"OFFICER, WHAT'S THE CHARGE?": AN ANALYSIS OF CONFESSION LAW IN LIGHT OF *COLORADO V. SPRING*

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In *Colorado v. Spring*,[1] the Supreme Court held that a suspect's awareness of the subject matter under investigation prior to his custodial interrogation is irrelevant in determining whether he effectively waived his fifth amendment privilege against self-incrimination.[2] The Court ruled that the police are not required to inform the suspect of the charges against him as a condition precedent to an effective waiver[3] and need not redeliver *Miranda* warnings[4] to the suspect when the subject matter of a custodial interrogation changes.[5] Continued controversy surrounding the admissibility of confessions in a criminal trial, particularly since the *Miranda* decision, has fueled debate concerning the wisdom of the *Colorado v. Spring* decision.[6]

After examining the impact of *Colorado v. Spring* on confession law, this Note will assess the legitimacy of the Court's rationale in *Spring*. It will suggest that this rationale fails to comport with the basic propositions underpinning the Court's decision in *Miranda* and will conclude that, in light of *Spring*, additional procedural safeguards beyond the *Miranda* warnings are warranted. A requirement that suspects be aware of the charges against

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1. 107 S. Ct. 851 (1987).

2. *Id.* at 859. The fifth amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Court first used the fifth amendment privilege to bar a confession of guilt in Bram v. United States, 168 U.S. 532 (1897).

3. *Spring*, 107 S. Ct. at 859. The *Spring* Court did not discuss when, where or from whom the suspect would acquire this information. The practical significance of the decision is to allow criminal suspects to waive their constitutional rights without knowing the material facts that would allow them to understand the nature of their rights and the consequences of abandoning them. *See infra* notes 56-62 and accompanying text.

4. In Miranda v. Arizona, 384 U.S. 436, 467-68 (1966), the Court held that statements obtained from defendants who had not been warned of their constitutional rights were inadmissible as having been obtained in violation of the fifth amendment. Accordingly, the Court found that a criminal suspect, before any questioning, 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, retained or appointed. *Id.* at 479.

5. The *Spring* Court implicitly rejected the Colorado Supreme Court's conclusion that before questioning Spring about a crime unrelated to the one for which he was arrested, the police possessed a duty to readvise Spring of his *Miranda* rights. *Spring*, 107 S. Ct. at 855.

6. *See* Ogletree, *Are Confessions Really Good For The Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1841 (1987). Professor Ogletree argues that *Colorado v. Spring* is an example of the Rehnquist Court's trend toward eroding the foundation and application of the *Miranda* decision and suggests that the Court erroneously found that knowledge of the possible topics of inquiry could have no bearing on a suspect's decision to waive his *Miranda* rights.

them and the possible subject matter of custodial interrogation before they waive their constitutional rights is essential to a "voluntary, knowing and intelligent" waiver.[7] If police deprive suspects of this information, a free and informed exercise[8] or waiver of their constitutional rights is impossible.

STRIPPING *MIRANDA V. ARIZONA* OF ITS CONTROVERSIAL RHETORIC: TWO BASIC PROPOSITIONS

The Supreme Court's decision in *Miranda v. Arizona*[9] has dominated the confession law arena in the 20th century.[10] The language of the opinion

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7. A self-incriminating statement is not "compelled" within the scope of the fifth amendment privilege if an individual "voluntarily, knowingly and intelligently" waives his constitutional rights. *Miranda*, 384 U.S. at 444. The Court first articulated this standard in Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

8. "Free and informed" describes a situation in which suspects deciding to assert or forego their constitutional rights are free from coercion and informed of material facts like the nature of the charges against them, the applicable law and their *Miranda* warnings. *See generally* Dix, *Mistake, Ignorance, Expectation of Benefit and the Modern Law of Confessions*, 1975 WASH. U.L.Q. 275 (1975). Professor Dix states that ensuring that a defendant's decision whether or not to confess is as fully informed and reasoned as possible should be the major objective of confession law. *Id.* at 347. Professor Dix would therefore likely agree that a suspect's awareness of the charges against him is a condition precedent to a free and informed waiver or exercise of constitutional rights.

See also King, *Developing a Future Constitutional Standard for Confessions*, 8 WAYNE L. REV. 481 (1962). Professor King advocates a due process standard for the admissibility of a confession and asserts that it is not enough to simply warn suspects of their constitutional rights; the courts must also focus on the suspect's ability to exercise those rights. *Id.* at 488-96. One criticism of a due process standard as opposed to a bright line duty to inform is the difficulty of inquiring into the subjective understanding of each individual defendant.

For a discussion of the psychological factors at work in custodial interrogation, see Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968-69); T. REIK, THE COMPULSION TO CONFESS: ON THE PSYCHOANALYSIS OF CRIME AND PUNISHMENT (1959). For an argument that a "free and rational choice" made by the suspect should be seen as an "independent constitutional good," see Shrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona*, 52 S. CAL. L. REV. 1, 41-51 (1978).

9. Miranda v. Arizona, 384 U.S. 436 (1966).

10. In 1976, the American Bar Association polled its members to determine the "milestone events" in American law. The members ranked *Miranda* fourth, ahead of all other criminal law decisions. *See* J. LIEBERMAN, MILESTONES! TWO HUNDRED YEARS OF AMERICAN LAW vi-vii (1976). For an interesting discussion of the *Miranda* decision, see Kamisar, *Miranda: the Case, the Man, and the Players*, 82 MICH. L. REV. 1074 (1984).

The *Miranda* decision continues to be highly controversial despite the fact that the Court decided *Miranda* over twenty years ago. The decision inspires spirited debate revealing a remarkable variety of viewpoints. *See* Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985). Professor Caplan argues that *Miranda* was neither a wise nor necessary decision and claims that *Miranda* sidetracked the American criminal justice system by demonstrating unwarranted solicitude for the accused. *Id.* at 1449. *See also* Ervin, *Miranda v. Arizona: A Decision Based on Excessive and Visionary Solicitude for the Accused*, 5 AM. CRIM. L.Q. 125 (1967); Frey, *Modern Police Interrogation Law: the Wrong Road Taken*, 42 U. PITT. L. REV. 731 (1981). Mr. Frey asserts that *Miranda* results in a "system designed to protect against improvident admissions from all but a limited group of fools and knaves who think they can outsmart the police or who simply don't know better and fail to pay attention to the advice they receive." *Id.* at 733. Professor Inbau similarly criticised *Miranda* and blames *Miranda* for producing a dangerous "over-kill" on the part of the police resulting in embellished and superfluous warnings. Inbau, *Over-reaction—the Mischief of Miranda v. Arizona*, 73 J. CRIM. L. & CRIMINOLOGY 797, 801 (1982). Attorney General Edwin Meese has called *Miranda* "a wrong decision" claiming the decision resulted in "all these ridiculous situations in which the police are precluded from asking the one person who knows the most about the crime what happened." The Wash. Post, Aug. 28, 1985, at A18, col. 1.

Others believe the *Miranda* decision did not go far enough toward protecting the rights of the criminally accused. *See generally* Kamisar, *Brewer v. Williams, Massiah & Miranda: What is an "Interrogation"? When does it Matter?*, 67 GEO. L.J. 1, 98-99 (1978). Professor Kamisar asserts that the *Miranda* decision inadequately ensures criminal suspects' ability to freely exercise their

and the social objectives motivating the decision[11] have prompted inconsistent interpretations of the Court's holding by subsequent courts grappling with the admissibility of confessions in criminal trials.[12]

The *Miranda* decision marked an abrupt departure from the "voluntariness test" which had come under harsh criticism for being unpredictable and unwieldy.[13] Since there was scanty precedent to support the Warren Court's adoption of procedural safeguards protecting the rights of the accused,[14] the Court resorted to a moral rationale steeped in Chief Justice Warren's egalitarian philosophy.[15]

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constitutional rights and suggests that the Court should supplement *Miranda* with additional safeguards. *See also* King, *supra* note 8, at 488-96; Ogletree, *supra* note 6, at 1830 (advocating an unambiguous per se rule prohibiting police interrogation without the presence of counsel).

At least one commentator claims the *Miranda* decision effectively balances the rights of the accused, society and law enforcement. *See* White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 21 (1986). Although Professor White acknowledges the flaws in the *Miranda* decision, he concludes that there is no reason to overrule *Miranda* because, after all, "[i]t gives us the best of all possible worlds." *Id.* at 21.

11. *See infra* note 15.

12. The conflict among the federal circuits which prompted the Court to grant certiorari in Colorado v. Spring demonstrates the courts' inability to grapple with the dimensions of the *Miranda* decision. *See infra* note 47.

