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United States v. McOmber: A Challenge to State Courts on Counselless Waivers

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The individual criminal suspect undergoing interrogation is often confronted with the police power of the state in circumstances which he finds confusing and frightening. The sixth amendment to the United States Constitution purports to protect the suspect by guaranteeing his right to the assistance of counsel.\footnote{U.S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."} This safeguard can be elusive if police investigators can too easily seduce the suspect into waiving his right to the presence of counsel.

The range of protections relating to the right of an accused to the presence of counsel during a police interrogation can be thought of as spanning a continuum. At one extreme would be a rule requiring no warning at all of the right to counsel. A move from this position toward greater protection was \textit{Miranda v. Arizona},\footnote{384 U.S. 436 (1966).} requiring that the police advise the suspect of the right to the presence of counsel in advance of the interrogation.\footnote{Id. at 474.} A further step would be to make notification of counsel a prerequisite to ques-
tioning. At the other end of the spectrum there would be a complete bar to questioning of the accused without the actual presence of counsel, notwithstanding counsel’s notification and opportunity to be present.

In recent years, the United States Supreme Court has sanctioned numerous limitations on the right to counsel. The Court has recently held that *Miranda* does not apply to volunteered statements, even when questioning is done behind closed doors at the police station. The Supreme Court has also allowed statements taken in violation of the requirements of *Miranda* to be used for impeachment.

Some state courts, however, have refused to follow this retreat from the policies of *Miranda*, preferring instead to use state constitutions and statutes to strengthen the protection given an accused. As the California Supreme Court noted in *People v. Disbrow*, these states can now find support in the decisions of another separate jurisdiction, the military. In April 1976, the United States Court of Military Appeals, the highest military appellate court, decided *United States v. McOmber*. This Comment discusses this independent approach to the problem of defining and limiting waiver of counsel. The first part of this Comment analyzes *McOmber*, which made notification of counsel a precondition for a valid waiver of counsel’s presence during interrogation. The Comment then considers the present effectiveness of *Miranda* in the civilian courts and examines whether state courts using state law could strengthen the *Miranda* protection by following the example of *McOmber*.

4. For a discussion of New York’s approach, see text accompanying notes 123-31 infra.
Development of a Per Se Exclusionary Rule in
Military Courts: United States v. McOmber

Pre-McOmber

In interpreting the sixth amendment, the Miranda Court required specific warnings of certain rights before custodial interrogation.\(^{12}\) One such right is the presence of counsel during the interrogation.\(^{13}\) In the absence of counsel, a suspect may not be interviewed without first making a knowing and voluntary waiver of this right.\(^{14}\)

The military defendant’s rights derive from both constitutional and statutory sources. First, United States v. Tempia\(^ {15}\) held that the sixth amendment and Miranda govern military proceedings. In applying Miranda, the military courts generally require nothing more than civilian courts:\(^ {16}\) If the government has given the Miranda warnings, and there has been no “dirty pool”\(^ {17}\) to eliminate voluntariness, the suspect is competent to waive the presence of counsel at an interrogation.\(^ {18}\)

In addition to Miranda, two sources, the Uniform Code of Military Justice (U.C.M.J.)\(^ {19}\) and the Manual for Courts-Martial (M.C.M.),\(^ {20}\) govern military procedure. Although military courts interpret these sources independently of civilian case law,\(^ {21}\) tradi-

\(^{12}\) 384 U.S. at 479.
\(^{13}\) Id. at 474.
\(^{14}\) Id. at 475.
\(^{17}\) United States v. Flack, 20 C.M.A. 201, 205, 43 C.M.R. 41, 45 (1970), quoting United States v. DeLoy, 421 F.2d 900, 902 (5th Cir. 1970). DeLoy, discussed at text accompanying notes 82-89 infra, held statements obtained in the absence of counsel are inadmissible only when the government had elicited, solicited, or suggested a statement in an unfair manner.
\(^{19}\) 11 U.S.C. §§ 801-950 (1970). Section 831, which lists the rights of a suspect in criminal proceedings, does not specifically mention the right to counsel; however, paragraph (d) forbids the use of any statement obtained through the use of coercion, unlawful influence, or unlawful inducement.
\(^{21}\) Parker v. Levy, 417 U.S. 733 (1974); Burns v. Wilson, 346 U.S. 137,
tionally their decisions closely parallel civilian rulings based upon Miranda.

The M.C.M. requires that counsel deal with a suspect only through the suspect's attorney. However, prior to McOmber, admissions made in interrogations outside the attorney's presence and without notification to the attorney were admissible. The rationale of these cases was that the suspect's knowing and voluntary waiver nullified any error. As a result, military appellate courts became enmeshed in a wearisome case-by-case review of the waiver's voluntariness. In 1974, the Army Court of Military Review, an intermediate appellate court, proclaimed that the "law is fixed that an accused who has been provided counsel may give a competent waiver." However, the court added that the rule was tolerable only as long as interrogations outside the presence of counsel remained an infrequent police practice. The court suggested that if that practice became more widespread, it would seriously consider replacing case-by-case reviews of the voluntariness of waiver of counsel with a per se exclusionary rule. The court especially noted the per se New York rule which invalidates any waiver given without notification to counsel.

McOmber

In the 1976 decision of United States v. McOmber, the Court of Military Appeals not only considered but also adopted a per se exclusionary rule. Airman James T. McOmber asserted his right to counsel at initial questioning regarding the theft of a tape deck.

