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Cloning Miranda: Why Medical Miranda Supports the Pre-Assertion of Criminal Miranda Rights

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CLONING *MIRANDA*: WHY MEDICAL *MIRANDA* SUPPORTS THE PRE-ASSERTION OF CRIMINAL *MIRANDA* RIGHTS

COLIN MILLER*

Courts across the country have concluded that suspects cannot assert their *Miranda* rights before being subjected to custodial interrogation. This reluctance to credit pre-assertions can be traced to dicta from *McNeil v. Wisconsin*, in which the Supreme Court noted that “[m]ost rights must be asserted when the government seeks to take the action they protect against.” This Article challenges this notion by drawing an analogy between criminal suspects and patients. In 1990, Congress passed the Patient Self-Determination Act (“PSDA”), the so-called “medical *Miranda*,” which requires health care providers who accept money from Medicaid or Medicare to inform patients of their rights regarding advance directives and the refusal of medical treatment prior to admission.

The goal of the PSDA is to inform patients of their health care rights prior to admission so that they can assert those rights before being pressed into an unfamiliar environment in which they face possible isolation and coercion. This Article contends that the same principles that led to the passage of the PSDA support the ability of suspects to be able to pre-assert their *Miranda* rights when custodial interrogation is “imminent.” It also sets up a framework for determining whether a suspect properly pre-asserted his *Miranda* rights.

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INTRODUCTION

Demetrius Wilson was a suspect in the fatal shooting of Reginald Knox, and Detective Brian Krueger “put out word” that he wanted to interview Wilson.¹ Wilson’s stepfather contacted Krueger and arranged for Wilson to come to the police station with relatives for an interview.² While being interviewed at the police station, Wilson made a first statement in which he claimed he shot Knox because Knox was robbing him at gunpoint.³ Police officers then accompanied Wilson and his

1. *Wilson v. Commonwealth*, 199 S.W.3d 175, 177 (Ky. 2006).

2. *Id.*

3. *Id.*

relatives to the crime scene, where Wilson walked them through his version of events.⁴ The officers (1) responded that his story was not consistent with the evidence; and (2) lied to him by telling him that video cameras recorded the shooting.⁵ The officers suggested that Wilson and his relatives talk things over at lunch and return to the police station in the afternoon.⁶

Upon returning to the police station, Wilson's stepfather told Detective Krueger that the family consulted with a lawyer, who told Wilson not to speak to police.⁷ Wilson then told a police officer "that if the police wished to speak with him, they should contact his attorney."⁸ Upon these words leaving Wilson's lips, he was immediately arrested and taken to an interview room.⁹ There, Wilson was read his *Miranda* rights, said he understood them, and gave an incriminatory statement that was inconsistent with his first statement.¹⁰

The court denied Wilson's motion to suppress his second statement, and he was eventually convicted of murder.¹¹ Wilson appealed, claiming he validly invoked his *Miranda* rights prior to giving his second statement, meaning the statement was inadmissible under the *Miranda* right to counsel.¹² The Supreme Court of Kentucky agreed that the second statement would be inadmissible if Wilson properly invoked his *Miranda* rights;¹³ however, the court concluded that Wilson's *Miranda* right to counsel had not yet attached because his request for an attorney was made before he was subjected to custodial interrogation.¹⁴ As support, the court cited the following dicta from the Supreme Court's opinion in *McNeil v. Wisconsin*¹⁵:

We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation" Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 176.

12. *Id.* at 178.

13. *Id.*

14. *Id.*

15. 501 U.S. 171 (1991).

custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.¹⁶

The court thereafter laid out a laundry list of other court opinions from around the country, each of which also cited this dicta from *McNeil* to conclude that a suspect cannot invoke *Miranda* “rights unless he or she is subject to custodial interrogation.”¹⁷

The thesis of this Article is that, contrary to the conventional wisdom, suspects should be able to pre-assert their *Miranda* rights. This Article advances this thesis by reference to the Patient Self-Determination Act (“PSDA”), the so-called “medical *Miranda*,” which requires all health care providers who accept money from Medicaid or Medicare to inform patients of their rights regarding advance directives and the refusal of medical treatment prior to admission in health care facilities. Specifically, this Article contends that the same policy goals that allow and even encourage patients to pre-assert their medical *Miranda* rights militate in favor of recognizing pre-assertion of criminal *Miranda* rights. Moreover, this Article argues that courts should determine whether custodial interrogation is “imminent” and thus conducive to pre-assertion of *Miranda* rights by applying the same “totality of the circumstances” test they use to decide whether police officers can pre-administer the *Miranda* warning.

Section I looks at the *Miranda* opinion and the subsequent Supreme Court opinions expanding and narrowing its scope. Section II analyzes the PSDA and the reasons why Congress thought it made sense to inform patients of the ability to execute advance directives before being admitted into health care facilities. Finally, Section III argues that the same principles that led to the passage of the PSDA support the ability of suspects to be able to pre-assert their *Miranda* rights when custodial interrogation is “imminent.” The Article concludes by setting up a framework for determining whether a suspect properly pre-asserted his *Miranda* rights.

I. *MIRANDA* AND ITS PROGENY

A. *Miranda* and Fifth Amendment Rights

The Supreme Court’s 1966 opinion in *Miranda v. Arizona*¹⁸ resolved four consolidated cases.¹⁹ In all four cases, police officers

16. *Wilson*, 199 S.W.3d at 178–79 (quoting *McNeil*, 501 U.S. at 182 n.3).

17. *Id.* at 179.

18. 384 U.S. 436 (1966).

interrogated suspects without first informing them of their right to remain silent and their right to counsel.²⁰ The four suspects each claimed that their interrogations violated the Fifth Amendment's requirement that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself"²¹

The Supreme Court agreed, concluding that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."²² The Court then 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."²³ According to the Court, before subjecting a suspect to such custodial interrogation, law enforcement officers must adhere to the following procedural safeguard or its functional equivalent: "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."²⁴

In response to this *Miranda* warning, the suspect can voluntarily, knowingly, and intelligently waive these rights.²⁵ If, however, the suspect indicates that he wishes to speak with an attorney, the interrogation cannot proceed.²⁶ Moreover, if the suspect is alone and invokes his right to remain silent by stating that he does not wish to be interrogated, the officers cannot question him.²⁷

B. *Michigan v. Mosley and the Right to Remain Silent*

Nine years later, in 1975, the Supreme Court was confronted with the question of whether law enforcement officers can re-administer the *Miranda* warning and interrogate a suspect who has already invoked his

19. *Id.* at 491–98.

20. *See id.* One of these suspects, Ernesto Miranda, was charged with kidnapping, rape, and armed robbery. Two police officers put Miranda in an interrogation room and emerged with a written confession two hours later without any indication they had informed him of his constitutional rights. *See id.* at 491–92.

21. *Id.* at 442, 491.

22. *Id.* at 444.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 444–45.

27. *Id.* at 445.

right to remain silent. In *Michigan v. Mosley*,²⁸ Detective James Cowie arrested Richard Mosley in connection with a string of robberies and read him the *Miranda* warning.²⁹ After Cowie began interrogating him, Mosley stated that he did not want to answer any questions about the robberies.³⁰ Cowie ceased questioning Mosley and took him to the cell block.³¹

Over two hours later, a different detective took Mosley to the Homicide Bureau and read him the *Miranda* warning.³² Mosley indicated that he understood the warning, and the detective proceeded to question him about a murder.³³ After first denying his involvement, Mosley incriminated himself in the homicide.³⁴ Upon being charged with first-degree murder, Mosley moved to suppress his confession, but the trial court denied the motion.³⁵ Following his ensuing conviction, Mosley appealed, claiming that the admission of his confession violated the *Miranda* doctrine.³⁶

The Supreme Court noted “that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his ‘right to cut off questioning’ was ‘scrupulously honored.’”³⁷ Applying this standard, the Court concluded that Mosley’s right to cut off questioning was, in fact scrupulously honored.³⁸ According to the Court, after Mosley initially asserted his right to remain silent, “the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.”³⁹

28. 423 U.S. 96 (1975).

29. *Id.* at 97.

30. *Id.*

31. *Id.*

32. *Id.* at 97–98.

33. *Id.* at 98.

34. *Id.*

35. *Id.* at 98–99.

36. *Id.* at 99.

37. *Id.* at 104 (quoting *Miranda v. Arizona*, 384 U.S. 436, 474, 479 (1966)).

38. *Id.*

39. *Id.* at 106. Many courts have referred to these four factors as the *Mosley* factors. See, e.g., *State v. Hartwig*, 366 N.W.2d 866, 870 (Wis. 1985). These factors, however, are not to be “woodenly applied,” and none of them alone is dispositive on the issue of whether a suspect’s right to remain silent was scrupulously honored. *Id.*; see, e.g., *Grant v. Warden, Maine State Prison*, 616 F.3d 72, 77 (1st Cir. 2010).

C. *Edwards v. Arizona and the Edwards Prophylaxis*

Another six years later, the Supreme Court was confronted with a similar question: can law enforcement officers re-administer the *Miranda* warning and interrogate a suspect who has already invoked his *Miranda* right to counsel? This time, however, the result was very different. In *Edwards v. Arizona*,⁴⁰ Robert Edwards was charged with robbery, burglary, and first-degree murder.⁴¹ During custodial interrogation and after being read the *Miranda* warning, Edwards expressed interest in making a deal, prompting the interrogating officer to give him the county attorney's phone number.⁴² Edwards dialed the number before quickly hanging up and saying, "I want an attorney before making a deal."⁴³ The officer responded by taking Edwards to the county jail.⁴⁴

The next morning, a guard informed Edwards that two detectives wished to speak to him, prompting Edwards to respond that he did not want to talk with anyone.⁴⁵ The guard responded that Edwards had to talk to the detectives.⁴⁶ Edwards thereafter met with the detectives, who read him the *Miranda* warning and played him the taped statement of an alleged accomplice who had implicated him.⁴⁷ Edwards then agreed to speak and incriminated himself.⁴⁸ Edwards moved to suppress his confession, but the trial court denied the motion, concluding that his statement was voluntary.⁴⁹

The United States Supreme Court reversed, concluding "that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights."⁵⁰ The Court further found that a suspect who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to

40. 451 U.S. 477 (1981).

41. *Id.* at 478.

42. *Id.* at 478–79.

43. *Id.* at 479.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 479–80.

50. *Id.* at 484.

him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”⁵¹

The Supreme Court has subsequently referred to this holding as the “*Edwards* prophylaxis” because it is a judicially crafted, non-constitutional rule rather than one that is constitutionally required.⁵² In other words, this prophylaxis is merely a “rule established to protect the Fifth Amendment based *Miranda* right to . . . counsel” and not part of the *Miranda* right itself.⁵³ Under this prophylaxis, the defendant’s subsequent waiver of his right to counsel is presumed to be involuntary and the result of the inherently compelling pressures of custodial interrogation.⁵⁴ Because this presumption is merely a prophylaxis, either the Supreme Court or a lower court can decide to expand it to different factual contexts.⁵⁵ That said, because the *Edwards* rule is prophylactic, a court can extend it to cover additional situations only after balancing benefits against costs and determining whether the extension serves its prophylactic purpose.⁵⁶

D. Pre-Assertion of Miranda Rights

1. *MCNEIL V. WISCONSIN* AND THE DICTA ON PRE-ASSERTION

A decade later, in *McNeil v. Wisconsin*, the defendant asked the Supreme Court to extend the *Edwards* prophylaxis. In *McNeil*, Paul McNeil was arrested on suspicion of armed robbery.⁵⁷ When two Milwaukee County deputy sheriffs read McNeil the *Miranda* warning and sought to interrogate him, he refused to answer any questions but did not ask for an attorney.⁵⁸ At his initial appearance/bail hearing, McNeil requested and was appointed a public defender.⁵⁹ After his bail hearing, McNeil was incarcerated, and Detective Joseph Butts visited him on three occasions over the next four days to talk about a murder,

51. *Id.* at 484–85.

