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Police Interrogations and Confessions in Massachusetts
Chapter 4

THE EXCLUSIONARY RULE

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Appeals Court, Commonwealth of Massachusetts

§ 4.1 INTRODUCTION

There are numerous **exclusionary rules** based on or derived from federal and state law that prevent the government from using evidence at trial that was obtained as a result of a violation of the defendant's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States or corresponding provisions of state constitutional law, as well as state statutory or common law. [FN1] Most **exclusionary rules** are judicially-created remedies. [FN2] The principal purpose of the **exclusionary rules** created in cases involving violations of the Fourth Amendment and Article 14 is to deter unlawful police conduct. [FN3] The "target of the **exclusionary rule** is official misconduct, and the rule is not intended to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." [FN4] "Evidence discovered and seized by private parties is admissible without regard to the methods used, unless State officials have instigated or participated in the search." [FN5] Violations of the Fourth Amendment and Article 14 that result in the seizure of evidence do not give rise to concerns about the reliability of that evidence. The probative value of such evidence is unaffected by and unrelated to the conduct of the police in seizing it. The reliability of confession evidence, on the other hand, cannot be divorced from the methods used to obtain it. Prior to the adoption of the Massachusetts Constitution in 1780, the common law regarded confession evidence as in need of careful judicial screening before it was given to a jury. "As early as 1755, the justice of the peace manuals began to require that the statements to the justice be voluntary—a synonym for a confession freely given—and to imply a rule of suppression if it was not voluntary." [FN6] "In Blackstone's 1778 edition, the last one he prepared personally ... [there is a] profound skepticism about confessions in general. ... [Blackstone wrote] even in cases of felony at the common law ... [confessions] are the weakest and most suspicious of all testimony; ever liable to be obtained by artiface, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence." [FN7]. This skepticism remained a tenet of all subsequent editions of Blackstone's treatise until it ceased publication in 1916 and was reflected in the decisions of the courts. Professors Thomas and Leo in their historical review of American interrogation law assign two reasons for this skepticism: (1) the realization that confessions "may proceed from influences that can interfere with a suspect's rational calculus;" and (2) confessions may not be reported accurately because "[e]ven if the words are accurately reported, the speaker's meaning is contextual and could be misunderstood." [FN8]

The history of the development of the common law and constitutionally based **exclusionary rules** with respect to confessions is complex. Several reasons are customarily given for the **exclusionary rule** with respect to confession evidence:

> The rationale for excluding statements made to law enforcement officials by someone who by dint of physical or mental impediments is incapable of withholding the information conveyed, can without difficulty be articulated in terms of the unreliability of the statement, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion. Those concerns are no less valid when the involuntary statement is made to a private citizen rather than a law enforcement official. [FN9]

Both the Supreme Court and the Supreme Judicial Court (SJC) generally agree that "[a] judicially crafted rule is justified only by reference to its prophylactic purpose, and applies only where its benefits outweigh its costs." [FN10] At common law, confessions obtained by government compulsion were involuntary and were not available for use at trial. [FN11] Thereafter, this rule continued to be followed on the basis of either the privilege against self-incrimination of the Fifth Amendment and Article 12 of the Massachusetts Declaration of Rights or the Due Process Clause. [FN12]

In *Miranda v. Arizona,* [FN13] the Supreme Court held that custodial interrogation was inherently compulsive, and thus confessions that are the product of custodial interrogation, even if voluntary under traditional standards, violate the privilege against self-incrimination and must be excluded from use at trial unless preceded by a waiver of the Miranda rights. [FN14] Although the *Miranda* decision is rooted in federal constitutional law, [FN15] the **exclusionary rule** established in *Miranda* is a judicially-created remedy that is broader in scope than what is required by either the privilege

against self-incrimination or the Due Process Clause. [FN16] Since the *Miranda* case was decided in 1966, the Supreme Court and the SJC have applied it differently, as we have seen in Chapters 2 and 3. In Massachusetts there is a growing tradition of reliance upon state law to enforce constitutional rights, especially those associated with the Miranda doctrine and access to the benefits of counsel, in the face of retrenchment by the Supreme Court. [FN17]

The existence of this system of parallel federal and state rules regarding the Miranda doctrine is the result of what has been termed the "new judicial federalism." [FN18]

§ 4.2 NEW JUDICIAL FEDERALISM [FN19]

In our federal system, when acting within their own sphere, states and the federal government are each sovereign. [FN20] This system requires the observance of limitations on the power of the federal government and a respect for the autonomy of the states in matters that are beyond the authority delegated by the federal constitution to the national government. [FN21] The first principle of judicial federalism is the primacy of the U.S. Constitution as the "supreme law of the land." [FN22] When presented with a case in which the outcome depends on the application of some provision of the federal constitution, including the Bill of Rights, state courts, no less than federal courts, are required to apply and enforce the federal constitution. [FN23] The second principle of judicial federalism is that when state courts apply the U.S. Constitution, they are bound by the interpretation of that document reached by the U.S. Supreme Court. [FN24]

The third principle of judicial federalism is that state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the U.S. Constitution. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." [FN25] "That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'" [FN26] In fact, state courts may have a duty in particular cases to arrive at their own independent understanding of the scope and content of state constitutional and common law protections of individual rights, even when the words in the text of the relevant state constitutional provision are identical or very similar to the words in the text of the corresponding federal constitutional provision.

> The Declaration of Rights was adopted in 1780, as part of the Massachusetts Constitution, some seven years before the United States Constitution was approved. The Declaration of Rights was written in the historical context of the abuses of governmental power inflicted on the colonists by British officials, and art. 14 was directed at the unlawful invasion of privacy rights by those officials. That the drafters of the Fourth Amendment subsequently chose to replicate the words used in art. 14 cannot support a conclusion that we are compelled to act in lockstep with the United States Supreme Court when it interprets that amendment. Such a conclusion posits a serious misunderstanding of the authority of this court to interpret and enforce the various provisions of the Massachusetts Constitution, particularly those in the area of civil liberties. Chief Justice Wilkins has stated that, "the [U.S.] Supreme Court... describes] a common base from which we can go up," but the Justices of this court "are, however, entitled to [their] own views, indeed constitutionally required to have them." Remarks of Chief Justice Herbert P. Wilkins to Students at New England School of Law on March 27, 1997, 31 New England L.Rev. 1205, 1213 (1997). The nature of federalism requires that State Supreme Courts and State Constitutions be strong and independent repositories of authority in order to protect the rights of their citizens. [FN27]

A corollary of this third principle is that states are free to serve as experimental laboratories, in the sense that Justice Brandeis used that term in his dissenting opinion in *New State Ice Co.* v. *Liebmann.* [FN28] "The genius of federalism is that the fundamental rights of citizens are protected not only by the United States Constitution but also by the laws of each of the states." [FN29] "The nature of federalism requires that State Supreme Courts and State Constitutions be strong and independent repositories of authority in order to protect the rights of their citizens." [FN30]

This third principle is also known as the doctrine of adequate and independent state grounds. In *Herb v. Pitcairn,* [FN31] the Supreme Court explained that the basis for the doctrine lies in the dual sovereignty of the federal and state governments under the federal constitution and the fact that the jurisdiction of the federal courts extends only to "cases

and controversies." [FN32] "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. [FN33]

In order to maintain the integrity of the first and second principles, the U.S. Supreme Court has enunciated a fourth principle of judicial federalism and held that whether a state court decision is based on federal law or state law is a federal question and, thus, the U.S. Supreme Court is the ultimate arbiter, at least in the first instance, of whether a state court decision rests on adequate and independent state grounds. [FN34] Determining whether a state court decision does or does not rest on federal law or an adequate and independent state ground has presented difficulties for the U.S. Supreme Court. In *Michigan v. Long,* [FN35] the Supreme Court addressed the problem of determining the adequacy of a state law ground when a state court decision contains indications that the result rests on both state and federal law grounds. [FN36]

In *Michigan v. Long,* the Supreme Court established ground rules for the operation of the doctrine of adequate and independent state grounds. When a state court decision is clearly based on state law that is both adequate and independent, the Supreme Court will not review the decision. [FN37] When the adequacy and independence of the state law ground is not "clear from the face of the opinion," the Supreme Court will assume the result was compelled by federal law and proceed to review the case as one presenting a federal question. [FN38] If a state court wishes to base a decision on state law grounds alone, it has two choices. First, the state court may make a "plain statement" in its opinion or judgment that it rests on state law grounds even though federal cases and authorities are cited. [FN39] Second, the state court may decide a question as a matter of federal law and state law, but insulate its judgment from review by the federal courts "if the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds... ." [FN40]

The "new judicial federalism" refers to the trend since the 1970s, at the state court level, to look to state constitutions, common law, and statutes for the rule of decision when determining individual rights and liberties. [FN41] "The independence of state courts in interpreting their own state constitutions in a fashion different than federal law has taken root in many state courts. [FN42] In addition to the growing body of state court opinions, there is a large body of literature exploring independent approaches employed by state courts to constitutional provisions that includes a vast number of law review articles, and a number of treatises and monographs." [FN43]

The states have developed a variety of approaches to the determination of whether state law or federal law supplies the rule of decision in cases involving criminal procedure. "There are at least four models for determining when and under what circumstances courts should base decisions on their own constitutions where there are related or similar federal constitutional provisions. The four are generally described as (i) the 'primacy' model, (ii) the 'interstitial' model, (iii) the 'dual sovereignty' model, and (iv) the 'lockstep' model. According to the primacy approach, a state court looks first to state constitutional law, develops independent doctrine and precedent, and decides federal questions only when state law is not dispositive. The interstitial approach establishes a presumption that federal law is controlling and reaches state constitutional issues only when the case cannot be resolved by reference to federal law. Courts employing a dual sovereignty approach analyze both federal and state grounds for the decision, even where the case can be resolved on federal grounds alone. The lockstep approach does not allow independent interpretation of a state constitution, effectively ceding interpretative authority for the state's constitution to the United States Supreme Court." [FN44] [FN45]

The SJC has not settled on any one particular approach. Generally, if a satisfactory result can be achieved by reliance on federal constitutional law, Massachusetts appellate courts will not independently address the state constitutional law claims. [FN46] However, in one recent decision, the SJC offered two complete constitutional analyses—one under federal law and one under state law—with the result that if lawyers rely on the federal law analysis, but not the state law analysis, and it is adopted by the reviewing state court, the result would be subject to further review by the U.S. Supreme Court. [FN47]

§ 4.3 CONVERGENCE AND DIVERGENCE BETWEEN STATE AND FEDERAL LAW

This section addresses the similarities and fundamental differences between the approach taken by the SJC and the Supreme Court to the application of the **exclusionary rule** in cases involving confessions.

§ 4.3.1 Involuntary Confessions Excluded Under Federal and State Law

There is general agreement that the right against compelled self-incrimination safeguarded by the Fifth Amendment and Article 12 is violated "whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise." [FN48] In such a case, federal and state courts agree that exclusion of the coerced confession is mandatory. "[A] defendant's compelled statements, as opposed to statements taken in violation of *Miranda,* may not be put to any testimonial use whatever against him in a criminal trial." [FN49] Federal and state law also are in agreement that statements that are coerced or involuntary may not even be used to impeach a defendant's credibility. [FN50] The two jurisdictions differ, however, on what constitutes an involuntary statement.

> Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so. [FN51]

§ 4.3.2 Test for Determining Voluntariness

(a) ***Federal Standard***

The definition of voluntariness, in the due process sense, has evolved over time beginning with decisions in the 1930s.

> [P]olice conduct requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will. This Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion." [FN52]

Although the use of psychological as well as physical coercion may contribute to a determination that a statement made by the defendant is involuntary, federal law requires proof of action by or on behalf of the government. In *Colorado* v. *Connolly,* [FN53] the state court suppressed a confession that was made spontaneously by the defendant to a police officer on grounds that it was not the product of a rational intellect and a free will and thus involuntary due to the defendant's severe mental illness. The Supreme Court reversed. "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." [FN54] The Court added that "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." [FN55] The Court's view was grounded in an interpretation of the Fifth Amendment, as concerned only with " governmental coercion.... [T]he Fifth Amendment privilege is not concerned with moral and psychological pressures ... emanating from sources other than official coercion." [FN56]

The **exclusionary rule** under federal law is not a "but for" test. Rather, the determination of whether a confession was coerced and thus should be excluded turns on a combination of the totality of the circumstances. [FN57]

(b) ***Massachusetts Standard***

The **exclusionary rule** applicable to involuntary confessions under Massachusetts law is broader and more demanding than its federal counterpart in three respects. First, a statement is not voluntary if it is the product of coercion, whether stemming from the conduct of law enforcement officials or private citizens. [FN58] Second, under the so-called humane practice, when the question of voluntariness is a "live issue" at trial, the jury, in addition to the judge, must independently determine its voluntariness before it may be considered as evidence against the defendant. [FN59] Third, apart from whether a statement is obtained as a result of coercion, a statement is not voluntary in Massachusetts, whether it is made to law enforcement or to a private person, if it is not the product of a rational intellect and free will. [FN60] "A statement

is inadmissible if it would not have been obtained but for the effects of the confessor's mental disease." [FN61] However, Massachusetts follows federal law and applies the totality of the circumstances test to determine whether a concession was a product of coercion. [FN62]

§ 4.3.3 Proof of Voluntariness

Massachusetts law requires a determination of voluntariness to be made by a standard of proof beyond a reasonable doubt. [FN63] Federal law requires only proof by a preponderance of the evidence to establish voluntariness. [FN64] Failure to meet the more exacting Massachusetts standard requires the suppression of a statement even though it would be admitted in a federal forum.

§ 4.3.4 Humane Practice Rule

(a) ***Federal Standard***

The federal constitution does not require an independent determination of voluntariness by the jury as well as by the judge. [FN65]

(b) ***Massachusetts Standard***

If the voluntariness of a defendant's statement [FN66] is a live issue at trial, [FN67] the judge must instruct the jury that the Commonwealth has the burden of proving beyond a reasonable doubt that the statement was made voluntarily and that the jurors must disregard the statement unless the Commonwealth has met its burden." [FN68] Although this is not an **exclusionary rule**, the failure to observe the rule when voluntariness is a live issue is reversible error. [FN69] The humane practice rule applies whether the defendant's statement was obtained by the police or made to a private party. [FN70]

If there is no evidence calling into question the voluntariness of a statement by the defendant—i.e., voluntariness is not a "live" issue—the court has no obligation to conduct a hearing or to submit the question to the jury under the humane practice rule. [FN71]

"[A] judge is obliged sua sponte to conduct a voir dire only where there is evidence of a substantial claim of involuntariness, ... and where voluntariness is a live issue at the trial." [FN72] "Cases which address whether the voluntariness of a defendant's statements was a live issue at trial consistently have failed to adopt any per se rule that if certain factors are present, voluntariness is a live issue." [FN73] Voluntariness is a live issue when the defendant raises the question by a pretrial motion or timely objection at trial, or where it appears that there is a relationship between factors associated with a lack of voluntariness, such as improper interrogation techniques like threats or promises of leniency, mental illness or intoxication, and the statements made by the defendant. [FN74]

When voluntariness is a live issue and the judge has determined that the Commonwealth has established voluntariness, "the judge must instruct the jury that the Commonwealth has the burden of proving beyond a reasonable doubt that the statement was voluntary and that the jurors must disregard the statement unless the Commonwealth has met its burden. In making its over-all determination of voluntariness of a statement, a jury may consider whether a defendant's waiver of his Miranda rights was voluntary." [FN75] However, the court must not inform the jury of its ruling admitting the confession. [FN76]

§ 4.3.5 General Rule of Exclusion for Miranda Violations

(a) ***Federal Standard***

The general rule is that "[t]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." [FN77]

(b) ***Massachusetts Standard***

Because the Miranda doctrine is based on the U.S. Constitution, [FN78] Massachusetts courts are bound by the **exclusionary rules** that are derived from *Miranda.* [FN79]

Massachusetts does not require the observance of any stricter standards than are required by federal law with respect to the definition of "custodial interrogation." [FN80] However, Massachusetts law differs from federal law in terms of a clear-cut differentiation under state law between informing a person of his or her Miranda warnings and a waiver of Miranda warnings, and in terms of what standard governs the determination of whether a person in police custody has asserted his or her Miranda rights during the time prior to a waiver of those rights. [FN81]

§ 4.3.6 Administration of Warnings Versus Waiver of Rights

In cases in which the person in custody does not expressly and directly waive his or her Miranda rights (e.g., by making a statement of waiver and/or by signing or initialing a written waiver form or card), but instead is said to have made an "implied waiver," there is a fundamental difference between state and federal law in terms of what constitutes sufficient proof of a valid waiver of Miranda rights.