See also Ogletree, *supra* note 6, at 1839-42. Professor Ogletree comments that the Court has been increasingly reluctant to pursue the Warren Court's goals in promulgating the *Miranda* warnings. Lower courts have followed the Supreme Court's lead, eviscerating *Miranda* without creating a new confession law doctrine to apply in its wake. The result is a body of law plagued by inconsistency.

13. The voluntariness test was originally applied as a federal standard to detect unreliable confessions. Later, the Court merged the voluntariness test with the due process standard the Court had developed for analyzing state court confessions. *See* McCormick, *Developments in the Law: Confessions*, 79 HARV. L. REV. 935, 961 (1965-66).

Professor Yale Kamisar leveled an influential criticism at the voluntariness test in *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963). Professor Dix pinpoints the unworkability of the voluntariness test as the result of making everything relevant and nothing determinative. Dix, *supra* note 8, at 293. Professor Ogletree, *supra* note 6, at 1833-36, observes that this approach failed to establish a consistent test for the admissibility of a criminal confession and required an ad hoc determination in almost every case. Consequently, the principles which emerged from the cases decided under this standard could not be squared with the precedent upon which they purported to rely. In deciding *Miranda*, the Warren Court sought to alleviate the inconsistency by promulgating a bright line test, applicable whenever a criminal confession was introduced at trial. *Miranda*, 384 U.S. at 442.

14. Justice Harlan, in his *Miranda* dissent, criticised the Court's rather breezy citation of authorities supporting the new fifth amendment warnings, indicating that much of the Court's precedent was actually derived from sixth amendment right to counsel cases. *Miranda*, 384 U.S. at 505-14 (Harlan, J., dissenting). The Court cited only three fifth amendment cases and yet declared that its reliance on the fifth amendment was not "an innovation in [the Court's] jurisprudence." *Miranda*, 384 U.S. at 442.

While it is true the Court could and perhaps should have been more candid in acknowledging its departure from precedent, this fact alone does not make the Court's promulgation of warnings unwarranted. Even Justice Harlan could not find an adequate reason why a suspect's knowledge of his rights should not be a condition precedent to his waiver of the fifth amendment privilege. Instead, he merely pointed out that the lower courts had not found a warning necessary and cryptically concluded that "[t]here might of course be reasons apart from Fifth Amendment precedent for requiring warning or any other safeguard on questioning but that is a different matter entirely." *Miranda*, 384 U.S. at 513 (Harlan, J., dissenting).

The *Miranda* Court's failure to unequivocally admit that it was setting forth a new standard is unfortunate in that it provided fuel for those whose criticism was largely directed at the Court's dicta. The *Miranda* Court's sleight of hand was perhaps an attempt to pay lip service to stare decisis—a principle rarely invoked in the history of confession law. *See* Ogletree, *supra* note 6, at 1831-36.

15. A biographer of Chief Justice Warren observes that the Chief Justice believed criminals

As a result, the *Miranda* opinion ranged far beyond a simple declaration that the *Miranda* warnings would inform a criminal suspect of his constitutional rights and would ensure the free exercise of the fifth amendment privilege. Instead, the Court condemned popular police interrogation tactics,[16] exalted the preservation of the dignity of the accused as an independent constitutional objective[17] and suggested that society's interests are advanced more by protecting the rights of a criminal suspect than by guaranteeing the police great latitude in the investigation of a crime.[18] It is, in part, this rhetoric which has acted as a lightning rod for criticism[19] and which has encouraged subsequent courts to limit the applicability of the *Miranda* Court's holding.[20]

Because the *Miranda* opinion is "tainted" by the Warren Court's adoption of an egalitarian philosophy,[21] courts and commentators have found it easier to attack and disparage the decision as a "child of the times," unwork-

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turned to crime in response to poverty, degradation, and social conditions. While the Chief Justice realized that "the Court could do nothing about the deplorable conditions of urban America," he felt that the Court "could at least ensure that the process of criminal justice did not add to the degraded status of those participating in it." *See* G. WHITE, EARL WARREN A PUBLIC LIFE 265 (1982); Caplan, *supra* note 10, at 1449-50. *See also* Driver, *supra* note 8, at 43. Professor Driver suggests that the *Miranda* Court interpreted the fifth amendment as a privilege protecting the dignity of the individual. This observation is amply supported by the text of the *Miranda* decision.

Professor Inbau argues that it was the Warren Court's eagerness to implement its egalitarian philosophy that made *Miranda* a dangerous decision. Inbau, *supra* note 10, at 808-09.

16. The *Miranda* Court devoted a total of twelve pages to its discussion of police interrogation techniques. For some, this was an unwarranted slap in the face to police. Caplan, *supra* note 10, at 1443-50.

Justice Clark, in his *Miranda* dissent, condemned the majority's reliance on police manuals as indicative of custodial interrogation practices. Justice Clark called these manuals "mere[ ] writings . . . by professors and some police officers" and asserted that he, for one, was proud of police efforts so unfairly characterized by the majority. *Miranda*, 384 U.S. at 499-500 (Clark, J., dissenting).

17. "Custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals." *Miranda*, 384 U.S. at 455. "[T]he constitutional foundation underlying the [fifth amendment] privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Id.* at 460. The Court found support for these propositions in Justice Brandeis's observation that "[d]ecency, security and liberty alike demand that government officials should be subjected to the same rules of conduct that are commands to the citizen. . . . Our government is the potent, the omnipresent teacher . . . [i]f the government becomes a law breaker, it breeds contempt for the law; it invites anarchy." *Id.* at 479-80 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

18. *Miranda*, 384 U.S. at 481.

19. *See supra* note 10.

20. *See infra* text accompanying notes 26-30.

21. *See supra* text accompanying notes 15-18. *See also* Caplan, *supra* note 10, at 1434 (suggesting that a resort to one's individual morals and values is an unavoidable attribute of judging). While a judge's subjective value system may often guide his or her decisionmaking process, it may be argued that the Warren Court's heavy reliance on an egalitarian rationale was unwarranted and that a more pragmatic approach may have rendered the decision more palatable and the rhetoric less distracting. For example, the *Miranda* Court could have simply stated that the *Miranda* warnings are a condition precedent to a "knowing, intelligent and voluntary" waiver because they inform a criminal suspect of the rights he may be waiving by agreeing to answer questions. Instead, the Warren Court described the warnings as an attempt to strike a balance between the suspect and the prosecution to ensure the suspect's dignity and integrity is not eroded by the interrogation process. *Miranda*, 384 U.S. at 460.

For a discussion of the difficulty of identifying an acceptable rationale for confession law cases, see generally Dolinko, *Is there a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986); Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313 (1964).

able now that the social and political climates have changed.[22] This Note suggests that it is possible to remain faithful to the basic propositions underlying the *Miranda* decision without adopting the *Miranda* Court's rhetoric.

Shorn of its controversial rhetoric, *Miranda* stands for two basic propositions that have underpinned confession law since its inception. First, the fifth amendment proscribes the admissibility of compelled confessions.[23] Second, it is axiomatic that a criminal suspect possesses certain constitutional rights and that awareness of these rights is a condition precedent to their waiver.[24] The Court took strides toward achieving each objective through its promulgation of the *Miranda* warnings.[25]

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22. *See* Caplan, *supra* note 10, at 1470. Professor Caplan comments that the *Miranda* decision was a response to the times—"a child of the racially troubled 1960's and our tragic legacy of slavery." Of course, the same can be said of civil rights and anti-discrimination laws. *Miranda* is only one of many "children" of the troubled sixties—this reason alone does not discredit the decision's underlying principles.

In his concurring opinion in Rhode Island v. Innis, 446 U.S. 291, 304 (1980), Chief Justice Burger stated that "at this late date" there is no reason to "overrule" or even "disparage" *Miranda*. The Chief Justice's seemingly benevolent attitude towards *Miranda* may perhaps be attributed to the fact that "by that late date" the Court had already strayed far afield of *Miranda*'s express declaration that confessions obtained through trickery and deceit would not be admissible. *See also* Note, *What Constitutes Interrogation?: Rhode Island v. Innis*, 22 B.C.L. REV. 1177 (1977).

23. The *Miranda* Court broadly defined the term "compelled," stating that the term encompasses psychological as well as physical coercion and ruling that "any evidence that the accused was threatened, tricked, or cajoled into a waiver [would], of course, show that the defendant did not voluntarily waive [the fifth amendment privilege]." *Miranda*, 384 U.S. at 476. Several previous cases supported this expansive defintion. For example, in Lynumn v. Illinois, 372 U.S. 528 (1963), the police without using any physical brutality extracted a confession from a woman by telling her that if she did not "cooperate," her children would be taken away from her. Similarly, in Spano v. New York, 360 U.S. 315 (1959), the defendant was cajoled into confessing by a "friend" who had joined the police force and who told the defendant that he would lose his job and would not be able to support his pregnant wife if the defendant did not confess. In Rogers v. Richmond, 365 U.S. 534 (1961), the police procured a confession from the defendant by threatening to book the defendant's arthritic wife.