52. *See, e.g., Maryland v. Shatzer*, 559 U.S. 98, 116 (2010) (citing the “*Edwards* prophylaxis”).

53. *Montejo v. Louisiana*, 556 U.S. 778, 787 (2009).

54. *Shatzer*, 559 U.S. at 115–16.

55. *See, e.g., State v. Stewart*, 780 P.2d 844, 850 (Wash. 1989) (en banc) (“*Stewart* requests this court to extend the *Edwards* prophylactic rule in order to shield his custodial confession that occurred following the invocation of his Sixth Amendment right to counsel at an arraignment on an unrelated charge.”).

56. *Shatzer*, 559 U.S. at 106–09.

57. *McNeil v. Wisconsin*, 501 U.S. 171, 173 (1991).

58. *Id.*

59. *Id.*

an attempted murder, and an armed burglary in Caledonia.⁶⁰ Each time, Butts read McNeil the *Miranda* warning, and, each time, McNeil signed a *Miranda* waiver.⁶¹ During Butts' third visit, McNeil made an incriminatory statement while Butts interrogated him.⁶²

The next day, McNeil was charged with the Caledonia crimes.⁶³ He moved to suppress his confession, but the trial court denied the motion.⁶⁴ After being convicted, McNeil appealed, claiming that his courtroom appearance with counsel constituted invocation of his *Miranda* right to counsel.⁶⁵

The Supreme Court began its analysis by considering the right to counsel contained in the Sixth Amendment, which states in relevant part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”⁶⁶ The Court noted that this Sixth Amendment right to counsel is offense-specific and only attaches when a prosecution is commenced via a “formal charge, preliminary hearing, indictment, information, or arraignment.”⁶⁷ Therefore, McNeil’s Sixth Amendment right to counsel had only attached in connection with the armed robbery and had not yet attached in connection with the Caledonia crimes.⁶⁸

McNeil, however, claimed that his invocation of his Sixth Amendment right to counsel in connection with the armed robbery charge also constituted “an invocation of the non-offense-specific *Miranda-Edwards* right.”⁶⁹ The Court agreed that the *Miranda* right to counsel “is *not* offense specific: Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present.”⁷⁰ The Court, however, disagreed with the argument that invocation of the Sixth Amendment right to counsel implies invocation of the *Miranda*/Fifth Amendment right to counsel; instead, it concluded that “[o]ne might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution.”⁷¹ Moreover, the Court admonished that invocation of the

60. *Id.* at 173–74.

61. *Id.*

62. *Id.* at 174.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 175 (quoting U.S. CONST. amend. VI).

67. *Id.* (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)).

68. *Id.* at 176.

69. *Id.* at 177.

70. *Id.* (citing *Arizona v. Roberson*, 486 U.S. 675, 680 (1988)).

71. *Id.* at 178.

Miranda right to counsel “requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*. Requesting the assistance of an attorney at a bail hearing does not bear that construction.”⁷²

McNeil nonetheless contended that the Court should still find attachment of the Sixth Amendment right to counsel implied invocation of the *Miranda* right to counsel as a matter of sound policy.⁷³ In other words, McNeil asked the Court to extend the *Edwards* prophylaxis.⁷⁴ The Court refused, finding that “if we were to adopt petitioner’s rule, most persons in pretrial custody for serious offenses would be *unapproachable* by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned*.”⁷⁵

After rejecting this argument, the *McNeil* majority addressed the dissent in a footnote that was partially quoted in the introduction to this Article:

The dissent predicts that the result in this case will routinely be circumvented when, “[i]n future preliminary hearings, competent counsel . . . make sure that they, or their clients, make a statement on the record” invoking the *Miranda* right to counsel. We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than “custodial interrogation”—which a preliminary hearing will not always, or even usually, involve. If the *Miranda* right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect. Assuming, however, that an assertion at arraignment would be effective, and would be routinely made, the mere fact that adherence to the principle of our decisions will not have substantial

72. *Id.*

73. *Id.* at 180.

74. *Id.* at 181.

75. *Id.* at 181–82.

consequences is no reason to abandon that principle. It would remain intolerable that a person in custody who had expressed *no* objection to being questioned would be unapproachable.⁷⁶

2. MCNEIL'S AFTERMATH AND THE ADOPTION OF THE PRE-ASSERTION DICTA

In the aftermath of *McNeil*, courts across the country correctly concluded that this footnote was dicta.⁷⁷ In *McNeil*, the Court determined that McNeil did not make any statement during his bail hearing that could “reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*.”⁷⁸ Therefore, the *McNeil* majority’s speculation about whether a suspect can assert his *Miranda* rights anticipatorily and in a context other than custodial interrogation was unnecessary to its opinion.⁷⁹

That said, while courts have construed this footnote as dicta, they have also categorically applied it to invalidate pre-assertions of *Miranda* rights. For instance, in *State v. Relford*,⁸⁰ police officers believed that Charles Relford committed a homicide and interrogated him after reading him the *Miranda* warning.⁸¹ At the end of this interrogation, the officers arrested Relford and transported him to jail.⁸² The following day, a sergeant told Relford about telephone restrictions at the jail and asked him if he wanted to speak to a lawyer.⁸³ Relford answered that “he needed the public defender.”⁸⁴ The sergeant responded that “a public defender would have to be appointed to him by the Court, however, if he wanted to call them, there was the phone, and I would provide the phone number for him.”⁸⁵ Relford did not follow up on his request, but the police did follow up with Relford the next day, securing his confession after reading him the *Miranda* warning.⁸⁶

76. *Id.* at 182 n.3 (alteration in original) (citations omitted) (quoting *id.* at 184 (Stevens, J., dissenting)).

77. *See, e.g., Alston v. Redman*, 34 F.3d 1237, 1246 (3d Cir. 1994).

78. *McNeil*, 501 U.S. at 178.

79. *Redman*, 34 F.3d at 1246 (“[T]his passage in *McNeil* is essentially dicta, being a response to a hypothetical posed by the dissent . . .”).

80. 623 N.W.2d 343, 344 (Neb. Ct. App. 2001).

81. *Id.* at 344–45.

82. *Id.* at 344.

83. *Id.* at 345.

84. *Id.*

85. *Id.*

86. *Id.* at 344–45.

Relford was later charged with murder and moved to suppress his confession.⁸⁷ The district court agreed with Relford, finding that his statement that “he needed the public defender” was an unequivocal and unambiguous invocation of his *Miranda* right to counsel.⁸⁸ But the Court of Appeals of Nebraska reversed, citing the aforementioned footnote from *McNeil*.⁸⁹

The Nebraska court was not alone in citing *McNeil*; it noted that “[m]any state courts which have considered the issue have relied on the language in *McNeil v. Wisconsin*, to hold that one cannot anticipatorily invoke the *Miranda* right to counsel prior to custodial interrogation.”⁹⁰ Moreover, “relying on *McNeil v. Wisconsin*, an overwhelming number of federal courts have also held that a defendant cannot invoke his *Miranda* rights outside the context of custodial interrogation.”⁹¹

While *McNeil* only involved the alleged assertion of the *Miranda* right to counsel, courts have also used it to defeat claims by suspects that they asserted their right to remain silent prior to custodial interrogation. For example, in *Barnett v. State*,⁹² Dustin Barnett voluntarily went to the police station where Detective Curtis Lampert took him to an interrogation room before telling him that he did not have to talk with police and that he was free to leave.⁹³ Barnett responded that he wanted to leave and did not want to talk.⁹⁴ Detective Lampert responded by leaving the room, returning a few minutes later, and telling Barnett that he was no longer free to leave.⁹⁵ Lampert later read Barnett the *Miranda* warning and interrogated him, resulting in Barnett making a number of incriminatory statements.⁹⁶

After he was charged with first-degree murder with a deadly weapon and robbery with a deadly weapon, Barnett unsuccessfully moved to suppress his statements and was convicted.⁹⁷ On appeal, the Supreme Court of Nevada cited *McNeil* for the proposition that *Miranda* rights cannot be asserted anticipatorily.⁹⁸ Therefore, the court found no constitutional violation because “Barnett’s initial invocation of

87. *Id.* at 345.

88. *Id.*

89. *Id.* at 346, 349 (citing *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991)).

90. *Id.* at 347 (citation omitted) (collecting cases).

91. *Id.* at 348 (citation omitted) (collecting cases).

92. No. 61083, 2013 WL 7155560 (Nev. Dec. 18, 2013).

93. *Id.* at *1.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (citing *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991)).

his right to remain silent occurred before *Miranda* circumstances even existed.”⁹⁹

II. THE PATIENT SELF-DETERMINATION ACT

A. *Cruzan and the Right to Refuse Unwanted Medical Treatment*

In *Cruzan v. Director, Missouri Department of Health*,¹⁰⁰ Nancy Cruzan was rendered incompetent and dependent on life support as the result of an automobile accident.¹⁰¹ Thereafter, her parents and coguardians moved for “a court order directing the withdrawal of their daughter’s artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties.”¹⁰² The Supreme Court of Missouri denied their request, concluding that they failed to prove by clear and convincing evidence that Cruzan would have wanted life support withdrawn under the present circumstances.¹⁰³

In addressing this issue on appeal in June 1990, the United States Supreme Court concluded that “the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.”¹⁰⁴ The Court was able to infer this “constitutionally protected liberty interest in refusing unwanted medical treatment” by considering both the Fourteenth Amendment’s Due Process Clause and prior precedent regarding the right to bodily integrity.¹⁰⁵ That said, the Court found no problem with Missouri enacting a procedural safeguard that surrogates seeking to withdraw life support must prove by clear and convincing evidence that the incompetent patient would have made the same decision.¹⁰⁶

In a concurring opinion, Justice O’Connor wrote separately to emphasize a few points not addressed by the majority’s opinion. One of these points was that the problem confronted by the Court could be avoided in the future based upon advance directives.¹⁰⁷ Specifically, she noted that decisions such as the one before the Court “might be avoided if the State considered an equally probative source of evidence: the

99. *Id.* at *2.

100. 497 U.S. 261 (1990).

101. *Id.* at 265.

102. *Id.*

103. *Id.*

104. *Id.* at 277.

105. *Id.* at 278.

106. *Id.* at 281–82.