(a) ***Federal Standard***

Under federal law, the doctrine of "implied waiver" has evolved from its original formulation. Presently, the Supreme Court's view is that once Miranda warnings have been given and understood, "an accused's uncoerced statement establishes an implied waiver of the right to remain silent." [FN82]

(b) ***Massachusetts Standard***

Massachusetts law also recognizes a version of the doctrine of implied waiver, but it is based on the Supreme Court's original formulation of the doctrine in *North Carolina v. ButlerP* [FN83] according to the SJC, "[i]n effect, the [Supreme] court in *[Berghuis* v.] *Thompkins* reversed the burden of proof applicable to waiver: under Federal law, waiver will now be presumed from the very fact that the defendant made any uncoerced statements, but the defendant cannot invoke his right to remain silent unless he does so with the utmost clarity. As a matter of State law, we continue to impose a 'heavy burden' on the Commonwealth in proving waiver [FN84]

§ 4.3.7 Assertion of Miranda Rights—Prewaiver Stage

(a) ***Federal Standard***

Under federal law, the special obligations of the police under the Miranda doctrine to "scrupulously honor" the assertion of the right to remain silent by suspending questioning for a time and the duty of the police to terminate questioning when there is a request for counsel until either counsel is present or the defendant initiates further discussion, are not triggered, regardless of whether the defendant has or has not yet waived his or her Miranda rights, unless record indicates a Miranda right was asserted clearly and unambiguously. [FN85]

(b) ***Massachusetts Standard***

Massachusetts law is more favorable to the defendant, at the stage prior to a waiver of Miranda rights, in terms of what is required to demonstrate that the right to remain silent or the right to counsel was asserted. [FN86] "[O]ur case law recognizes that it makes sense to expect heightened clarity from a suspect who wants to change course and cease interrogation after having already indicated a desire to continue questioning. Prewaiver, however, the suspect has yet to exercise the choice between speech and silence that underlies Miranda. To require a suspect, before a waiver, to invoke his or her right to remain silent with the utmost clarity, as called for by Thompkins, would ignore this long-standing precedent and provide insufficient protection for residents of the Commonwealth under art. 12." [FN87]

§ 4.3.8 Burden of Proof as to Waiver of Miranda Rights and Voluntariness

(a) ***Federal Standard***

Federal law requires no more than the preponderance of the evidence standard to establish a valid waiver of Miranda rights [FN88] or that a statement was made voluntarily. [FN89]

(b) ***Massachusetts Standard***

Massachusetts law requires proof beyond a reasonable doubt to establish a valid waiver of Miranda rights [FN90] and that a statement was made voluntarily. [FN91]

§ 4.3.9 Use of Statements Obtained in Violation of Miranda for Impeachment

(a) ***Federal Standard***

In *Harris v. New York,* [FN92] the U.S. Supreme Court held that a statement made during custodial interrogation that is not preceded by a valid waiver of Miranda rights is nonetheless admissible in evidence at trial for impeachment purposes should the defendant testify, provided that the statement is otherwise voluntary.

(b) ***Massachusetts Standard***

Massachusetts does not require the observance of any stricter standards than are required by federal law. [FN93]

§ 4.3.10 Rule of Exclusion for Violation of Miranda's Right to Remain Silent

(a) ***Federal Standard***

In *Miranda,* the Court stated that all questioning must cease once the accused "indicates in any manner, at any time prior to or during questioning" that he or she wishes to remain silent. [FN94] Thus, when the right to remain silent is asserted but police questioning continues, the defendant's subsequent statements must be excluded. [FN95]

In *Miranda,* the Supreme Court did not state when, if at all, police questioning may resume once a person asserts the right to remain silent. This issue was addressed in *Michigan v. Mosley.* [FN96] In *Mosley,* the Supreme Court fashioned a rule whereby statements made as a result of custodial interrogation following the defendant's assertion of the right to remain silent will not be admissible unless the government demonstrates that the defendant's right to cut off questioning was "scrupulously honored." [FN97]

"Unlike the clearcut, purely objective test in *Miranda*—did the police officers fully inform the suspect of his rights before he confessed?—the inquiry in *Mosley* involves a multiple factor review." [FN98] The relevant factors include "(1) whether a significant amount of time elapsed between the suspect's invocation of the right to remain silent and further questioning; (2) whether the same officer conducted both the interrogation where the suspect invoked the right and the subsequent interrogation, and whether the venues differed; (3) whether the suspect was given a fresh set of Miranda warnings before the subsequent interrogation; (4) whether the subsequent interrogation concerned the same crime as the interrogation previously cut off by the suspect; and (5) the persistence of the police in wearing down the suspect's resistance in order to change his mind." [FN99] *Mosley* requires more than simply the avoidance of plainly coercive interrogation tactics. [FN100]

(b) ***Massachusetts Standard***

Massachusetts follows the *Mosley* standard and is not stricter than federal law in terms of the application of the **exclusionary rule** when, in the postwaiver setting, the suspect asserts the right to remain silent. [FN101]

§ 4.3.11 Rule of Exclusion for Violation of Miranda's Right to Counsel

(a) ***Federal Standard***

In *Miranda,* the Court, relying on the Fifth Amendment, determined that a person has a constitutional right to have counsel present during a custodial interrogation, and that the police have a duty to inform the person of this right by means of the now familiar Miranda warnings before any interrogation begins. [FN102] The Court also held that when such a person requests counsel, "the interrogation must cease until an attorney is present." [FN103]

In *Edwards v. Arizona,* [FN104] the Supreme Court addressed the question of under what circumstances could a waiver of the right to counsel occur once a person in custody requests an attorney. The Court explained that although a person has a right to assert and then waive his or her Miranda rights, "additional safeguards are necessary when the accused asks for counsel." [FN105] The Supreme Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." [FN106] Further, an accused

who requests an attorney, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." [FN107]

In *Minnick v. Mississippi,* [FN108]* *the Supreme Court clarified its* Edwards *decision by holding that when a person subject to custodial interrogation asserts his or her right to counsel, mere consultation with an attorney outside the interrogation room does not satisfy the Miranda doctrine. Relying on passages from* Edwards *and* Miranda, *the Court held that once the right to counsel is invoked, custodial interrogation must cease until an attorney "is present." [FN109]*

> In our view, a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney. [FN110]

"The Edwards rule quite plainly is not offense specific." [FN111] Therefore, if a person subject to custodial interrogation asks for an attorney and the interrogation continues without counsel, *Edwards* requires that the defendant's statements must be suppressed regardless of what criminal offense they are related to. On the other hand, under *Edwards,* the police are permitted to interrogate the defendant who asserts his or her right to counsel if he or she "initiates further communication, exchanges, or conversations with the police." [FN112]

The question left open in *Edwards* was whether the Edwards rule is time-tethered. A positive answer to this question was supplied in *Maryland v. Shatzer.* [FN113] In *Shatzer,* the Supreme Court established a bright-line rule by declaring that when a person who is subject to custodial interrogation asserts the right to counsel, he or she may be subjected to further custodial interrogation by the police, after waiving his or her Miranda rights but without the presence of counsel, as long as there has been a break in Miranda custody of at least fourteen days. [FN114] "That [fourteen days] provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." [FN115]

To appreciate the significance of *Shatzer,* it is also necessary to understand that the Supreme Court also decided a question it had previously left open—namely whether a person serving a prison sentence who returns to the general population after a custodial interrogation inside the prison remains in police custody for purposes of Miranda:

> At the time of the 2003 attempted interrogation, Shatzer was already serving a sentence for a prior conviction. After that, he returned to the general prison population in the Maryland Correctional Institution-Hagerstown and was later transferred, for unrelated reasons, down the street to the Roxbury Correctional Institute. Both are medium-security state correctional facilities. Inmates in these facilities generally can visit the library each week; have regular exercise and recreation periods; can participate in basic adult education and occupational training; are able to send and receive mail; and are allowed to receive visitors twice a week. His continued detention after the 2003 interrogation did not depend on what he said (or did not say) to Detective Blankenship, and he has not alleged that he was placed in a higher level of security or faced any continuing restraints as a result of the 2003 interrogation. The "inherently compelling pressures" of custodial interrogation ended when he returned to his normal life. [FN116]

More recently, in *Howes v. Fields,* [FN117] the Supreme Court rejected the view that a person serving a sentence in a correctional facility is necessarily in custody whenever he or she is isolated from the general population and questioned about events that took place outside the prison.

> When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted. An inmate who is removed from the general prison population for questioning and is thereafter ... subjected to treatment in connection with the interrogation that renders him in custody for practical purposes ... will be entitled to the full panoply of protections prescribed by Miranda. [FN118]

(b) ***Massachusetts Standard***

The SJC has not yet had occasion to consider whether it will follow *Maryland* v. *Shatzer,* supra, or *Howes v. Fields,* supra, or establish a rule more favorable to defendants. [FN119] *Shatzer* appears to be inconsistent with the assumption made by the SJC in *Commonwealth v. Perez,* [FN120] that the *Edwards* rule is not time-tethered. In *Perez,* the defendant asserted his right to counsel after several interviews with the Lowell police, who had traveled to Puerto Rico to interrogate him about a homicide. Following admissions that he was at the scene of the murder, six months later, the defendant was returned to Massachusetts, again advised of his Miranda rights, purported to waive his rights, and made additional admissions consistent with his earlier statements, but still denied that he was the shooter. The SJC assumed without deciding that the *Edwards* rule barred the police interrogations that took place months after the defendant had asserted his right to counsel and after he had been readvised of his Miranda rights and waived those rights. This reasoning is consistent with *Shatzer* if the defendant was in an await-ing-trial status while in Puerto Rico because such confinement is tantamount to ongoing custodial interrogation. However, if the defendant was serving a sentence and returned to the general prison population after his interview, the passage of fourteen days would satisfy *Shatzer.*

The SJC distinguished *Edwards* in *Commonwealth v. Galford,* [FN121] where there was only a two-day interval between the defendant's assertion of his right to counsel during custodial interrogation and his subsequent interview following new Miranda warnings without the presence of counsel. According to the SJC, *Edwards* did not apply because the defendant had been released from police custody after his first custodial interrogation. [FN122] While this result is consistent with *Shatzer* in the sense that the SJC regarded the break in custody as determinative of whether the *Edwards* rule should be applied, it diverges from *Shatzer* because the break was not for fourteen days.

Generally, the SJC follows the decisions of the U.S. Supreme Court in the area of alleged *Edwards* violations. [FN123] One area where there may be divergence between state and federal is the result of *Commonwealth v. Santos,* [FN124] in which the SJC addressed a question not yet addressed by the U.S. Supreme Court. In *Santos,* the SJC held that when a person in police custody who has waived his or her Miranda rights requests an attorney but then, without prompting by the police, qualifies that request by indicating it applies only to any further questioning about a specific topic, the police are limited to a brief and focused question designed solely to resolve the ambiguity. Only if it is clear that the defendant does not want an attorney may the interrogation resume.

§ 4.3.12 Use of Statement in Violation of Miranda to Refresh Recollection

In *Commonwealth v. Wodbine,* [FN125] the SJC had occasion to address an unusual application of the evidentiary doctrine of recollection refreshed in the context of a Miranda violation. The court held that a witness may testify at trial even after his or her memory has been refreshed by using a statement that was suppressed on the basis of a Miranda violation, as long as the judge determines prior to his or her testimony that the Commonwealth "has met its burden of establishing that the witness will testify not from a memory of the suppressed statement, which by definition is not to be placed in evidence, but from an independent memory of the separate event." [FN126]

§ 4.3.13 "Fruit of the Poisonous Tree" Doctrine-General Principle

(a) ***Federal Standard***

The "fruit of the poisonous tree" doctrine is an artificial construct designed to ensure that the **exclusionary rule** is effective as a deterrent against governmental misconduct by excluding not only evidence that is a direct result of the misconduct, but also evidence that is causally related to the misconduct. [FN127] However, "[t]he United States Supreme Court has never held that 'making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.'" [FN128] When a confession is the fruit of an earlier illegality, the test of its admissibility is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." [FN129]

The doctrine is applied differently in the context of a Miranda violation than in the context of a Fourth Amendment violation. A "Miranda violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the 'fruits' doctrine." [FN130] Under federal and state law, voluntary, but unwarned, statements are admissible for impeachment purposes. See § 4.3.9, supra. Under federal law, physical

evidence obtained as a result of information learned from a voluntary statement secured in violation of Miranda is admissible. [FN131] See § 4.3.16, infra. Under both federal and state law, the "fruit of the poisonous tree" doctrine does not necessarily require the suppression of a voluntary confession or incriminating statement that was preceded by an involuntary statement. [FN132] See § 4.3.14, infra.

As a general rule, the defendant bears the burden of demonstrating that there is a connection between an act of governmental misconduct and the government's acquisition of evidence. Once such a connection is established, the government bears the burden of proving that the connection between the police misconduct and evidence acquired "has become so attenuated as to dissipate the taint," [FN133] or that there was an independent source for the evidence. [FN134] Whether the government has met its burden "is a question of fact" left to the "learning, good sense, fairness and courage of [the] trial judges." [FN135] In determining whether the requirements for the "attenuation of the taint" exception have been met, the Supreme Court follows a three-factor test: (1) "[t]he temporal proximity" between the illegal activity and the evidence, (2) "the presence of intervening circumstances," and (3) "the purpose and flagrancy of the official misconduct." [FN136]

(b) *Massachusetts Standard*

Massachusetts law follows the same general approach as federal law, [FN137] although, as noted in § 4.3.9, supra, and § 4.3.14 and § 4.3.16, infra, Massachusetts law is in some respects stricter than federal law in its application of the "fruit of the poisonous tree" doctrine.

