercion under traditional standards of voluntariness, but that discourage defendants from exercising their right to remain silent or their right to counsel. *See* Kamisar, *supra* note 2, at 184-88 and authorities cited. And, there is a wealth of literature on the subject of false confessions. *See generally Police Interrogation, supra* note 21, at 195-236; *Police-Induced Confessions, supra* note 34; *Saul Kassin, Interrogation: Why Innocent People Confess*, 32 Am. J. Trial Advoc. 525 (2009).

[68] *See, e.g.*, Ogletree, *supra* note 67.

[69] *See Commonwealth v. Van Sok*, 435 Mass. 743, 751 (2002); *Commonwealth v. Edwards*, 420 Mass. 666, 669 (1995); *Commonwealth v. Day*, 387 Mass. 915, 921 (1983).

[70] *See Commonwealth v. Collins*, 440 Mass. 475, 478 (2003); *Commonwealth v. Mavredakis,* 430 Mass. 848, 849, 860 (2000); *Commonwealth v. Sherman*, 389 Mass. 287, 295-96 (1983).

[71] 402 Mass. 275 (1988).

adult is present, understood the warnings and had an opportunity to consult with the juvenile, and that for other juveniles, consultation with an interested adult should ordinarily occur. Additionally, Massachusetts applies a more comprehensive and stricter version of the exclusionary rule than do the federal courts.[72] Finally, Massachusetts has recognized the dangers presented by the use of deception and trickery during incommunicado interrogation by decisional law that expresses a strong preference that custodial interrogations at the police station be recorded electronically.[73]

However, one recent Supreme Judicial Court decision takes a different path. In *Commonwealth v. Simon*,[74] the Supreme Judicial Court decided that despite the absence of *Miranda* warnings, the fortuitous presence of the defendant's attorney, with whom the defendant had also consulted before the arrival of the police, during custodial interrogation, satisfied the requirements of the Fifth Amendment and Article 12 of the Massachusetts Declaration of Rights[75] and was an adequate substitute for *Miranda* warnings.[76]

Although in *Simon* the Supreme Judicial Court followed the Supreme Court's lead in *Davis v. United States,* which places added burdens on a person in police custody who wishes to assert the right to counsel by requiring that such requests be

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[72] *See Commonwealth v. Martin*, 444 Mass. 213, 215 (2005)(The Supreme Judicial Court adopts a common-law rule that physical evidence derived from statements obtained in violation of *Miranda* is presumptively excludable from evidence at a criminal trial as the "fruit" of a *Miranda* violation.); *Commonwealth v. Smith*, 412 Mass. 823, 836-37 (1992) (The Supreme Judicial Court adopts a common law rule that calls for the application of the exclusionary rule to statements obtained or derived from violations of *Miranda* even though the police later obtain the evidence after advising the suspect of her *Miranda* rights and securing a waiver of *Miranda* before questioning the suspect a second time.).

[73] *See Commonwealth v. Digiambattista*, 442 Mass. 423, 424-25 (2004) (Fact that police made deliberate and intentional false statements to accused in an effort to convince him to confess casts doubt on the voluntariness of the confession and will be taken into account in determining both voluntariness and waiver.).

[74] 456 Mass. 280 (2010). The facts of *Simon* are unique, and unlikely to be repeated soon. Briefly, the defendant was arrested for murder in his attorney's office, after the police intercepted the accused calling his lawyer. The defendant's attorney remained with him throughout the encounter with the police. Aware that he was wanted for questioning in connection with "an incident in Winchester," the defendant and counsel met in counsel's office for 45 minutes before the police joined them to effectuate an arrest. The police explained in conversational tones the basic facts about the shooting, that the survivor had identified the defendant as the shooter from a photographic array, and that one of the victims had died from his wounds. The defendant was not advised of his *Miranda* warnings by the police or by his counsel. The defendant denied any involvement in the incident and provided an alibi for the time in question. A short time later, defendant's counsel ended the interview and the defendant was arrested. Although the Court concluded the interrogation was custodial, a majority determined that the presence of counsel, coupled with the opportunity to consult with the lawyer, met *Miranda*'s requirement of "other fully effective means to inform suspect of right to remain silent and continuous opportunity to exercise it." *Id.* at 288.