107. *Id.* at 289–90 (O’Connor, J., concurring).

patient's appointment of a proxy to make health care decisions on her behalf."¹⁰⁸ She also presciently pointed out that "[d]elegating the authority to make medical decisions to a family member or friend is becoming a common method of planning for the future."¹⁰⁹

Justice O'Connor observed that some states had started to allow agents appointed via durable power of attorney to make health care decisions while others "allow an individual to designate a proxy to carry out the intent of a living will."¹¹⁰ Assessing these developments, Justice O'Connor concluded that "[t]hese procedures for surrogate decisionmaking, which appear to be rapidly gaining in acceptance, may be a valuable additional safeguard of the patient's interest in directing his medical care."¹¹¹

B. The Patient Self-Determination Act

1. INTRODUCTION

In large part based upon the Supreme Court's decision in *Cruzan*, Congress passed the bipartisan Patient Self-Determination Act¹¹² ("PSDA") in November 1990.¹¹³ Under the PSDA, any health care providers receiving Medicare or Medicaid payments must provide written information to patients regarding their rights under the law of the state in which the facility is located.¹¹⁴ This disclosure must include written information about the right "to make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives."¹¹⁵ It also must include written information about "the written policies of the provider or organization respecting the implementation of such rights."¹¹⁶

Importantly, this written information must be provided:

(A) in the case of a hospital, at the time of the individual's admission as an inpatient,

108. *Id.* at 290 (O'Connor, J., concurring).

109. *Id.* (O'Connor, J., concurring).

110. *Id.* at 290–91 (O'Connor, J., concurring).

111. *Id.* at 291–92 (O'Connor, J., concurring).

112. Omnibus Budget Reconciliation Act of 1990 §§ 4206, 4751, 42 U.S.C. §§ 1395cc(a)(1)(Q), (f), 1395mm(c)(8), 1396a(a)(57), (58), 1396a(w) (2012).

113. Justin Waddell, *Dead Letters: Protecting the Intentions of a Living Will Declarant with a Dedicated Advocate*, 25 *GEO. J. LEGAL ETHICS* 801, 806 (2012).

114. Richard E. Shugrue, *The Patient Self-Determination Act*, 26 *CREIGHTON L. REV.* 751, 761–62 (1993).

115. § 1395cc(f)(1)(A)(i).

116. § 1395cc(f)(1)(A)(ii).

- (B) in the case of a skilled nursing facility, at the time of the individual's admission as a resident,
- (C) in the case of a home health agency, in advance of the individual coming under the care of the agency, [and]
- (D) in the case of a hospice program, at the time of initial receipt of hospice care by the individual from the program¹¹⁷

After receiving this information, the patient can choose whether to execute an advance directive, which the PSDA defines as "a written instruction, such as a living will or durable power of attorney for health care, recognized under State law (whether statutory or as recognized by the courts of the State) and relating to the provision of such care when the individual is incapacitated."¹¹⁸ The PSDA requires the health care facility "to document in a prominent part of the individual's current medical record whether or not the individual has executed an advance directive."¹¹⁹

2. GOALS OF THE PSDA

a. Pre-asserting rights before isolation

Part of the reason for the passage of the PSDA was the recognition of the isolation that patients often face when admitted to health care facilities.¹²⁰ This isolation is especially acute in cases where patients are faced with terminal illnesses and end-of-life decisions.¹²¹ Indeed, some have asserted that, "like soldiers and prisoners, they are . . . 'captives' of their disease, their physicians and hospital, and their enforced isolation."¹²² Moreover, elderly patients are often "frail, seriously sick, and socially isolated from the outset of the provider/patient relationship."¹²³ In such cases:

117. § 1395cc(f)(2).

118. § 1395cc(f)(3).

119. § 1395cc(f)(1)(B).

120. See LAWRENCE P. ULRICH, *THE PATIENT SELF-DETERMINATION ACT: MEETING THE CHALLENGES IN PATIENT CARE* 104–05 (1999). See generally Elizabeth McCloskey, *Between Isolation and Intrusion: The Patient Self-Determination Act*, 19 L. MED. & HEALTH CARE 80 (1991).

121. D. Christian Addicott, *Regulating Research on the Terminally Ill: A Proposal for Heightened Safeguards*, 15 J. CONTEMP. HEALTH L. & POL'Y 479, 492 (1999).

122. JAY KATZ, *EXPERIMENTATION WITH HUMAN BEINGS* 1053 (1972).

123. Marshall B. Kapp, *Malpractice Liability in Long-Term Care: A Changing Environment*, 24 CREIGHTON L. REV. 1235, 1238 (1991).

The patient may understandably see herself as a burden—as requiring the family to waste the resources to maintain her in a painful and virtually incommunicado condition—until the money, the pain, and the technology is cut off by someone who neither knows her, nor really cares for her, but cares only that the medicare check comes in payment.¹²⁴

By allowing a patient to pre-assert his health care rights, the PSDA empowers the patient to make important decisions “when the patient is healthy and before she ‘experiences the dislocation that often attends inpatient admission.’”¹²⁵ At the same time, the PSDA does not seek to coerce a patient into making certain health care decisions. During the Senate debate on the PSDA, an American Bar Association spokesperson expressed concern “for the indigent, poorly educated and isolated individuals who could be vulnerable to facile execution of documents urged upon them by over-enthusiastic caretakers.”¹²⁶ In response, the PSDA was written so that health care providers merely provide patients with information about advance directives, not the directives themselves.¹²⁷

b. Overcoming the secrecy of the physician-patient relationship

The physician-patient relationship is traditionally shrouded in secrecy based upon a nexus of laws ensuring confidentiality.¹²⁸ Collectively, these laws “shield doctor-patient interactions from the scrutiny of the outside world, thereby ensuring that the doctor’s influence will go unmitigated and undetected.”¹²⁹ Indeed, in the end-of-life context, “several commentators have concluded that the

124. Paul J. Zwier, *Looking for a Nonlegal Process: Physician-Assisted Suicide and the Care Perspective*, 30 U. RICH. L. REV. 199, 223 (1996).

125. Thaddeus Mason Pope, *The Maladaptation of Miranda to Advance Directives: A Critique of the Implementation of the Patient Self-Determination Act*, 9 HEALTH MATRIX 139, 153 (1999) (quoting Susan M. Wolf et al., *Sources of Concern About the Patient Self-Determination Act*, 325 NEW ENG. J. MED. 1666, 1667 (1991)).

126. *Living Wills: Hearing Before the Subcomm. on Medicare and Long-term Care of the S. Comm. on Fin.*, 101st Cong. 42 (1990) (statement of Charles P. Sabatino, Assistant Director, Commission on Legal Problems of the Elderly, American Bar Association).

127. See Edward J. Larson & Thomas A. Eaton, *The Limits of Advanced Directives: A History and Assessment of the Patient Self-Determination Act*, 32 WAKE FOREST L. REV. 249, 265 (1997).

128. Patrick M. Curran, Jr., Note, *Regulating Death: Oregon’s Death with Dignity Act and the Legalization of Physician-Assisted Suicide*, 86 GEO. L.J. 725, 740 (1998).

129. *Id.* at 740–41.

privacy of this relationship renders effective regulation of [physician-assisted suicide] impossible.”¹³⁰

The PSDA addresses this issue in two meaningful ways. First, it ensures that, if end-of-life “disputes arise . . . patients or their decision-makers and physicians will have a summary of patients’ rights under state law to make life-sustaining medical treatment decisions.”¹³¹ Second, it facilitates the execution of advance directives, ensuring that there will be a written record of their wishes that will be known and honored by health care providers.¹³²

c. Counteracting the unfamiliarity of health care facilities

The PSDA recognizes that patients being admitted into health care facilities can become disoriented based upon the unfamiliarity of the new staff and surroundings confronting them.¹³³ The unfamiliar surroundings facing a patient upon admission make a health care facility a difficult place for patients to decide to execute advance directives.¹³⁴ The PSDA, however, facilitates the execution of advance directives “when the patient is healthy and before she ‘experiences the dislocation that often attends inpatient admission.’”¹³⁵

d. Preventing coercion

The PSDA was passed in large part to address the coercion that a patient can face when receiving medical care, especially in cases

130. *Id.* at 741; *see also* Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. RICH. L. REV. 1, 8 (1996) (“If it is true, as it indubitably is, that ‘decisions about medical treatment are normally made in the privacy of the doctor-patient relationship,’ then an obvious question must be asked: how is it possible, or could it *ever* be possible, to monitor and regulate those decisions regarding PAS that occur within the ambit of that privacy?” (footnotes omitted) (quoting Franklin G. Miller et al., *Regulating Physician-Assisted Death*, 331 NEW ENG. J. MED. 119, 119 (1994))).

131. Robert Gatter, *Unnecessary Adversaries at the End of Life: Mediating End-of-Life Treatment Disputes to Prevent Erosion of Physician-Patient Relationships*, 79 B.U. L. REV. 1091, 1126 (1999).

132. Charles P. Sabatino, *National Advance Directives: One Attempt to Scale the Barriers*, 1 NAELA J. 131, 135 (2005).

133. Marni J. Lerner, Note, *State Natural Death Acts: Illusory Protection of Individuals’ Life-Sustaining Treatment Decisions*, 29 HARV. J. ON LEGIS. 175, 210 n.180 (1992).

134. Tara Rayne Shewchuk, *Completing Advance Directives for Health Care Decisions: Getting to Yes*, 4 PSYCHOL. PUB. POL’Y & L. 703, 713–14 (1998).

135. Pope, *supra* note 125, at 153 (quoting Wolf et al., *supra* note 125, at 1667).

involving possible end-of-life care.¹³⁶ Many have argued that the physician-patient relationship is “inherently coercive” because “the balance of power between doctor and patient is almost entirely one-sided.”¹³⁷ Others have noted that the physician-patient relationship is rife with actual coercion because “physicians manipulate the consent process to obtain the result they desire by the tone and sequence in which they convey the risk information”¹³⁸ Moreover, the Supreme Court itself has recognized that end-of-life situations are especially rife with the risk of coercion.¹³⁹ Finally, coercion is a concern throughout the field of advance directives and not limited to fear of doctor or hospital staff coercion. Some mental health advocates fear that family members may coerce persons with mental illness into signing advance directives, consenting to treatment they do not want. On the other hand, mental health professionals fear that advocates will persuade the mentally ill to reject both needed and wanted prospective treatment.¹⁴⁰

The PSDA addresses these concerns by informing patients about their health care rights so that they can choose whether to execute documents like advance directives before their condition deteriorates and they are more susceptible to heightened pressures from a variety of sources.¹⁴¹

e. Promoting autonomy

The PSDA was primarily passed because of the belief that patients were unable to exercise autonomy in making health care decisions under the existing framework.¹⁴² Specifically, most patients “cannot exercise even a semblance of autonomy about where they will spend

136. See Larson & Eaton, *supra* note 127, at 267 (noting how one of the goals of the PSDA was to empower patients and alleviate concerns about coercion).

137. Curran, *supra* note 128, at 740.

138. Mark A. Hall, *Theory of Economic Informed Consent*, 31 GA. L. REV. 511, 570 n.178 (1997).

139. *Washington v. Glucksburg*, 521 U.S. 702, 732 (1997) (construing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 281 (1990)).