The analytical tools used by the SJC to determine whether a second confession is admissible following an earlier involuntary confession or violation of *Miranda* are described as a "break in the stream of events," which corresponds to the concept of "independent source," [FN138] and "cat out of the bag," which corresponds to "attenuation of the taint." [FN139]

> In order to determine whether the taint from an illegal interrogation has been eliminated, and, consequently, whether a subsequent statement is admissible, case law here has followed two lines of analysis ... as follows: In the first line of analysis, the court must look for a break in the stream of events, the coercive circumstances which extracted earlier statements, sufficient to insulate the subsequent statement from the effect of all that went before. The focus of this line of analysis is on external constraints, continuing or new, which may have overborne the defendant's will. When circumstances no longer coerce the defendant, a break in the stream has occurred. The second line of analysis looks more specifically to the effect of the previous confession on the defendant's will. To be admissible, subsequent statements may not be merely the product of the erroneous impression that the cat was already out of the bag, because one coerced confession has let the secret out for good. [FN140]

The SJC has explained its application of the "fruit of the poisonous tree" analysis in confession cases involving the taint that results from an earlier custodial interrogation of the defendant without a valid waiver of Miranda rights: "According to our cases, the taint of an earlier Miranda violation may be removed if either (1) sufficient time has elapsed and there has been a sufficient break in the course of events to allow the conclusion that the taint has been dissipated, or (2) the pre-Miranda interview led to no inculpatory statement." [FN141]

§ 4.3.14 Initial Miranda Violation, Followed by Miranda Warnings, Miranda Waiver, and Second Statement

(a) *Federal Standard*

The Supreme Court has rejected the principle that a statement obtained by custodial interrogation without Miranda warnings presumptively taints a subsequent statement by the same person that is preceded by Miranda warnings. [FN142] Instead, the Supreme Court held that in the absence of deliberate wrongdoing by the police, the administration of Miranda warnings to a suspect who has made an unwarned but voluntary statement may be sufficient to render the second statement the product of a valid waiver, provided that there has been a sufficient passage of time or change in circumstances. The unwarned statement is inadmissible, but the subsequent statement will be admitted if the government establishes that it was knowingly and voluntarily made. [FN143] However, a plurality of the Court rejected an invitation to extend this principle further. In *Missouri v. Seibert,* [FN144] the Court held that an intentional failure to advise a

suspect of the Miranda warnings, based on a police protocol that called for questioning the suspect first without Miranda warnings followed by a midstream administration of Miranda warnings before interrogation resumed, would not provide a basis for a waiver of Miranda rights. [FN145] "Thus when Miranda warnings are inserted in the midst of coordinated and continuous interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."' [FN146]

(b) *Massachusetts Standard*

Massachusetts applies a stricter version of the "fruit of the poisonous tree" doctrine in this context than that followed by the Supreme Court. In *Commonwealth v. Smith,* the SJC has decided, as a matter of common law, that when the police fail to administer Miranda warnings, there is a presumption that any statements by the defendant that follow as a result of custodial interrogation are tainted and not admissible in the government's case in chief. [FN147]

The common law presumption that a second confession is tainted even though it is preceded by Miranda warnings may be overcome if the Commonwealth establishes that there was a "break in the stream of events" between the two statements and provided that the first statement did not "let the cat out of the bag." [FN148]

Additional Illustrations

The analytical framework established in *Commonwealth v. Smith* has been applied in a number of cases. In *Commonwealth v. Haas,* 373 Mass. 545 (1977), the SJC suppressed an incriminating response that was preceded by Miranda warnings because it followed so closely the illegal police interrogation "that we cannot discern a break in time or the stream of events sufficient to insulate the latter statement from the events which went before." *Id.* at 554. Alternatively, in *Haas,* the SJC also concluded that the admission made by the defendant prior to receiving his Miranda warnings had Ietthe cat out of the bag, and that "a belated adequate warning could not put the cat back in the bag." [FN149]

In *Commonwealth v. Osachuk,* [FN150] there was no break in the stream of the events between the defendant's unwarned and incriminating statement made while he was handcuffed in the rear seat of the police cruiser and his later statements made after receiving Miranda warnings. "[T]he questioning was continuous and ... the unlawfully obtained statements were incriminating because they placed the defendant at the scene of the crime and presented an implausible explanation for the victim's death." [FN151]

In *Commonwealth v. Watkins?* [FN152] the SJC ruled that a second custodial statement made by a suspect who had initially requested an attorney was admissible. The SJC applied "break in the stream of events" analysis, and concluded that, because the defendant's second statement was made after he was given the opportunity to communicate with an attorney and after he had a lengthy telephone conversation with his mother and his sister, the intervening circumstances "overshadowed" the fact that the two statements were close in time to each other. [FN153] In *Watkins,* the SJC concluded that the "cat out of the bag" theory should not be applied because the defendant's first statement to the police was not inculpatory, and only his later statement described his involvement in the crimes.

Likewise, in *Commonwealth v.* Prater, [FN154] the SJC concluded that the presumption of taint that resulted from a confession made following an invalid waiver of Miranda rights due to the defendant's intoxication (among other things) was overcome by evidence that there was a "break in the stream of events" before the defendant's second videotaped confession.

[T]he trial judge determined that: (1) by the time the defendant received Miranda warnings for the videotaped confession sufficient time had elapsed for the effects of alcohol to have worn off; and (2) ninety minutes passed between termination of the first confession and the commencement of the videotaped confession. The trial judge further noted that on the videotape the "[defendant appears ... to be calm, making eye contact with the police, joking...." These findings of fact support a conclusion that there was a break in the stream of events sufficient to insulate the second confession from the circumstances of the first confession. We note that because the trial judge indicated in his order that the defendant's intoxication was the primary reason the judge was not convinced beyond a reasonable doubt that the first confession was voluntary, the trial judge's findings with regard to the passage of time and the defendant's

appearance of sobriety on the videotape support his implicit conclusion that there was a break in the stream of events between the first and second confessions. [FN155]

In applying the second strand of the analysis, the SJC also agreed with the trial judge's determination that the defendant's second confession was not simply the result of his judgment that the cat was out of the bag. "The trial judge found that, by the time of the second confession, being sober, (1) the defendant began to realize the enormity of what he had done and (2) felt the pangs of a guilty conscience. (3) He hoped for favorable treatment by the police. (4) He was feeling the pressure to seek expiation by confession." [FN156] Even though the defendant made a remark indicating he had little to lose by videotaping his confession ("Seeing as I got nothing to lose, I'll do this too"), the SJC concluded that "[i]t would be neither conducive to good police work, nor fair to a suspect, to allow the erroneous impression that he has nothing to lose to play the major role in a defendant's decision to speak a second or third time." [FN157]

A good illustration of this pragmatic limitation on the application of the **exclusionary rule** is found in *Commonwealth v. OlafO.#* [FN158] In *Olaf* O., the Appeals Court applied the "break in the stream of events" analysis to uphold the admission of a voluntary inculpatory statement made by a fifteen-year-old boy to his aunt about his involvement in the sexual assault of a child under the age of fourteen despite the fact that the juvenile had only shortly before this made a confession to the victim's mother that was found to have been involuntary. "On the evidence the judge could properly find that, although the break in time and place between the two confessions was not sufficiently significant to contribute to a finding of voluntariness, nevertheless the dramatic change in circumstances brought about by the intervention of the loving and caring aunt and physical separation from the victim's mother and boyfriend caused the statements made to the aunt to be voluntary." [FN159]

§ 4.3.15 Use of a Statement Obtained in Violation of Miranda to Obtain a Confession

(a) *Federal Standard*

The federal standard is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." [FN160]

(b) *Massachusetts Standard*

In *Commonwealth v. Parham, [FN161] the defendant claimed that his station house confession was the result of the police showing him a confession made by a codefendant that had been obtained by the police illegally. The SJC held that the defendant's statement was admissible because it was not clear that the codefendant's confession had played any role in inducing the defendant to confess, the defendant had received Miranda warnings and waived his rights, and the misconduct, if any, by the police was not flagrant because at the time the defendant may have seen the codefendant's confession the police had no way to know it would be suppressed at a later proceeding. [FN162]*

§ 4.3.16 Exclusion of Physical Evidence Seized on Basis of Statements Obtained in Violation of Miranda

(a) *Federal Standard*

In *United States* v. *Patane,* [FN163] the Supreme Court held that the "fruit of the poisonous tree" doctrine developed in the Fourth Amendment context is inapplicable to violations of the Miranda rule. The failure to advise a suspect of his or her Miranda warnings in circumstances in which the statements made are voluntary does not require the suppression of physical evidence seized as a result of the unwarned statements. [FN164] The Court reasoned that the failure to give Miranda warnings to a person in police custody does not violate the person's constitutional rights. [FN165] It is only when statements obtained by police interrogation of such a person are admitted into evidence that a violation of the privilege against self-incrimination occurs. [FN166] Correspondingly, the introduction of the nontestimonial fruit of a Miranda violation, such as a firearm, does not create any risk that the defendant's coerced statements will be used against him or her and thus provides no occasion for the application of the **exclusionary rule**. [FN167]

(b) *Massachusetts Standard*

In *Commonwealth v. Martin,* [FN168] the SJC rejected the reasoning and result in *United States v. Patane* [FN169] and held that physical evidence derived from custodial interrogation of a person who did not validly waive his or her Miranda rights is presumptively excluded from evidence at trial as fruit of the violation of Miranda.

§ 4.3.17 Confession Is the Product of an Illegal Search or Seizure

(a) *Federal Standard*

A confession or statement that is obtained by the exploitation of an illegal search or seizure must be suppressed as a remedy for the violation of the Fourth Amendment. [FN170] However, when the police have probable cause to arrest someone, but make the arrest inside a home and without a warrant, the Supreme Court does not regard a subsequent confession that is obtained after an otherwise valid waiver of Miranda warnings as an exploitation of the primary illegality. [FN171]

(b) *Massachusetts Standard*

Massachusetts follows the federal rule that excludes statements obtained by exploiting an unlawful search or seizure. [FN172] Massachusetts also follows the Supreme Court view that a confession obtained after a warrantless arrest inside the defendant's home is admissible.

> We adopt the holding in *New York v. Harris,* supra, and conclude that, despite the defendant's unlawful warrantless arrest, his postarrest statements at the police station were admissible. We agree with the comments in *New York v. Harris,* stated above, that, upholding otherwise valid statements given by defendants at the police station after such an invalid arrest, will not cause the police to ignore the Payton rule. The penalty for an unlawful arrest in a defendant's dwelling is the suppression of anything seized at the time of the arrest, either from the defendant or in the dwelling, and any statements made at the time of the arrest. It is at this point, i.e., the time of the arrest, that some of the most incriminatory evidence is commonly obtained. The police are unlikely to risk the loss of the admission of that evidence in the hope that the defendant will confess to the crime later at the police station. Where the later statement was itself the product of illegal seizure of evidence or statements made at the time of the arrest, the later statement could still be suppressed under a "fruit of the poisonous tree" or "cat out of the bag" analysis. Our adoption of *New York v. Harris* does not preclude suppression where there is a connection between unlawfully seized evidence or unlawfully obtained statements and a defendant's later statement. On the facts of this case, there is no such connection. We conclude that the unlawful arrest here tainted only the physical evidence seized in the defendant's home after the arrest. [FN173]

Massachusetts follows the four-factor analysis suggested by the Supreme Court to determine whether there has been adequate attenuation of the taint from illegally obtained evidence: "(1) the temporal proximity of the admission to the arrest; (2) the presence of intervening circumstances between the arrest and the admission; (3) the observance of the Miranda rule subsequent to the unlawful arrest; and (4) the purpose and flagrancy of the official misconduct." [FN174]

§ 4.3.18 Statements Derived from Unlawful Electronic Surveillance

(a) *Federal Standard*

Federal law provides that evidence obtained in violation of the Fourth Amendment can be used for the limited purpose of impeaching a testifying defendant's credibility. [FN175]

(b) *Massachusetts Standard*

Massachusetts law makes a distinction between cases in which such impeachment is permitted and cases in which it is forbidden based on the nature of the illegal conduct by the police.

In *Commonwealth* v. *Domaingue,* [FN176] in which the defendant was on trial for sexual assaults, the police electronically recorded a conversation at a restaurant between the defendant and the complainant, of which the defendant was unaware. The trial judge ruled that the warrantless recording was in violation of the Massachusetts Wiretap Law [FN177] and excluded it from use during the Commonwealth's case in chief. However, the trial judge ruled that the defendant's recorded statements could be used at trial to impeach the defendant if he took the stand. The defendant testified, and on cross-examination the prosecutor asked him whether he had discussed with the complainant the possibility that she

had become pregnant by him. The defendant answered, "No." The prosecutor then showed him a transcript of the taped conversation and asked him whether that refreshed his recollection. The defendant said, "No." The transcript was not introduced in evidence or shown to the jury. [FN178] On appeal, the SJC upheld the trial judge and followed the reasoning of cases allowing the use of statements obtained in violation of the Miranda doctrine to be used at trial for impeachment. [FN179]

In *Commonwealth v. Fini, [FN180] the SJC distinguished* Domaingue *and refused to allow the Commonwealth to use recorded conversations of the defendant obtained by the police as a result of an unlawful electronic surveillance in and around the defendant's home between the defendant and an informant, in violation of the defendant's rights under Article 14 of the Massachusetts Declaration of Rights. The SJC reasoned that the nature of the constitutional violation (warrantless electronic recording inside a person's home) was especially significant in light of the heightened expectation of privacy associated with the home. [FN181] The SJC explained that the decision whether to apply the* ***exclusionary rule*** *depends on "a proper balance between the State's interest in impeachment and its interest in deterrence of police misconduct," and this, in turn, calls for an examination of "the kind of unconstitutional intrusion that had occurred as well as on the likely impact on the defendant of the evidence obtained thereby." [FN182] Due to the magnitude of the constitutional violation, in* Fini, *the SJC decided that "half measures of deterrence are not enough," and no use should be made of the unlawfully recorded conversations. [FN183]*

§ 4.3.19 When Counsel Seeks to Contact Custodial Defendant

(a) *Federal Standard*

The Supreme Court has held that there is nothing in either the Fifth or Sixth Amendments that requires the police to advise a person in custody that his or her lawyer is trying to reach him or her, and that the failure by the police to do so has no bearing on the admissibility of any statements made by the defendant while in police custody. [FN184] The Court's reasoning was that events occurring outside the arena of custodial interrogation have no bearing on whether the defendant's statements were the result of coercion or a free and voluntary act. [FN185]

(b) *Massachusetts Standard*

Massachusetts decisions have long placed a high value on ensuring that a person in police custody has access to counsel when requested or when counsel is seeking out the defendant. [FN186] For example, in *Commonwealth* v. *Mavredakis,* [FN187] the SJC held, under Article 12 of the Declaration of Rights, that "when an attorney representing a suspect held in custody makes it known to the police that the attorney is seeking to reach his or her client to provide legal advice, the police have an affirmative duty to inform the suspect immediately of the attorney's efforts." [FN188] The duty arises whether or not the attorney has formally been appointed to represent the defendant. [FN189] If the police fail to honor this duty, suppression of any statements made by the defendant following the attorney's request is usually required. [FN190]

"*Mavredakis* established a 'bright-line rule, providing that police must stop questioning and inform a suspect immediately of attempts of an attorney identifying himself or herself as counsel acting on the suspect's behalf to contact the suspect.'" [FN191]

In *Mavredakis,* the SJC also added that the duty of the police when contacted by an attorney representing the defendant is "to apprise the defendant of a specific communication from his attorney that bore directly on the right to counsel." [FN192] The court explained this obligation further in *Commonwealth v. McNulty,* [FN193] noting that there were four separate points made to the Salem police by defendant's counsel that "bore directly on the right to counsel," and which should have been transmitted by the police to the defendant: "(1) that the attorney represented the defendant; (2) that he wanted to speak to the defendant; (3) that the police were to tell the defendant that [attorney] Buso said not to talk to the police; and (4) that [attorney] Buso would be at the station shortly." The SJC added that "the statements that attorney Buso had expressly requested to speak to the defendant and would be at the station 'shortly'—the second and fourth points—could be of critical importance in 'actualizing' the abstract promise of an attorney provided by the Miranda warning into concrete reality; there is a significant difference between being told that one can stop questioning and speak

to an appointed attorney, and hearing that the appointed attorney has already stated that he or she wants to meet and speak, and is in fact due to arrive at one's side 'shortly.'" In *McNulty,* the SJC stressed that although the police are not required "to deliver verbatim to a defendant the message given by his attorney," [FN194] an attorney's message that his or her client should not talk to the police or submit to a test or an examination bears directly on the right to counsel and must be passed on to the client. [FN195]