[75] *Simon* raises the issue of the relationship between the Fifth Amendment and article 12 of the Massachusetts Declaration of Rights.

[76] The Supreme Judicial Court noted that courts are divided as to whether the presence of a lawyer during custodial interrogation is an adequate substitute for the failure to give warnings. *Simon,* 456 Mass. at 288-289. Although most courts which have considered the question take the position of the majority in *Simon*, there is little, if any, analysis in the cases beyond a reference to the language in *Miranda*, where the Supreme Court observed that "[t]he presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege (against self-incrimination). His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." *Miranda*, 384 U.S. at 466.

The *Simon* majority's view is that article 12's protections are not broader than those of the Fifth Amendment in the sense that the presence of an attorney during custodial interrogation and a "meaningful opportunity" to consult with an attorney obviates the need for any sort of formal warnings about the Privilege Against Self-Incrimination. "[W]hen Federal law is adequate to protect the rights secured by art. 12, a separate State law rule is not required." *Id.* at 290. The dissenters, led by Justice Botsford, disagree and expressed the view that article 12 calls for more than the Fifth Amendment in this context. "[C]ontrary to the court's view, our decisions make clear that art. 12 has substantive content independent of the Fifth Amendment, and that we depart from Federal law to give meaning to that content . . . ." *Id.* at 303-304, discussing *Opinion of the Justices*, 412 Mass. 1201 (1992) (concluding that defendant's refusal to provide non-testimonial evidence violated article 12 even though it not violate the Fifth Amendment); *Attorney General v. Colleton*,

unambiguous, it is far from clear whether the Supreme Judicial Court will follow the approach taken in *Berghuis*. In *Simon,* the Justices were all in agreement that the police questioning of the murder suspect, which took place in his lawyer's office, was custodial interrogation. Furthermore, the majority in *Simon* was clear that its holding was limited to the question of whether the presence of and an opportunity to consult with counsel was an adequate substitute for the *Miranda* warnings, and that the issue of whether the defendant made a valid waiver of the Fifth Amendment and article 12 privileges was a separate issue that was not before the Court.[77] Thus, the majority opinion in *Simon* does not affect the core of the *Miranda* doctrine, which is that a valid waiver of the Fifth Amendment privilege will not be presumed simply because a person who is in police custody answers questions.[78] The significance of *Commonwealth v. Simon* is difficult to assess because of its narrow scope. It does, however, raise some troubling new questions about what constitutes meaningful consultation between client and counsel in order for the presence of counsel to serve as a substitute for *Miranda* warnings.[79]

D. Four Steps To Strengthen the *Miranda* Doctrine

#1 Require Videotaping of all Questioning of Defendants at Police Stations or Similar Locations

The Massachusetts Supreme Judicial Court and other like-minded courts that have been generally supportive of the *Miranda* doctrine could strengthen their commitment to the enforcement of the Fifth Amendment privilege (and analagous provisions in state constitutions) by first requiring videotaping or audiotaping[80] of the entire encounter between the police and persons under arrest once the defendant arrives at the police station (or equivalent location), including during booking, without the option for the defendant to waive or suspend the requirement. There is no sound reason for the current Massachusetts rule, which allows a defendant to expressly waive the recording of a custodial interrogation at the police station.[81] Allowing waivers first raises the question of whether promises or inducements were made by the police, or second, complicates the accurate determination of motions to suppress when the defendant, who agreed to be questioned by the police but whose confession was not recorded, later changes his tune and claims he was

387 Mass. 390 (1982) (concluding that only full transactional immunity, not simply use immunity, would overcome assertion of the privilege against self-incrimination under article 12).

77 "The decision whether to speak with the police during custodial interrogation belongs to the suspect." *Simon*, 456 Mass. at 293.

78 *See Miranda*, 384 U.S. at 475 ("An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was eventually obtained.")