140 (1953) (military law is a jurisprudence existing separately and apart from the civilian judiciary).
22. M.C.M., supra note 20, at para. 44(h).
26. Id.
27. Id.
The investigators immediately terminated the interrogation, supplying McOmber with the name and address of a defense counsel. The investigators again interviewed McOmber. The second interview related to nine larceny offenses, including the same tape deck charge. The appointed counsel who now represented McOmber was not present at the questioning. The investigators admitted they had failed to notify McOmber's attorney before the second interview. Adequate warnings of the right to counsel preceded both interrogations. On the second occasion, however, McOmber waived those rights, giving an incriminating statement which was later admitted at his trial for larceny of the tape deck.

At trial and on appeal, the defendant argued that the use of this statement violated both his constitutional and statutory rights to counsel. The government, while admitting technical violations of the M.C.M., contended that such errors were not prejudicial when accompanied by the suspect's waiver.

Chief Judge Fletcher of the United States Court of Military Appeals insisted that allowing a defendant to waive the presence of counsel would encourage violations of the right to counsel. He ruled that once an investigator becomes aware that the suspect has an attorney, further questioning may not take place without affording that attorney a reasonable opportunity to be present at the interrogation. If the investigator does not notify counsel, any statement obtained will be inadmissible under the U.C.M.J. The military courts thus adopted a per se exclusionary rule intended to protect the suspect's right to counsel by eliminating case-by-case reviews of voluntariness. McOmber explicitly limited its holding to statutory grounds, although Chief Judge Fletcher referred to

30. 24 C.M.A. at 208, 51 C.M.R. at 453.
32. M.C.M., supra note 20, at para. 44(h).
34. 24 C.M.A. at 209, 51 C.M.R. at 454.
36. 24 C.M.A. at 208, 51 C.M.R. at 453.
Miranda and other civilian cases interpreting the sixth amendment.\textsuperscript{37}

The specific holding in McOmber requires merely notification of counsel and a reasonable opportunity for the attorney to be present during the interrogation.\textsuperscript{38} In its reasoning, however, the court evidenced a broader concern for the theoretical question of whether there can be any effective waiver of counsel without the actual presence of counsel.\textsuperscript{39} Although in practice military investigators interpret notification of counsel to include an affirmative statement by the suspect's attorney permitting the questioning, the extent to which actual waiver by counsel is a necessary part of notification remains an unresolved issue.

\textbf{CIVILIAN CASES—THE NORM}

\textit{Miranda}, Massiah v. United States,\textsuperscript{40} and the ABA Code of Professional Responsibility\textsuperscript{41} could provide justification for requiring the presence of counsel at the interrogation. However, most civilian courts—state and federal—reject this view and hold that a defendant is competent to waive the presence of his attorney.\textsuperscript{42} By thus refusing to extend the right to the presence of counsel, the federal courts have left to the states the task of providing further protection for the right to counsel.\textsuperscript{43}

Miranda

\textit{Miranda} is subject to varying interpretations.\textsuperscript{44} The \textit{Miranda} Court was obviously concerned for the suspect confronted with the

\begin{itemize}
\item \textsuperscript{38} 24 C.M.A. at 209, 51 C.M.R. at 454.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} 377 U.S. 201 (1964), discussed in text accompanying notes 51–67 infra.
\item \textsuperscript{41} See text accompanying notes 68–77 infra.
\item \textsuperscript{42} Dillon v. United States, 391 F.2d 433 (10th Cir. 1968); Hart v. State, 484 P.2d 1334 (Okla. Crim. App. 1971).
\item \textsuperscript{43} Moore v. Wolff, 495 F.2d 35, 37 (8th Cir. 1974); Dillon v. United States, 391 F.2d 433, 437 (10th Cir. 1968).
\item \textsuperscript{44} Compare the various opinions in Michigan v. Mosley, 423 U.S. 96 (1975). Justice Stevens, writing for the majority, insisted “clearly the Court in \textit{Miranda} imposed no such requirement” of an attorney's presence for a valid waiver. Id. at 104 n.10. Justice Brennan's dissent, on the contrary, felt that \textit{Miranda} indeed suggests that once a request for counsel has been made, questioning must be stopped until counsel is present. Id. at 117. In this connection, consider dicta in Mathies v. United States, 374 F.2d 312, 316 n.3 (D.C. Cir. 1967) that “[t]he prospective application of \textit{Miranda} . . . plainly will require that such interviews can be con-
\end{itemize}
atmosphere of custodial interrogation. The Supreme Court observed that if "the individual states that he wants an attorney, the interrogation must cease until an attorney is present." The Court thus appeared to clearly prohibit counselless interrogation. Such a prohibition would effectively ensure repeated questioning would not overbear the suspect's will.

In addition, however, the Miranda ruling imposed a "heavy burden" upon the government if the interrogation proceeds without the presence of an attorney. The Court defined this "burden" as requiring proof that the defendant knowingly and intelligently waived his right to counsel. But because this discussion of the burden would have been superfluous if Miranda had imposed a flat ban on questioning outside of the presence of counsel, the majority of courts ignores the seemingly broad language of Miranda and does admit statements made at counselless interrogations if the government meets its burden of showing a knowing and voluntary waiver of counsel.