The Massachusetts rule is strict. The police must communicate the message relating to the right to counsel from counsel to the defendant without delay. [FN196] When the police memorialize a defendant's statement in such a way that it is not possible to tell whether certain statements were made by the defendant before or after his or her attorney contacts the police, all such statements must be suppressed. [FN197]

§ 4.3.20 Sixth Amendment Right to Counsel

There is general agreement between federal and state law with respect to the right to counsel under the Sixth Amendment and Article 12. Federal and state law are consistent in providing that the right to counsel attaches when adversary judicial proceedings begin. "The Sixth Amendment and art. 12 confer the right to the assistance and advice of counsel in order to protect the unaided layman at critical confrontations with the government after being charged with a specific crime. The right attaches at the time judicial proceedings are commenced—in this case, on the return of the indictment. Once the right has attached, the State has an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protections it affords." [FN198]

(a) ***Federal Standard***

The right to counsel under the Sixth Amendment arises or "attaches" once adversary judicial proceedings, such as an indictment or arraignment, are commenced against a person. [FN199]

(b) ***Massachusetts Standard***

Massachusetts does not require the observance of any stricter standards than are required by federal law. [FN200] The right to counsel attaches once the government commits itself to the prosecution of the defendant. This occurs at arraignment or once an indictment is returned, but not simply when a complaint or a warrant issues. [FN201]

§ 4.3.21 General Rule of Exclusion for Sixth Amendment Violations

There is a general rule of exclusion applied as a matter of both federal and state law to any statements that are deliberately elicited from the defendant by the police after the right to counsel attaches, unless the defendant has made a valid waiver of the right to counsel. [FN202]

§ 4.3.22 Waiver of the Sixth Amendment Right to Counsel

Under both federal law and Massachusetts law, the police may interview a defendant whose right to counsel has attached without the presence of counsel so long as they obtain a valid waiver of his or her Miranda rights. [FN203]

(a) ***Federal Standard***

In *Michigan v. Jackson,* [FN204] (later overruled, see below) the Supreme Court held that once a defendant has indicated he or she wants the assistance of counsel, further questioning by the police is prohibited unless the defendant initiates the conversation. Once the right to counsel has been effectively invoked, *Jackson* forbids a waiver without the presence of counsel. The court held: "Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis." [FN205]

Following *Jackson,* the Supreme Court decided *Patterson v. Illinois.* [FN206] After his indictment, Patterson asked police officers why another person had not also been indicted. After signing a Miranda waiver form, he made incriminating statements. There was a second interview by the prosecutor, who again reviewed the Miranda warnings and had Patterson sign another waiver form, after which Patterson made further incriminating statements. Patterson moved to suppress the statements on the ground that they were obtained in violation of his Sixth Amendment right to counsel. The Supreme Court denied Patterson's claim. Although the Court agreed that "[t]here can be no doubt that petitioner had the right

to have the assistance of counsel at his postindictment interviews with law enforcement authorities," [FN207] the Court noted that Patterson had never actually retained or accepted by appointment counsel to represent him. [FN208]

The Court distinguished *Michigan v. Jackson,* stating:

> Our decision in Jackson, however, turned on the fact that the accused 'ha [d] asked for the help of a lawyer' in dealing with the police." [FN209] The Court stated: "In the past, this Court has held that waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege. In other words, the accused must know what he is doing so that his choice is made with eyes open. In a case arising under the Fifth Amendment, we described this requirement as a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Whichever of these formulations is used, the key inquiry in a case such as this one must be: Was the accused, who waived his Sixth Amendment rights during postindictment questioning, made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel? In this case, we are convinced that by admonishing petitioner with the Miranda warnings, respondent has met this burden and that petitioner's waiver of his right to counsel at the questioning was valid. [FN210]

In *Montejo v. Louisiana,* [FN211] the Court abandoned the rule in *Jackson* because it was satisfied that the Miranda warnings and waiver regime provide an adequate basis for an accused to make a knowing and intelligent waiver of the Sixth Amendment right to counsel.

> So long as the accused is made aware of the dangers and disadvantages of self-representation during post-indictment questioning, by use of the Miranda warnings, his waiver of his Sixth Amendment right to counsel at such questioning is knowing and intelligent. [FN212]

In assessing the holding in *Montejo,* the question is whether the Sixth Amendment right to the assistance of counsel, like most other rights, can be effectively waived—even by an accused already represented by counsel, without the presence of counsel. According to the Supreme Court, the answer is "yes." [FN213]

(b) *Massachusetts Standard*

In *Commonwealth v. Tlasek,* [FN214] the Appeals Court, relying exclusively on federal law, followed the reasoning in *Monte jo* and held that following the defendant's arrest on drug charges and the appointment of counsel, his waiver of his Miranda rights while in custody was sufficient to serve as a waiver of his Sixth Amendment rights for purposes of questioning by a different police department about crimes related to those for which he had been arrested. [FN215] One significant difference between federal and state law with regard to the waiver of the defendant's right to counsel in this setting that was unnecessary to address in *Tlasek* is the burden of proof necessary to establish a valid waiver. Presumably, it is beyond a reasonable doubt under state law. See § 4.3.8, supra.

In *Commonwealth v. Anderson,* [FN216] the SJC faced a situation where the defendant was serving a lengthy prison sentence on other offenses in Maine. The Massachusetts authorities tried to interview the defendant while he was serving his Maine sentence, but when advised of his Miranda rights, the defendant asserted his right to counsel. The Massachusetts state police continued their investigation and eventually the defendant was indicted. A lawyer for the Committee for Public Counsel Services learned of the indictment. CPCS filed a notice with the Massachusetts Superior Court that it was assigning the defendant a lawyer subject to the approval of the court. The court approved the assignment. The defendant's lawyer also delivered a letter to the prosecutor informing him that the defendant had counsel and that no attempt should be made to secure any physical evidence or take any statements from the defendant without the express approval of counsel.

About one week after learning of the indictment but before he was aware that counsel had been appointed, the defendant told Maine authorities that he wanted to plead guilty and asked to speak to a representative of the District Attorney's Office. Several days later, but prior to the defendant's arraignment in Massachusetts, the Massachusetts state police and prosecutors traveled to Maine and interviewed the defendant about the murder. They did not notify his attorney. The police reminded the defendant that he had asserted the right to counsel during their last interview. The defendant said he wanted to talk about the murder. The police also showed the defendant the letter written by his attorney in which

he advised his client not to speak to the police, and that the attorney would be representing him when he returned to Massachusetts. The defendant said he wanted to go forward with the interview without presence of counsel. [FN217] The SJC concluded that whether the case is viewed as one in which the defendant initiated the conversation with the police or one in which he waived his right to counsel, the result would be the same—a valid waiver of the right to counsel. [FN218]

> If Anderson had been represented by counsel, he could still choose, on his own, to initiate contact with the police and validly waive his Sixth Amendment right to counsel for purposes of a postindictment interview. If he was unrepresented and had not requested counsel, he could execute a valid waiver of counsel for such an interview even if it was police initiated, so long as he was sufficiently advised of his constitutional right to counsel. In either event, the Miranda warnings Anderson received were adequate to apprise him of his Fifth and Sixth Amendment rights. A different case, at least under art. 12, would have been presented if Nagle had not fully informed Anderson of Ferg's entry into the case and Ferg's request that Anderson not be interviewed. A waiver obtained in such circumstances would not be knowing and intelligent within the meaning of art. 12. [FN219]

It is significant that in *Commonwealth v. Anderson,* supra, the SJC expressly declined to hold that under Article 12 of the Declaration of Rights, once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his or her right to counsel in the absence of the lawyer. [FN220]

Based on *Anderson,* there does not appear to be any reason in the SJC's jurisprudence under Article 12 why the court would not follow *Montejo* when the question is squarely presented.

§ 4.3.23 Massiah Doctrine

In *Massiah v. United States,* [FN221] decided two years before *Miranda,* the Supreme Court relied on the Sixth Amendment to hold for the first time that once adversary judicial proceedings have commenced in a criminal case the defendant has a right not to be questioned by an agent of the government without the presence of his or her counsel unless there has been a waiver of counsel. In *Massiah,* federal agents violated the defendant's Sixth Amendment right to counsel when, after indictment, they deliberately elicited statements from the defendant without the presence and approval of his counsel by employing the codefendant as an informant and secretly and deliberately recorded incriminating conversations between the pair and then introduced the statements at trial. [FN222] The remedy for such a violation is the suppression of such evidence from use at trial. [FN223] The basis for the Massiah doctrine is that after the commencement of formal adversary proceedings, the defendant has the right to rely on counsel as the medium between him and the state, and in the absence of a waiver of that right the government may not question him. [FN224]

Massachusetts follows the basic framework of the federal Massiah doctrine, [FN225] but it remains to be seen whether the SJC will adopt the reasoning in some of the most recent Supreme Court decisions that are discussed below.

§ 4.3.24 Scope of the Massiah Doctrine

(a) *Federal Standard*

In *McNeil v. Wisconsin,* [FN226] the Supreme Court explained that "[t]he Sixth Amendment right [to counsel] ... is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." As a result, the Court held that although the defendant's right to counsel had attached as to certain charged offenses, statements made by the defendant regarding other crimes that he was not charged with were admissible. [FN227] In *Texas v. Cobb,* [FN228] the Supreme Court clarified its holding in *McNeil* and held that at the time of the defendant's confession to the murder of a mother and child (which was preceded by the waiver of his Miranda rights), he had been indicted for the burglary, but not for the murder, and thus his Sixth Amendment right to counsel had not attached with respect to the murder even though it was an offense that was factually related to the burglary. [FN229]

(b) *Massachusetts Standard*

In *Texas v. Cobb,* supra, the Supreme Court noted that some courts, including Massachusetts, had incorrectly read the decision in *McNeil v. Wisconsin,* supra, and other cases, as support for the view that the Sixth Amendment right to counsel attached not only to offenses for which the defendant has been arraigned or indicted, but also to other offenses that are "inextricably intertwined" with or closely related to the offenses to which the Sixth Amendment right to counsel has attached. [FN230] In view of the tradition of applying Article 12's right to counsel expansively, and strong indications in existing Massachusetts right to counsel cases, it is likely that Massachusetts will continue to apply the "inextricably intertwined" test for determining whether questioning a defendant who was represented by counsel about other crimes violated the right to counsel with regard to the crimes that are the subject of the inquiry. [FN231]

§ 4.3.25 Massiah Is Not Limited to Police "Interrogation" of the Defendant

(a) ***Federal Standard***

In *Fellers v. United States,* [FN232] the defendant was indicted for conspiracy to distribute methamphetamine. The officers who arrested him at his home informed him that the indictment described his involvement with others and named four other persons. The defendant made a statement "that he knew the four people and had used methamphetamine during his association with them." [FN233] The defendant was transported to the jail and advised of his Miranda warnings. Fellers waived his rights, repeated what he said earlier at his home, and made additional inculpatory statements. The defendant was convicted. The Eighth Circuit agreed with the trial judge that the defendant's uncounseled statements were not used in violation of the Sixth Amendment because they were not obtained by police interrogation. [FN234] The Supreme Court reversed, explaining that for purposes of the Sixth Amendment, unlike the Miranda doctrine, the issue is not whether the police interrogated the defendant, but rather whether they "deliberately elicited" information from him. [FN235] "The officers, upon arriving at petitioner's house, informed him that their purpose in coming was to discuss his involvement in the distribution of methamphetamine and his association with certain charged co-conspirators. Because the ensuing discussion took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights," the statements should have been excluded at trial. [FN236]

(b) ***Massachusetts Standard***

Massachusetts does not require the observance of any stricter standards than those required by federal law.

§ 4.3.26 Whether Government Agents Deliberately Elicited Statements from Defendant

(a) ***Federal Standard***

The Supreme Court has not clearly defined when a relationship between an individual who elicits statements from a represented defendant and the government rises to the level of an agency relationship for purposes of the Massiah doctrine. [FN237] In *United States v. Henry*, [FN238] the Supreme Court found *Massiah* controlling precedent in a case in which a paid government informant, who told authorities that he was housed in the same section of the prison as the defendant who had been indicted for bank robbery, acted as an agent of the government and "deliberately elicited" statements from the defendant. The Court found this conduct was in violation of the Sixth Amendment right to counsel even though the federal authorities instructed the informant simply to listen for any statements made by the defendant and other prisoners and not to question them or initiate any conversations. The informant, in fact, did engage the defendant in some conversations and learned details of the bank robbery. The Supreme Court rejected the argument that it had not deliberately elicited statements from the defendant. [FN239] Under the circumstances the government "must have known" the informant would induce the defendant to make statements. [FN240] "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." [FN241] Whether the communications from the defendant are obtained as a result of a meeting arranged directly by the government or by a government agent is of no consequence. [FN242]

(b) ***Massachusetts Standard***

The SJC has held that the Massiah doctrine applies both to "overt interrogation by police officers and informants acting as government agents." [FN243] The question of agency is a question of law for the court. [FN244] In *Commonwealth v. Hilton,* [FN245] the SJC held that questioning by a court officer violated the defendant's Sixth Amendment right to counsel and rejected the Commonwealth's argument that the officer was not a government agent. [FN246] The court stated that the *Massiah* line of cases is concerned "not merely with the actions of police themselves, but with 'secret interrogation by investigatory techniques that are the equivalent of direct police investigation.'" [FN247] Also, in *Commonwealth v. Howard,* [FN248] the SJC held that a state-employed social worker was acting as an agent of the government in violation of the defendant's right to counsel when she questioned the defendant and forwarded her report to the prosecutor.