As early as 1914, in Lisenba v. California, 314 U.S. 219 (1941), the Supreme Court promised to take a tough stance toward confessions obtained through trickery, fraud, and deceit.

> If, by fraud, collusion, trickery, and subornation of perjury, on the part of those representing the State, the trial of an accused person results in his conviction, he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured, and used in the trial.

Id. at 237.

For an influential discussion suggesting that it does little good to afford a criminal defendant a panopoly of rights at trial when his fate is determined at the stationhouse, see Y. KAMISAR, *Equal Justice in the Gatehouse and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1 (A. Howard ed. 1965).

24. Awareness of the right to remain silent is a threshold requirement for an intelligent decision as to its exercise. *Miranda*, 384 U.S. at 468.

25. The Court's ultimate success in this endeavour is open to dispute. Professor Caplan compares the *Miranda* warnings to the caution printed on a cigarette package. "The smoker is advised of the risks he is taking, but he does not get the message until the package is in hand when the impulse for gratification is strongest. The warning is thus ineffective in most cases." Caplan, *supra* note 10, at 1449. Mr. Frey, on the other hand, thinks the warnings are too effective and prevent the police from obtaining confessions from all but a handful of fools. Frey, *supra* note 10, at 733. Still others find the warnings a step in the right direction but woefully inadequate in protecting a suspect's constitutional rights. *See* Kamisar, *supra* note 10, at 97-98; King, *supra* note 8, at 488-96; Ogletree, *supra* note 6, at 1830. In light of the decision in Colorado v. Spring, 479 U.S. 564 (1987), an additional procedural safeguard informing suspects of the charges against them is warranted.

NARROWING OF THE *MIRANDA* HOLDING: *MORAN V. BURBINE* AND *COLORADO V. SPRING*

The Court's decisions in *Moran v. Burbine*[26] and *Colorado v. Spring*[27] suggest that the justices now comprising the Court have chosen not to give full credence to an expansive construction of *Miranda*'s dual objectives.[28] Instead, the Court exhibits an intent to narrowly interpret and curtail the *Miranda* decision rather than follow through with the *Miranda* Court's broad mandates that a confession must not be extracted by trickery and deception,[29] but must be made by a suspect who understands his rights and the consequences of abandoning them.[30]

In *Moran*, the Court found the police's deliberate deception of a defendant's attorney constitutionally permissible.[31] The Court explained that its holding in *Miranda* merely proscribed the police from deceiving or tricking the *defendant*.[32] The *Moran* Court found nothing in *Miranda* to suggest that the police may not deceive a defendant's *attorney*.[33]

The *Moran* Court also ruled that the police do not possess a duty to inform criminal defendants of *all* the facts that might assist them in evaluating their self-interests.[34] This second holding in *Moran* forms the foundation for the Court's decision in *Colorado v. Spring*.[35]

THE FACTUAL AND PROCEDURAL SETTING OF *COLORADO V. SPRING*

On March 30, 1979, Alcohol, Firearm and Tobacco (ATF) agents arrested John Leroy Spring in Kansas City, Missouri for interstate firearms transactions.[36] Initially, the agents questioned Spring about his involvement in the firearm transactions. The interrogation, however, soon turned to Spring's involvement in a Colorado murder.[37] Spring's answers to the agents' questions were at least potentially incriminating.[38] On May 26,

26. 475 U.S. 412 (1986).
27. 479 U.S. 564 (1987).
28. *See infra* text accompanying notes 56-86.
29. *Id.*
30. Moran v. Burbine, 475 U.S 412, 420-24 (1986). *See* Ogletree, *supra* note 6, at 1840. Professor Ogletree argues that the Rehnquist Court has narrowed *Miranda*, virtually eliminating the requirement of a knowing and intelligent waiver and claims that it is difficult to comprehend how, in *Moran*, Justice O'Connor's majority opinion could conclude that failure to inform a suspect that his attorney was attempting to contact him could have no bearing on the validity of his waiver.
For a discussion of the facts in *Moran*, see *infra* text accompanying notes 69-73.
31. *Moran*, 475 U.S. at 424-25.
32. *Id.*
33. *Id. See infra* note 77 and accompanying text.
34. *Moran*, 475 U.S. at 422.
35. 479 U.S. 564 (1987). For a discussion of the application of Moran v. Burbine to Colorado v. Spring, see *infra* text accompanying notes 68-86.
36. Colorado v. Spring, 107 S. Ct. 851, 853 (1987).
37. Spring and a companion shot and killed Donald Walker while hunting in Colorado. Shortly thereafter, an informant alerted ATF agents to Spring's firearm transactions and involvement in the Colorado murder. When the police received this information, Walker's body had neither been found nor reported missing. Based on the informant's tip, ATF agents set up an undercover operation to purchase firearms from Spring. The agents arrested Spring in the act of selling illegal firearms. *Spring*, 107 S. Ct. at 853.
38. The ATF agents read Spring his *Miranda* warnings once upon arrest and a second time after the agents had transported him to the ATF office in Kansas City. After asking him about the illegal firearms transactions, the agents asked Spring if he had a criminal record. Spring admitted

1979, approximately two months later, Colorado law enforcement officials visited Spring in his Kansas City jail cell, and after reading him his *Miranda* rights, they obtained Spring's full confession to the Colorado murder.[39]

A Colorado state court charged and convicted Spring of first degree murder.[40] The trial court rejected Spring's motions to suppress both his March 30 and May 26 statements, observing that because the questions themselves suggested the focus of their investigation, the agents possessed no additional duty, after giving *Miranda* warnings, to inform Spring of the subject matter of their investigation.[41]

The Colorado appellate court reversed and ruled that the March 30 statement was inadmissible. The appellate court further held that the ATF agents had a duty to either inform Spring that he was a murder suspect or to readvise Spring of his *Miranda* rights prior to questioning him about the Colorado murder.[42]

The Colorado Supreme Court affirmed, applied its own version of the "voluntariness test,"[43] and announced that a suspect's awareness of the nature of the charges under investigation prior to custodial interrogation is a factor in determining the validity of the suspect's waiver.[44] In some circum-

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that he had a juvenile record for shooting his aunt when he was ten years old. The ATF agents persisted and asked Spring if he had ever shot anyone else. Spring lowered his head, mumbling "I shot another guy once." The agents asked Spring if he had ever visited Colorado. Spring said "no." The agents then asked Spring if he shot Donald Walker. Spring hesitated, ducked his head and replied "no." At this point, the agents concluded their interrogation. *Spring*, 107 S. Ct. at 853-54.

39. Before questioning Spring, the Colorado officers told him that they wanted to ask him about the Colorado murder. Spring said that he "wanted to get [the murder] off his chest" and confessed during an interview that lasted approximately one and one-half hours. The officers summarized the interview in a written statement which Spring read, edited and signed. *Spring*, 107 S. Ct. at 854.

40. *Id.*

41. *Id.* (citing App. to Pet. for Cert. 4-A). The trial court, nevertheless, refused to admit Spring's March 30 statement because it was irrelevant and related only by an inadequate inference to the Colorado murder. The court, however, admitted Spring's May 26 confession and convicted Spring of first degree murder. *Id.* (citing App. to Pet. for Cert. 5-A).

42. Colorado v. Spring, 671 P.2d 965, 966 (Colo. App. 1983), *cert. granted*, 107 S. Ct. 851 (1987). The Colorado Court of Appeals noted that because the agents failed to inform Spring that he was a murder suspect or to readvise him of his *Miranda* rights before questioning him about the murder, "any waiver of rights in regard to questions designed to elicit information about Walker's death was not given knowingly and intelligently." *Spring*, 671 P.2d at 967. Moreover, because the state did not prove beyond a reasonable doubt that the May 26 confession was untainted by the prior illegal statement, the appellate court also ruled the confession inadmissible. *Id.* at 968.

43. *See supra* note 13. The Colorado Supreme Court held that the determination of whether Spring's waiver of constitutional rights was voluntarily, knowingly and intelligently made requires examination of the totality of the circumstances. Although no one factor is always determinative in this analysis, whether and to what extent a suspect is aware of the possible topics of interrogation prior to its commencement is relevant and may even be determinative in some situations. People v. Spring, 713 P.2d 865, 872-73 (Colo. 1985), *cert. granted*, 107 S. Ct. 851 (1987). For an extensive discussion of the lingering voluntariness standard, see Dix, *supra* note 8, at 300-24.