Massiah

Deprived of recourse to Miranda, defendants often invoke Massiah to attack the validity of waivers outside the presence of counsel. However, Massiah involved more than the bare absence of the suspect's attorney during interrogation. Although Massiah

45. The Court noted that the "circumstances surrounding in-custody interrogation can operate very quickly to overbear the will." 384 U.S. at 469.
46. Id. at 474.
47. Id. at 466.
48. Id. at 475.
52. Judge Godbard commented in United States v. Anderson, 523 F.2d 1192, 1195 (5th Cir. 1975), that Massiah is an expression of a "broad concern, which is to protect an indicted defendant who has counsel from erosion of the benefits of his sixth amendment right to counsel." For a military case unsuccessfully invoking Massiah, see United States v. Flack, 20 C.M.A. 201, 43 C.M.R. 41 (1970).
had an attorney, he was free on bail when he had an incriminating conversation in a co-defendant's bugged automobile. Massiah did not realize that investigators were listening to the conversation. This surreptitious behavior, the Court held, deprived Massiah of the knowledge of the interrogation essential to a valid waiver of the presence of counsel.

The confusion surrounding Massiah arises from the Supreme Court's cryptic decision in McLeod v. Ohio. After his arrest, McLeod made an oral confession during the search for the murder weapon. He was not then represented by counsel. The trial court admitted the deputy sheriff's testimony reporting the confession. The Ohio Supreme Court dismissed the appeal for lack of a debatable constitutional issue. The United States Supreme Court vacated the original judgment and remanded it for consideration in light of Massiah. On remand, the Ohio Supreme Court distinguished Massiah on the grounds that McLeod involved no surreptitious government acts and that the suspect had never requested an attorney. Massiah had made his incriminating statement after the appointment of counsel. In contrast, McLeod did not yet have an attorney.

On a second appeal, the United States Supreme Court disposed of the case tersely—"Reversed. Massiah." One interpretation of the Court's reversal limits its application to cases in which the police never inform the suspect of the right to counsel. A valid waiver of counsel requires that the suspect know of the right.

Thus, if the only similarity between Massiah and McLeod is the absence of knowledge at the time of the supposed waiver, neither case will apply to the suspect who knows of the right to counsel and who has exercised that right. But, if the similarity between

53. 377 U.S. at 203.
54. Id. at 206.
56. The facts are given in the second Ohio Supreme Court decision, State v. McLeod, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964).
59. State v. McLeod, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964).
60. The McLeod series of cases runs from 1962 until 1965, all pre-Miranda. Thus, the standards of Escobedo and Massiah defined the right to counsel and there was no requirement that the police offer counsel to McLeod.
62. The dissent in State v. McLeod assumed the deputy sheriff never advised the suspect of the right to counsel. 1 Ohio St. 2d 60, 203 N.E.2d 349, 353 (1964) (dissenting opinion).
Massiah and McLeod lies instead in the absence of counsel, McLeod extends Massiah to exclude any counselless statement or waiver. This exclusion would apply whether the absence of counsel is the result of total absence from the case or a mere lack of notification. The argument for this extension, however, has rarely been successful. Courts prefer to limit the interpretations of both Massiah and McLeod.

In addition to allowing waivers without the actual presence of counsel, most civilian courts permit waiver even without notification to counsel. While admitting that "the better, fairer and safer practice is to afford the defendant's attorney reasonable opportunity to be present," United States v. Coughlan allowed the defendant to waive his right to counsel without notice to his attorney. The civilian courts have generally held that neither Miranda nor Massiah requires notice of the interrogation to the suspect's attorney.

**Code of Professional Responsibility**

The general rule that the police need not notify the suspect's attorney in advance of the interrogation is subject to a possible exception found in the ABA Code of Professional Responsibility. Disciplinary Rule 7-104 states that an attorney may communicate with an adverse party only through that party's attorney. Although the Code applies only to attorneys, a minority of courts refuses to distinguish between the attorney who engages in prohibited questioning and the attorney who merely uses the results of such question-
ing by a non-attorney. In United States v. Thomas, for instance, the Tenth Circuit held the admission of a statement obtained in the absence of the suspect's attorney was improper. The court insisted that an attorney may not offer in evidence any statement taken by a police investigator if that investigator had not given the suspect's attorney an opportunity to be present.

The Second Circuit considered this application of the Code in United States v. Massiah and rejected the contention that government investigators must refrain from any contact with a suspect in the absence of his attorney. The overwhelming majority of courts agree with the Second Circuit that statements obtained in supposed violation of the Code are not excludable. The courts find no constitutional issue and refuse to exercise their supervisory authority to enforce the standards of ethics.

These defense arguments that Miranda, Massiah, and the ABA Code of Professional Responsibility preclude waiver without the presence of counsel are generally rejected by most state and federal courts. Instead of developing their own standards, state courts have generally followed the federal lead requiring only that the waiver of counsel be both knowing and voluntary. The state courts have