140. Justine A. Dunlap, *Mental Health Advance Directives: Having One's Say?*, 89 KY. L.J. 327, 374–75 (2000).

141. See Larson & Eaton, *supra* note 127, at 265; Ben Kusmin, Note, *Swing Low, Sweet Chariot: Abandoning the Disinterested Witness Requirement for Advance Directives*, 32 AM. J.L. & MED. 93, 99 (2006); Ruth F. Maron, Note, *Who Has a Will to Live?: Why State Requirements for Advance Directives Should be Uniformly Revised*, 24 REGENT U. L. REV. 169, 193 (2011); Lester J. Perling, Comment, *Health Care Advance Directives: Implications for Florida Mental Health Patients*, 48 U. MIAMI L. REV. 193, 226–27 (1993).

142. See, e.g., John F. Peppin, *Physician Neutrality and Patient Autonomy in Advance Directive Decisions*, 11 ISSUES L. & MED. 13, 15 (1995).

their final days because such decisions are often fraught with coercion and fiscal pressures.”¹⁴³ Indeed, patient autonomy was the primary principle guiding the creation of the PSDA.¹⁴⁴

The PSDA was passed based on the recognition that informing patients of their health care rights after they have been admitted is often too late to allow them to effectively understand and assert those rights.¹⁴⁵ By providing information at an earlier stage, the PSDA allows patients to engage in advance planning that “avoids the need for state coercion and incompetency adjudication with its accompanying labeling effects while preserving the individual’s sense of dignity and autonomy.”¹⁴⁶

The PSDA is directed more toward “the process of decisionmaking rather than the decision itself.”¹⁴⁷ The intent behind the PSDA was “to give patients accurate and uniform information without creating undue anxiety or pressuring them to execute documents they either did not understand or genuinely want.”¹⁴⁸ Because it requires health care providers to supply information concerning health care rights at an early stage, it ensures that patients are “allowed to make their own decisions about the use or nonuse of advance directives.”¹⁴⁹

3. MEDICAL MIRANDA

The PSDA has frequently been described as “medical *Miranda*.”¹⁵⁰ Indeed, co-sponsor John C. Danforth introduced the PSDA as an act

143. Arthur L. Caplan, *Commentary: Can the Case Manager Offer Placement in Good Conscience?*, in *ETHICAL CONFLICT IN THE MANAGEMENT OF HOME CARE: THE CASE MANAGER’S DILEMMA* 133, 136 (Rosalie A. Kane & Arthur L. Caplan eds., 1993); *see also* Pope, *supra* note 125, at 158.

144. *See* Larson & Eaton, *supra* note 127, at 257; William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 *COLUM. L. REV.* 1701, 1705 n.9 (1999) (“For example, autonomy concerns led to the passage of the Patient Self-Determination Act (PSDA) . . .”).

145. *See* Larson & Eaton, *supra* note 127, at 264 (quoting an American Hospital Association representative who stated during the debate on the PSDA that “[a]s a practical matter in many cases when the patient arrives at the hospital it is too late really to effectively deal with the situation”).

146. Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 *PSYCHOL. PUB. POL’Y & L.* 6, 39 (1995).

147. Paul F. Stavis, *The Nexum: A Modest Proposal for Self-Guardianship by Contract: A System of Advance Directives and Surrogate Committees-at-Large for the Intermittently Mentally Ill*, 16 *J. CONTEMP. HEALTH L. & POL’Y* 1, 53 (1999) (quoting Larson & Eaton, *supra* note 127, at 267).

148. Larson & Eaton, *supra* note 127, at 267.

149. *Id.*

150. Pope, *supra* note 125, at 142; *see also* Fred H. Cate, *Implementing the Education Mandate of the Patient Self-Determination Act*, 7 *HEALTH LAW.*, Fall 1993,

that would create “health care’s own *Miranda* warning.”¹⁵¹ The analogy makes sense because it requires medical providers to inform patients of their health care rights just like criminal *Miranda* obligates police officers to advise suspects of their right to counsel and their right to remain silent.¹⁵²

III. *MIRANDA* REVISITED

A. Introduction

In its dicta in *McNeil*, the Supreme Court expressed skepticism about extending the *Edwards* prophylaxis to cover pre-assertions of *Miranda* rights for two primary reasons. First, the Court noted that most rights cannot be asserted until “the government seeks to take the action they protect against.”¹⁵³ Second, the Court feared that it could place no meaningful limitations on the pre-assertion of the *Miranda* right to counsel if it approved such pre-assertion.¹⁵⁴ Instead, the *Miranda* right to counsel could be asserted “by a letter prior to arrest” or “prior to identification as a suspect,” with the police subsequently unable to interrogate the suspect in perpetuity.¹⁵⁵

This section addresses this dicta and makes four arguments in favor of extending the *Edwards* prophylaxis to cover pre-assertions of *Miranda* rights. Part B of this section argues that the same principles

at 11, 13 (“How do we keep the Act from becoming what has already been called a ‘medical *Miranda*,’ whose very familiarity causes patients to ignore its meaning and importance?”); Paul Cotton, *Providers to Advise of ‘Medical Miranda,’* 265 JAMA 306 (1991); Michael A. Refolo, *The Patient Self-Determination Act of 1990: Health Care’s Own Miranda*, 8 J. CONTEMP. HEALTH L. & POL’Y 455 (1992); Lerner, *supra* note 133, at 179 (noting that the PSDA is “[r]eferred to as a ‘medical *Miranda* warning’”); Doug Podolsky, *A Right to Die Reminder: A New Law Requires Hospitals to Read You Your Medical Rights*, U.S. NEWS & WORLD REP., Dec. 2, 1991, at 74 (noting that health care facilities must provide patients with a written “medical *Miranda*” outlining their health care rights); Leonard Sloane, *‘91 Law Says Failing Patients Must be Told of Their Options*, N.Y. TIMES, Dec. 8, 1990, at A4.

151. See Pope, *supra* note 125, at 142 n.11 (noting that “Senator John C. Danforth of Missouri introduced the bill this way”).

152. John D. Gorby, *Viewing the “Draft Guidelines for State Court Decision Making in Authorizing or Withdrawing Life-Sustaining Medical Treatment” from the Perspective of Related Areas of Law and Economics: A Critique*, 7 ISSUES L. & MED. 477, 508 (1992) (“It has been described as a health care ‘*Miranda* warning’ because it informs patients about their basic rights to refuse treatment.”); Sloane, *supra* note 150.

153. *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991).

154. *Id.*

155. Such a concern would not be present with pre-assertion of the right to remain silent because that right merely needs to be “scrupulously honored,” allowing for officers to seek to interrogate the suspect hours later. See *supra* notes 37–39 and accompanying text.

supporting the pre-assertion of health care rights that led to the passage of the PSDA justify legal recognition of the pre-assertion of *Miranda* rights. Part C of this section contends that courts have already laid the framework for pre-assertion of *Miranda* rights in a way that allows for equitable and meaningful limitations to be placed on pre-assertion. Part D of this section asserts that the Supreme Court's recent opinion in *Maryland v. Shatzer*¹⁵⁶ quells concerns that authorizing pre-assertions would hinder police investigations in perpetuity. Finally, Part E of this section notes that the Supreme Court has recently created an important limitation on the principles at the heart of the *Edwards* prophylaxis that supports its extension to certain pre-assertions of *Miranda* rights.

B. The Similar Justifications for Criminal and Medical Miranda

1. ASSERTING RIGHTS BEFORE ISOLATION

The *Miranda* opinion was based to a large extent on the fact that most custodial interrogations take place “in the isolated setting of the police station,” with the suspect being incommunicado, i.e., unable to communicate with others besides his interrogators.¹⁵⁷ The *Miranda* Court began by noting that each of the cases before it involved “incommunicado interrogations of individuals in a police-dominated atmosphere”¹⁵⁸ The Court observed that the largely incommunicado nature of most custodial interrogations keeps “what transpires at such interrogations” largely under wraps and also cited to a myriad of cases in which it previously uncovered police extortion of confessions via physical violence and “sustained and protracted questioning incommunicado”¹⁵⁹

Later, the Court focused on three prior cases in which it reversed convictions because police engaged in *mental* rather than *physical* coercion during custodial interrogation.¹⁶⁰ With regard to these interrogations, the Court concluded that, “[i]n other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.”¹⁶¹ The Court later found a suspect's inability to speak with others (or his lack of knowledge of that ability) inconsistent with the privilege against

156. 559 U.S. 98 (2010).

157. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966).

158. *Id.* at 445.

159. *Id.* at 445–46.

160. *Id.* at 456 (citing *Haynes v. Washington*, 373 U.S. 503 (1963); *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963)).

161. *Id.*

self-incrimination, noting that “[t]he 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.”¹⁶²

In terms of isolation, the Court pointed out that police manuals instruct officers “[t]o highlight the isolation and unfamiliar surroundings” of a stationhouse custodial interrogation.¹⁶³ The Court thereafter determined that these practices are effective because, “[a]s a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.”¹⁶⁴ Finally, the Court tied both the isolation and incommunicado strands of its analysis together, concluding that the government bears the heavy burden of proving subsequent waiver after a suspect who previously asserted his right to remain silent or right to an attorney subsequently waived that right.¹⁶⁵ From the Court’s perspective, “[s]ince the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.”¹⁶⁶

In its subsequent opinion in *United States v. Washington*,¹⁶⁷ the Court succinctly explained that “[a]ll *Miranda*’s safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody.”¹⁶⁸

2. OVERCOMING THE SECRECY OF THE POLICE OFFICER–SUSPECT RELATIONSHIP

Because most suspects are incommunicado during isolated custodial interrogations at stationhouses, there is a privacy and secrecy that shrouds the process. The *Miranda* Court observed that “[i]nterrogation still takes place in privacy.”¹⁶⁹ According to the Court, this “[p]rivacy results in secrecy and this in turn results in a gap in our

162. *Id.* at 457–58.

163. *Id.* at 450.

164. *Id.* at 461.

165. *Id.* at 475.

166. *Id.*

167. 431 U.S. 181 (1977).

168. *Id.* at 187 n.5.

169. *Miranda*, 384 U.S. at 448.

knowledge as to what in fact goes on in the interrogation rooms.”¹⁷⁰ The Court again referenced police manuals, which inform officers “that the ‘principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation.’”¹⁷¹ The privacy and secrecy of the process led the Court to conclude that preliminary advice by an attorney is insufficient; instead, upon request, counsel must be present throughout a custodial interrogation because “[e]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process.”¹⁷²

According to at least one source, “[t]he *Miranda* Court’s greatest concern was the inherent coercion in incommunicado interrogation that arises from the privacy and secrecy of” custodial interrogations.¹⁷³

3. COUNTERACTING THE UNFAMILIARITY OF THE STATIONHOUSE

While officers are required to give the *Miranda* warning whenever and *wherever* they subject suspects to custodial interrogation, the *Miranda* Court’s opinion was born out of four cases in which police conducted interrogations within the four walls of the stationhouse. According to the Court, in each of the cases before it, “the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.”¹⁷⁴ As previously noted, the *Miranda* Court cited to police manuals, which instructed officers “[t]o highlight the isolation and unfamiliar surroundings” of a stationhouse custodial interrogation.¹⁷⁵ The Court then went on to explain that

If at all practicable, the interrogation should take place in the investigator’s office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The

170. *Id.*

171. *Id.* at 449 (quoting FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (1962)).

172. *Id.* at 470.

173. Lorraine J. Adler, *New York’s Loyalty to the Spirit of Miranda: Simply the Best for Twenty-Five Years*, 47 VAND. L. REV. 889, 896 (1994).