Arizona's version of the voluntariness test provides in part: "the trial judge shall take into consideration all the circumstances surrounding the confession, including but not limited to the following . . . (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession." ARIZ. REV. STAT. ANN. § 13-3988 (B) (1978).

44. *See supra* note 43 and *infra* note 47. Pennsylvania is the only state to expressly hold that criminal defendants must be aware of the nature of the charges against them in order to waive their constitutional rights. Commonwealth v. Howe, 246 Pa. Super. 7, 369 A.2d 783 (1977); Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974); Commonwealth v. Jacobs, 445 Pa. 364, 284 A.2d 717 (1971); Commonwealth v. Collins, 436 Pa. 114, 259 A.2d 160 (1969). Other states, however, join Colorado in holding that suspects' awareness of the matters under investigation is relevant

stances, like those in *Spring*, this factor may be determinative.[45] For this reason, the court found that because Spring lacked the requisite awareness of the matters under investigation, his March 30 statement was not the product of a "voluntary, knowing and intelligent" waiver.[46] The United States Supreme Court granted certiorari to review the Colorado Supreme Court's decision as well as to resolve a conflict among several federal appeals courts.[47]

The Supreme Court found that law enforcement officials have no obligation to deliver any information in excess of the *Miranda* warnings. The Court asserted that the ATF agents' failure to inform Spring of the matters under investigation was irrelevant to the constitutional validity of Spring's decision to waive his fifth amendment privilege against self-incrimination. Even though Spring had no idea that he would be questioned about the Colorado murder, the Court held that he still possessed all the information he needed to make a "voluntary, knowing and intelligent" waiver of his constitutional rights.[48]

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to determining the validity of their waiver of constitutional rights. *See, e.g.*, Schneck v. Ellsworth, 293 F. Supp. 26 (D. Mont. 1968). The *Schneck* court found that the county attorney's statement that he wanted to talk to the defendant concerning the shooting incident of the defendant's wife insufficient to inform the defendant that he was a murder suspect. The court observed: "Certainly, it stands to reason that a suspect cannot intelligently make the decision as to whether he wants counsel if knowledge of the crime suspected is withheld from him. This knowledge is a necessity to the free exercise of the right to counsel." *Id.* at 29.

45. The Colorado Supreme Court noted that not only did the ATF agents fail to advise Spring that they intended to question him about the Colorado murder, but Spring could not reasonably expect such questions when he executed the waiver. The court accordingly found Spring's ignorance of the matters under investigation sufficient to undermine the validity of his waiver. Two Colorado Supreme Court justices dissented in *Spring*. They insisted that *Miranda* does not require the police to inform a suspect of all the charges under investigation prior to custodial interrogation. Instead, the dissenters asserted, *Miranda* requires nothing more than the warnings themselves and found "ample evidence" to indicate, in their view, that Spring validly waived his constitutional rights. *Colorado*, 713 P.2d at 880-81.

46. *Id.* at 874.

47. Prior to the *Spring* decision, the following circuit courts held a suspect's awareness of the charges under investigation prior to custodial interrogation relevant in determining the validity of the suspect's waiver: United States v. Burger, 728 F.2d 140, 141 (2nd Cir. 1984) (there is no *Miranda* requirement that the police must inform a suspect of the crime they are investigating; however, the defendant's ignorance is a factor to be considered in the totality of the circumstances); Carter v. Garrison, 656 F.2d 68, 70 (4th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 952 (1982) (police have no duty to inform the suspect of the crime they are investigating, however, suspect's ignorance of exact subject of interrogation is relevant in evaluating the totality of the circumstances); United States v. McCray, 643 F.2d 323, 328 (5th Cir. 1981) (admission of defendant's incriminating statements made to officer who had not informed defendant of nature of offense upon which interrogation was based held harmless error because of other sufficient, independent and incriminating evidence).

Other circuits, however, held that a suspect's awareness of the potential subject matter of custodial interrogation is not a factor in determining the validity of the suspect's waiver: United States v. Anderson, 533 F.2d 1210, 1212 n.3 (D.C. Cir. 1976) (rejecting defendant's argument that his statements were not made pursuant to a *knowing* waiver since he had not been informed of the charges against him); United States v. Campbell, 431 F.2d 97, 99 n.1 (9th Cir. 1970) (noting that *Miranda* does not require disclosure of the charge against the suspect); Collins v. Brierly, 492 F.2d 735 (3rd Cir.), *cert. denied*, 419 U.S. 877 (1974) (rejecting, in dicta, a requirement that the warning include the crime under investigation).

48. *Spring*, 107 S. Ct. at 856-59. *Accord* Beasley v. United States, 512 A.2d 1007 (D.C. App. 1986), *cert. denied*, 107 S. Ct. 2485 (1987). In *Beasley*, the police arrested a suspect and informed him that he was being charged with illegal possession of a firearm. Beasley waived his *Miranda* rights and agreed to answer questions about the firearm charge. The police began questioning Beasley about a brutal kidnap-murder in which the victim was struck with a gun. The police told Beasley

The dissent[49] questioned how the Court could pledge to examine the "totality of the circumstances" surrounding a waiver of constitutional rights[50] and yet, in the same breath, declare that the suspect's awareness of the matters under investigation is irrelevant in determining whether the suspect effectively waived his *Miranda* rights.[51]

Arrested for illegal firearms transactions, Spring could not have anticipated questions regarding a Colorado murder.[52] Spring's initial incriminating statements, coupled with the element of surprise, too closely approximated the deception and trickery condemned by *Miranda*.[53]

For this reason, the dissent concluded that a suspect's awareness of the matters under investigation prior to custodial interrogation is relevant, and, in some cases even determinative of the validity of a waiver of constitutional rights.[54] By recognizing the relevancy of the suspect's awareness of the charges, the dissent predicted that not only would legitimate investigative techniques remain intact, but consideration of the suspect's awareness would substantially contribute towards insuring lawful arrests and constitutionally valid confessions.[55]

SCOPE OF THE *COLORADO V. SPRING* DECISION

The *Spring* Court held that a criminal suspect's awareness of *all* possible topics of inquiry prior to custodial interrogation is irrelevant to determining whether the suspect validly waived his *Miranda* rights.[56] This

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that his fingerprints were found on the victim's car, that the victim's blood was found on the gun, that the victim's daughter had identified him and that an eyewitness saw Beasley taking items from the victim's apartment after her death. All these statements were untrue. Beasley denied murdering the victim, but the police persisted, telling Beasley that in light of the substantial evidence against him, he should cut his losses and confess. *Id.* at 1010-11. Beasley's subsequent confession resulted in his conviction. The District of Columbia Court of Appeals upheld the conviction. *Id.* at 1016.

Professor Dix asserts that "a thorough reading of the *Miranda* opinion leaves little doubt that the Court was offended at the prospect of a suspect making the decision to confess on the basis of an inaccurate awareness of the facts relating to his case . . . and of the law determining the criminal significance of these facts." *See* Dix, *supra* note 8, at 296.

49. Justice Marshall, joined by Justice Brennan, dissented in *Spring*.

50. *Spring*, 107 S. Ct. at 859-60 (Marshall, J., dissenting), *quoting* Moran v. Burbine, 475 U.S. 412, 421 (1986); *accord* Fare v. Michael C., 442 U.S. 707, 724-25 (1979).

51. Justice Marshall asserted: "It seems to me self-evident that a suspect's decision to waive this privilege will necessarily be influenced by his awareness of the scope and seriousness of the matters under investigation." *Spring*, 107 S. Ct. at 860. The dissent noted that in Johnson v. Zerbst, 304 U.S. 458 (1938), the Court had previously pledged to "indulge every reasonable presumption against [a] waiver" of constitutional rights and to not "presume acquiescence in the loss of fundamental rights." *Id.* at 464. Moreover, *Miranda* mandates that *any* evidence that police tricked, cajoled or coerced a defendant into confessing renders the defendant's waiver involuntary. *Miranda*, 384 U.S. at 476 (emphasis added).

52. The dissent claimed that when Spring waived his rights he could not have expected questions regarding a separate offense "as it occured in a different state and was a violation of state law outside the normal investigative focus of federal [ATF] agents." *Spring*, 107 S. Ct. at 861.

53. *Miranda*, 384 U.S. at 445-58, 475-76. The *Spring* dissent observed that interrogators describe a suspect's first admission as the "breakthrough" and the "beachhead" which gives the interrogator enormous "tactical advantages." *Spring*, 107 S. Ct. at 861 (quoting R. ROYAL & S. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION: A PROFESSIONAL MANUAL AND GUIDE 143 (1970); F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 82 (2d. ed. 1967) (cited in Oregon v. Elstad, 470 U.S. 298, 328 (1985) (Brennan, J., dissenting))).