69. Allowing a prosecutor to use statements he could not personally obtain encourages prosecutors to intentionally overlook dubious police practices. See generally Broader, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L. Rev. 483 (1962).
70. 474 F.2d 110 (10th Cir.), cert. denied, 412 U.S. 932 (1973).
71. Id. at 112.
72. Id.
73. 307 F.2d 62 (2d Cir. 1962).
74. Id. at 66. The majority opinion in the Supreme Court did not deal with this issue. 377 U.S. 201 (1964). Justice White's dissent noted the purpose of the Code in protecting the suspect from the supposed imbalance of legal skills and acumen between the lay suspect and the attorney, without considering the possibly higher investigatory acumen of the professional police investigator. Id. at 211 (White, J., dissenting).
75. E.g., United States v. Crook, 502 F.2d 1378, 1381 (3d Cir. 1974), cert. denied, 419 U.S. 1123 (1975); United States v. Vasquez, 476 F.2d 730 (5th Cir. 1973); United States v. Springer, 460 F.2d 1344, 1352 (7th Cir. 1972); State v. Yatman, 320 So. 2d 401 (Fla. App. 1975); State v. McConnell, 529 S.W.2d 185 (Mo. App. 1975).
77. United States v. Crook, 502 F.2d 1378, 1381 (3d Cir. 1974), cert. denied, 419 U.S. 1123 (1975), holding that the supervisory powers may not be used to "disregard the congressional mandate of 18 U.S.C. § 3501(a)." The court was referring to the Omnibus Crime Control & Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. II, § 701, 82 Stat. 197, 211 (1968), which provided that the trial judge is to determine voluntariness and hence admissibility. See also Lewis v. State, 259 Ind. 431, 288 N.E. 2d 138 (1972).
78. See, e.g., Moore v. Wolff, 495 F.2d 35 (8th Cir. 1974).
been content with the presumption that the formalities of the \textit{Miranda} warnings assure a knowing waiver.\textsuperscript{79} That this presumption is incorrect is evident in the cases involving suspects who make oral admissions, yet refuse to sign written waivers of their right to counsel.\textsuperscript{80} These suspects do not have an adequate understanding of waiver or of the consequences of their acts. Their clear intention is to preserve their rights. Yet the courts continually hold this a valid waiver of the right to counsel.\textsuperscript{81}

The second issue in the determination of a waiver is voluntariness.\textsuperscript{82} The courts presume that voluntariness, like knowledge, results from the receipt of the \textit{Miranda} warnings,\textsuperscript{83} provided that the government has not committed acts of "dirty pool."\textsuperscript{84} Dirty pool is narrowly limited to surreptitious interrogations,\textsuperscript{85} police problems of knowledgeability arise also in considering waivers given by mental incompetents. Here, most courts avoid any definite rules, preferring to analyze whether each particular defendant was capable of understanding his situation. See, e.g., Elrod v. State, 281 Ala. 331, 202 So. 2d 539 (1967); Schade v. State, 512 P. 2d 909 (Alaska 1973); People v. Tipton, 48 Cal. 2d 389, 309 P.2d 813, cert. denied, 355 U.S. 846 (1957).

Many of the cases refusing to admit post-waiver statements involved other factors such as the use of drugs, length of interrogation, or age. For cases considering drug use, see Logner v. North Carolina, 260 F. Supp. 970 (M.D. N.C. 1966); New Mexico v. Ortiz, 77 N.M. 316, 422 P.2d 355 (1967). For a consideration of the length of interrogation, see Culombe v. Connecticut, 367 U.S. 568 (1961). Age is discussed in Reck v. Pate, 367 U.S. 433 (1961), and State v. Falbo, 333 S.W.2d 279 (Mo. 1960). See also State v. Ashdown, 5 Utah 2d 59, 62, 296 P.2d 726, 729 (1956), aff'd, 357 U.S. 426 (1958), holding that even a combination of "tender age and weak intellect" would not alone render a confession inadmissible.

\textsuperscript{79} United States v. Frazier, 476 F.2d 891, 899 (D.C. Cir. 1973), commenting that to require anything more would be "alien to the duties and the training of policemen."

\textsuperscript{80} Coughlan v. United States, 391 F.2d 371, 372 (9th Cir.) (dissenting opinion), cert. denied, 393 U.S. 970 (1968), noting that the defendant had refused to sign his supposed waiver.

\textsuperscript{81} United States v. Johnson, 529 F.2d 581 (8th Cir.), cert. denied, 425 U.S. 916 (1976), where an oral waiver was combined with lack of knowledge by the police that the defendant had an attorney.

\textsuperscript{82} United States v. Clark, 499 F.2d 802 (4th Cir. 1974); United States v. Hodge, 487 F.2d 945 (5th Cir. 1973); State v. Iowa Dist. Ct., 236 N.W.2d 54 (Iowa 1975).

\textsuperscript{83} United States v. Vasquez, 476 F.2d 730 (5th Cir. 1973).

\textsuperscript{84} United States v. DeLoy, 421 F.2d 900, 902 (5th Cir. 1970). The court refused to agree that Massiah taints any statement made by a defendant outside the presence of his counsel, without something more which the court characterized as governmental "dirty pool."

\textsuperscript{85} Massiah v. United States, 377 U.S. 201 (1964).
pressures, trickery, and affirmative acts impeding the free exercise of the suspect’s will. It usually does not include the mere failure to notify counsel.