174. *Miranda*, 384 U.S. at 457.

175. *Id.* at 450.

atmosphere suggests the invincibility of the forces of the law.¹⁷⁶

As the Supreme Court later noted in *Minnesota v. Murphy*,¹⁷⁷ “[m]any of the psychological ploys discussed in *Miranda* capitalize on the suspect’s unfamiliarity with the officers and the environment.”¹⁷⁸

4. PREVENTING COERCION

Given the aura of invincibility surrounding “the forces of the law,” it is unsurprising that the *Miranda* Court deemed custodial interrogations inherently coercive. The Court deemed the *Miranda* warning necessary “to dispel the compulsion inherent in custodial surroundings”¹⁷⁹ Later, the Court found that custodial interrogation without the *Miranda* warning “contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”¹⁸⁰ The Court then restated this conclusion even more forcefully, finding that the *Miranda* warning is “an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.”¹⁸¹ The *Miranda* dissent put it the most concisely, characterizing the majority’s position as declaring that “in-custody interrogation is inherently coercive,”¹⁸² a characterization that the Court has often repeated.¹⁸³

The Court’s conclusion in *Miranda* rested not merely on the coercion inherent in custodial interrogation but also on the actual coercive techniques that law enforcement officials are taught to apply while questioning suspects. As noted, some of these techniques involve isolating the suspect within the four walls of the stationhouse and making sure that the interrogation is conducted incommunicado.¹⁸⁴ The Court also cited to police manuals instructing officers “to display an air

176. *Id.* at 449–50 (quoting CHARLES O’HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1956)).

177. 465 U.S. 420 (1984).

178. *Id.* at 433.

179. *Miranda*, 384 U.S. at 458.

180. *Id.* at 467.

181. *Id.* at 468.

182. *Id.* at 533 (White, J., dissenting).

183. *See, e.g., United States v. Patane*, 542 U.S. 630, 645 (2004) (Souter, J., dissenting) (“*Miranda* rested on insight into the inherently coercive character of custodial interrogation and the inherently difficult exercise of assessing the voluntariness of any confession resulting from it.”).

184. *See supra* notes 163–66 and accompanying text.

of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details."¹⁸⁵ Additionally, the Court referenced the recommendation that police officers team up to interrogate suspects, using the classic "good cop, bad cop" technique.¹⁸⁶ The Court then later concluded:

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained."¹⁸⁷

5. PROMOTING FREE CHOICE/AUTONOMY

In the end, the *Miranda* Court combined all of the above factors to get to the heart of the issue: Law enforcement officers must not conduct custodial interrogations in a manner that runs afoul of the Fifth Amendment privilege against self-incrimination.¹⁸⁸ And, according to the Court, a custodial interrogation only complies with the Fifth Amendment privilege if the interrogating officer apprises the suspect of his right to remain silent as well as his right to an attorney and secures a voluntary, knowing, and intelligent waiver of those rights.¹⁸⁹

The purpose, then, of the *Miranda* warning is to ensure that the statements that a suspect makes in response to custodial interrogation are the result of a free and rational waiver of his constitutional rights. This is a theme that the *Miranda* majority repeated throughout its opinion. The Court found none of the four convictions under review to be constitutionally viable because "in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free

185. *Miranda*, 384 U.S. at 450 (citing INBAU & REID, *supra* note 171, at 34-43, 87).

186. *See id.* at 452.

187. *Id.* at 455 (quoting FRED E. INBAU & JOHN E. REID, LIE DETECTION AND CRIMINAL INTERROGATION 185 (3d ed. 1953)).

188. *Id.* at 444.

189. *Id.*

choice.”¹⁹⁰ This lack of appropriate safeguards meant that each defendant was put “in such an emotional state as to impair his capacity for rational judgment.”¹⁹¹

The Court then found that these concerns were not unique to the cases before it but instead would apply to any custodial interrogation: “Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”¹⁹² Therefore, “whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.”¹⁹³ Moreover, a suspect must thereafter be able to invoke his right to remain silent and his right to an attorney “at any time prior to or during questioning” because, “[w]ithout the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.”¹⁹⁴

As the Southern District of New York later explained in *United States v. Dosanjh*,¹⁹⁵ *Miranda* requires “that the autonomy of the individual not be intimidated, or coerced, or compromised by ignorance.”¹⁹⁶

6. THE INEFFECTIVENESS OF *MIRANDA*

Studies conducted over the course of more than four decades have consistently found that around eighty percent of adults waive their *Miranda* rights.¹⁹⁷ Three decades of research also supports the empirical finding that more than ninety percent of juveniles waive their *Miranda* rights.¹⁹⁸

Many have claimed that the *Miranda* warning is ineffective because it “come[s] too late to impose significant constraints on the

190. *Id.* at 457.

191. *Id.* at 465.

192. *Id.* at 458.

193. *Id.* at 469.

194. *Id.* at 474.

195. No. 08 Cr. 211(AKH), 2008 WL 5209991 (S.D.N.Y. Dec. 11, 2008).

196. *Id.* at *5.

197. Barry C. Feld, *Real Interrogation: What Actually Happens when Cops Question Kids*, 47 L. & SOC’Y REV. 1, 11 (2013).

198. *Id.*

acquisition of evidence from the accused.”¹⁹⁹ The *Miranda* warning is likely ineffective in large part because it primarily governs custodial interrogations conducted by detectives, “a small elite in the police force who can become trained and experienced in minimizing the effect of *Miranda* or even using it to their strategic advantage.”²⁰⁰ These detectives often “give[] considerable thought about how to use such warnings to their strategic advantage.”²⁰¹ For instance, some detectives “preface[] the warnings with an explanation that they were part of the police’s good-faith attempt to hear the suspect’s side of the story before deciding whether to bring charges.”²⁰² As a result, when suspects realize they have said too much, “it [i]s almost always too late.”²⁰³

While many have dubbed the PSDA “medical *Miranda*,”²⁰⁴ the Act is actually much more efficacious than its criminal counterpart because it allows patients to assert their health care rights before admission. Conversely, criminal suspects cannot assert their *Miranda* rights until they are subjected to the very process that the Supreme Court has deemed inherently coercive.²⁰⁵

7. PRE-ASSERTION OF RIGHTS BEFORE GOVERNMENTAL ACTION

In *McNeil*, the Court noted that most rights cannot be asserted until “the government seeks to take the action they protect against.”²⁰⁶ To the extent that this statement is true,²⁰⁷ this thinking probably makes sense for most rights. For instance, why would a citizen need to assert his Eighth Amendment right against cruel and unusual punishment before the government seeks to sentence him to the death penalty, life imprisonment, or some other harsh criminal penalty? Similarly, why

199. Jacqueline Ross, *Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany*, 28 OXFORD J. LEGAL STUD. 443, 449 (2008).

200. Kent Roach & M.L. Friedland, *Borderline Justice: Policing in the Two Niagras*, 23 AM. J. CRIM. L. 241, 295 (1996).

201. *Id.* at 294.

202. *Id.*

203. *Id.*

204. *See supra* notes 150–52 and accompanying text.

205. *See supra* notes 182–83 and accompanying text.

206. *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991).

207. It is unclear whether the *McNeil* Court’s statement is in fact accurate. An argument could be made, for instance, that a citizen who files a petition for a parade or demonstration is pre-asserting his First Amendment rights before the government seeks to take contradictory action. Similarly, a party seeking a declaratory judgment determining whether a private contract might violate constitutional rights could be said to be pre-asserting his rights. *See, e.g., BNSF Ry. Co. v. Tri-City & Olympia R.R.*, No. CV-09-5062-EFS, 2011 WL 2607162, at *8–9 (E.D. Wash. July 1, 2011).

would a citizen need to assert his Seventh Amendment right to a trial by jury before the government charges him with violating a criminal law? In either of these cases, it would be nonsensical for the citizen to pre-assert his rights, and no coercive force would prevent him from asserting his rights after the government sought to act.

Conversely, both health care and *Miranda* rights seem to fall into a different category based upon the unique circumstances surrounding their assertion. As previously noted, several sources have recognized the difficulty that both patients and suspects face in asserting their rights due to factors such as isolation and coercion. Therefore, it makes sense for both patients and suspects to be able to pre-assert their rights because the future versions of themselves might not be able to assert these rights.²⁰⁸

In similar contexts, legislatures have passed laws based upon exactly this type of thinking. One example of this type of law is a mandatory arrest law, which requires police officers responding to 911 calls to arrest suspects if they have probable cause to believe that they committed acts of domestic violence, regardless of whether the alleged victim consents to the arrest.²⁰⁹ Currently, approximately twenty-two states have some version of a mandatory arrest law, and many prosecutors' offices also have no-drop policies, which "require prosecution of a domestic violence perpetrator, regardless of the victim's wishes"²¹⁰

The rationale for these laws and policies are the same as the rationale for the PSDA: when isolated with her abuser before his arrest and prosecution, a domestic violence victim might be coerced into not pressing charges or pursuing the case to trial.²¹¹ While many argue that

208. See Stephen J. Dubner, *Save Me from Myself: A New Freakonomics Radio Podcast*, FREAKONOMICS (Feb. 2, 2015, 9:24 AM), <http://freakonomics.com/2012/02/02/save-me-from-myself-a-new-freakonomics-radio-podcast/>.

209. See, e.g., Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 161 (2003).

210. *Id.*; see also Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 MICH. J. GENDER & L. 1, 9 (2013).

211. See, e.g., Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 601 (2012) ("The stock argument in support of mandatory arrest and prosecution is seductively logical: Because batterers coercively control abuse victims by allowing victims to decline arrest, allowing prosecution essentially cedes power over the criminal process to the batterer."); Allison J. Cambria, Note, *Defying a Dead End: The Ramifications of Town of Castle Rock v. Gonzales on Domestic Violence Law and How the States Can Ensure Police Enforcement of Mandatory Arrest Statutes*, 59 RUTGERS L. REV. 155, 165 (2006).

these laws and policies infringe upon the victim's autonomy,²¹² others claim that they promote the autonomy and empowerment of the victim by honoring the choice that she made to call 911 rather than her subsequent decision to drop the case after potentially being subjected to isolation and coercion.²¹³

These same rationales similarly support the idea that the *Edwards* prophylaxis should be extended to allow suspects to pre-assert their *Miranda* rights. In *Miranda*, the Court found the *Miranda* warning to be constitutionally mandated to ensure that suspects either assert their rights or execute a voluntary, knowing, and intelligent waiver of those rights.²¹⁴ But, as used to be the case with domestic violence victims as well as patients, especially those suffering from potentially terminal illnesses, there is a real danger that their ultimate decisions will be involuntary based upon a combination of factors such as isolation and coercion.²¹⁵

C. Applying the Existing *Miranda* Framework to Allow for Pre-Assertion

1. INVOCATION OF *MIRANDA* RIGHTS WHEN INTERROGATION IS "IMMINENT"

Assuming that courts accept the general theory that the *Edwards* prophylaxis should be extended to cover some pre-assertions of *Miranda* rights, there is a remaining question over where to draw the

212. See, e.g., Dennis P. Saccuzzo, *How Should the Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest*, 39 SANTA CLARA L. REV. 765, 777 (1999) ("For example, critics have argued that mandatory arrest strips the battered person of her autonomy.").