79 The dissenters are certainly correct in pointing out that this new exception to the traditional formulation of the *Miranda* doctrine raises unanswered questions:

> What constitutes an "opportunity to consult"? Is it enough if the suspect and the lawyer speak together for fifteen minutes? Ten? Five? One? Does it matter if the lawyer and the suspect have a prior relationship? Does it matter whether the lawyer has any training in criminal defense? It is clear that what should matter here is not the opportunity to consult but the actual consultation itself: have the lawyer and the suspect-the lawyer's client-discussed at least the client's right against self-incrimination and the possibility of waiver? However, there can be no inquiry into the nature or contents of the consultation because the attorney-client privilege forbids it.

Simon, 456 Mass. at 306-07 (Botsford, J., dissenting).

80 In all cases except those in which some exigency makes it impossible to do so.

81 *See Commonwealth v. Trombley*, 72 Mass. App. Ct. 183, 187 (2008) (discussing *Commonwealth v. Digiambattista*, 442 Mass. 423 (2004) ("Where, as here, the absence of a recording was the choice of the defendant and there is no suggestion of overbearing or coercive tactics by the police, the absence of a recording should not be made the dominant factor in determining that the confession was voluntary.").

forced to sign a waiver.[82] "Over 500 jurisdictions have now enacted policies and procedures requiring their officers to record confessions. At present, seventeen states and the District of Columbia have enacted such requirements through the state legislature, court decision, amendment to the state's rules of evidence, or by court rules."[83]

This change could be accomplished by legislation or Court action under the common law or its rule-making authority. The advent of videotaped confessions is the most important development since the *Miranda* decision in terms of insuring that the individual's Fifth Amendment privilege is respected by the police during custodial interrogation. The costs of implementing such a policy are modest, but to insure rapid and complete compliance, it should be paid by federal and state governments. In my experience, prosecutors and defense counsel have responded favorably to the practice of videotaping and audiotaping police interrogations, and they should be enlisted in support of this initiative. Recording the complete station house encounter between the police and the defendant will lead to more accurate and fair assessments of the defendant's statement by the jury, and promote greater respect for and confidence in law enforcement.

#2 *Adopt the "stop and clarify" approach when a suspect makes an ambiguous statement about the validity of his or her waiver, such as "maybe I need a lawyer," or "maybe I should stop talking"*

In *Davis v. United States*, the Supreme Court held that a defendant undergoing custodial interrogation "must unambiguously request counsel" in order to trigger an obligation on the part of the police to cease questioning and to provide the defendant with an attorney, unless the defendant voluntarily initiates further conversation.[84] In her opinion for the Court, Justice O'Connor explained that when a suspect makes an ambiguous request for counsel, the police should not be put in the position of having to make a judgment call about whether the defendant is exercising his right to counsel "with the threat of suppression if they guess wrong. Such an approach 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.'"[85] However, at the same time, Justice O'Connor acknowledged that it might be good police practice to ask clarifying questions when a suspect makes an ambiguous request for counsel.[86]

In *Berghuis v. Thompkins*, as noted above, the Court decided that the *Davis* standard, requiring an unambiguous request for counsel should be applied in the context of the assertion of the right to remain silent. However, in *Berghuis*, the majority did not suggest, as it did in *Davis*, that where the language used by the defendant is ambiguous, police should inquire further to ascertain whether a request (or assertion) has been made.[87] The heart of the *Miranda* doctrine lies in the recognition that a waiver of the Fifth Amendment privilege must represent the "unfettered" choice of the person in police custody, and may be withdrawn by that person at any time during the interrogation. The good police practice recognized by the Supreme Court in *Davis* should be made an explicit element of the *Miranda* doctrine.

In Massachusetts, whether a person in police

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[82] *See supra* note 65.

[83] Alan M. Gershel, *A Review of the Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, 16 Rich. J.L. & Tech. 9 (2010). *See also* The Innocence Project, *False Confessions & Recording Of Custodial Interrogations*, http://www.innocenceproject.org/Content/314.php (last visited July 13, 2010) ("To date, Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oregon, Wisconsin, and the District of Columbia have enacted legislation requiring the recording of custodial interrogations. State supreme courts have taken action in Alaska, Iowa, Massachusetts, Minnesota, New Hampshire and New Jersey. Approximately 500 jurisdictions have voluntarily adopted recording policies.").