**Civilian Cases—Exceptions to the Norm**

In the exceptional situation involving the juvenile accused, many jurisdictions invalidate counselless waivers. The courts consider the capabilities of the person waiving and impose a higher standard than is required under general interpretations of *Miranda* and the sixth amendment. A 1970 University of San Diego study of waivers by children gives important insight into juvenile competency. Children of varying backgrounds, intelligence, and sophistication regarding police practices responded to both formal and

86. Biddy v. Diamond, 516 F.2d 118 (5th Cir. 1975).
87. United States v. Anderson, 523 F.2d 1192 (5th Cir. 1975).
88. Contra, Commonwealth v. Yates, 357 A.2d 134 (Pa. 1976). In Yates, the police affirmatively misrepresented to counsel that the suspect was either unavailable or had already given a statement. The waiver was held valid. It thus appears that the dirty pool must be in relation to the suspect, not his attorney.
89. For a military case reaching the same conclusion, see United States v. Flack, 20 C.M.A. 201, 43 C.M.R. 41 (1970). While voluntariness is generally the central concern in determining the validity of a waiver of counsel, courts will often consider other factors. A suspect can more easily waive an attorney appointed or retained for other charges than an attorney already involved in the subject of the interrogation. Police knowledge of the existence of the attorney is also significant even in those jurisdictions which generally do not allow a waiver outside the presence of counsel. People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965). While this distinction may be useful in determining the reasonableness of police conduct, it seems to have little to do with the validity of the waiver from the suspect’s point of view. A simple question about the retention or appointment of counsel, appended to the standard *Miranda* warnings, would more satisfactorily indicate the propriety of the waiver.
90. Consider also Wilson v. United States, 398 F.2d 331 (5th Cir. 1968), holding that while it is improper to interrogate a suspect who is known to have counsel, such impropriety does not constitute reversible error.
91. There may be valid reasons to suspend certain criminal rights in a juvenile proceeding. The purpose of the juvenile courts is rehabilitation rather than punishment. Strict observation of technical criminal procedure might prevent necessary disclosure. However, rather than functioning as a kindly parent, the juvenile court may actually conduct delinquency proceedings which are hardly distinguishable from adult criminal prosecutions. Justice Douglas, in *McKeiver v. Pennysylvania*, 403 U.S. 528, 559 (1971) (dissenting opinion), noted that when juvenile proceedings are used to “convict” a person of a violation of a criminal statute which results in confinement in a state institution, it is very difficult to justify distinctions based upon a lesser need for criminal rights.
simplified *Miranda* warnings. Of the ninety children participating in the test, eighty-six waived their rights. Later interviews showed that most of these eighty-six misunderstood their rights at the time of the waiver. The right least understood was the right to presence of counsel during interrogations.

This study supports the holdings of state courts which apply a higher standard of waiver to juveniles in light of the inadequacy of the *Miranda* warnings. For example, the Indiana Supreme Court has held that a juvenile is incompetent to waive his rights without consulting a guardian. According to the court, "[i]t indeed seems questionable whether any child falling under the legally defined age of a juvenile and confronted in such a setting can be said to be able voluntarily and willingly to waive those most important rights." The court noted the inconsistency of permitting a waiver of constitutional rights by a person legally incompetent under state law to give blood, to marry, or to execute a binding contract.

Despite this evidence, many courts assume a child has the capacity to make a valid waiver of the right to counsel. The Minnesota Supreme Court has held that as long as the child is aware of the adversary atmosphere of a custodial interrogation, his

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92. The simplified version read:
You don’t have to talk to me at all, now or later on, it is up to you.
If you decide to talk to me, I can go to court and repeat what you say, against you.
If you want a lawyer, an attorney, to help you to decide what to do, you can have one free before and during questioning by me now or by anyone else later on.
Do you want me to explain or repeat anything about what I have just told you?
Remembering what I’ve just told you, do you want to talk to me? *Id.* at 40. The test selected children from facilities for delinquents and from community junior high schools. None of the juveniles interviewed knew in advance that they were being tested. The interviewer attempted to create the impression that he was investigating the juvenile's suspected involvement in a crime. After the initial interview in which the children were asked to waive their rights, a second interview was conducted to determine the depth of understanding for each child.

93. *Id.* at 53.
95. *Id.* at 437, 288 N.E.2d at 141.
96. *Id.* at 437-38, 288 N.E.2d at 142. *See also State ex rel. S.H.*, 61 N.J. 108, 293 A.2d 181, 184 (1972) (the recitation of *Miranda* rights to a ten-year-old is undoubtedly meaningless).
waiver of counsel's presence is acceptable. Another court has held that if the child knows the difference between right and wrong, the child can waive. These courts consider the totality of circumstances, only one of which is the age or maturity of the child. Just as with mental incompetents, most cases excluding a juvenile's statement outside the presence of counsel have involved other factors such as mental retardation, lack of criminal sophistication, or insanity. Many of those courts which do permit counselless waivers by children impose only a minimal requirement of notification to parents or a guardian rather than to an attorney.

AN ANALYSIS OF COUNSELLESS WAIVERS

There is now a clear split of authority about the validity of a suspect's waiver of the right to counsel in the absence of his attorney. Most civilian courts feel the Miranda warnings provide sufficient protection for the suspect. However, the New York and military courts believe the suspect needs additional protection. The choice between these two alternatives depends upon a resolution of two issues. Does a mere Miranda warning adequately protect the sixth amendment rights of the average defendant? If not, would it be desirable for state courts to adopt either the notification rule of McOmber or the more stringent New York rule prohibiting any counselless waiver?

The Effectiveness of the Miranda Warning

The post-Miranda presumption is that the mere reading of the right to counsel ensures a voluntary and knowing waiver. This presumption is unrealistic. The most important weakness of the prevailing view is its overestimation of the capacity of the typical suspect. The 1970 study established that many children do not understand even a simplified version of the Miranda warnings.