An informant who acts out of conscience but not in accordance with an agreement with the government (even though he may expect it will help his case), is not acting as an agent of the police for purposes of the Massiah doctrine. [FN249] "If nothing is asked or offered of the informant, he will not be considered as a government agent. However, if there is an agreement whereby the government will pay the informant for information, an agency relationship may exist." In *Commonwealth v. Reynolds,* [FN250] the SJC found that a cooperation agreement between the government and an informant was dispositive of an agency relationship. "The recognition of cooperation, promised by the Commonwealth to be given in another pending criminal matter was sufficient to make the witness the Commonwealth's agent." [FN251]

In *Commonwealth v. Murphy,* [FN252] the SJC faced the question whether statements made by the defendant while in state custody to a person who was a federal informant and who had entered into a cooperation agreement with federal prosecutors were deliberately elicited by state authorities in violation of the Massiah doctrine. The evidence indicated that a federal informant had an agreement with the federal prosecutor that if he provided "substantial assistance" to the federal government, the federal prosecutor had discretion to file a motion that would permit the federal sentencing judge to impose a sentence below the guideline range. At his plea hearing, the federal judge remarked that "any cooperation" by the informant will be considered by the court if the federal prosecutor makes the motion. Thereafter, by chance, the informant and the defendant came to be housed in the same facility. The informant did a favor for the defendant. Later, he had conversations with the defendant, who made incriminating statements about pending charges involving a murder. The informant, through his attorney, communicated these incriminating statements to the police, adding that he had not received any promises from the federal authorities. The state prosecutor stated that the informant had "no deal" with Massachusetts. However, she did bring the informant's cooperation to the attention of the federal prosecutor. The federal prosecutor later moved for a reduction in the informant's sentence. [FN253] The SJC concluded that whether the government has instructed its informant to specifically target an individual or not should not be determinative of the outcome under federal law. [FN254]

In *Murphy,* supra, the SJC held that if its interpretation of the Massiah doctrine was deemed to be too broad, it would reach the same result under Article 12 of the Massachusetts Declaration of Rights based on the court's longstanding practice of interpreting Article 12 "generously to recognize the fundamental right of a person accused of a crime to have the aid and advice of counsel." [FN255]

Having found the informant was acting as an agent of government, in *Murphy,* the SJC went on to determine whether the informant had deliberately elicited statements from the defendant. The SJC relied principally on the reasoning of *United States v. Henry,* supra, that the government cannot deliberately create a situation that is designed to induce a defendant to make incriminating statements. [FN256] Moreover, the defendant did not speak to the informant until the informant took steps to win him over. "This was not a case of merely passive listening where, by luck or happenstance, the informant acquired incriminating information about the defendant." [FN257]

§ 4.4 EXCLUSION OF EVIDENCE OBTAINED IN VIOLATION OF TELEPHONE RIGHTS

The defendant has a right under G.L. c. 276, § 33A to make a telephone call at the police station upon "formal arrest," not simply when he is subjected to custodial interrogation. [FN258]

When the evidence indicates that law enforcement officers intentionally withheld the telephone right in violation of G.L. c. 276, § 33A, the appropriate remedy is suppression of any evidence obtained as a result of the violation. [FN259] The defendant bears the burden of establishing an intentional violation of the statute. [FN260]

"There is no requirement that a defendant be permitted a private telephone call, and a defendant does not have an expectation of privacy in making such a telephone call." [FN261]

In *Commonwealth* v. *Haith,* [FN262] the SJC found it unnecessary to decide whether G.L. c. 276, § 33A applied to cases in which a person was held in another jurisdiction for transport back to Massachusetts. However, even assuming that it did, the SJC concluded that the defendant failed to satisfy his burden to establish that "law enforcement officers intentionally withheld the defendant's telephone right in order to coerce the defendant or to gain an advantage in the investigation."

§ 4.5 EXCLUSION OF CONFESSION OR STATEMENT BASED ON CONFRONTATION CLAUSE (BRUTON DOCTRINE)

As a general rule, the Commonwealth has the right to offer the prior statement of a defendant under the admission of a party opponent exception to the rule against hearsay. [FN263] If, however, such evidence is offered for the truth of the matter asserted, it is admissible only against that defendant and not against any codefendant. As to a codefendant, such evidence is inadmissible hearsay. In *Bruton v. United States,* [FN264] the U.S. Supreme Court recognized that "when the confession of one defendant inculpates the other in the commission of the crime, the risk that a jury will disregard a judge's instruction to consider the confession only against the confessing defendant and not the codefendant 'is so great, and the consequences of failure so vital to the [codefendant], that the practical and human limitations of the jury system cannot be ignored.'" [FN265] In such a case, the defendant's constitutional right of cross-examination under the Confrontation Clause of the Sixth Amendment is violated. [FN266] The appropriate remedy is to sever the trials unless the defendant who is implicated by the admission into evidence of a codefendant's statement waives the protections of the Confrontation Clause. [FN267]. If a valid *Bruton* claim is properly preserved and raised on appeal, the defendant is entitled to a new trial unless the error is found to be harmless. [FN268]

In *Richardson v. Marsh,* [FN269] the Supreme Court considered whether *Bruton* required the same result at a joint trial where all references to a defendant in the nontestifying codefendant's confession have been redacted, but other properly admitted evidence linked the defendant to the confession. In *Richardson,* the Court indicated that *Bruton* established a "narrow exception" to the presumption that jurors follow instructions. Ultimately, the Court concluded that *Bruton* did not apply because a jury could be presumed to follow a limiting instruction to consider the confession of a nontestifying codefendant only against its maker where the confession made no reference at all to the defendant at their joint trial. More recently, in *Gray v. Maryland,* [FN270] the Supreme Court held that a redaction or substitution of a defendant's name that nevertheless leaves the confession "pointing] directly" or "referring] directly" to the defendant is within the scope of *Bruton.*

If the out-of-court statement is not offered for its truth, the codefendant's right to confrontation is not affected. [FN271]

The Bruton doctrine has no application to the admission of out-of-court statements of the joint venturers made during the course of the "cooperative effort and in furtherance of its goal." [FN272] "This exception does not apply after the criminal enterprise has ended, but does apply during the period when the joint venturers are acting to conceal the crime that formed the basis of the enterprise." [FN273] Also, *Bruton* has no application if the codefendant testifies and is subject to cross-examination. [FN274]

The SJC has followed the framework established by the U.S. Supreme Court in this area, [FN275] and has not indicated that Article 12 provides greater protections for defendants than the corresponding safeguards under the Bruton doctrine, although the issue has not yet been specifically addressed. [FN276]

One area where the jurisprudence of the SJC may diverge from what the U.S. Supreme Court requires under the Sixth Amendment is with regard to the doctrine of "contextual incrimination:" According to the SJC, "[i]f the contextual incrimination from the use of a codefendant's admission is strong enough, it can—and here it did—undermine the effect of a judge's limiting instruction such that the use of the coerced admission becomes inherently unfair." [FN277]

§ 4.6 PROBATION VIOLATION PROCEEDINGS

In *Commonwealth v. Simon,* [FN278] the Appeals Court concluded that in the absence of police harassment or conduct designed specifically to obtain a statement to use in probation revocation proceeding, the **exclusionary rule** will not be applied at a probation revocation hearing. [FN279]

> Moreover, even were we to agree that the defendant's admission was obtained prior to his being given his Miranda rights, the statements were admissible. Following the rationale established in *United States* v. *Calandra,* 414 U.S. 338 (1974), and in certain other Federal cases dealing with the use of evidence obtained in violation of the Fourth Amendment, the Supreme Judicial Court, in *Commonwealth* v. *Vincente,* 405 Mass. 278, 279-281 (1989), ruled that, even though certain statements made by a defendant were properly suppressed at trial as having been obtained in violation of the defendant's Miranda rights, those same inculpatory statements, perhaps subject to certain considerations not present here, might properly provide the basis for a probation surrender. Where, as here, the primary focus of the police inquiry, including the arrest of the defendant and Crosby for reasons of protective custody, and the ensuing questioning, sobriety tests, and ultimate charge were to prosecute the incident of driving under the influence, the exclusion at a probation revocation hearing of the defendant's statement would be unlikely to serve any deterrent purpose. [FN280]

§ 4.7 CIVIL PROCEEDINGS

Statements obtained by the police in violation of the Miranda doctrine but which otherwise were obtained voluntarily are admissible in civil proceedings. [FN281]

FNa. HON. PETER W. **AGNES**, JR. was appointed as an Associate Justice of the Appeals Court in September, 2011. Prior to that, he served as an Associate Justice of the Superior Court (2000-2011) and as the First Justice of the Charlestown District Court (1991-2000). Judge **Agnes** is an adjunct professor of law at the Massachusetts School of Law. He has lectured often for MCLE, the Judicial Institute of the Trial Court, and the Flaschner Judicial Institute.

FN1. *See Commonwealth* v. *Lora,* 451 Mass. 425, 438-39 (2008) ("The exclusion ary rule is typically used in cases involving violations of the Fourth, Fifth, and Sixth Amendments to the United States Constitution, and their counterparts in the Massachusetts Declaration of Rights.").

FN2. *Commonwealth* v. *Lora,* 451 Mass. 425, 438 (2008) (quoting *United States* v. *Calandra,* 414 U.S. 338, 347, 348 (1974) ("The suppression of evidence under the **exclusionary rule** is a 'judicially created remedy,' whose 'prime purpose is to deter future unlawful police conduct.'")); *Commonwealth* v. *Ford,* 394 Mass. 421, 426 (1985) (creating **exclusionary rule** as remedy for violations of Article 14 of Declaration of Rights). *Accord Davis v. United States,* 131 S. Ct. 2419 (2011) (Court declines to apply **exclusionary rule** when police acted on basis of binding precedent subsequently overruled; "[r]eal deterrent value is a necessary condition for exclusion, but it is not a sufficient one. The analysis must also account for the substantial social costs generated by the rule.") (quotation omitted). *See Brown* v. *Illinois,* 422 U.S. 590, 609 (1975) (Powell, J., concurring in part) ("The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the **exclusionary rule** no longer justifies its cost."); *Commonwealth* v. *Benoit,* 382 Mass. 210, 216 (1981) (explaining that attenuation of taint exception to "fruit of poisonous tree" doctrine "is justified when the deterrence rationale is outweighed by the competing societal interest in convicting the guilty"); *City of Boston* v. *Ditson,* 4 Mass. App. Ct. 323, 331 (1976) (declining to apply **exclusionary rule** in civil proceeding based on cost-benefit analysis). *See also United States v. Leon,* 468 U.S. 897, 905 (1984) (explaining that **exclusionary rule** is not itself part of Fourth Amendment's guarantee).

FN3. *See Kansas* v. *Ventris,* 556 U.S. 586, 590-91 (2009) (explaining that **exclusionary rule** is not mandated by Fourth Amendment and is applied selectively as a result of a cost-benefit analysis); *Commonwealth v. Upton,* 394 Mass. 363, 364-65 (1985) (explaining that historically the exclusion of evidence was not a remedy for an illegal search under Massachusetts law). *See also Commonwealth v. Perito, All* Mass. 674, 683 ((1994) (citing *Massachusetts* v. *Sheppard,* 468

U.S. 981, 990-91 (1984) (**exclusionary rule** not intended to punish errors of magistrates and judges but to punish police in order to deter future violations)); *Commonwealth v. Carr,* 76 Mass. App. Ct. 41, 47 (2009), and cases cited (declining to apply **exclusionary rule** to private searches; "[i]t cannot be gainsaid that Boston College is a private actor not subject to the constraints of the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights"). In *United States v. Leon,* 468 U.S. 897 (1984), the court created exception to **exclusionary rule** when officers reasonably rely on facially valid search warrant, so long as it was supported by probable cause or officers executing it reasonably believed that it was). In *Stone v. Powell,* 428 U.S. 465, 484, 486 (1976), the Court indicated that the purpose of the **exclusionary rule** is to "deter future unlawful police conduct," not to "redress the injury to the privacy of the victim of the search or seizure."

FN4. *Commonwealth v. Brandwein,* 435 Mass. 623, 631 (2002) (**exclusionary rule** had no application to conduct of nurse who obtained gun from defendant and turned it over to police even if she violated her professional duties to keep patient information confidential).

FN5. *Id.* at 632, and cases cited.

FN6. George C. Thomas and Richard A. Leo, *Confessions of Guilt,* 44 (Oxford Univ. Press 2012).

FN7. *Id.* at 47

FN8. George C. Thomas III and Richard A. Leo, *Confessions of Guilt,* 74 (Oxford Univ. Press 2012).

FN9. *Commonwealth v. Allen,* 395 Mass. 448, 456 (1985) (citations and quotations omitted).

FN10. *Maryland* v. *Shatter,* _ U.S. _, 120 S. Ct. 1213, 1220 (2010) (citations and quotations omitted). *Compare Commonwealth v. Gomes,* 408 Mass. 43, 46 (2008) (in connection with application of **exclusionary rule** under Article 14, court observes that "the decision whether to exclude such evidence should properly turn on: (1) the degree to which the violation undermined the prin ciples underlying the governing rule of law, and (2) the extent to which ex clusion will tend to deter such violations from being repeated in the future") (citations and quotations omitted).

FN11. *See, e.g., Hopt* v. *United States,* 110 U.S. 574, 584-87 (1884).

FN12. *See, e.g., Oregon* v. *Elstad,* 470 U.S. 298, 306-07 (1985); *Michigan* v. *Tucker, All* U.S. 433 (1974); *Carney* v. *City of Springfield,* 403 Mass. 604, 607 n.5 (1988).

In *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), the Supreme Court held that when a public employee is ordered to answer questions about matters that could lead to self-incrimination or risk the loss of his job, it involved the same sort of compulsion that the *Miranda* Court found was inherent in custodial interrogation. *See Commonwealth v. Dormandy,* 423 Mass. 190 (1996). *See generally* Mass. Guide Evid. § 511 (Flaschner, ed. 2012). In *Carney v. City of Springfield,* 403 Mass. 604, 609-10 (1988), the SJC held that "[w]here public employers compel answers in an investigation, however, the employer, at the time of the interrogation, must specify to the employee the precise repercussions (i.e., suspension, discharge, or the exact form of discipline) that will result if the employee fails to respond. Where, as here, economic sanctions threaten an individual's livelihood, a general warning that the employee may be subject to "departmental disciplinary proceedings" is insufficient. Moreover, an employee's awareness that other employees have been punished in similar circumstances does not render recitation of the warning unnecessary; the burden to inform remains on the employer at each appropriate stage of the questioning" (citation, quotation, and footnote omitted). *Contrast Commonwealth v. Harvey,* 397 Mass. 351, 356-57 (1986) ("[T]he fact that there existed the possibility of adverse consequences from the defendant's failure to cooperate does not demonstrate that the defendant was "compelled" to incriminate himself. The defendant has not argued that there was any overt threat or direct pressure from his superiors

that coerced his choice. He was not told that he would be discharged if he refused to cooperate on grounds of self-incrimination.").

Article 12 is interpreted more broadly than the Fifth and Fourteenth Amendments in that the Massachusetts Constitution requires that a person is entitled to transactional immunity, as opposed to mere "use" or "derivative use" immunity, before he can be compelled to answer questions by a government officer which may incriminate him or expose him to discharge or discipline as a public employee. *See Carney,* supra (transactional immunity required to compel private citizen to answer civil investigative inquiries); *Cabot v. Corcoran,* 332 Mass. 44, 51-52 (1954) (transactional immunity sufficient to compel testimony before special commission on organized crime); *Emery's Case,* 107 Mass. 172, 185 (1871) (Article 12 transactional immunity applies in legislative hearings). General Laws c. 233, §§ 20C-20I vests the power to grant immunity to grand jury witnesses for certain enumerated crimes in a justice of the SJC. *See Grand Jurors for Middlesex County for the Year 1974* v. *Wallace,* 369 Mass. 876, 879 (1976). A Superior Court judge may also grant immunity to a witness in a criminal trial under narrow circumstances. G.L. c. 233, § 20F. Various other statutes expressly confer immunity. *See Attorney Gen.* v. *Colleton,* 387 Mass. 790, 797 n.8 (1982) (collecting statutes).

FN13. 384 U.S. 366, 476 (1966).

FN14. *See Commonwealth* v. *Hine,* 394 Mass. 564, 569 (1984) (citing *Miranda v. Arizona,* 384 U.S. 436, 479 (1966)).

FN15. *Dickerson v. United States,* 530 U.S. 428 (2000).

FN16. *See Elstad,* 470 U.S. at 306 ("The Miranda **exclusionary rule**, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."); *Commonwealth* v. *Mahnke,* 368 Mass. 662, 696 (1975) (citations, quotations, and footnote omitted) ("The **exclusionary rules** fashioned in Miranda and like cases deter impermissible police conduct by excluding from trial any evidence which was improperly obtained.").