54. *Spring*, 107 S. Ct. at 861.

55. *Id.* at 860.

56. *Id.* at 859.

"careful phraseology" neatly avoids a critical question:[57] What if there is no indication that the suspect is aware of *any* of the charges against him? Is his lack of awareness still irrelevant in assessing the validity of his waiver?[58] Logic dictates that the answer lies in the circumstances surrounding the defendant's arrest.

If suspects can guess the nature of the charges against them through the arrest and booking process, then they are entitled to use this information in deciding whether to assert or forego their rights. If, however, a suspect fails to discover the matters under investigation prior to custodial interrogation, the suspect will have to decide whether to assert or forego his rights without knowing the extent of possible criminal liability—under *Spring,* police have no affirmative duty to provide a suspect with this information.[59]

The *Spring* decision implies that not only does *Miranda* absolve the police of a duty to inform a criminal suspect of *all* of the charges against him prior to custodial interrogation, it is also constitutionally acceptable to disclose *no* information concerning the nature of the matters under investigation.[60] That is, the police do not possess an affirmative duty to release information concerning the investigation. Whether this rule applies when the defendant asks the police to reveal the possible topics of inquiry prior to custodial interrogation is uncertain.

Assume for a moment that Spring had asked the ATF agents to indicate which crimes they intended to question him about and the agents remained silent or told Spring that the firearm transactions were the only crimes under investigation, would the *Spring* Court still find Spring's ignorance of the possible topics of inquiry irrelevant?

The two situations are clearly distinguishable. In one, the suspect does not ask the critical question and the police do not answer it. In the other, the suspect asks the right question but is either unanswered or answered untruthfully. In each situation, however, the police deprive the suspect of information that would allow him to gauge the seriousness and complexity of the matters under investigation.

Defining "deception" as a deliberate intent to create a false impression, an argument can be made that in each situation, the police conduct contains an element of either passive or active deception. One could therefore conclude that in certain situations "mere silence" just as easily rises to the level

57. *Id.* at 860.

58. *Id.* The facts of *Spring* indicate that the answer to this question may well be "yes." In *Spring,* the ATF agents caught the defendant "redhanded" in a illegal firearms transaction. Thus, Spring's awareness of at least *some* of the matters under investigation was the product of the circumstances of his arrest, and not attributable to any police disclosure.

59. *Spring,* 107 S. Ct. at 859.

60. *See supra* note 58. *Compare* Dix, *supra* note 8, at 331, 343-47. Professor Dix suggests that "maximization of the subject's ability to make [a] fully informed tactical choice" should be a major objective of confession law and asserts that "[a]lthough it has been largely unarticulated, the desire to ensure that a confessing defendant makes a fully informed and reasoned choice has permeated the case law." Professor Dix additionally claims the Court has evidenced concern that a criminal defendant be aware of the legal and factual status of his case and has sought to safeguard a defendant's ability to judge his own tactical best interests. Of course, Professor Dix's observations predate the Court's decisions in *Moran* and *Spring.*

of deception and trickery as do lies, misrepresentations, and false promises.[61] Moreover, it seems ludicrous to fashion a confession law doctrine which turns on the fortuity of a suspect asking the right questions. Such a doctrine rewards "smart" suspects and punishes those less astute.[62]

In *Miranda*, the Court promised to invalidate a waiver of constitutional rights when there was *any* evidence that the police had deceived, tricked, coerced or cajoled a defendant into a confession.[63] "Any" in this context is a powerful word. The *Spring* Court's refusal to even entertain the idea that the ATF agents had deceived or tricked the defendant demonstrates the Court's unwillingness to recognize the full import of the principles underpinning the *Miranda* decision.[64]

More importantly, the *Spring* decision signals the Court's approval of interrogation techniques that straddle the border between acceptable police investigative tactics and constitutionally impermissible deception and trickery.[65] The decision also indicates that perhaps the Court will not "indulge every reasonable presumption against [a] waiver of constitutional rights."[66] After *Spring*, it is questionable how heavy the burden is on the prosecution to prove that a defendant made a "voluntary, knowing and intelligent" decision to abandon his *Miranda* rights. It appears that the mere reading and receipt of *Miranda* warnings, absent evidence of physical coercion, will be sufficient.

The importance of the *Spring* decision lies not in its narrow holding, but

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61. The *Spring* majority asserted that "mere silence" by the police as to the intended subject matter for custodial interrogation is not "trickery." *Spring*, 107 S. Ct. at 858. The Court did not address the question whether Spring's waiver of *Miranda* rights would still be valid had the ATF agents affirmatively misrepresented the scope of their interrogation. *Id.* at 858 n.8.

The *Spring* dissent stated "there can be no constitutional distinction . . . between a deceptive misstatement and the concealment by the police of a critical fact." *Spring*, 107 S. Ct. at 861 n.1 (Marshall, J., dissenting) (quoting Moran v. Burbine, 475 U.S. 412, 453 (1986) (Stevens, J., dissenting)). *See* Dix, *supra* note 8, at 291-306, 334-35. Professor Dix asserts that there is no consensus as to the extent to which ignorance, mistake or deception give rise to constitutional issues and states that in addressing affirmative police deception, the Court has "floundered." Accordingly, Professor Dix advocates de novo analysis of this entire body of confession law. De novo analysis may, however, be avoided by strict adherence to the basic principle underpining the *Miranda* decision, the desire for free and informed confessions.

62. For an interesting case announcing that it is fully consistent with both the Constitution and good morals to exploit a criminal suspect's ignorance and stupidity in the investigation of a crime, see State v. McKnight, 52 N.J. 35, 243 A.2d 240 (1968). Professor Inbau deemed the *McKnight* opinion the best refutation of *Miranda* philosophy. Inbau, *supra* note 10, at 809.

63. *Miranda*, 384 U.S. at 476 (emphasis added); *Spring*, 107 S. Ct. at 861 n.1 (1987) (Marshall, J., dissenting). *See supra* note 23.

64. *Spring*, 107 S. Ct. at 859-62 (Marshall, J., dissenting). *See* Caplan, *supra* note 10, at 1418 (arguing that since its decision in Harris v. New York, 401 U.S. 222 (1971), the Court has not only avoided opportunities to expand *Miranda*, but has diluted the decision's principles); Ogletree, *supra* note 6, at 1841. The *Spring* decision reveals the Court's reluctance to faithfully implement the Warren Court's standards for ensuring that suspects not only understand their rights and the consequences of foregoing them, but additionally possess the opportunity to decide whether to assert or waive their rights.

65. *Cf. Moran*, 475 U.S. at 438-39 (Stevens, J., dissenting) (observing that the *Moran* Court embraced incommunicado questioning as a "societal goal of the highest order that justifies police deception of the shabbiest kind"); Ogletree, *supra* note 6, at 1829 (since the Court has substantially restricted the application of *Miranda*, it has, in effect, encouraged the police to invent new ways of circumscribing the *Miranda* warnings).

66. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

in the tenor of the Court's decision.[67] Clearly, after *Spring*, the Court's promise to indulge every presumption against waiver will become almost meaningless.

MORAN AND *SPRING* DISTINGUISHED: QUESTIONING THE *SPRING* HOLDING

The Court's opinion in *Spring* implies an extension of the *Moran v. Burbine* precedent. A comparison of those two decisions reveals that although superficially similar, the cases are clearly distinguishable. The distinction is twofold; it centers on the disparity in the importance of the information withheld in *Moran* as compared to that in *Spring*, and recognizes that the target of the government's deception differs in each case.

Although both cases held that the police need not provide criminal defendants with *all* the information that might be helpful in deciding whether to waive their constitutional rights, the *Moran* Court recognized that in certain circumstances, deliberate or reckless withholding of critical information could affect the validity of a waiver.[68]

In *Moran*, the police arrested the defendant in connection with a local burglary.[69] Shortly after the arrest, the police realized that the defendant fit an informant's description of the person who had committed an unsolved and much-publicized murder.[70] The police decided to question the defendant about the murder when they received a phone call from an attorney seeking to represent the defendant on the burglary charge.[71] When the attorney asked the police if they intended to interrogate the defendant that night, the police said "no". In fact, after the defendant waived his *Miranda* rights, the police began questioning the suspect within an hour of the attorney's phone call.[72] The police never told the defendant that an attorney was attempting to contact him.[73]

In reviewing the validity of the defendant's waiver, the *Moran* Court stated that the Constitution does not require law enforcement officers to provide a flow of information sufficient to allow a suspect to calculate his own best interests.[74] The Court therefore found that a defendant could validly waive his constitutional rights even though the police did not tell him that his sister had contacted an attorney and that the attorney was trying to

67. "It is not only the Court's ultimate conclusion that is deeply disturbing; it is also its manner of reaching that conclusion. The Court completely rejects an entire body of law on the subject—the many carefully reasoned state decisions that have come to precisely the opposite conclusion." *Moran*, 475 U.S. at 439 (Stevens, J., dissenting).