97. State v. Loyd, 297 Minn. 442, 212 N.W.2d 671 (1973). See also State v. Gullings, 244 Or. 173, 416 P.2d 311 (1966), permitting waiver whenever the situation is clear to the juvenile.
99. See note 79 supra.
100. In re Roderick P., 7 Cal. 3d 801, 500 P.2d 1, 103 Cal. Rptr. 425 (1972).
101. Id.
102. State v. Falbo, 333 S.W.2d 279 (Mo. 1960).
103. E.g., Gallegos v. Colorado, 370 U.S. 49 (1962); In re ADR, 515 S.W. 2d 438 (Mo. 1974).
104. See text accompanying notes 40-89 supra.
105. See text accompanying notes 123-31 infra.
106. See text accompanying notes 91-93 supra.
Other studies indicate that many adult suspects fail to comprehend the *Miranda* warnings.\(^{107}\) This finding is true of supposedly sophisticated graduate students as well as illiterate first-time offenders.\(^{108}\) The intellectual capacity to understand is different from actual understanding in a particular situation, especially in the intimidating circumstances of custodial interrogation.\(^{109}\) Even supplementing the *Miranda* warnings with questions relating to the suspect's understanding of his rights is ineffective. The suspect may not understand enough to recognize a misunderstanding.

The underlying assumption of the civilian voluntariness decisions has been that if a suspect can voluntarily waive the right to counsel at the outset of the proceedings, he is competent to waive the presence of the attorney at a later time.\(^{110}\) Some courts reason that any suspect knowledgeable enough to assert a right is knowledgeable enough to waive the right.\(^{111}\) This assumption ignores the suspect's implicit admission of incompetence to handle his own case when he first asserts the right to counsel.\(^{112}\) The request for counsel casts suspicion on a subsequent waiver. The interrogator should be required to make an extra showing of voluntariness and knowingsness to combat this suspicion.\(^{113}\)

The waiver has some validity in the case of a hypothetical suspect subjected to no outside pressures from the police. In reality

\(^{107}\) Interrogation in New Haven: The Impact of *Miranda*, 76 *Yale L.J.* 1519 (1967).

\(^{108}\) Note, A Postscript to the *Miranda* Project: Interrogations of Draft Protestors, 77 *Yale L.J.* 300 (1967). This study included 21 draft resisters of whom 7 were faculty members and 11 were graduate or professional students. Very few of these asserted their *Miranda* rights, even after formal warnings; those who did refuse to answer acted on a "hunch," not a knowing decision. The article concludes that the *Miranda* warnings are almost totally ineffective.

\(^{109}\) United States v. Frazier, 476 F.2d 891, 899 (D.C. Cir. 1973) (dissenting opinion).


\(^{111}\) Biddy v. Diamond, 516 F.2d 118, 122 (5th Cir. 1975).

\(^{112}\) Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring) (a decision to make a statement after already asserting a right to counsel may properly be viewed with skepticism). See also United States v. Clark, 499 F.2d 802 (4th Cir. 1974); Moore v. Wolff, 495 F.2d 55, 37 (8th Cir. 1974); United States v. Springer, 460 F.2d 1344 (7th Cir. 1972); State v. McConnell, 529 S.W.2d 185 (Mo. App. 1975).

\(^{113}\) United States v. Springer, 460 F.2d 1344, 1352 (7th Cir. 1972).

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the average suspect encounters pressures undermining his will.\textsuperscript{114} It is not contended here that the investigator is likely to beat a confession out of a suspect. However, pressures other than those physical can affect the human will—the mere fact of custodial interrogation creates considerable pressures.\textsuperscript{115} The policeman in the heat of an investigation is not concerned with a strict preservation of the suspect's rights for a future trial.\textsuperscript{116} The average policeman has neither the legal nor the psychological training to protect the accused.\textsuperscript{117} Even when a suspect manifests misunderstanding, the policeman rarely stops the interrogation to explain the legal intricacies of a confession.\textsuperscript{118} The voluntariness of a suspect's change of mind is especially unlikely when the police, rather than the suspect, reinitiate the questioning.\textsuperscript{119}

Some courts allow resumed interrogation only to check whether the suspect has changed his mind.\textsuperscript{120} The distinction between permissible checking and impermissible interrogation is too fine to withstand the realities of police practice.\textsuperscript{121} The suspect may not understand the difference and will respond to the increased pressure with an involuntary waiver of the right to the presence of counsel. In addition, a great temptation exists for the interviewer to ask one more question or press for one more answer. Other courts hold, more reasonably, that a subsequent waiver of the right to counsel is involuntary as a matter of law whenever it results from acts of the police.\textsuperscript{122}

\textsuperscript{114} Miranda v. Arizona, 394 U.S. at 467. The Court concluded that “the process of in-custody interrogation of persons suspect or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak when he would not otherwise do so freely.”

\textsuperscript{115} Id.

\textsuperscript{116} Note, A Postscript to the Miranda Project: Interrogation of Draft Protestors, 77 YALE L.J. 300, 309 (1967).

\textsuperscript{117} Id. See also United States v. Frazier, 476 F.2d 891 (D.C. Cir. 1973); Interrogations at New Haven: The Impact of Miranda, 76 YALE L.J. 1519, 1554 (1967).


\textsuperscript{119} Michigan v. Mosley, 423 U.S. 96, 102 (1975); United States v. Clark, 499 F.2d 802 (4th Cir. 1973); Coughlan v. United States, 391 F.2d 371, 374 (9th Cir.) (dissenting opinion), cert. denied, 393 U.S. 870 (1968).

\textsuperscript{120} United States v. Olof, 527 F.2d 752 (9th Cir. 1975); United States v. Jackson, 436 F.2d 39, 41 (9th Cir. 1970).