FN17. *See, e.g., Commonwealth v. Clarke,* 461 Mass. 336, 346 n.8 (2012) ("Where we have deemed Federal law inadequate to protect rights guaranteed under art. 12, we have not shied away from the promulgation of separate State law rules as "adjuncts to the Miranda rule"); *Commonwealth v. McNulty,* 458 Mass. 305, 315-16 (2010) (police have duty not only to inform defendant that his attorney is trying to reach him, but to communicate advice about his rights); *see* Symposium, "The Law of American State Constitutions; Criminal Proce dure and the Massachusetts Constitution," 45 *New Eng. L. Rev.* 815 (2011)).

FN18. *See generally* Robert J. Cordy, "Criminal Procedure and the Massachusetts Constitution," 45 *New Eng. L Rev.* 815 (2011).

FN19. This phrase "describes the fact that State judges in numerous cases have interpreted their state constitutional rights provisions to provide more protection than the national minimum standard guaranteed by the federal constitution." Robert F. Williams, *The Law of American State Constitutions* 114 (2009). "Since the 1970's, our court, like most other state supreme courts, has exhibited a greater willingness to look to our state constitution when determining individual rights and liberties." *See* Robert K. Fitzpatrick, "Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights," 79 *N. Y. U. L Rev.* 1833 (2004).

FN20. *See* Scott L. Kafker, "America's Other Constitutions: Book Review of the Law of American State Constitutions," 45 *New Eng. L. Rev.* 835, 837-41 (2011).

FN21. *See, e.g., Printz v. United States,* 521 U.S. 898, 919 (1997) (Supreme Court relies on principles of federalism in striking down legislation that required state police to perform background checks on potential gun owners); *id.* at 919 (Court notes that establishment of dual sovereignties was "reflected throughout the Constitution's text," and had vested in the states "'a residuary and inviolable sovereignty'" (quoting *The Federalist No. 39* (James Madison)); *United States*

v. Lopez, 514 U.S. 549 (1995) (Court determines legislation criminalizing local conduct was beyond powers of Congress under Commerce Clause and recognized importance of the states' authority to "defin[e] and enforc[e] the criminal law"); *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991) (Court notes that rule requiring Congress to speak clearly in order to preempt state law "acknowledges] that the States retain substantial sovereign powers under our constitutional scheme"); *see also Virginia v. Reinhard,* 568 F.3d 110, 115 (4th Cir. 2009) ("State sovereign immunity is a bedrock principle of 'Our Federalism."') (citation omitted).

FN22. U.S. Const. Art. VI.

FN23. *See Arizona v. Evans,* 541 U.S. 1, 8 (1995) ("State courts, in appropriate cases, are not merely free to-they are bound to-interpret the United States Constitution.").

FN24. *Id.* at 8-9 (citing *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821)).

FN25. *Minnesota v. Nafl Tea Co.,* 309 U.S. 551, 557 (1940); *accord California v. Greenwood,* 486 U.S. 35, 43 (1988) ("Individual states may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."); *California v. Ramos,* 463 U.S. 992, 1013-14 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."); *Prune Yard Shopping Ctr. v. Robins,* 447 U.S. 74, 81 (1980) (noting that each state has "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution").

FN26. *Goodridge* v. *Dep't of Pub. Health,* 440 Mass. 309, 328 (2003) (quoting *Ari zona v. Evans,* 514 U.S. 1, 8 (1995)).

FN27. *Commonwealth* v. *Gonsalves,* 429 Mass. 658, 667-68 (1999).

FN28. 285 U.S. 262, 311 (1932). "It is one of the happy incidents of the federal sys tem that a single courageous State may, if its citizens choose, serve as a la boratory; and try novel social and economic experiments without risk to the rest of the country." *Id.,* 285 U.S. 262, 287 (1932); *Arizona v. Evans,* supra, 541 U.S. at 9. *Accord California v. Greenwood,* 486 U.S. 35, 43 (1988) (Su preme Court held that Fourth Amendment to U.S. Constitution does not pro vide a person with reasonable expectation of privacy in trash contained in opaque plastic bags and placed at curbside of one's home for collection; Court expressly acknowledged that state courts "may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution").

FN29. *State v. Hempele,* 120 N.J. 182, 196, 576 A.2d 793, 800 (1990); *see also Pruneyard Shopping Ctr. v. Robins, AA1* U.S. 74, 81 (1980) (Supreme Court explains that its role is not to "limit the authority of the State ... to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution").

FN30. *Commonwealth v. Gonsalves,* 429 Mass. 658, 663 (1999).

FN31. 324 U.S. 117, 125 (1945) (citations omitted).

FN32. U.S. Const. Art. Ill, cl. 2.

FN33. *Herb v. Pitcairn,* 324 U.S. at 125-26. The state law ground must not only be independent, but adequate to support the result. This means that the state law ground must itself satisfy the requirements of the federal constitution. *See, e.g., Doan v. Brigano,* 237 F.2d 722, 727-28 (6th Cir. 2001), *overruled on other grounds, Wiggins v. Smith,* 539 U.S. 510 (2003) (Court concludes that Ohio Evid. R. 606(B), though independent ground for the state court deci sion, could not serve as adequate basis for state court's decision because it violated U.S. Constitution by preventing defendant from litigating

issue of ef fect of extraneous influence jury; "[s]tate law obviously is not adequate to support the result when there is a claim that the state law itself violates the United States Constitution").

FN34. *Arizona v. Evans,* supra, 541 U.S. at 9 n.4.

FN35. 463 U.S. 1032, 1041 (1983).

FN36. In *Bloyer v. Peters,* 5 F.3d 1093, 1099 n.5 (7th Cir. 1993), the Seventh Circuit explained that in *Michigan v. Long,* 463 U.S. 1032 (1983), the Supreme Court was confronted with a state supreme court decision that cited both the Michigan state constitution's and the federal Constitution's search and seizure provisions. The defendant argued that the Michigan constitutional provision provided an adequate and independent state law ground and thus the decision could not be reviewed by the U.S. Supreme Court. Specifically, the defendant argued that Michigan interpreted its constitution more broadly than the federal Constitution had been interpreted. *Id.* at 1038. It was unclear whether the court in *Long* had relied upon the state or federal Constitution. Therefore, the court concluded that it would presume that the state court relied on federal grounds. However, the court also held that, had the state court clearly relied upon the state constitution, the decision would not be open to federal review: "It is fundamental that state courts be left free and unfettered ... to interpret their state constitutions." *Id.* at 1041.

FN37. *Id.* at 1041. Whether a state court decision plainly rests on federal law or state law is not always answered unanimously by the appellate court. *See Redgrave v. Boston Symphony Orchestra, Inc.,* 855 F.2d 888 (1st Cir. 1988) (majority and dissent disagree over basis for decision by Massachusetts SJC).

FN38. *Id.*

FN39. *See, e.g., Commonwealth* v. *Doe,* 405 Mass. 676, 678 (1989) (in holding that under Article 12 of Declaration of Rights a custodian of corporate records may invoke privilege against self-incrimination in response to summons for records, SJC added that "[o]ur decision is based on the Massachusetts state constitution," and cited *Michigan v. Long,* supra).

FN40. *Michigan v. Long,* supra at 1041. *See, e.g., Commonwealth v. Clarke,* 461 Mass. 336 (2012). In such a case, if the state court's interpretation of the U.S. Constitution is in conflict with an authoritative decision by the U.S. Supreme Court or a future decision by the U.S. Supreme Court, the state court's view of the meaning of the U.S. Constitution lacks any authority or precedential value. Following the decision in *Michigan v. Long,* the Supreme Court explained that if the state court decision appears to be based on an interweaving of state and federal law and lacks a "plain statement" that it is based on state law, the Supreme Court will review it. *See Illinois v. Rodiguez; see also Pennsylvania v. Lebron,* 518 U.S. 938 (1996). *Compare Coleman v. Thompson,* 501 U.S. 722, 729 (1991) (Supreme Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment"), *with California v. Carney, All* U.S. 386, 389 n.l (1985) (mere references to state constitution and state case law does not establish that state court decision is based on adequate and independent state ground). *E.g., New York v. Class,* 475 U.S. 106, 109-10 (1986) ("The opinion of the New York Court of Appeals mentions the New York Constitution but once, and then only in direct conjunction with the United States Constitution. The opinion below makes use of both federal and New York cases in its analysis, generally citing both for the same proposition. The opinion lacks the requisite 'plain statement' that it rests on state grounds."); *Oliver v. United States,* 466 U.S. 170, 175 (1984) ("We do not read that decision, however, as excluding the evidence because the search violated the State Constitution. The Maine Supreme Judicial Court referred only to the Fourth Amendment of the Federal Constitution and purported to apply the Katz test; the prior state cases that the court cited also construed the Federal Constitution. In any case, the Maine Supreme Judicial Court did not articulate an independent state ground with the clarity required by *Michigan* v. *Long,* 463 U.S. 1032 (1983).").

Some states have attempted to satisfy the "plain statement" rule from *Michigan* v. *Long,* 463 U.S. 1032, 1041 (1983), by including in their decisions general disclaimers that are intended to apply to future decisions of that court. *See, e.g., State* v. *Ball,* 124 N.H. 226, 233, 471 A.2d 347, 352 (1983) ("We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions."); *State* v. *Kennedy,* 295 Ore. 260, 267, 666 P.2d 1316, 1321 (1983) ("Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines.").

FN41. *See, e.g., Kahn* v. *Griffin,* 701 N.W.2d 815, 827 (2005) (quoting G. Alan Tarr, "The New Judicial Federalism in Perspective," 72 *Notre Dame L Rev.* 1097, 1118 (1997)); *see also* W. Brennan, "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights," 61 *N.Y.U. L Rev.* 535, 547#8 (1986) (noting "an unmistakable trend in the Court to read the guarantees of individual liberty restrictively, which means that the content of the rights applied to the states is likewise diminished;" and that "the Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach").

FN42. *State v. Ochoa,* 792 N.W2d 260, 264 (Hawaii 2010) (citations and footnotes omitted) ("We conclude that a parolee may not be subjected to broad, war rantless searches by a general law enforcement officer without any particular ized suspicion or limitations to the scope of the search."). In *Ochoa,* the Ha waii Supreme Court rejected the holding in *Sampson v. California,* 547 U.S. 843 (2007), where the Supreme Court upheld the warrantless and suspicionless search of a parolee by a police officer. *See generally* G. Alan Tarr, *Under standing State Constitutions,* 177-78 (1988).

FN43. For an excellent overview of the new judicial federalism in the law of crimi nal procedure in Massachusetts, see Robert J. Cordy, "Criminal Procedure and the Massachusetts Constitution," 45 *New Eng. L Rev.* 815 (2011).

FN44. *West* v. *Thompson Newspapers,* 872 P.2d 999, 1005-06 (1994) (citations and footnotes omitted); *see also* Joseph A. Grasso, Jr., "'John Adams Made Me Do It': Judicial Federalism, Judicial Chauvinism, and Article 14 of the Mas sachusetts Declaration of Rights," 77 *Miss. L.J.* 315 (2007). In Illinois, the Supreme Court follows what is termed the "limited lockstep approach." Under this approach, Illinois courts will "look first to the federal constitution, and only if federal law provides no relief turn to the state constitution to determine whether a specific criterion—for example, unique state history or state expe rience—justifies departure from federal precedent." *People v. Caballes,* 221 I11.2d 282, 309-10 (2006) (quoting L. Friedman, "The Constitutional Value of Dialogue and the New Judicial Federalism," 28 *Hastings Const. L.Q.* 93, 104 (2000)). This approach is also referred to as the "interstitial approach." "Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state con stitutional claim is not reached. If it is not, then the state constitution is exam ined. A state court adopting this approach may diverge from federal prece dent for three reasons: a flawed federal analysis, structural differences be tween state and federal government, or distinctive state characteristics." *State v. Gomez,* 122 N.M. 777, 783, 932 E.2d 1, 7 (1997). Iowa follows the "dual sovereignty" approach in which "[a] Fourth Amendment opinion of the Unit ed States Supreme Court, the Eighth Circuit Court of Appeals, or any other federal court is no more binding upon our interpretation of article I, section 8 of the Iowa Constitution than is a case decided by another state supreme court under a search and seizure provision of that state's constitution. The degree to which we follow United States Supreme Court precedent, or any other precedent, depends solely upon its ability to persuade us with the rea soning of the decision. When both federal and state constitutional claims are raised, we may, in our discretion, choose to consider either claim first in or der to dispose of the case, or we may consider both claims simultaneously." *State v. Ochoa,* supra, 792 N.W.2d at 267. Closely related to this approach is what has been termed the "primacy approach," under which "the state court undertakes an independent [state] constitutional analysis, using all the tools appropriate to the task, and relying upon federal decisional law only for guidance." *See People* v. *Caballes,* 221 I11.2d 282, 308-09 (2006) (citation omitted).

FN45. The SJC has not adopted a consistent approach to the determination of whether state or federal law should supply the rule of decision. For an excel lent analysis of the varying approaches taken by the SJC to decision making in the area of search and seizure on the basis of state law as opposed to federal law see Joseph A. Grasso, Jr., "'John Adams Made Me Do It': Judicial Feder alism, Judicial Chauvinism, and Article 14 of the Massachusetts Declaration of Rights," 77 *Miss. L.J.* 315, 334#3 (2007). *See, e.g., Commonwealth* v. *Clarke,* 461 Mass. 336 (2012) (example of "dual sovereignty" approach).

FN46. According to Professor James Garner, this is the most common approach taken by state courts. James Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* 14 (University of Chicago Press 2005). Professor Garner also believes this approach is justified because "state constitutions are not like the U.S. Constitution: they have a different role to play in our federalist scheme of government and, accordingly, demand a different interpretive approach than we would employ in respect to the U.S. Constitution. Gardner correctly notes that the interpretive factors that the proponents of independent state constitutional analysis favor are suspect." Lawrence Friedman, "Path Dependence and the External Constraints on Independent Constitutionalism," 115 *Penn. State L Rev.* 783, 790 (2011) *("Path Dependence").* Nonetheless, even those who question the validity of state constitutional rules based on a "state's unique character and values," recognize a role for independent state constitutionalism. "Indeed, every individual rights case in which a state court resolves the balance of competing interests under a given doctrinal framework differently than would a federal court makes that state court decision a thread in the discussion about how we should be valuing such interests as privacy, autonomy, free expression, equality, and due process in our constitutional democracy. Each of these state constitutional individual rights decisions, moreover, could serve as an entrance by a state court into a dialogue with the U.S. Supreme Court about these issues and, perhaps, influence a constitutional discourse that includes not just the nine justices in Washington, but also their colleagues in other federal and state courts, as well as scholars and jurists here and abroad." *Path Dependence,* supra at 835.

FN47. *See Commonwealth v. Clarke,* 461 Mass. 336 (2012).

FN48. *Kansas v. Ventris,* 556 U.S. 586, 129 S. Ct. 1841 (2009) (citing *New Jersey v. Portash,* 440 U.S. 450, 458-59 (1979)); *Carney* v. *City of Springfield,* 403 Mass. 604, 607 n.5 (1988).