68. The *Moran* Court stated that "deliberate or reckless" withholding of information, while objectionable as a matter of ethics, is relevant to the constitutional validity of a waiver only if it deprives a suspect of knowledge essential to his ability to understand the nature of his *Miranda* rights and the consequences of abandoning them. *Moran*, 475 U.S. at 423-24.

69. *Id.* at 412.

70. *See infra* note 81.

71. The defendant's sister telephoned the public defender's office to obtain legal counsel for her brother on the burglary charge.

72. Moran, 475 U.S. at 412.

73. *Id.*

74. *Id.* at 422.

reach him.[75] The Court explained that these events took place without the defendant's knowledge and thus could not have affected his decision to waive his constitutional rights.[76]

The *Moran* Court stressed that the police had practiced their deception solely upon the defendant's attorney.[77] The suspect, on the other hand, was advised of his *Miranda* rights and clearly understood the seriousness of the charge involved. Moreover, the sole concern of the attorney at the time of the phone call was to represent the defendant on an unrelated, less serious charge. The *Moran* Court therefore more easily concluded that the absence of this information had no bearing on the defendant's waiver.[78]

In contrast, the defendant in *Spring* was the exclusive target of police deception and trickery. Furthermore, the information withheld from Spring could not have been more directly related to the subject matter of the ATF agents' investigation.

In *Spring*, the defendant reasonably could have concluded that the ATF agents wished to question him about the illegal transactions for which he was arrested. The *Spring* dissent speculated that had Spring known that the agents intended to question him about the Colorado murder, he would have exercised his *Miranda* rights and chosen to remain silent.[79] Knowledge of the matters under investigation was therefore critical, in the dissent's view, to Spring's decision to waive his constitutional rights.[80]

The importance of this information is clearly distinguishable from the information withheld from the defendant in *Moran*. In *Moran*, the suspect knew the police were investigating a gruesome murder[81] yet he decided to answer questions.[82] Knowledge that his sister had contacted an attorney

75. *Id.*

76. *Id.*

77. *Id.* at 423-28. The *Moran* majority dismissed a footnote in *Miranda* which stated that the police violate the sixth amendment right to counsel when they prevent an attorney from consulting with his client and that any statement obtained in the wake of this event is inadmissible. *Miranda*, 384 U.S. at 465 n.35. Of course, it may be argued that the police in *Moran* did not actually *prevent* the attorney from consulting with his client but merely led the attorney to believe there was no pressing need to do so. While nothing requires the police to tell an attorney when consultation with her client would be most opportune, in *Moran* the action of the police was nothing short of deliberate deception. Such deception at least approximates the "prevention" proscribed in footnote 35. The *Moran* Court dismissed this sixth amendment argument by pointing out that the egregious conduct of the police preceded the formal initiation of adversary judicial proceedings and therefore sixth amendment protection had yet to attach. *Moran*, 475 U.S. at 428-32.

78. *Id.* at 423.

79. *Spring*, 107 S. Ct. at 861-62 (Marshall, J., dissenting).

80. *Id.* at 860. The *Spring* dissent criticized the majority's attempt to minimize the relevance of the information withheld from Spring. In particular, the dissent questioned the Court's conclusion that knowledge of the charges under investigation could have affected only the *wisdom* but not the *validity* of Spring's waiver. Justice Stevens called this an "inapposite distinction" and commented: "it seems to me self-evident that a suspect's decision to waive [the fifth amendment] privilege will necessarily be influenced by his awareness of the scope and seriousness of the matters under investigation." *Id.* at 859-60 (Marshall, J., dissenting).

81. At the time of his arrest, the defendant was a suspect in several crimes including the brutal rape and murder of Mary Jo Hickey who was found in a pool of her own blood, her dentures broken and her head crushed from the blows of a metal pipe found near the body. The case was so sensational it had already been the subject of a television drama. *Moran*, 475 U.S. at 435-36 (Stevens, J., dissenting).

82. The *Moran* Court noted that apparently it was the defendant and not the police who initiated the conversation which produced the defendant's most incriminating statement. *Moran*, 475

regarding a much *less serious charge* may not have swayed the suspect's decision to confess. It is therefore understandable that the Court found this information irrelevant in determining the validity of the defendant's waiver.[83]

In *Spring*, however, the facts are reversed. The police deprived the defendant of information concerning the *more serious charge*. Since the ATF agents arrested Spring in the act of selling illegal firearms, it is possible that Spring decided to answer questions simply because he felt he had nothing more to lose.[84] The murder charge, however, was far less of a foregone conclusion.[85]

Spring and *Moran* are distinguishable by both the importance of the information withheld from the defendant and by the target of the government's deception, factors the *Moran* Court clearly found pivotal. Arguably then, *Moran* and *Spring* are dissimilar on all the issues the *Moran* Court considered most important. The applicability of *Moran* to *Spring* is therefore questionable. *Spring* may, in fact, present the very case the *Moran* Court posited when it suggested that, in certain circumstances, deliberate and reckless withholding of essential information might impair the validity of a criminal suspect's waiver of *Miranda* rights.[86]

AN EXPLANATION FOR THE *SPRING* COURT'S RATIONALE: AN IMPLICIT PRESUMPTION OF GUILT?

The *Spring* Court ruled that a suspect may make a "knowing, intelligent and voluntary" waiver of his constitutional rights without full awareness of the charges under investigation.[87] There are at least two possible explanations for the Court's conclusion. Either the *Spring* Court has narrowly con-

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U.S. at 421-22 (citing the First Circuit's opinion as authority, 753 F.2d at 180). The dissent, however, pointed out that the state courts made no finding to this effect. *Moran*, 475 U.S. at 447-48 (Stevens, J., dissenting).

83. *Moran*, 475 U.S. at 422-23.

84. *See* Dix, *supra* note 8, at 277. Professor Dix observes that "[i]n the vast majority of jurisdictions, a defendant is likely to obtain a dispositional advantage by cooperating with prosecution authorities, and [that] the earlier such cooperation begins, the greater the advantage is likely to be." *Compare* Ogletree, *supra* note 6, at 1828 (noting that suspects generally hope that by answering questions, they will somehow improve their case). Spring's willingness to answer the ATF agents' questions after his arrest suggests that perhaps Spring believed he could only gain ground by agreeing to cooperate with the police in their investigation of the interstate firearm transactions. After all, the ATF agents arrested Spring in the act of committing a felony. If the agents told Spring they additionally intended to question him about the Colorado murder, Spring may have felt cooperation was no longer prudent. Such a result is often the basis for an argument that suspects should not be informed of the charges against them. *See* text accompanying notes 89-101.

85. Spring killed Walker in the Colorado wilderness in front of only one witness, burying Walker's body in a snowbank. Walker's body had neither been found nor reported missing. Spring therefore might have decided that he should try to avoid a murder conviction by refusing to answer questions until he obtained counsel. If this seems an unsavory result, it at least demonstrates the importance of the information withheld from Spring.

The introduction of the right to counsel in the stationhouse setting is perhaps the single most controversial result of the giving of *Miranda* warnings. Although the Court has stated that a defendant's attorney should not be regarded as a menace to effective law enforcement, where the police's objective is to secure evidence of guilt, an attorney might very well impede this objective. *Miranda*, 384 U.S. at 480-81. As Justice Jackson observed: "[a]ny lawyer worth his salt would tell the suspect in no uncertain terms to make no statement to the police under any circumstances." Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., dissenting).

86. *Moran*, 475 U.S. at 422.

87. *Spring*, 107 S. Ct. at 859.

strued the phrase "knowing, intelligent, and voluntary" to mean only that the suspect received *Miranda* warnings prior to waiving his rights[88] or the Court's conclusion is influenced by a presumption of guilt. This second explanation will be discussed at length.