\textsuperscript{121} United States v. Olof, 527 F.2d 752, 753 (9th Cir. 1975); United States ex rel. Chabonian v. Liek, 366 F. Supp. 72, 80 (E.D. Wisc. 1973).

Strengthening the Miranda Warning

The effectiveness of the Miranda warning is slight. The suspect is not likely to understand the warnings, and even the understanding suspect is often incapable of resisting police questioning. Thus, the state courts face a choice: Either accept the United States Supreme Court's return to the voluntariness standard or strengthen Miranda through the adoption of the McOmber rule as state law.

New York has chosen to entirely exclude counselless waivers. Predating Miranda, the New York rule originally applied only to situations in which the police actively prevented the suspect from consulting his attorney. New York subsequently extended the rule to cover any counselless waiver. Under this rule it is immaterial that the attorney represents the suspect only informally or for a different charge. The only requirement is that the police know of the attorney's involvement. Whenever the interrogators have this knowledge, the New York courts prohibit any questioning in the absence of counsel. Because the New York courts deny the validity of counselless waivers, the issue of notification does not arise. The New York courts base the per se exclusionary rule upon state statutory and constitutional grounds, although the opinions applying the rule often refer to the policies of the sixth amendment cases—Escobedo, Massiah, and Miranda. Acknowledging the legitimate interests of law enforcement, the New York courts nevertheless insist that a grant of the right to an attorney be realistic. The New York courts find that consultation with

126. See notes 124-25 supra.
127. People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 666 (1968) (finding no requirement that the attorney request the police to respect the rights of the suspect).
an attorney supplies the most effective protection against an involuntary waiver of the right to counsel.\textsuperscript{131}

Justice White has argued that the New York rule paternalistically disregards the suspect's own intentions and "imprison[s] him in his privileges."\textsuperscript{132} It is inconsistent, however, to insist on the "privilege" to make a decision based on an unintelligible recitation of rights. To say that a suspect is free to make a voluntary and knowing waiver without ensuring that he is able to make that decision, grants only the form, not the substance required by the sixth amendment.

The argument that the McOmber rule would cripple law enforcement is unsound. The police have adapted to the requirements of Miranda,\textsuperscript{133} despite the dire predictions of the Miranda dissenters that the decision would weaken law enforcement.\textsuperscript{134} An additional requirement of the presence of counsel for a valid waiver may result in more delays and fewer confessions, perhaps even in fewer convictions. However, the experiences of New York and the expectations of the military under McOmber\textsuperscript{135} indicate that such delays are not overwhelming. The per se exclusionary rule of McOmber is workable.

\textbf{CONCLUSION}

The Miranda warnings fail in two ways to provide sufficient pro-


Moreover, the principle is not so much, important as that is, to preserve the civilized decencies, but to protect the individual often ignorant and uneducated, and always in fear, when faced with the coercive police power of the State. The right to the continued advice of a lawyer, already retained or appointed, is his real protection against an abuse of power by the organized State.


\textsuperscript{133} E.g., Interrogations at New Haven: The Impact of Miranda, 76 YALE L.J. 1519, 1562-65 (1967).

California recognizes a distinction between pre- and post-indictment police requirements, assuming that once charges have been filed, the need for investigation decreases. People v. Wong, 18 Cal. 3d 178, 555 P.2d 297, 133 Cal. Rptr. 511 (1976) (no need to notify counsel of pre-indictment interrogation, leaving open the question of post-indictment waiver).

\textsuperscript{134} 483 U.S. at 516-17 (dissenting opinion).

\textsuperscript{135} The military courts have found the McOmber rule sufficiently workable to subsequently forbid counselless waivers when the attorney represents a suspect on charges different from the subject of the interrogation. United States v. Lowry, No. NCM 75-0449 (C.M.A. Nov. 5, 1976).}
tection for the accused. First, the warnings are unintelligible and ineffective without the advice of counsel. Second, even if the original *Miranda* interpretation of the right to counsel did furnish adequate protection for the accused, the Supreme Court's increasingly narrow interpretation of *Miranda* and the right to counsel endangers this protection.\(^{136}\)

This erosion of *Miranda* has been accompanied by the federal courts' rejection of the possibilities of using *Massiah*, *McLeod*, and the ABA Code of Professional Responsibility to reinforce the right to counsel.\(^{137}\) The Supreme Court's decisions on the right to counsel have been part of a general retreat from the activism of the Warren Court under the fourth,\(^{138}\) fifth,\(^{139}\) and sixth\(^{140}\) amendments. As

\[^{136}\text{E.g., Oregon v. Mathiason, } 97 \text{ S. Ct. 711 (1977); Michigan v. Mosley, } 423 \text{ U.S. 96 (1975); Oregon v. Hass, } 420 \text{ U.S. 714 (1975). The rationale and possible effects of } \text{Mosley are discussed in Comment, Michigan v. Mosley: A Further Erosion of Miranda, } 13 \text{ SAN DENTO L. REV. 861 (1976).}^\]