[84] *Davis*, 512 U.S. at 459.

[85] *Id.* at 460-61.

[86] *Id.* at 461.

[87] The Supreme Judicial Court has yet to decide whether the *Davis* rule should be followed in the context of an ambiguous reference to the right to remain silent. *See Commonwealth v. Sicari*, 434 Mass. 732, 749 n.13 (2001). In such cases, to require the police to respond by clarifying whether the defendant wishes to continue to answer questions seems more consistent with their responsibility to scrupulously honor the defendant's rights, *see Michigan v. Mosley*, 423 U.S. 96 (1975), than simply ignoring the

custody has asserted the right to remain silent or the right to counsel is a mixed question of fact and law for the court.[88] The Supreme Judicial Court has applied *Davis*'s "clear articulation" rule to ambiguous requests for an attorney after the defendant made a valid waiver of *Miranda* rights.[89] However, in applying the *Davis* rule that police questioning need not cease whenever the defendant makes an ambiguous request for counsel, the Supreme Judicial Court also has observed that the better practice is for the police to interrupt the interrogation and clarify whether the defendant wishes to have counsel present or to continue with the interrogation.[90] For example, in *Commonwealth v. Corriveau*, the defendant stated during custodial interrogation that "it's beginning to sound like I need a lawyer."[91] Instead of simply continuing with the interrogation, the police responded, "You may use the telephone to call a lawyer and you may leave at any time if you wish to do so."[92] The defendant replied that he did not want to leave or to call a lawyer, and the questioning continued. The Supreme Judicial Court had no trouble in finding the evidence was sufficient to demonstrate a waiver.[93] Thus, requiring the police to clarify ambiguous statements would not require the police to halt interrogations at the first sign of hesitation by the person in custody, but simply enable a reviewing court to have confidence that the interrogation resumed or continued on the basis of a valid waiver of the Privilege by the defendant.

In urging adoption of a rule calling on the police to clarify a defendant's ambiguous statement about counsel, Justice Souter observed, "the *Miranda* safeguards exist to assure that the *individual's right to choose* between speech and silence remains unfettered throughout the interrogation process . . . Social science confirms what common sense would suggest, that individuals who feel intimidated or powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant."[94] The flaw in the position that custodial interrogation may continue without any duty to clarify an ambiguous request for counsel, according to Justice Souter, is that "[w]hile it might be fair to say that every statement is meant either to express a desire to deal with police through counsel or not, this fact does not dictate the rule that interrogators who hear a statement consistent with either possibility may presume the latter and forge ahead; on the contrary, clarification is the intuitively sensible course."[95]

In view of the importance that the Supreme Judicial Court attaches to the right to counsel, especially in the context of custodial interrogations,[96] and the obligation under Massachusetts law to establish a valid waiver of *Miranda* rights by proof beyond a reasonable doubt, the Court's suggestion that it is good practice for the police to clarify an ambiguous statement by the defendant about the right to remain silent or an ambiguous request for counsel should be converted to a common law duty on the part of the police to clarify ambiguous references by the defendant either the right to remain silent or the right to counsel. "'[T]he opportunity to exercise [*Miranda*] rights throughout the interrogation is as important as being informed of those rights.'"[97]

#3 Establish a per se rule of exclusion for confessions or statements based in whole or in part on knowing misrepresentations of fact

A few courts have strongly condemned false state-

defendant's statements and continuing with the interrogation.

[88] *See Commonwealth v. Almonte,* 444 Mass. 511, 519 (2005). *See also Commonwealth v. Cobb*, 374 Mass. 514, 520 (1978) (Defendant's post-arrest response "What can I say?" was, as a matter of law, an assertion of the right to remain silent.).

[89] *See, e.g., Commonwealth v. Morganti*, 455 Mass. 388, 396-98 (2009), and cases cited.

[90] *See Commonwealth v. Obershaw*, 435 Mass. 794, 801 (2002).

[91] 396 Mass. 319, 331 (1985)

[92] *Id.*

[93] *Id.* at 330.