A presumption of guilt is premised upon a belief that a criminal suspect knows only too well the potential subject matter of a custodial interrogation.[89] The suspect's knowledge arises from his guilt. Because the suspect has committed crimes, when he decides to waive his privilege against self-incrimination, he, of all people, is aware of the consequences of that decision. In a nontechnical sense, he is aware of his potential liability. The suspect, however, is usually ignorant of the extent and depth of the police's investigation. Thus, to require the police to inform a suspect of the charges under investigation prior to custodial interrogation creates two unnecessary hurdles to the admissibility of a confession. First, the requirement handcuffs the police to a meaningless procedural safeguard that provides a defendant with a "loophole" which may render an otherwise valid confession inadmissible. Second, the requirement gives criminal suspects a decided advantage. Armed with knowledge of the extent of the police's investigation, a suspect may be able to guard against improvident disclosures in a custodial interrogation which might expose the suspect to more extensive liability.

This presumption of guilt is one possible explanantion for the decision in *Spring*. If one assumes that Spring was guilty of both the illegal firearms

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88. The *Spring* Court may, indeed, have intended this construction of the waiver standard, drawing upon the construction given the phrase in *Moran*. The *Moran* Court held that:

> Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he knew at all times he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

Moran, 475 U.S. at 422-23. This paragraph describes little more than a reading of *Miranda* warnings and in fact truncates the warnings by failing to note that a suspect must be aware that he is entitled to a court-appointed lawyer if he cannot afford to retain one. Moreover, the *Moran* Court's description of the waiver inquiry is at odds with its statement that "[a] waiver must [be] made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it" and with the *Moran* Court's conclusion that "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Id.*

Nevertheless, if the *Moran* Court, in the face of this inconsistency, could conclude that the waiver analysis is complete when it is determined that the suspect received his *Miranda* rights and voluntarily decided to forego them, then it is not inconceivable that the *Spring* Court intended to similarly construe the phrase "knowing, intelligent and voluntary" to mean the reading of *Miranda* warnings and nothing else. If this is in fact the case, the Court should have been more candid in setting forth this change in confession law.

89. Although a presumption of guilt upon arrest is often the bulwark of commentaries asserting that the *Miranda* decision went too far in protecting the rights of criminal suspects, ironically the presumption also crops up in commentaries claiming the decision did not go far enough. For examples of the presumption of guilt in both types of commentaries, see Caplan, *supra* note 10, at 1467 ("in evaluating the privilege against self-incrimination, we should start with the premise that the privilege shelters the guilty"); Dix, *supra* note 8, at 347 (asserting that it is likely that criminal suspects will already be aware of the basic facts and law concerning their potential liability for the charges under investigation even without a disclosure of the charges by the police); Inbau, *supra* note 10, at 809 (suggesting that a criminal suspect is "reasonably presumed to be guilty"). *See also* Kamisar, *Fred E. Inbau; "The Importance of Being Guilty,"* 68 J. CRIM. L. & CRIMINOLOGY 182 (1977); Driver, *supra* note 8, at 60 (describing interrogation as an encounter in which the sole focus is establishing the guilt of the accused); Ogletree, *supra* note 6, at 1829 (noting that *Miranda* is widely criticized as overprotecting "guilty" defendants).

transactions and the murder, one can also assume that Spring knew only too well the range of the possible topics for interrogation. Presuming Spring's guilt in the murder at the time of his arrest explains why an inquiry into Spring's awareness of the charges under investigation is not necessary. If the ATF agents told Spring that they were investigating a Colorado murder, this information would have only one effect: it would tell Spring that the police knew about the Colorado murder. The police's knowledge may come as a surprise to Spring but the murder charge would not. Why then inform Spring of the matters under investigation? As the *Spring* Court observed, this information may affect the *wisdom* of Spring's subsequent waiver but could have no bearing upon its voluntary and knowing nature.[90] When guilt is the premise, it naturally follows that a recitation of the charges against a particular suspect is superfluous and does nothing more than reveal to the suspect the depth of the police investigation.

If this reasoning in fact influenced the *Spring* Court's decision, then such a covert presumption of guilt creates dangerous precedent that disregards individual rights on the theory that guilt is proven not at trial but upon arrest.[91] To allow a covert presumption of guilt to exist invites courts and law enforcement to transform our accusatorial system of justice into an inquisitorial one.[92] A court must preserve a criminal suspect's opportunity to exercise constitutional rights, regardless of guilt, even if this means that "bad" people receive beneficial information.[93]

An examination of the effect of revealing the matters under investigation to a criminal suspect indicates that while this information will improve a suspect's ability to understand his rights and the consequences of abandoning them, the police will not be unduly handicapped by a requirement that they either inform the suspect of the charges against him or prove, beyond a reasonable doubt, that the suspect already possessed this information.

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90. *Spring*, 107 S. Ct. at 859.

91. *See* Y. Kamisar, *supra* note 23, at 27-40 (commenting that it does little good to afford criminal defendants with a panopoly of rights at trial when their guilt has already been determined during police interrogation); King, *supra* note 8, at 493 (observing that an accused is given virtually no protection when he needs it most—before his trial). *But see* Frey, *supra* note 10, at 733-34. Mr. Frey agrees that the law does not fully protect a suspect's interests during the investigational stage and that guilt is often proven upon arrest but concludes that this is "wholly desirable."

92. In Watts v. Indiana, 338 U.S. 49, 54 (1949) Justice Frankfurter explained the difference between the two systems:

> Ours is the accusatorial as opposed to the inquisitorial system. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. . . . Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confession is subversive of the accusatorial system."

(cited in *Moran*, 475 U.S. at 434 n.1 (Stevens, J., dissenting)). The dissent stated that the *Moran* majority opinion represented a "startling departure" from Justice Frankfurter's insight.

93. Justice Frankfurter observed that it is "a fair summary of history to say that the safeguards of liberty have been forged in controversies involving not very nice people." United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). Similarly, Macaulay commented that "the guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent." T. MACAULAY, THE HISTORY OF ENGLAND 482 (1968 ed.). *Moran*, 475 U.S. at 437 (Stevens, J., dissenting).

ADOPTING A GOOD FAITH RULE FOR POLICE DISCLOSURE OF THE MATTERS UNDER INVESTIGATION

Requiring a police officer to inform an arrestee of the nature of the matters under investigation is not a novel proposition.[94] Absent any apparent affirmative duty of law enforcement officials to disclose this information, many courts recognize the defendant's awareness of the charges as an important factor in determining the validity of his waiver.[95] Arizona specifically acknowledges this criterion in its voluntariness test.[96] Similarly, the 1968 Omnibus Crime Bill promulgated this consideration as one of the indicia courts should assess in evaluating a waiver of constitutional rights.[97]

In short, ample evidence indicates that consideration of the defendant's awareness of the matters under investigation does not depart from established criminal law. In fact, such a requirement may be more consistent with prior case law and legislation than the *Colorado v. Spring* decision itself. Even so, several arguments militate against a duty of disclosure.

To insist that law enforcement officers inform arrestees of the charges against them may force the police to act inconsistently with their true objective—to secure evidence of guilt.[98] For some, this is the equivalent of losing a card game by tipping one's hand to an opponent.[99] Armed with the powerful knowledge of all the possible topics of inquiry, the suspect might imme-

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94. *See* Dix, *supra* note 8, at 347-51. Professor Dix advocates a requirement that a suspect be aware of the matters under investigation prior to validly waiving his constitutional rights but suggests that the burden of proving ignorance be placed upon the defendant.

Even Professor Inbau apparently recognized a duty of disclosure and suggested that one way of securing self-incriminating information is to ask the suspect if he knows why he is being questioned. Professor Inbau warns, however, that this tactic may not be used when the suspect is in custody because the reading of constitutional rights necessarily requires disclosure of the matters under investigation. F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS 94 (1967).

95. *See supra* notes 42-45 & 47.

96. *See supra* note 43.

97. 18 U.S.C.A. § 3501 (West 1969). The Omnibus Crime Bill provides that a confession shall be admissible if it is voluntarily given. "The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including. . .(2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession." *Id.*

98. Y. KAMISAR, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 85 (1980) (criticizing the Court for requiring a police officer to deliver *Miranda* warnings as this forces the police to perform a "schizophrenic" role); Ogletree, *supra* note 6, at 1828 (under *Miranda*, it is the police who must advise suspects of their rights. The police, argues Professor Ogletree, have little interest in ensuring that a suspect's waiver of constitutional rights is made knowingly and intelligently); Frey, *supra* note 10, at 734-35 (*Miranda* requires the police to play the dual role of investigating a crime and securing a valid waiver of constitutional rights from the very suspects the police want to interrogate).

99. *See* Caplan, *supra* note 10, at 1419, 1441-42. Professor Caplan asserts that the *Miranda* decision accentuated "just those features of our system that manifest the least regard for truthseeking, that imagine the criminal trial is a game of chance in which the offender should always have some prospect of victory. . . ." Professor Caplan refers to what is commonly known as the "fox hunter's reason" or the "sporting theory of justice." According to this view, the criminal justice system is seen as a sporting match in which the suspect attempts to outwit his opponent, the police. To make the match fair, the suspect is given certain weapons like the *Miranda* warnings and the ability to tag in a gladiator-attorney when the going gets rough.