\[^{137}\text{Miranda narrowly escaped even further limitation in the recent decision of Williams v. Brewer, } 97 \text{ S. Ct. 1232 (1977). In a 5 to 4 decision, the Court found an invalid “waiver” of the right to counsel when an accused revealed the location of a body after police questioning outside the presence of counsel. However, far from being an acceptance of the necessity for counsel's presence, the Court specifically noted that the accused could have waived his right to counsel but did not do so in the particular circumstances. Not only had the accused previously asserted his right to counsel and his right to silence, but his counsel also had released him into police custody for transportation without counsel’s presence, only after repeated police assurances that there would be no questioning during the trip. The narrowness of this decision is obvious in the vehement dissent of Chief Justice Burger, in which he insisted that the “result reached by the Court in this case ought to be intolerable in any society which purports to call itself an organized society.” } \text{Id. at 1248 (dissenting opinion).}^\]

\[^{138}\text{E.g., United States v. Watson, } 423 \text{ U.S. 418 (1976); Gustafson v. Florida, } 414 \text{ U.S. 260 (1973); United States v. Robinson, } 414 \text{ U.S. 218 (1973); Schneckloth v. Bustamonte, } 412 \text{ U.S. 218 (1973).}^\]

\[^{139}\text{E.g., Michigan v. Tucker, } 417 \text{ U.S. 433 (1974).}^\]

\[^{140}\text{E.g., Oregon v. Hass, } 420 \text{ U.S. 714 (1975) (statements violating } \text{Miranda may be used for impeachment); Kirby v. Illinois, } 406 \text{ U.S. 682 (1972).}^\]
a result, some state courts have become receptive to Justice Brennan's call to arms in his dissent to Baxter v. Palmigiano.141 The Justice accused the Court of insensitivity to criminal rights and called on state courts and legislatures to "remember that they remain free to afford protection of our basic liberties as a matter of state law."142

State courts are, of course, free to construe state law and constitutions to impose higher standards than are required under federal law.143 An exclusionary rule based upon state law is effectively shielded from the changing attitudes of the United States Supreme Court.144 This fact provides an incentive for state courts to adopt and interpret Miranda as a state law.145 In adopting the McOmber rule, the military courts suggest a means whereby state courts can effectively implement Miranda's policies. The alternative of return-

142. Id. at 339. See also Justice Brennan's dissent in Michigan v. Mosley, 423 U.S. 96, 121 (1975), where he comments on the erosion of the Miranda standard.


ing to the voluntariness test does not provide adequate protection for the suspect.\textsuperscript{146}

Allowing waiver outside the presence of counsel violates the suspect's right to counsel as effectively as actively preventing the attorney-client contact.\textsuperscript{147} The United States Court of Military Appeals has recognized this fact in \textit{McOmber} by requiring notification to counsel. Any other rule fails to provide the suspect with effective assistance of counsel.\textsuperscript{148}

Standing alone, the \textit{Miranda} warnings do not afford a suspect adequate protection of the right to counsel. A critical juncture in

\textsuperscript{146} The United States Supreme Court has recently hinted at a return to this approach. Brewer \textit{v. Williams}, 97 S. Ct. 1232 (1977). The Court found the proper standard to be whether there had been an "intentional relinquishment or abandonment of a known right or privilege." Johnson \textit{v. Zerbst}, 304 U.S. 458, 464 (1938). Both Chief Justice Burger and Justice White, in their dissents, also stressed the voluntariness test for a valid waiver. 97 S. Ct. at 1248 & 1255 (dissenting opinions).

Thus, \textit{Williams v. Brewer} shows the Court, majority and dissents, accepting something less than the rigid requirements of \textit{Miranda}, and certainly less than the additional protection of the \textit{McOmber} rule. Chief Justice Burger, in fact, is prepared to abandon the exclusionary rule entirely as based on personal rights, retaining it only in regard to unreliable evidence and police deterrence. \textit{Id.} at 1248 (dissenting opinion).

A third alternative is to forbid all interrogations other than those of an impartial magistrate. This suggestion was first made in Kauper, \textit{Judicial Examination of the Accused—A Remedy for the Third Degree}, 30 Mich. L. Rev. 1224 (1932), and recently revived in Kamisar, \textit{Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article}, 73 Mich. L. Rev. 15 (1974). Advocates of this procedure note the inevitable conflict of interest when investigatory police are simultaneously the guardians of the suspect's rights. Chief Judge Bazelon commented that a system that places reliance on police warnings puts "a mouse under the protective custody of the cat." Letter from Chief Judge Bazelon to Professor Herbert Wechsler, Nov. 16, 1976, quoted in Kamisar, \textit{id.}, at 25.

Those who feel the \textit{McOmber} rule would too seriously hamper law enforcement might well consider this alternative, which would certainly increase delays in information gathering and probably decrease usable confessions.

\textsuperscript{147} Coughlan \textit{v. United States}, 391 F.2d 371, 375 (9th Cir.) (dissenting opinion), cert. denied, 393 U.S. 870 (1968).

\textsuperscript{148} United States \textit{v. Lowry}, No. NCM 75-0449 (C.M.A. Nov. 5 1976). Justice Stevens, while a circuit judge, in his dissent to United States \textit{v. Springer}, 460 F.2d 1344, 1355 (7th Cir. 1972), regarded counselless interviews as "such a departure from 'procedural regularity' as to violate the due process clause of the fifth amendment." In at least that case, Justice Stevens believed the defendant could not understand the nature of the constitutional protection he was waiving, and thus could not make a valid waiver without the active assistance of counsel.
the history of the *Miranda* decision has been reached. The states must either adopt it as state law or lose it. If other state courts are unwilling to follow the example of New York in excluding any counselless waiver, they should adopt the rule of *McOmber* requiring notification to the suspect's attorney.

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