[94] *Davis*, 512 U.S. at 468, 470 n.4 (Souter, J., concurring in the judgment) (emphasis in original) (internal quotations and citations omitted).

[95] *Davis*, 512 U.S. at 473.

[96] *See, e.g., Commonwealth v. Mavredakis*, 430 Mass. 848, 858 (2000) (explaining that article 12 of the Declaration of Rights provides more protection than the federal constitution "in regard to self-incrimination and the affirmative right to access counsel during police interrogations").

[97] *Id.* at 860 (quoting *Commonwealth v. McKenna*, 355 Mass. 313, 324 (1969)).

ments about the law made by the police to a person in police custody in an effort to obtain a confession, and treated such conduct as coercion per se.[98] Beyond this, however, the United States Supreme Court has never held that the *Miranda* doctrine imposes direct limits on the types of tactics and techniques used by the police to conduct interrogations. This is because *Miranda* establishes ground rules for the admissibility of statements at trial. The Court has, however, held that the consequence of using certain interrogation tactics and techniques may result in a determination that the defendant did not waive his or her Fifth Amendment rights from the outset, or that an otherwise valid waiver was no longer effective and the defendant's statements will be excluded from use at trial in the government's case in chief.[99] "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."[100]

Despite *Miranda*'s focus on the conditions that will make statements obtained during custodial interrogation admissible at trial, there is language in state court decisions, including in Massachusetts, that indicates that the *Miranda* doctrine does impose limits on the types of interrogation methods used by the police.[101] The predominant national view, including in Massachusetts, is that false statements by the police to a suspect in custody suggesting: an accomplice has confessed and implicated the subject; a witness has identified the suspect; an accomplice is willing to testify; scientific evidence exists linking the defendant to the crime; or the interrogator "sympathizes" with the subject or "understands" his motivation (sometimes referred to as minimization), do not automatically render a resulting confession involuntary.[102]

Although up to now the use of deception as an

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[98] *See Lynumn v. Illinois*, 373 U.S. 528, 534 (1963); *Commonwealth v. Novo*, 442 Mass. 262, 268-69 (2004) (Based on article 12 of the Mass. Declaration of Rights).

[99] *See United States v. Patane*, 542 U.S. 630, 637 (2004) (plurality opinion) ("[T]he *Miranda* rule is not a code of police conduct, and police do not violate the constitution (or even the *Miranda* rule for that matter) by mere failures to warn."). *See also Chavez v. Martinez*, 538 U.S. 760 (2003) (where no one opinion commanded a majority, but a majority of the justices, writing in separate opinions, were in agreement that the Fifth Amendment is not violated by unlawful police interrogation practices until statements obtained as a result of those practices are offered against the defendant). *But see Chavez*, 538 U.S. at 789 (Kennedy, J, concurring in part and dissenting in part) (opining that the Fifth Amendment privilege "is a substantive restraint on the conduct of government, not merely an evidentiary rule governing the work of the courts"). The Supreme Court indicated in the past that the use of deceit or trickery as a method to obtain a confession may be considered in evaluating the voluntariness of a confession. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986) ("[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception . . . [T]he record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements."); *Fare v. Michael C.*, 442 U.S. 707, 726-727 (1979) (The defendant was "not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit . . .)".

[100] *Miranda*, 384 U.S. at 476. The Supreme Court has held that the police do not trick a defendant into waiving his *Miranda* rights when they fail to tell him about all of the crimes under investigation. *See Colorado v. Spring*, 479 U.S. 564,572-74 (1987).

[101] *See DiGiambattista*, 442 Mass. 423 (2004). *See also Commonwealth v. Smith*, 412 Mass. 823, 836 (1992) (observing that the failure to comply with *Miranda* "is itself an improper police tactic").