213. See, e.g., Milton C. Regan, Jr., *Marriage at the Millennium*, 33 FAM. L.Q. 647, 656 (1999); Arthur L. Rizer III, *Mandatory Arrest: Do We Need to Take a Closer Look?*, 36 UWLA L. REV. 1, 13 (2005) ("In essence, he argues that mandatory arrest promotes the autonomy and empowerment of women.").

214. See *supra* note 25 and accompanying text.

215. Indeed, the argument for pre-assertion of medical and criminal *Miranda* rights is much stronger than the argument that mandatory arrest laws bolster victim autonomy. Mandatory arrest laws prevent a victim from changing her mind. An advance directive merely indicates a patient's wishes at the time of execution; nothing prevents the patient from amending or withdrawing such a directive if he changes his mind while of sound mind. See, e.g., Daryl L. Miller, Comment, *Legal Killing: The Imminent Legalization of a Physician's Affirmative Aid-in-Dying*, 34 SANTA CLARA L. REV. 663, 708 (1994). Similarly, if a suspect were allowed to pre-assert his *Miranda* rights, nothing would prevent him from reinitiating communications with the police. Furthermore, if a suspect pre-asserted his *Miranda* right to counsel, nothing would prevent the police from interrogating him once counsel was appointed. See *supra* note 51 and accompanying text.

line. In *McNeil*, the Court expressed concern that authorizing pre-assertion of the *Miranda* rights could lead to their assertion “by a letter prior to arrest” or “prior to identification as a suspect.”²¹⁶ The possibility of such a slippery slope could be reason not to authorize pre-assertion because it could “unduly hamper[] the gathering of information.”²¹⁷

It appears, however, that a mechanism is already in place for courts to approve of a more incremental extension of the *Edwards* prophylaxis to cover only certain pre-assertions. As noted, courts across the country have used the *McNeil* dicta to conclude that *Miranda* rights cannot be invoked “in a context other than ‘custodial interrogation.’”²¹⁸ That said, both federal²¹⁹ and state courts²²⁰ across the country have held that individuals can assert their *Miranda* rights either during custodial interrogation or “when an interrogation is imminent.”²²¹ In other words, many courts have concluded that pre-assertion of the *Miranda* rights when interrogation is “imminent” is an assertion made in the context of custodial interrogation.²²²

Despite this language, however, courts have applied an extremely narrow construction to the word “imminent,” which has only allowed suspects to invoke their *Miranda* rights “in response to or just before interrogation.”²²³ For instance, in *Hoerauf v. State*,²²⁴ the defendant asked to speak to an attorney both while he was being fingerprinted during booking and while being placed in a holding cell hours before being taken to an interrogation room.²²⁵ Eventually, the defendant was taken to the interrogation room, waived his *Miranda* rights, and confessed.²²⁶ In finding that the trial court properly denied the

216. *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991).

217. *Davis v. United States*, 512 U.S. 452, 461 (1994).

218. *See supra* notes 90–91 and accompanying text.

219. *See, e.g., United States v. Bautista*, 145 F.3d 1140, 1147 n.3 (10th Cir. 1998); *United States v. LaGrone*, 43 F.3d 332, 339 (7th Cir. 1994).

220. *See, e.g., Sapp v. State*, 690 So. 2d 581, 583 (Fla. 1997); *People v. Villalobos*, 737 N.E.2d 639, 645 (Ill. 2000).

221. *Alston v. Redman*, 34 F.3d 1237, 1249 (3d Cir. 1994).

222. *See, e.g., United States v. Grimes*, 142 F.3d 1342, 1348 (11th Cir. 1998) (“We find the reasoning of our fellow circuits persuasive and hold that *Miranda* rights may be invoked only during custodial interrogation or when interrogation is imminent.”).

223. *LaGrone*, 43 F.3d at 340; *see also State v. Appleby*, 221 P.3d 525, 546 (Kan. 2009) (“Other courts have been very restrictive in defining ‘imminent,’ allowing no intervening activity between the invocation of the right and the planned initiation of questioning.”).

224. *Hoerauf v. State*, 941 A.2d 1161 (Md. Ct. Spec. App. 2008).

225. *Id.* at 1167–68.

226. *Id.* at 1165–67.

defendant's motion to suppress, the Court of Special Appeals of Maryland cited its prior opinion in *Marr v. State*,²²⁷ which in turn cited five federal courts in support of the proposition that *Miranda* rights can be asserted during actual or imminent custodial interrogation.²²⁸ The court, however, concluded that the defendant did not invoke his right to counsel when custodial interrogation was imminent; instead, "all such requests were made by appellant prior to being placed in the interrogation room and questioned by Detective Sofelkanik."²²⁹

Similarly, in *Pardon v. State*,²³⁰ Raymond Pardon asked to speak to an attorney after he was arrested and being booked into detention on the same charge that would lead to his custodial interrogation.²³¹ The District Court of Appeal of Florida held that he had not validly invoked his right to counsel because the interrogation of Pardon was not imminent.²³² He was merely being booked into detention, albeit on the same charge on which he was later questioned.²³³ Questioning did not occur until a few hours later.²³⁴ Any request for an attorney at this point was an anticipatory invocation of his *Miranda* rights, which would not prevent the officers from later reading him his rights preparatory to interrogation.²³⁵

Indeed, in applying a limited construction to the word "imminent," the Third Circuit in *Alston v. Redmond*²³⁶ was only able to find two cases applying a somewhat broader construction of the word.²³⁷ Even these cases, however, did not apply expansive definitions of the word "imminent."

In *United States v. Kelsey*,²³⁸ Joseph Kelsey asked to see his attorney three or four times after being arrested in his home.²³⁹ The

227. *Hoerauf*, 941 A.2d at 1175 (citing *Marr v. State*, 759 A.2d 327 (Md. Ct. Spec. App. 2000)).

228. *Marr*, 759 A.2d at 339 (citing *United States v. Grimes*, 142 F.3d 1342, 1347-48 (11th Cir. 1998); *LaGrone*, 43 F.3d 332; *United States v. Thompson*, 35 F.3d 100 (2d Cir. 1994); *Alston v. Redman*, 34 F.3d 1237 (3d Cir. 1994); *United States v. Wright*, 962 F.2d 953 (9th Cir. 1992)).

229. *Hoerauf*, 941 A.2d at 1175.

230. 930 So. 2d 700 (Fla. Dist. Ct. App. 2006).

231. *Id.* at 703.

232. *Id.* at 703-04.

233. *Id.* at 703.

234. *Id.*

235. *Id.* at 703-04.

236. 34 F.3d 1237 (3d Cir. 1994).

237. *Id.* at 1248-49 ("We recognize that some courts, post-*McNeil*, have found a proper invocation of the *Miranda* right to counsel when a suspect has requested counsel *prior* to interrogation or to the reading of the *Miranda* rights.").

238. 951 F.2d 1196 (10th Cir. 1991).

239. *Id.* at 1198.

police, however, “did not question Kelsey at this point and did not read him his *Miranda* warnings until much later.”²⁴⁰ Later, Kelsey was read the *Miranda* warning at his home, waived his *Miranda* rights, and confessed.²⁴¹ The Tenth Circuit honored Kelsey’s pre-assertion of his *Miranda* rights, concluding that Kelsey was in “precisely the type of coercive atmosphere that generates the need for application of the *Edwards* rule” when he was arrested in his home.²⁴²

In *State v. Torres*,²⁴³ the defendant was arrested for murdering her husband.²⁴⁴ She was subsequently detained in the conference room of the Sheriff’s Department from 7:00 p.m. to 10:00 p.m., whereupon she was taken to the sheriff’s office and told that she would be questioned shortly.²⁴⁵ The defendant asked to speak to counsel twice while in the conference room and once when taken to the sheriff’s office.²⁴⁶ When she was eventually questioned at 10:35 p.m., however, she waived her *Miranda* rights and confessed.²⁴⁷ The Supreme Court of North Carolina found that the defendant had validly invoked her *Miranda* right because “[i]t would make little sense to require a defendant already in custody to wait until the onset of questioning or the recitation of her *Miranda* rights before being permitted to invoke her right to counsel.”²⁴⁸

While most courts have narrowly construed the term “imminent,” at least one court has applied a more expansive construction. In *State v. Hambly*,²⁴⁹ Detectives Rindt and Clausing approached Scott Hambly “in a parking lot outside his apartment and attempted to convince him to speak to them without their taking him into custody.”²⁵⁰ In response, Hambly repeatedly refused to speak, prompting Detective Rindt to place him under arrest.²⁵¹ As Rindt shepherded Hambly to his squad car, Hambly “said that he wanted to speak to an attorney.”²⁵² Rindt responded by placing Hambly “in the back of the car and told him that he could call an attorney once they arrived at the Washington County Jail.”²⁵³ Later, Hambly was read the *Miranda* warning, waived his

240. *Id.*

241. *Id.*

242. *Id.* at 1199.

243. 412 S.E.2d 20 (N.C. 1992).

244. *Id.* at 25.

245. *Id.*

246. *Id.* at 23.

247. *Id.* at 21, 25.

248. *Id.* at 26.

249. 745 N.W.2d 48 (Wis. 2008).

250. *Id.* at 52.

251. *Id.*

252. *Id.*

253. *Id.*

Miranda rights, and made a confession.²⁵⁴ The trial court eventually denied Hambly's motion to suppress his confession, and Hambly was ultimately convicted of delivery of cocaine.²⁵⁵

In addressing Hambly's subsequent appeal, the Supreme Court of Wisconsin concluded that a suspect can assert his *Miranda* rights when custodial interrogation is "imminent or impending."²⁵⁶ In finding that Hambly asserted his *Miranda* right to counsel when interrogation was imminent or impending, the court used the following reasoning:

In the minutes leading up to the defendant's request for counsel, Detective Rindt made it clear that he intended to question the defendant. The defendant could have reasonably surmised that because Rindt was persistent in wanting to interrogate him, Rindt would continue to attempt to interrogate him in a custodial setting after he refused to speak with Rindt in a noncustodial setting. The defendant had no reason to believe that Rindt's eagerness to question him dissipated once Rindt took him into custody.²⁵⁷

Hambly thus shows how most courts could easily apply the existing *Miranda* framework to allow for pre-assertions of *Miranda* rights by simply applying a broader definition of the word "imminent." That said, the court's opinion in *Hambly* was anything but easy. The court floated but rejected the possibility that a suspect should be able to assert his *Miranda* rights "any time the suspect is in custody, even before *Miranda* warnings or the onset of questioning."²⁵⁸ The court also surveyed every case which had found that a suspect could invoke his *Miranda* rights when custodial interrogation was imminent but determined that none of these cases actually set forth a standard for defining imminence.²⁵⁹ Ultimately, the court concluded "that an interrogation is impending or imminent if a reasonable person in the defendant's position would have believed that interrogation was imminent or impending."²⁶⁰

Hambly therefore illustrates another reason why courts could refuse to extend the *Edwards* prophylaxis to pre-assertions of *Miranda* rights. Currently, according to nearly all courts, suspects can only assert their *Miranda* rights during or just before custodial interrogation,

254. *Id.* at 52–53.

255. *Id.* at 51.