Justice Fortas articulated the essence of this theory when he observed that the accused and his accusors are "equals, meeting in battle." Fortas, *The Fifth Amendment: Nemo Tenetur Seispsum Prodere*, 25 J. CLEV. B.A. 98 (1954).

diately ask for a lawyer and the police's investigation would come to a close.[100]

Alternatively, there is also a distinct potential for abuse. For example, a police officer, in his eagerness to obtain incriminating evidence, may be tempted to "bluff" by characterizing the nature of the charges against the accused as either innocuous or serious simply to gain a psychological advantage.[101] An imposition of a duty of good faith upon the police officer might strike the necessary balance between forcing the police to disclose every scintilla of suspicion and exposing this safeguard to the risk of manipulation by an overzealous police officer.

Under a good faith rule, the police would only be required to demonstrate that the information they disclosed to the arrestee was reasonably calculated to apprise the suspect of the potential topics of inquiry prior to custodial interrogation.[102] There need not be disclosures of information in exquisite detail, but there must not be any calculated surprises either.

Since the standards of "good faith" and "reasonableness" are not foreign to the criminal law arena,[103] it is unlikely that this duty of disclosure would create significant administrative inconvenience.[104] In fact, if the courts are truly committed to indulging every presumption against a waiver,[105] such an additional procedural safeguard may allow courts to as-

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100. Justice Jackson had a ready response to arguments based on this fear. He admonished:

> No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, [his constitutional] rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

101. For example, *see Moran*, 475 U.S. at 461 n.47 (Stevens, J., dissenting) (quoting App. in Michigan v. Jackson, O.T. 1985, No. 84-1531, pp. 157-158) (police statement to suspect: "I think you need a brick to hit you against a wall to realize that your (sic) in serious trouble here and that the only way that you have any hope is by us. I know what your (sic) gonna think, how if you want an attorney, I'll tell you what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to the police. . . But, the attorney doesn't go to jail, does he?").

102. *See* Dix, *supra* note 8, at 338-51. Professor Dix advocates a standard by which the admissibility of a confession depends on whether the suspect possessed the opportunity to make a free, informed and tactical decision to waive his rights but argues that the burden of establishing ignorance should be on the accused.

Forcing the prosecution to prove that the defendant was either informed or was aware of the charges under investigation will better ensure that the suspect receives this information and that the police are cognizant of their duty to deliver it. Moreover, imposing the burden of proof upon the accused places the defendant in the anomolous position of proving his own ignorance and requiring the police to provide countervailing evidence of the suspect's awareness.

103. The Court has applied the standards of "good faith" and "reasonableness" to several areas. In United States v. Leon, 468 U.S. 897 (1984), the Court created a good faith exception to the exclusionary rule permitting admissibility of evidence seized through reasonable reliance on a seemingly valid warrant. Similarly, in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court held that the constitutionality of a consent search turned upon the reasonableness of the officer's conduct and her good faith belief that effective consent had been given. Reasonableness and good faith also govern a police officer's ability to briefly stop and question an individual where there is no probable cause to arrest. Terry v. Ohio, 392 U.S. 1 (1968).

104. The *Spring* dissent observed that a disclosure of the crimes under investigation would leave legitimate interrogation techniques intact and would contribute significantly to ensuring that confessions are lawfully obtained. *Spring*, 107 S. Ct. at 860 (Marshall, J., dissenting). Professor Dix similarly suggests that informing the suspect of the material facts and law governing his situation is unlikely to impose an unrealistic burden on the police because in most cases it will be easy to discern what information need be disclosed. Dix, *supra* note 8, at 350.

105. *See supra* note 104.

certain the constitutional validity of a suspect's waiver with greater certainty.[106] For example, if the police inform a suspect that he is being charged with aggravated rape and if the suspect decides to forego his *Miranda* rights despite this information, he will find it difficult to convince a court that he misunderstood his rights, their significance and the consequences of waiving them. A suspect who is aware of the potential charges against him understands the full import of the *Miranda* warnings in a manner that a suspect deprived of this information cannot.[107]

Finally, analysts of human behavior suggest that people often experience a great compulsion to exonerate themselves in the face of accusation.[108] Assuming this to be true, a duty to disclose potential charges to a suspect may even aid the police in their investigation.[109] Of course, a difficult question is presented when one considers that an announcement of charges may constitute custodial interrogation.[110] On the one hand, if the police do not inform the defendant, he may not possess sufficient facts to make a "knowing, intelligent and voluntary" waiver of his rights. On the other hand, if the police do advise the defendant of the charges, it may be seen as an attempt to elicit an incriminating response. On balance, it appears preferable to inform the defendant of the matters under investigation in conjunction with the delivery of *Miranda* warnings. The warnings may have the effect of neutralizing the provocative element in a disclosure of the charge.

CONCLUSION

An attempt to safeguard a suspect's right to a free and informed exercise or waiver of constitutional rights may require law enforcement officials to provide information which is in fact unnecessary to acheive this result.[111] Some suspects are well-acquainted with their rights, the consequences of foregoing those rights, and the nature of the charges under investigation.[112]

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106. For example, a suspect who believes the police have arrested her for driving under the influence may see no reason to exercise her *Miranda* rights because she believes the matter is something she can handle herself without the assistance and expense of a lawyer. If that same suspect were told she was suspected of complicity in an armed bank robbery, her understanding of the import of her constitutional rights and the consequences of foregoing them would be dramatically transformed. Accordingly, awareness of the charges under investigation often directly affects a suspect's ability to fully comprehend the meaning of the fifth amendment privilege.

107. For an expanded analysis on this point, *see generally* T. REIK, *supra* note 8 (1959); Driver, *supra* note 8, at 60; Ogletree, *supra* note 6, at 1828-29; White, *supra* note 10, at 6-9. *But see* Frey, *supra* note 10, at 734 (suspects do not freely confess but usually require some coaxing).

108. *See* D. NISSMAN, E. HAGEN & P. BROOKS, LAW OF CONFESSIONS 138-39 (1985). While few courts find interrogation in the mere announcement of the charge, such a disclosure may produce remarkable results. For example, in State v. Perez, 422 A.2d 913, 914 (R.I. 1980), the police told the defendant he was a robbery suspect. Indignantly, the defendant responded, "Robbery. How can you charge me with robbery? I was out in the car." In State v. Easthope, 28 Utah 2d 244, 501 P.2d 109 (1972), the police told the defendant he was being held for rape based on a line-up identification. The defendant replied, "I don't see how anybody could identify me with a silk stocking over my face."

109. At least one court has found the announcement of the charge to constitute custodial interrogation. *See* People v. Thompson, 107 Ill. App. 3d 285, 437 N.E. 2d 916 (1982) (Police informed a suspect that he was under arrest for attempted murder. The suspect's reply, "[a]ttempted murder? I should have killed him," was suppressed.).

110. *See supra* text accompanying notes 89-93.

111. *Id.*

112. *See Spring*, 107 S. Ct. at 860 (Marshall, J., dissenting).

Courts, commentators and law enforcement authorities may therefore bridle at a suggestion that the police provide this information anyway.[113] This Note does not suggest chaining the police to a limitless string of procedural safeguards. It merely suggests that a suspect's awareness of the matters under investigation should be a factor in determining whether a suspect made a "knowing, intelligent and voluntary" waiver of constitutional rights. If the suspect is aware of the nature of the charges under investigation, the prosecution will not only be able to prove the confession was the result of a valid waiver of constitutional rights, but the integrity of the criminal justice system will be upheld since it will be less likely that a court will hear a coerced confession.

This Note advocates an exception to the duty to inform where the prosecution can prove, beyond a reasonable doubt, that a suspect was aware of the charges under investigation prior to custodial interrogation. Such a provision would ensure that no mere "technicality" would bar the admission of a confession of guilt. An examination of the effect of informing a criminal suspect of the charges against him reveals that such a requirement neither constitutes a radical departure from prior confession law nor significantly impairs legitimate investigative techniques.

A criminal justice system which seeks to preserve criminal suspects' "voluntary, knowing and intelligent" decision to exercise or waive their constitutional rights must impose a requirement that law enforcement officials either specifically inform suspects of the charges against them or prove, from the "totality of the circumstances," that arrestees possessed this information prior to waiving their constitutional rights. This information is essential to a suspect's ability to understand the full import of the *Miranda* warnings and reflects a court's willingness to preserve the dual propositions underpinning the *Miranda* decision.

113. *See supra* notes 104 and 108.