[102] *See Frazier v. Cupp*, 394 U.S. 731, 738-39 (1969) (confession that followed after defendant was falsely told that his partner had already confessed was voluntary); *Commonwealth v. Raymond*, 424 Mass. 382, 395 (1997) ("[m]isinformation by the police does not necessarily render a confession involuntary," but it is a factor); *Commonwealth v. Magee*, 423 Mass. 381, 389 (1996) ("police deception regarding the facts of a particular crime or the existence of evidence linking the defendant to the crime [does] not, by itself, render a confession involuntary"); *Commonwealth v. Selby*, 420 Mass. 656, 663 (1995), *same case*, 426 Mass. 168 (1997) (the use of "nonexistent incriminatory information" consisting of a false statement that the police found the defendant's handprint and fingerprints at the scene of the crime did not require a finding of involuntariness); *Commonwealth v. Meehan*, 377 Mass. 552, 563 (1979), *cert. dismissed*, 445 U.S. 39 (1980) ("Taken alone, the misinformation would not, we think, suffice to show 'involuntariness' . . . but the judge could view it as a relevant factor in considering whether the defendant's ability to make a free choice was undermined."). *See also* Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions,* 40 Valpariso U.L. Rev. 601, 612 (2006) (Based on a comprehensive review of state and federal decisions dealing with voluntariness issues over a twenty year span, author reaches a firm conclusion: "One begins here with a

interrogation tactic does not automatically require a determination that a confession is involuntary, the Supreme Judicial Court has condemned the technique.[103] Other than its apparent effectiveness as a method to gain a confession, there is no sound policy reason to permit the police to make false statements to persons undergoing custodial interrogation, especially as we begin to better understand the phenomenon of false confessions and the fact that a myriad of factors may contribute to them.[104] We do not tolerate knowing false statements by the police in their reports or in judicial proceedings; we should demand as much during custodial interrogations in which the suspect has the same constitutional right to remain silent as she does in a courtroom. The use of modern psychological methods of interrogation that are designed to break down the inhibitions and reservations that may lead a defendant to remain silent is one thing, but to lie about the existence of incriminating evidence, the strength of the government's case, or the culpability of a family member or loved one is quite another. This type of conduct severely undercuts any claim that a suspect's waiver of rights remains valid or that her confession was an exercise of free will. The eradication of deception as an interrogation tactic would not only strengthen the *Miranda* doctrine and help to insure that statements made during custodial interrogation are voluntary, but would also build greater respect for and confidence in law enforcement.[105]

#4. Require automatic judicial review of statements that are the product of custodial interrogation

States such as Massachusetts could take another important step to strengthen the *Miranda* doctrine by requiring, in every case in which the government offers into evidence at trial any statement by the defendant following his arrest, judicial inquiry into the voluntariness of the statement and whether it complies with *Miranda* regardless of whether the defendant files a motion to suppress.

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central truth: Police are permitted to lie to suspects during the interrogation."); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 Conn. L. Rev. 425, 451 (1996) ("[H]istory demonstrates that the standards for admissibility of confessions have shifted back and forth over time. As currently interpreted, however, the modern test of voluntariness—woven from evidentiary rule, the Fifth Amendment, and the Fourteenth Amendment requirement of Due Process—provides great flexibility, flexibility that courts have used to permit confessions obtained by police lying.").

[103] In *DiGiambattista,* the Supreme Judicial Court stated that "'we expressly disapprove of the tactics of making deliberate and intentionally false statements to suspects in an effort to obtain a statement,' as 'such tactics cast doubt' on both the validity of a suspect's waiver of rights and the voluntariness of any subsequent confession." 442 Mass. 423, 432-33 (2005) (quoting *Commonwealth v. Jackson*, 377 Mass. 319, 328 n.8 (1979). *See Commonwealth v. Edwards*, 420 Mass. 666, 671 (1995) (use of false statements to obtain suspect's waiver is "disapproved of and may indicate that any subsequent waiver was made involuntarily"); *Commonwealth v. Nero*, 14 Mass. App. Ct. 714, 716 (1982) ("use of false information as a tactical device is strongly disapproved and casts instant doubt on whether a defendant's statement is voluntary").

[104] *See* The Innocence Project, *False Confessions,* www.innocenceproject.org/understand/False-Confessions.php (last visited July 13, 2010) (documenting numerous instances of wrongful convictions attributed to false confessions that were obtained in part by means of police deception and trickery).