256. *Id.* at 57.

257. *Id.* at 59.

258. *Id.* at 58–59.

259. *Id.* at 57.

260. *Id.*

which is the same point in time when the police must administer the *Miranda* warning. The argument could thus be made that allowing suspects to pre-assert their *Miranda* rights would require courts to create a second test that is different from the test for determining when officers must administer the *Miranda* warning. Such an argument, however, would be misguided because courts can determine whether a suspect can pre-assert his *Miranda* rights by using the same test that they already apply for deciding whether an officer can pre-administer the *Miranda* warning.

2. THE ABILITY OF OFFICERS TO PRE-ADMINISTER THE *MIRANDA* WARNING

A year after the Supreme Court of Wisconsin decided *Hambly*, it handed down its decision in *State v. Grady*.²⁶¹ In *Grady*, Marchand Grady voluntarily went to the police station to discuss the murder of Allen Jemison.²⁶² Upon arrival at 8:16 p.m., Grady was indisputably not in custody when Detective Corbett began questioning him about the murder; nonetheless, “Detective Corbett began the interview by administering *Miranda* warnings to Grady so as to be ‘better safe than sorry,’ and Grady indicated that he understood the rights he was read.”²⁶³

At 10:45 p.m., another suspect being questioned separately said that Grady killed Jemison, resulting in Grady being placed under arrest.²⁶⁴ At this point, “*Miranda* warnings were not readministered to Grady,” who made several inculpatory statements.²⁶⁵ Before trial, Grady moved to suppress his post-arrest statements, but the court denied his motion, and he was ultimately convicted of murder.²⁶⁶

On appeal, Grady asked the Supreme Court of Wisconsin to adopt a “bright-line rule,” pursuant to which “any and all *Miranda* warnings prior to custody [are] *ipso facto* ineffective.”²⁶⁷ The court declined to adopt this bright-line rule and instead applied the totality of the circumstances test utilized by “the overwhelming majority of other courts who have considered this question.”²⁶⁸ Under this test, courts determine whether the pre-administration of the *Miranda* warning

261. 766 N.W.2d 729 (Wis. 2009).

262. *Id.* at 731.

263. *Id.*

264. *Id.* at 732.

265. *Id.*

266. *Id.*

267. *Id.* at 733.

268. *Id.* at 734.

before custody and the failure to re-administer the warning immediately before custodial interrogation is unconstitutional by looking at multiple factors,

including whether the same officer or officers conducted the questioning, whether the location changed, whether the subject matter of the questioning was consistent, whether a reminder of the *Miranda* rights was given before the custodial interrogation began, whether the suspect was mentally or emotionally impaired, whether more coercive tactics were used when the suspect was placed in custody, the suspect's past experience with law enforcement, and how much time elapsed between the administration of the *Miranda* warnings and the custodial interrogation or confession.²⁶⁹

In its opinion, the *Grady* court cited to a laundry list of opinions from courts around the country, each of which found that the pre-administration of the *Miranda* warning hours before custodial interrogation was constitutional, even when the warning was not re-administered immediately before custodial interrogation.²⁷⁰ The court then agreed with this analysis, noting that the goal of *Miranda* is "to inform the suspect that the interrogators will recognize his or her rights if exercised" and "ensure that a confession is free and unconstrained."²⁷¹ According to the court,

Given this purpose, a rule that assumes a suspect is a blank slate with no awareness of his or her rights as soon as he or she is placed in custody is a head-in-the-sand approach. In addition, application of *Grady*'s bright-line rule would focus the analysis on the custody status of a suspect rather than on the individual's comprehension and waiver of his rights. It is, in short, form over substance. A rule that says warnings given one minute before custody are ineffective per se because they were not given when the suspect was actually in custody is manifestly unreasonable.²⁷²

In addition to finding that a bright-line rule against pre-administration betrayed *Miranda*'s primary purpose, the court concluded that

269. *Id.* at 735–36.

270. *Id.* at 734 n.6.

271. *Id.* at 736.

272. *Id.*

beyond its lack of fidelity to the purposes and principles behind *Miranda*, Grady's approach is unworkable. One of its major flaws is that it assumes that the precise point of custody is fixed and known at the time of questioning. While this may sometimes be the case, it is not always true. In practice, it is not always clear when a suspect is officially under arrest.²⁷³

These lines of analysis by the court were eminently reasonable and similar to the analysis conducted by other courts on the issue.²⁷⁴ Conversely, this analysis lays bare the unreasonableness of courts failing to allow suspects to pre-assert their *Miranda* rights. If courts are unwilling to treat suspects like a blank slate at the start of custodial interrogation, why do they treat pre-assertions of *Miranda* rights as if they were written on Etch-a-Sketches simply because they were made before the technical definition of custodial interrogation? If the lack of clarity over when a suspect is technically in custody justifies allowing officers to pre-administer the *Miranda* warning, why are suspects, who have much less familiarity with the legal definition of custody, not similarly able to pre-assert their *Miranda* rights?

This Article thus proposes a test based on reciprocity and equanimity: Suspects should be allowed to pre-assert their *Miranda* rights under the same circumstances that officers are allowed to pre-administer the *Miranda* warning. In other words, if the totality of the circumstances supports a finding that an officer could pre-administer the *Miranda* warning, the same totality of the circumstances should support a finding that the suspect could pre-assert his *Miranda* rights.

For example, consider the outcomes in the following two cases: First, in *People v. Petrone*,²⁷⁵ Officer Roy Rodriguez responded to a 911 call regarding a robbery of money and jewelry at the house of Hazel Hudson.²⁷⁶ Later, about a mile and a half away from Hudson's house, Officer Rodriguez pulled over a car driven by John Petrone.²⁷⁷ Petrone consented to a search of his vehicle, which led to Officer Rodriguez discovering jewelry and \$600 in cash.²⁷⁸ Officer Rodriguez did not arrest Petrone but did read him the *Miranda* warning and asked him about the jewelry.²⁷⁹ Petrone responded that the jewelry belonged

273. *Id.*

274. *Id.*

275. No. F048289, 2006 WL 1321155 (Cal. Ct. App. May 16, 2006).

276. *Id.* at *1.

277. *Id.*

278. *Id.* at *2.

279. *Id.*

to his mother and was in his car because he was in the process of moving and did not want it to get stolen.²⁸⁰

Officer Rodriguez then arrested Petrone and took him to the police station, where he subjected him to a custodial interrogation one hour and fifteen minutes later; Rodriguez never re-administered the *Miranda* warning.²⁸¹ In finding no issue with the trial court's denial of Petrone's motion to suppress the statement he made during custodial interrogation, the appellate court applied the totality of the circumstances test.²⁸² According to the court, "the effectiveness of appellant's initial waiver was not reduced by the one hour and fifteen minutes between when appellant was first *Mirandized* and when he was subsequently interrogated at the police station."²⁸³

Second, in *United States v. Stanley*,²⁸⁴ Trooper Jay Poppe pulled over Leon Stanley for speeding.²⁸⁵ While conducting the traffic stop, Trooper Poppe noted some irregularities, such as the fact that Stanley's rental car had aftermarket tires and wheels.²⁸⁶ After being questioned about the nature of his trip, Stanley responded, "[T]his is all because of what happened in Missouri, isn't it?"²⁸⁷ When Trooper Poppe asked about Missouri, Stanley responded that he had been arrested with fourteen pounds of marijuana.²⁸⁸ Trooper Poppe asked for consent to search Stanley's vehicle, but Stanley refused to give consent.²⁸⁹

Trooper Poppe then told Stanley that he believed he was engaged in criminal activity and that he was detaining him pending the arrival of a narcotics-detection dog.²⁹⁰ Stanley demanded to speak to an attorney on several occasions, but Trooper Poppe answered that Stanley did not have any right to counsel because he was merely being detained, not arrested.²⁹¹ About half an hour later, the dog arrived and alerted to the trunk, leading to discovery of a gun but no drugs.²⁹²

At this point, Poppe placed Stanley under arrest and read him the *Miranda* warning.²⁹³ Stanley responded "that he had already requested,

280. *Id.*

281. *Id.* at *2, *6-7.

282. *Id.*

283. *Id.*

284. No. 4:08CR3086, 2009 WL 2105676 (D. Neb. July 13, 2009).

285. *Id.* at *1-2.

286. *Id.* at *2.

287. *Id.* at *3.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at *4.

and been denied, a lawyer.”²⁹⁴ Trooper Poppe responded that “he was denied a lawyer while being detained, but now he is now under arrest.”²⁹⁵ Stanley waived his *Miranda* rights and later made incriminatory statements when interrogated in an interview room at traffic headquarters.²⁹⁶ The court later denied Stanley’s motion to suppress his statements, citing *McNeil*’s dicta about suspects not being able to invoke their *Miranda* rights anticipatorily in a context other than custodial interrogation.²⁹⁷

Given the factual similarity between *Petrone* and *Stanley*, it seems clear that the court would have had no problem with Trooper Poppe pre-administering the *Miranda* warning after calling for the narcotics-detection dog and failing to re-administer the *Miranda* warning before engaging in subsequent custodial interrogation. Therefore, the same dispensation should have been given to Stanley, allowing him to pre-assert his *Miranda* rights at the same point in time.

The same analysis could also be done in other contexts. For instance, courts have found that officers can pre-administer the *Miranda* warning while asking suspects for consent to search.²⁹⁸ Therefore, despite current precedent to the contrary,²⁹⁹ courts should find that suspects can pre-assert their *Miranda* rights when being asked to consent to searches. Because courts have allowed officers to pre-administer the *Miranda* warning before suspects take polygraph examinations,³⁰⁰ suspects should be able to pre-assert their *Miranda* rights at this same time, even if the *Miranda* warning is not given in connection with polygraph testing.³⁰¹

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at *6.

298. *See, e.g., United States v. Young*, No. 10-CR-6211L, 2012 WL 5245305, at *6 (W.D.N.Y. Oct. 19, 2012) (“In addition to advising him of his *Miranda* rights, the agents also informed Young that he did not have to consent to the search, and they explained and read the consent form to Young.”).

299. *See, e.g., United States v. LaGrone*, 43 F.3d 332, 337 (7th Cir. 1994) (“LaGrone could not have invoked his *Miranda* right to counsel at the time he asked to call his attorney concerning the consent to search.”).

300. *See, e.g., State v. Rogers*, No. M2002-01798-CCA-R3-DD, 2004 WL 1462649, at *21 (Tenn. Crim. App. June 30, 2004) (“[T]he defendant contends that because he was given no further *Miranda* warnings following the polygraph examination and change in status of the interrogation, his subsequent statements to the police should have been suppressed.”).

301. *Cf. State v. Nightingale*, 58 A.3d 1057, 1064 (Me. 2012) (“Because the trial court did not [sic] err in concluding that Nightingale was not in custody during the interrogation surrounding the polygraph, it follows that *Shatzer*’s fourteen-day waiting period does not apply.”).

Such a reciprocal test is not merely rooted in fairness; it also means that courts would not have to create any new test for dealing with pre-assertions of *Miranda* rights, conserving judicial resources.