FN49. *New Jersey v. Portash,* 440 U.S. 450, 459 (1979); *Jackson v. Denno,* 378 U.S. 368, 376 (1964); *Commonwealth* v. *Durand,* 457 Mass. 574, 591-92 (2010); *accord Mincey* v. *Arizona,* 437 U.S. 385, 398 (1978); *see also United States* v. *Carrasco,* 540 F.3d 43, 52 n.15 (1st Cir. 2008); *Commonwealth* v. *Allen,* 395 Mass. 448, 454 (1985); *Commonwealth* v. *Harris,* 371 Mass. 462, 467-68 (1976), and cases cited; *Commonwealth v. Mahnke,* 368 Mass. 662, 679 (1968), and cases cited; *Commonwealth v. Meehan,* 377 Mass. 522, 568-69 (1979). The SJC observed in *Commonwealth* v. *Mahnke,* 368 Mass. 662, 680 (1975), that "[t]he use of coerced confessions ... is forbidden because the method used to extract them offends constitutional principles and because declarations procured by torture or other coercive means are not premises from which a civilized forum will infer guilt." Likewise, in *Jackson v. Denno,* 378 U.S. 368, 385-86 (1964), Justice White observed that "[i]t is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will, and because of 'the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves"' (quotation omitted). *See also Breithaup v. Abram,* 352 U.S. 432, 435 (1957) (evidence obtained by means of government conduct that "shocks the conscience" of the court cannot be used to support a conviction).

In *Durand,* the SJC left open the question whether under state law, the admission into evidence of an involuntary confession is a structural error that requires a new trial. The SJC noted that in *Arizona* v. *Fulminante,* 499 U.S. 279,

306-12 (1991), "five Justices of the Supreme Court held that admission in evidence of a coerced confession (or involuntary statement) is a 'trial error' subject to harmless error analysis rather than a 'structural defect' in the trial mechanism—we do not now need to resolve whether the Massachusetts Constitution requires a similar standard of review or whether the structural error standard should apply. Here, the introduction of the defendant's statement ... [concerning the toy shark alleged to have been thrown at the child victim] gave rise to a substantial risk of a miscarriage of justice." *Id.* at 592 (citing *Commonwealth* v. *Randolph,* 438 Mass. 290, 294-95, 297-98 (2002)).

FN50. *Commonwealth v. Dwyer,* 448 Mass. 122, 132 (2006); *accord Mincey v. Ari zona,* 437 U.S. 385, 398 (1978) (police questioned defendant in intensivecare unit of hospital while he was in severe pain and undergoing treatment for life-threatening gunshot wounds; Supreme Court held that "[a]ny criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law") (emphasis in original).

FN51. *Stein* v. *New York,* 346 U.S. 156, 192 (1953); *see also Smith* v. *United States,* 348 U.S. 147, 153 (1954) (acknowledging that courts have long history of experience with confessions that may be voluntary but nonetheless false); *Jarrell v. Balkcom,* 735 F.2d 1242, 1252 (11th Cir. 1982) ("Evidence exclud ed under fifth amendment Miranda claims and the fourth amendment exclu sionary rule may very well be reliable and probative; however, an involuntary confession is inherently unreliable.").

FN52. *Id.* at 389-90 (quotation omitted); *accord Commonwealth v. Mandile,* 397 Mass. 410, 413 (1986) (explaining "totality of the circumstances" test used to measure voluntariness). "Voluntariness turns on the 'totality of the circumstances,' including promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of Miranda warnings." *Commonwealth v. Mandile,* 397 Mass. 410,413 (1986).

FN53. 479 U.S. 157 (1986).

FN54. *Id.* at 164. The *Connelly* case represents a shift in federal jurisprudence away from the common law. *See United States v. Boskic,* 545 F.3d 69, 78 (1st Cir. 2008); *see also LeBeau v. Roden,* 806 F. Supp. 2d 384 (D. Mass. 2011).

FN55. *Id.* at 166.

FN56. *Id.* at 170 (quoting *Oregon v. Elstad,* 476 U.S. 298, 305 (1985)).

FN57. *Arizona v. Fulminante,* 499 U.S. 279, 285 (1991). *Contra State v. Madsen,* 813 N.W.2d 714, 724-26 (Iowa 2012).

FN58. *See Commonwealth v. Mahnke,* 368 Mass. 662, 680-81 (1975), *cert, denied,* 425 U.S. 995 (1976).

FN59. *See Commonwealth* v. *Sheriff,* 425 Mass. 186,193-94 (1997), and cases cited.

FN60. *Commonwealth* v. *Allen,* 395 Mass. 448, 456 (1985). "The rationale for excluding statements made to law enforcement officials by someone who by dint of physical or mental impediments is incapable of withholding the information conveyed, can without difficulty be articulated in terms of the unreliability of the statement, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion. Those concerns are no less valid when the involuntary statement is made to a private citizen rather than a law enforcement official." *Commonwealth v. Allen,* 395 Mass. 448, 456 (1985) (citations and quotations omitted); *see also Commonwealth v. Vasquez,* 387 Mass. 96, 100 n.8 (1982) ("Courts do exclude statements by individuals suffering from mental illness if the disease rendered the individual incapable of understanding the meaning and effect of a confession or caused the individual to be indifferent to self-protection.").

FN61. *Commonwealth v. Libran,* 405 Mass. 634, 639 (1989). It is important to recognize that "[w]hether the defendant's statements were the product of a rational intellect is a question of fact." *Commonwealth v. Allen,* 395 Mass, at 457. It should be noted that a person may be incapable of validly waiving his Miranda rights due to an incapacity such as mental illness, but nonetheless make statements that will be regarded as voluntary. *See Commonwealth v. Hilton,* 443 Mass. 597, 608 (2005).

FN62. *See Commonwealth* v. *Raymond,* 424 Mass. 382, 395 n.ll. *Contra State* v. *Madsen,* 813 N.W.2d 715, 724-26 (1997) (Iowa 2012) (if but for a promise of leniency a confession would not have been obtained it must be excluded).

FN63. *Commonwealth v. Crawford,* 429 Mass. 60, 65 (1999); *Commonwealth v. Tavares,,* 385 Mass. 140, 151-52, *cert, denied,* 457 U.S. 1137 (1982).

FN64. *Lego v. Twomey,* 404 U.S. 477, 489 (1972).

FN65. *See Jackson v. Denno,* 378 U.S. 368, 392-93 (1968); *see United States v. Campusano,* 947 F.2d 1 (1st Cir. 1991).

FN66. At one time, Massachusetts law recognized a distinction between a confession and an admission, and required observance of the humane practice only with regard to confessions. "This right, however, exists only with reference to a confession, as that word is accurately used in the criminal law; that is, to an acknowledgment by the accused in express words of the truth of the guilty fact charged. It does not exist in case of mere incriminating admissions or declarations of subordinate or independent facts, which may tend in connection with other facts and circumstances to prove the defendant's guilt, but do not constitute an acknowledgment that he is guilty of the precise crime with which he is charged." *Commonwealth* v. *Haywood,* 247 Mass. 16, 18 (1923). In *Commonwealth v. Tavares,* 385 Mass. 140, 150, *cert, denied,* 457 U.S. 1137 (1982), the SJC extended the applicability of the humane practice to admissions. Currently, the human practice is observed as to any statement offered by the Commonwealth when there is a live issue as to the voluntariness of the statement.

FN67. *See Commonwealth v. Anderson,* 425 Mass. 685, 692 (1997) ("Although there was conflicting testimony on the voluntariness of his confession by the defendant himself during voir dire, this evidence was never before the jury. Raising the issue of voluntariness before the trial and invoking the right to a voir dire proceeding alone does not give rise to the obligation of the judge to give the "humane practice" instructions sua sponte.").

FN68. *Commonwealth v. Cryer,* 426 Mass. 562, 571 (1998). The humane practice rule stems from the opinion by Chief Justice Shaw in *Commonwealth v. Morey,* 59 Mass. (1 Gray) 461 (1854). *See also Commonwealth v. Grenier,* 415 Mass. 680, 687 (1993); *Commonwealth v. Parham,* 390 Mass. 833, 841 (1984); *Commonwealth v. Tavares,* 385 Mass. 140,152 (1982).

FN69. *See Commonwealth v. Harris,* 371 Mass. 462, 469 (1976).

FN70. *Compare Commonwealth v. Adams,* 416 Mass. 55, 60-61 (1993) (finding reasonable question of voluntariness for purposes of humane practice rule when defendant presented evidence that his mother psychologically coerced his confession to police), *with Commonwealth* v. *Kirwan,* 448 Mass. 304, 318 (2007) (defendant did not raise any issue before or during trial about voluntariness of his statements and there was no basis in evidence that required court to raise it on its own).

FN71. *See Commonwealth v. Harris,* supra, 371 Mass, at 471 n.3.

FN72. *Commonwealth v. Stroyny,* 435 Mass. 635, 646 (2002), and cases cited. In *Stroyny,* the SJC added that "[w]hile there was evidence that the defendant had ingested marijhuana and Valium, there was nothing to suggest that his mental condition had been affected. There was no evidence that he suffered any ill effects from the injuries to his wrists, which were no longer bleeding, or that any injury impaired his mental function. The nurse did not speak to the defendant until

forty-five minutes after he was admitted, by which time he had begun to recover from his injuries." *Id.* at 647; *see also Commonwealth* v. *Murphy,* 426 Mass. 395, 397-98 (1998) ("The defendant argues that the statements to his friend, a private citizen, were involuntary because he was exhausted, suicidal, and hysterical at the time they were made] and that the judge was obliged to address, sua sponte, the voluntariness of the statements before they were admitted in evidence. Where, as here, the defendant fails to raise the issue, a judge has no constitutional duty to do so, and is obliged to do so only where there is a substantial claim of involuntariness."). *Compare Commonwealth v. Harris,* 371 Mass. 462 (1976) (duty to conduct voir dire triggered by testimony from defendant that he had been beaten by police until he confessed); *Commonwealth v. Hooper,* 42 Mass. App. Ct. 730, 732-34 (1997) (error for judge not to grant defense counsel's request for humane practice instruction, since voluntariness was live issue in that during summation, defense counsel urged jury to disregard defendant's statement in light of defendant's impaired state, and judge specifically referred to statement in his consciousness of guilt instruction).

FN73. *Commonwealth* v. *Pavao,* 46 Mass. App. Ct. 271, 274 (1999).

FN74. *See Commonwealth v. Benoit,* 410 Mass. 506, 515-16 (1991).

FN75. *Commonwealth* v. *Ostrander,* 441 Mass. 344, 351-55 (2004).

FN76. *Harris* v. *Commonwealth,* 371 Mass 478, 481 n.3 (1976).

FN77. *Miranda* v. *Arizona,* 384 U.S. 436, 444 (1966); *see Missouri* v. *Seibert,* 560 U.S. 600, 608 (2004) ("Miranda conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained."); *United States* v. *Patane,* 542 U.S. 630, 639 (2004) (citing *Dicker son* v. *United States,* 530 U.S. 428, 434-35 (2000) ("[I]n the absence of specific warnings," the Miranda rule creates a generally irrebuttable presumption of coercion and renders the individual's statement inadmissible at trial.)); *Orozco v. Texas,* 394 U.S. 324, 326 (1969) ("[T]he use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination clause of the Fifth Amendment as construed in Miranda.").

FN78. *See Dickerson* v. *United States,* 530 U.S. 428, 444 (2000).

FN79. *See, e.g., Commonwealth v. Martin,* 444 Mass. 213, 218 (2005); *Common wealth v. Hine,* 393 Mass. 564, 569 (1984); *Commonwealth v. Hooks,* 375 Mass. 284, 288 (1978).

FN80. *See Commonwealth v. Hine,* 394 Mass. 564, 569 (1984) (citing *Miranda v. Arizona,* 384 U.S. 436, 479 (1966)).

FN81. *Compare Commonwealth v. Clarke,* 461 Mass. 336 (2012), *with Berghuis v. Thompkins,* 130 S. Ct. 2250 (2010). The observation in the text is based on the view that a finding of implied waiver on the facts in *Berghuis* would not constitute a valid waiver under Massachusetts law even apart from the differing burdens of proof.

FN82. *Berghuis v. Thompkins,* 130 S. Ct. 2250, 2262 (2010).

FN83. 441 U.S. 369, 373, 375-76 (1979).

FN84. *Clarke,* 461 Mass, at 351 n.12.

FN85. *See Berghuis* v. *Thomplins,* 130 S. Ct. 2250, 2260 (2010), and cases cited.

FN86. *Compare Commonwealth v. Clarke,* 461 Mass. 336 (2012), *with Berghuis v. Thompkins,* 130 S. Ct. 2250 (2010). The view in the text as to the assertion of the right to counsel is not based on a specific case, *see Commonwealth v. Hoyt,*

461 Mass. 143 (2011) (specifically leaving question open), but rather on the assumption that when presented with the question the SJC would apply the same reasoning which led it to reject the federal rule in *Commonwealth* v. *Clarke,* 461 Mass. 336 (2012).

FN87. *Clarke,* 461 Mass, at 349.

FN88. *Missouri v. Siebert,* 542 U.S. 600, 609 n.l (2004) (citing *Colorado v. Connel ly,* 479 U.S. 157, 169 (1986) (burden of proof on Miranda waiver under U.S. Constitution is preponderance of evidence)).

FN89. *Lego* v. *Twomey,* 404 U.S. 477, 488-89 (1972).

FN90. *See Commonwealth v. Hoyt,* 461 Mass. 146, 152 (2011); *Commonwealth v. Vao Sok,* 435 Mass. 743, 751 (2002); *Commonwealth v. Edwards,* 420 Mass. 666, 669 (1995); *Commonwealth v. Day,* 387 Mass. 915, 921 (1983). *See also Commonwealth v. Ward,* 426 Mass. 290, 296 (1997) ("[Although we encour age judges to use the words 'beyond a reasonable doubt' in their findings, it is not error not to do so.").

FN91. *Commonwealth* v. *Edwards,* 420 Mass. 666, 669 (1995).

FN92. 401 U.S. 222 (1971).

FN93. *See Commonwealth v. Harris,* 364 Mass. 236, 238-40 (1973) (following *Harris v. New York,* supra); *see also Commonwealth v. Ferrer,* 47 Mass. App. Ct. 645, 648#9 (1999) (applying rule in *Commonwealth* v. *Harris* to statement by juvenile that was suppressed due to violation of "interested adult" rule).

FN94. *Miranda,* 384 U.S. at 473-74.

FN95. *Miranda,* 384 U.S. at 473-74.

FN96. 423 U.S. 96 (1975).

FN97. *Mosley, 423 U.S. at 104.*

FN98. *United States v. Barone,* 968 F.2d 1378,1383 (1st Cir. 1992).

FN99 *Commonwealth v. Callendar,* 81 Mass. App. Ct. 153, 157 (2012) (citing *Mosley,* 423 U.S. at 105-06).

FN100. *See United States* v. *Barrone,* 968 F.2d 1378, 1384-85 (1st Cir. 1992); *see id.* at 1384 (excluding postinvocation statements where officers "repeatedly spoke to [defendant] for the purpose of changing his mind, failed to provide new Miranda warnings, applied pressure by emphasizing the danger he would face in Boston if he did not cooperate, and took advantage of a long delay in arraignment").

FN101. *See Commonwealth v. Leahy,* 445 Mass. 481, 487-89 (2005) (statement admissible applying federal standard); *Commonwealth v. Brant,* 380 Mass. 876, 883-87 (1990) (statement inadmissible applying federal standard); *Commonwealth v. Jackson,* 377 Mass. 319, 326-27 (1979) (statement inadmissible applying federal standard); *Commonwealth v. Callendar,* 81 Mass. App. Ct. 153 (2012) (statement inadmissible applying federal standard).

FN102. *See Edwards v. California,* 451 U.S. 477, 482 (1981).

FN103. *Miranda* v. *Arizona,* 384 U.S. at 474.

FN104. 451 U.S. 477 (1981).

FN105. *Edwards*, 451 U.S. at 484.

FN106. *Id.* at 484.

FN107. *Id.* at 484-85.