[105] The law permits the police to make use of deception in conducting undercover investigations such as when an officer poses as a drug dealer or purchaser. *See, e.g., Lewis v. United States*, 385 U.S. 206, 208 (1966); *Commonwealth v. Villar*, 40 Mass. App. Ct. 742 (1996), and cases cited. In these situations, however, the police are not using deception to obtain a waiver of the person's constitutional rights. Nonetheless, there are limits on such conduct. "The law independently forbids convictions that rest upon entrapment." *United States v. Jimenez*, 537 U.S. 270, 276 (2003). *See also Commonwealth v. Garner*, 423 Mass. 735 (1996) (Police did not act unlawfully in use a "flash bang" device to assist them with the execution of a search warrant; the Supreme Judicial Court acknowledges, however, that "an unreasonable execution of a warrant may violate the Fourth Amendment."). When a law enforcement officer misrepresents her purpose in conducting an investigation, the resulting consent given by the person is not regarded as valid. *See Commonwealth v. Carp*, 47 Mass. App. Ct. 229, 233, 234 (1999). *See also United States v. Peters*, 153 F.3d 445, 451 (7th Cir. 1998) (noting that consensual searches for criminal investigations that are misrepresented as civil tax audits are unreasonable under the Fourth Amendment). *See generally* Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2(n), 133-41 (4th ed. 2004 & Supp. 2009) (discussing the effect of deception on consensual searches).

In states such as Massachusetts, which follow the so-called "humane practice" rule, which requires judicial review whenever voluntariness is a "live" issue as well as an independent assessment of voluntariness by the jury, at trial,[106] this would not add significantly to the court's current responsibilities. In fact, in most cases, this would not require an evidentiary hearing. Nonetheless, it would signal to police and prosecutors that the judicial branch will give the same scrutiny to waivers of the privilege against self-incrimination by the defendant that occur behind the closed doors of the police interrogation room as we give to waivers by the defendant that occur in our courtrooms.

Conclusion

With its decision in *Berghuis v. Thompkins*, the Supreme Court has obliterated the vital distinction between awareness of one's rights and waiver of one's rights, a difference which lies at the heart of the *Miranda* doctrine. As a result, the Supreme Court has so fundamentally transformed the *Miranda* doctrine that it has lost most of its vitality. Courts in states such as Massachusetts have retained key elements of the *Miranda* doctrine and in some cases expanded its procedural rules to further safeguard the Fifth Amendment privilege and corresponding state constitutional rights. By expanding the practice of recording station house questioning, by imposing on the police a duty to clarify ambiguous requests to remain silent or for counsel made by defendants during custodial interrogation, by eliminating the use of deception as an interrogation method when suspects are in police custody, and by requiring judicial review of any statements that are the product of custodial interrogation before they are offered for use at trial, regardless of whether there is an objection by the defendant, Massachusetts and other state courts have the opportunity to significantly strengthen the *Miranda* doctrine without foreclosing the use of custodial interrogation as a valid investigative measure.[107]

Ultimately, *Miranda* is worth saving and strengthening because, as Peter Baird wrote in a Wall Street Journal counterpoint on the 25th anniversary of *Miranda*, "[m]ore than anything else, *Miranda v. Arizona* means that information about our constitutional guarantees is no longer rationed on the basis of wealth, experience, or education."[108]

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[106] *See Commonwealth v. Harris*, 371 Mass. 462, 469-70 (1976).

[107] There is another debate underway over whether further exceptions to the *Miranda* doctrine and other rules of federal criminal procedure should be established by the Supreme Court or the Congress to address the needs of law enforcement in investigating and preventing incidents of domestic terrorism. *See, e.g., Holder Backs A Miranda Limit for Terror Suspects*, N.Y. Times, May 9, 2010; "*Miranda*'s *Future*" (panel discussion sponsored by the American Constitution Society and held on July 13, 2010 at the National Press Club in Washington, D.C.), video available at www.acslaw.org (last viewed July 19, 2010). This subject is beyond the scope of this Article.

[108] Stuart, *supra* note 9, at 101 (quoting Peter Baird, *Critics Must Confess: Miranda was the Right Decision*, The Wall Street Journal, June 13, 1991, at A15).

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