D. The Limited Duration of Miranda Rights

Prior to 2010, critics of expanding the *Edwards* prophylaxis to cover pre-assertions could claim that it would hinder police investigations because it would prevent officers from being able to interrogate suspects in perpetuity. First, such a criticism would not be entirely accurate because an officer could still interrogate such a suspect once he was given counsel or if the suspect himself reinitiated communications with the officer.³⁰² Indeed, in the aforementioned *Hambly* case, in which the suspect pre-asserted his *Miranda* rights, the Supreme Court of Wisconsin found no constitutional violation because the suspect himself initiated further communications.³⁰³

Second, this criticism is no longer accurate at all after the Supreme Court's 2010 opinion in *Maryland v. Shatzer*. In *Shatzer*, Michael Shatzer was in prison for an unrelated crime when he was approached by a detective about allegations he had abused his son before being incarcerated.³⁰⁴ Thinking he was being questioned about the unrelated crime, Shatzer initially waived his *Miranda* rights but later refused to speak to the detective without an attorney upon realizing he was being asked about abusing his son.³⁰⁵ The detective immediately ceased questioning Shatzer.³⁰⁶ Two and a half years later, another detective approached Shatzer about the allegations he had abused his son.³⁰⁷ At this point, Shatzer waived his *Miranda* rights, failed a polygraph test, and eventually confessed to the crime.³⁰⁸

Shatzer later moved to suppress his confession, claiming that the *Edwards* prophylaxis precluded the detective from interrogating him once he had invoked his *Miranda* right to counsel.³⁰⁹ The trial court

302. See *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (finding that a suspect who has “expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police”).

303. *State v. Hambly*, 745 N.W.2d 48, 69–70 (Wis. 2008) (“For the reasons set forth, we conclude that the defendant ‘initiated’ further communication with Rindt.”).

304. *Maryland v. Shatzer*, 559 U.S. 98, 100–01 (2010).

305. *Id.* at 101.

306. *Id.*

307. *Id.*

308. *Id.* at 101–02.

309. *Id.* at 102.

denied Shatzer's motion to suppress, and the Supreme Court eventually agreed with this decision.³¹⁰ First, the Supreme Court held that a return to the general prison population was a break in "custody," at least for *Miranda* purposes.³¹¹ Second, the court held that a break in custody of at least fourteen days renders the *Edwards* prophylaxis inapplicable; in other words, if an officer approaches a suspect at least fourteen days after he has validly asserted his *Miranda* right to counsel, the suspect's statements are not presumed to be involuntary.³¹²

*E. The Edwards Prophylaxis Should Be Extended to
Cover Pre-Assertions*

Ultimately, courts deciding whether to expand the *Edwards* prophylaxis to cover certain pre-assertions of *Miranda* rights must determine whether the benefits of extension outweigh the costs.³¹³ The primary benefit of the *Edwards* prophylaxis is that it acts to "[p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel" by "prevent[ing] police from badgering [him] into waiving his previously asserted *Miranda* rights."³¹⁴ Its secondary benefit is "conserv[ing] judicial resources which would otherwise be expended in making difficult determinations of voluntariness."³¹⁵ Conversely, the costs of the *Edwards* prophylaxis are "the in-fact voluntary confessions it excludes from trial, and the voluntary confessions it deters law enforcement officers from even trying to obtain."³¹⁶ Simply put, courts must determine whether the number of coerced confessions an expanded *Edwards* prophylaxis would exclude justify the number of voluntary confessions the expanded prophylaxis would prevent.³¹⁷

In *Shatzer*, the Court refused to extend the *Edwards* prophylaxis because it concluded that the interrogation at issue did not implicate the "concer[n] that motivated the *Edwards* line of cases"³¹⁸: "that the

310. *Id.* at 102, 112–14.

311. *Id.* at 112–14.

312. *Id.* at 110–12.

313. *Id.* at 106.

314. *Id.* (alterations in original) (citations omitted) (quoting *Patterson v. Illinois*, 487 U.S. 285, 291 (1998); *Michigan v. Harvey*, 494 U.S. 334, 350 (1990)).

315. *Id.* (alteration in original) (quoting *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990)).

316. *Id.* at 108.

317. *Id.* at 106.

318. *Id.* at 115 (alteration in original) (quoting *id.* at 120 (Stevens, J., concurring)).

suspect will be coerced into saying yes.”³¹⁹ Instead, the Court concluded that “there is no reason to believe a suspect will view confession as ‘the only way to end his interrogation’ when, before the interrogation begins, he is told that he can avoid it by simply requesting that he not be interrogated without counsel present—an option that worked before.”³²⁰

Conversely, in cases in which suspects seek to pre-assert their *Miranda* rights, their attempts are rebuffed. Indeed, such suspects are often flatly told that they cannot assert their rights.³²¹ Therefore, when they are later read the *Miranda* warning, there is a significant reason to believe that they will view confessions as the only way to end their interrogations.

In *Davis v. United States*,³²² the Supreme Court found that a suspect’s *Miranda* rights were not violated because the suspect failed to unequivocally assert them.³²³ That said, in their opinion concurring in the judgment, four Justices partially analogized the case before them to the pre-*Miranda* opinion in *Escobedo v. Illinois*,³²⁴ in which the Supreme Court deemed a confession involuntary in large part due to the fact that the suspect’s preliminary request to speak to an attorney was denied.³²⁵ According to the concurring Justices in *Davis*, “[w]hen a suspect understands his (expressed) wishes to have been ignored . . . , he may well see further objection as futile and confession (true or not) as the only way to end his interrogation.”³²⁶

In *McNeil*, the Supreme Court did not deny that allowing suspects to pre-assert their *Miranda* rights would preserve the integrity of the accused’s choice. Instead, it merely worried that extending the *Edwards* prophylaxis would not conserve judicial resources because it would be impossible to place meaningful limitations on the ability of suspects to pre-assert their *Miranda* rights.³²⁷

This Article, however, has set forth a test that allows courts to put meaningful limitations on both the front and back end of the process. On the back end, the Court’s recent opinion in *Shatzer* means that officers can interrogate a suspect fourteen days after pre-assertion of the *Miranda* right to counsel and even earlier if the suspect re-initiates

319. *Id.* at 115.

320. *Id.* (quoting *id.* at 122 (Stevens, J., concurring)).

321. *See supra* note 291 and accompanying text.

322. 512 U.S. 452 (1992).

323. *Id.* at 461–62.

324. *Id.* at 472–73 (Souter, J., concurring) (citing *Escobedo v. Illinois*, 378 U.S. 478 (1964)).

325. *Escobedo*, 378 U.S. at 485.

326. *Davis*, 512 U.S. at 472–73 (Souter, J., concurring).

327. *See supra* note 76 and accompanying text.

communications or is appointed an attorney.³²⁸ Meanwhile, if a suspect pre-asserts his right to silence, officers must merely “scrupulously honor” that right.³²⁹

On the front end, courts can conserve judicial resources by determining whether suspects can pre-assert their *Miranda* rights by applying the same totality-of-the-circumstances test that they use for deciding whether officers can pre-administer the *Miranda* warning.³³⁰ Under this test, suspects can only pre-assert their *Miranda* rights when custodial interrogation is “imminent,”³³¹ quelling the *McNeil* Court’s concern about suspects being able to pre-assert their rights at any point in time.

Most importantly, the pre-assertion scenario is the opposite of the scenario the Court confronted in *Shatzer*. Usually, the Court is skeptical about a suspect’s decision to speak with authorities after initially invoking his *Miranda* rights.³³² In *Shatzer*, the Court was able to overcome this skepticism based on the belief that a suspect who successfully asserted his right to counsel would believe he could make the same choice if officers waited at least fourteen days before approaching him again.³³³

In the pre-assertion context, however, a suspect’s initial attempt to assert his *Miranda* rights is (currently) rejected. Sometimes, this rejection consists of the officer saying that the suspect cannot invoke his *Miranda* rights;³³⁴ other times, this rejection consists of the suspect immediately being placed under arrest.³³⁵ Given these circumstances, there is little reason to believe that the suspect will think that he can avoid custodial interrogation by asserting his *Miranda* rights given that his prior attempt at assertion did not work.

There is also little reason to believe that a suspect’s decision to waive his *Miranda* rights after pre-assertion is the result of anything other than the inherently coercive nature of custodial interrogation. In *Shatzer*, the Court found that officers could reapproach a suspect

328. See *supra* note 312 and accompanying text.

329. See *supra* note 37 and accompanying text.

330. See *supra* Part III.C.

331. See *supra* Part III.C.

332. See, e.g., *Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring) (“[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities’ insistence to make a statement without counsel’s presence may properly be viewed with skepticism.”).

333. See *supra* note 320 and accompanying text.

334. See *supra* note 291 and accompanying text.

335. See *supra* note 9 and accompanying text.

fourteen days after he initially asserted his *Miranda* right to counsel by using the following reasoning:

When . . . a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt. . . . His change of heart is less likely attributable to “badgering” than it is to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest. Uncritical extension of *Edwards* to this situation would not significantly increase the number of genuinely coerced confessions excluded. The “justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time.”³³⁶

In pre-assertion cases covered by the test proposed in this Article, none of these factors are present. The “earlier experience” of suspects in these cases is unsuccessful assertion of *Miranda* rights, which might make them believe subsequent attempts at assertion would be futile. Given that suspects would only be allowed to pre-assert their *Miranda* rights when custodial interrogation is “imminent,” these suspects are not able to return to their normal lives for any period of time. Therefore, there is no reason to believe that they had a change of heart regarding waiver and every reason to believe that their confessions are simply the product of a process that the Supreme Court has deemed “inherently coercive.”³³⁷ Accordingly, legal acknowledgment of pre-assertions of *Miranda* rights will likely lead to the correct result most of the time.

CONCLUSION

In its opinion in *Miranda*, the Supreme Court required officers to give what is now known as the *Miranda* warning so that suspects would

336. *Maryland v. Shatzer*, 559 U.S. 98, 107–08 (2010) (footnote omitted) (quoting *Coleman v. Thompson*, 501 U.S. 722, 737 (1991)).

337. See *supra* note 182–83 and accompanying text.

have a “full opportunity” and a “continuous opportunity” to exercise their Fifth Amendment rights.³³⁸ Decades of empirical data, however, reveal that this opportunity is illusory, with around eighty percent of suspects waiving their *Miranda* rights.³³⁹ This Article has identified the likely reason for this under-assertion: the inability of suspects to pre-assert their *Miranda* rights until they are subjected to the very process that the Supreme Court has described as “inherently coercive.”³⁴⁰

The unwillingness of courts to honor pre-assertions of *Miranda* rights can be traced back to dicta from the Supreme Court’s opinion in *McNeil*. The *McNeil* Court cautioned against crediting pre-assertions because most rights cannot be anticipatorily asserted and because meaningful limitations could not be placed upon the right to pre-assert. This Article has identified the PSDA, the so-called “medical *Miranda*,” as a useful analogue that demonstrates how allowing pre-assertion of certain rights can bolster autonomy and counteract the effects of coercion and isolation. Given the comparisons between the physician-patient and officer-suspect relationships, the same principles that support the pre-assertion of medical *Miranda* rights also support the pre-assertion of criminal *Miranda* rights. Moreover, the framework is already in place for courts to credit such pre-assertions in an equitable way that will not strain judicial resources.

338. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

339. See *supra* note 197 and accompanying text.

340. See *supra* note 182–83 and accompanying text.