FN108. 498 U.S. 146 (1990).

FN109. *Minnick,* 498 U.S. at 152.

FN110. *Id.* at 153.

FN111. *See Commonwealth v. Rainwater,* 425 Mass. 540, 554-55 (1997), *cert, denied,* 522 U.S. 1095(1998).

FN112. *Edwards v. Arizona,* 451 U.S. at 484-85; *accord Oregon v. Bradshaw,* 462 U.S. 1039, 1045-6 (1983); *Commonwealth v. LeClair,* 445 Mass. 734, 738-39 (2006), and cases cited.

FN113. 559 U.S. _, 130 S. Ct. 1213 (2010).

FN114. *Id.* at_.

FN115. *Id.*

FN116. *Shatzer,* 120 S. Ct. at 1225 (citations omitted); *accord State v. Butt,* P.3d _, 2012 WL 2149782 (Utah 2012).

FN117. _U.S._, 132 S.Ct. 1181(2012).

FN118. *Id.* at 1193.

FN119. *See State v. Wessells,* 209 N.J. 395, 410-11, 37 A.3d 1122, 1130-31 (2012) (holding that *Shatzer* states a bright-line rule: "By electing to use language of certainty, the Court signaled its intention to avoid debate. If we concluded that a break in custody of fewer than fourteen days might nonetheless be suf ficient to purge the taint of the earlier coercive effect, we would be reading *Shatzer* to have left open to endless debate, and to divergent results, all breaks in custody of lesser duration. We can only conclude that by announcing a single, prophylactic rule, the Court meant to forestall such debate and to re place the uncertainty that it would create with the certainty that flows from a clear rule of application. Although it is possible that some individuals who are released for fewer than fourteen days might, if approached by law en forcement, in fact thereafter voluntarily elect to waive their rights free of taint, the clear implication of the Court's ruling is to utilize this single, easy to apply rule so as to eliminate all doubt.").

FN120. 411 Mass. 249(1991).

FN121. 413 Mass. 364 (1992).

FN122. *Id.* at 370-71.

FN123. *See Commonwealth* v. *LeClair,* 445 Mass. 734, 739 (2006).

FN124. 463 Mass. 273 (2012).

FN125. 461 Mass. 720 (2012).

FN126. *Commonwealth* v. *Woodbine,* 461 Mass. 720, 731-38 (2012). According to the court, in such a case, the trial judge was required to conduct a voir dire and to determine "whether, to what extent, and by what means Keeler [the testifying police officer] was able to distinguish between what was contained in the document he reviewed and what he actually remembered taking place. To make this determination, the judge was required to examine the founda tions of Keeler's claim to a present and independent recollection." *Id.* at 735. Justice Gants dissented and argued that the majority misunderstood the issue: "The issue properly before the judge was whether Detective Sergeant Keeler was testifying to what the defendant told him before the Miranda violation rather than after the Miranda violation, and the judge properly resolved that issue in her findings. The issue was not whether Keeler's memory as to what the defendant confessed before the Miranda violation was refreshed by, and not independent of, his review of the transcript of the defendant's tape recorded confession after the Miranda violation." *Id.* at 749-50 (Gants, J., dissenting).

FN127. *See Nardone v. United States,* 308 U.S. 330, 341 (1939); *Commonwealth v. White,* 374 Mass. 132,139 (1977).

FN128. *Commonwealth v. Mahnke,* 368 Mass. 662, 682 (1975), *cert, denied,* 425 U.S. 959 (1976) (quoting *United States* v. *Bayer,* 331 U.S. 532, 541 (1947)).

FN129. *Wong Sun v. United States,* 371 U.S. 471, 488 (1963) (quoting Maguire, *Evi dence of Guilt,* 221 (1959)).

FN130. *Oregon v. Elstad,* 470 U.S. 298, 306 (1985), discussing *Miranda v. Arizona,* 384 U.S. 436 (1966).

FN131. *United States v. Patane,* 542 U.S. 630, 637 (2004).

FN132. *See Lyons* v. *Oklahoma,* 322 U.S. 596 (1944) (even though defendant's first confession was involuntary, state was allowed to use second confession ob tained twelve hours later because the coercion surrounding first confession had sufficiently dissipated as to make second confession voluntary); *Com monwealth v. Prater,* 420 Mass. 569, 584 (1995), quoting *Commonwealth v. White,* 353 Mass. 409,417 (1967), quoting *Lyons v. Oklahoma,* 322 U.S. 596, 603 (1944) ("If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncer tain situation, that the confession should be admitted as voluntary, cannot be a denial of due process."). In *Prater,* the SJC held that even though the de fendant's first confession was properly suppressed due to the defendant's lev el of intoxication and his low intelligence quotient, the trial judge correctly ruled that a second, videotaped confession given about two and one-half hours later, was admissible based on his findings of fact that there had been a break in the stream of events sufficient to insulate the second confession from the first confession.

FN133. *Murray* v. *United States,* 487 U.S. 533, 537 (1988) (quoting *Nardone* v. *Unit ed States,* 308 U.S. 338, 341 (1939)); *see also Commonwealth v. Fredette,* 396 Mass. 455, 459 (1985).

FN134. *See Murray* v. *United States,* 487 U.S. 533, 536-37 (1988); *see also Com monwealth v. Balicki,* 436 Mass. 1, 16 (2002).

FN135. *Commonwealth v. Caso,* 377 Mass. 236, 242 (1979) (quoting *Nardone v. United States,* 308 U.S. 338, 342 (1939)).

FN136. *Brown v. Illinois,* 422 U.S. 590, 603-04 (1975).

FN137. *See Commonwealth* v. *Cote,* 386 Mass. 354, 362 (1982) (quoting *Common wealth v. Haas,* 373 Mass. 545, 556 (1977) ("Where the nexus between the conduct of the police deemed illegal and the discovery of the challenged evi dence is so attenuated as to dissipate the taint, such evidence is admissi ble.")); *Commonwealth v. Saia,* 372 Mass. 53, 58 (1977) (evidence sought to be suppressed must be shown to be "an 'exploitation' of the primary illegality"). A good illustration of the similarity between state and federal is supplied by *Commonwealth v. Hine,* 393 Mass. 564 (1994) (although forged

Miranda card was properly suppressed, defendant's subsequent confession was product of valid waiver of Miranda rights and not tainted by earlier illegality).

FN138. *Commonwealth* v. *Mahnke,* 368 Mass. 662, 685-86 (1975).

FN139. *Id.* at 686-87.

FN140. *Commonwealth* v. *Smith, 411* Mass. 823, 830-31 (1992) (citations and quota tions omitted). "The cat-out-of-the-bag line of analysis requires the exclusion of a statement if, in giving the statement, the defendant was motivated by the belief that, after a prior coerced statement, his effort to withhold further in formation would be futile and he had nothing to lose by repetition ... of the earlier statement." *Commonwealth v. Mahnke,* 368 Mass. 662, 686 (1975). In the "break in the stream of events" analysis, the focus "is on external con straints, continuing or new, which may have overborne the defendant's will." *Smith, 411* Mass, at 830.

FN141. *Commonwealth* v. *Larkin,* 429 Mass. 426, 437 (1999) (citations omitted); *see Commonwealth* v. *Bradshaw,* 385 Mass. 244, 258 (1982) (confession not tainted by illegal arrest where defendant was given Miranda warnings twice before confession, and over an hour elapsed before statement made).

FN142. *See Oregon v. Elstad,* 470 U.S. 298, 307 (1985).

FN143. *Id.* at 309.

FN144. 560 U.S. 600 (2004).

FN145. The "question first" protocol that was reviewed and found unlawful in *Mis souri* v. *Seibert,* 542 U.S. 600, 609 (2004), was not confined to the single Missouri police department that investigated the case before the Court. In *Seibert,* Justice Souter noted that "[a]n officer of that police department testi fied that the strategy of withholding Miranda warnings until after interrogat ing and drawing out a confession was promoted not only by his own depart ment, but by a national police training organization and other departments in which he had worked." Moreover, Justice Souter pointed out that some police training programs teach officers to disregard Miranda entirely if the antici pated answers are not necessary for use in the prosecutor's case in chief. *Seibert,* 542 U.S. at 610 n.2. Thus, while it may be true that "Miranda has embedded in routine police practice to the point where the warnings have be come part of our national culture," as Chief Justice Rehnquist observed in *Dicker son* v. *United States,* 530 U.S. 428, 430 (2000), and that most police trainers teach that Miranda warnings should be given when required, *see Seibert,* 542 U.S. at 611, there remains considerable hostility within the law enforcement community against the Miranda doctrine. *See also Seibert,* 542 U.S. at 617 ("Strategists dedicated to draining the substance out of Miranda cannot accomplish by training instructions what *Dickerson* held Congress could not do by Statute.").

FN146. *Seibert,* 542 U.S. at 613-14 (plurality opinion by Souter, J.) (quotation omitted).

FN147. See *Commonwealth* v. *Smith,* 412 Mass. 823, 836-37 (1992), declining to follow *Oregon v. Elstad,* 470 U.S. 298 (1985) (rejecting doctrine of presump tive taint; holding that in the absence of deliberate wrongdoing by the police, the administration of Miranda warnings to a suspect who has made an un warned, but voluntary statement is sufficient to render the second statement the product of a valid waiver). Massachusetts has come very close to adopt ing the original Miranda doctrine as a matter of state constitutional law. *See Commonwealth v. Mavredakis,* 430 Mass. 848 (2000); *see also Common wealth v. Snyder,* 413 Mass. 521, 531 (1992) ("Miranda warnings furnish in formation about state constitutional rights as well as rights contained in the Constitution of the United States."). *But see Commonwealth v. Martin,* 444 Mass. 213, 215 (2005) ("Because we conclude that the Supreme Court's con struction of the Miranda rule, which was intended to secure the privilege against compelled incrimination in the context of inherently coercive custo dial interrogations,

is no longer adequate to safeguard the parallel but broader protections afforded Massachusetts citizens by art. 12, we adopt a common law rule governing the admissibility of physical evidence obtained in these circumstances."); *id.* at 221 (Massachusetts courts turn to common law when confronted with "shrinking protections" afforded to federal right against self-incrimination implicating Article 12 rights).

FN148. *Commonwealth v. Haas,* 373 Mass. 545 (1977), *S.C.,* 398 Mass. 806 (1986). In *Commonwealth* v. *Watkins,* 375 Mass. 472,482 (1978), the SJC applied the *Hass* analysis and ruled that an inculpatory statement by the defendant was admissible even though he had made an earlier unwarned and noninculpatory statement a short time later because of the presence of special, intervening circumstances (communication with an attorney and a lengthy conversation with his mother and sister). *See also Commonwealth* v. *Nom,* 426 Mass. 152, 156 (1997) (defendant's first non-Mirandized statement was "sufficiently non-inculpatory to permit admission of the later statements"). *Accord Com monwealth v. Matthews,* 450 Mass. 858, 878 (2008). This analysis applies in cases involving juveniles as well as adults. *See Commonwealth v. Mark M.,* 59 Mass. App. Ct. 86, 90-91 (2003).

FN149. *Id.* (quotation omitted); *accord Commonwealth v. Damiano,* 422 Mass. 10 (1996).

FN150. 418 Mass. 229 (1994).

FN151. *Id.* at 13.

FN152. 375 Mass. 472, 482 (1978).

FN153. *Id.*

FN154. 420 Mass. 569 (1995).

FN155. *Prater,* 420 Mass, at 582.

FN156. *Id.* at 583.

FN157. *Id.* at 583-84.

FN158. 57 Mass. App. Ct. 918, *furthur appellate review denied,* 439 Mass. 1107 (2003).

FN159. *Id.* at 918. In *Commonwealth* v. *OlafO.,* 57 Mass. App. Ct. 918 (2003) (re script), no explanation is given for why the court did not apply the "cat out of the bag" analysis and inquire about whether the juvenile, having once con fessed to the victim's mother, did not confess again to his aunt because he felt that it was futile at that point to hold anything back.

FN160. *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963).

FN161. 390 Mass. 833 (1984).

FN162. *Id.* at 843#14.

FN163. 542 U.S. 630 (2004).

FN164. *Patane,* 542 U.S. at 641.

FN165. *Id.* at 641.

FN166. *Id.* at 641-42. In *Patane,* Justice Thomas, writing for the majority, opined that the Miranda doctrine does not operate as a direct constraint on the police but only operates to make certain statements obtained without a waiver of

Miranda rights inadmissible at trial. *United States v. Patane,* 542 U.S. 630, 641-42 & n.3. "It is not for this Court to impose its preferred police practices on either federal law enforcement officials or their state counterparts." *Id.* at 642.

FN167. *Id.* at 643.

FN168. 444 Mass. 213, 215 (2005).

FN169. 542 U.S. 630 (2004).

FN170. *See Kaupp v. Texas,* 538 U.S. 626, 627 (2003) (quoting *Brown v. Illinois,* 422 U.S. 590, 603 (1975)). However, depending on the circumstances, such a statement may be admissible "if it was obtained "by means sufficiently dis tinguishable to be purged of the primary taint." *Wong Sun v. United States,* 371 U.S. 471,487-88 (1963).

FN171. *New York* v. *Harris,* 495 U.S. 14, 21 (1990).

FN172. *Commonwealth v. Damiano,* 444 Mass. 444, 456 (2005), and cases cited.

FN173. *Commonwealth* v. *Marquez,* 434 Mass. 370, 378-79 (2001).

FN174. *Id.* at 455; *see also Commonwealth* v. *Cruz,* 442 Mass. 299 (2004); *Com monwealth* v. *Chongarlides,* 52 Mass. App. Ct. 366 (2001).

FN175. *Williams v. Poulos,* 11 F.3d 271, 287 n.35 (1st Cir. 1993) (citing *Walder v. United States,* 347 U.S. 62, 65 (1954)). In *United States* v. *Havens,* 446 U.S. 620, 627 (1980), the Supreme Court reasoned that the "incremental furthering" of the objectives of the **exclusionary rules** by forbidding impeachment by means of evidence unlawfully obtained was insufficient to "permit or require that false testimony go unchallenged." *Commonwealth v. Fini,* 403 Mass. 567, 570 (1988) (quoting *Havens,* 446 U.S. at 627).

FN176. 397 Mass. 693 (1986).

FN177. G.L. c. 272, § 99. Of significance is that the trial judge did not rule that the electronic surveillance was in violation of Article 14 of the Declaration of Rights.

FN178. *Domaingue,* 397 Mass, at 702.

FN179. *Id.,* citing *Commonwealth v. Harris,* 364 Mass. 236, 238# 40 (1973), citing *Harris v. New York,* 401 U.S. 222, 224 (1971).

FN180. 403 Mass. 567 (1988).

FN181. *Fini,* 403 Mass, at 572-73, discussing *Commonwealth v. Blood,* 400 Mass. 61 (1987). The rule in *Fini* does not apply to electronic recordings in all indoor settings. *See, e.g., Commonwealth, v. Rodriguez,* 67 Mass. App. Ct. 636, 642-44 (2006).

FN182. *Fini,* 403 Mass, at 571.

FN183. "Surely, if we accept the validity of the premise that the exclusion from the government's case-in-chief of evidence obtained by unconstitutional means tends to deter that misconduct, a premise which this court has repeatedly ac cepted, see *Commonwealth v. Bishop,* 402 Mass. 449, 451 (1988); *Common wealth v. Blood,* supra at 77; *Commonwealth v. Ford,* 394 Mass. 421, 426 (1985), it is also reasonable to conclude that the exclusion of such evidence for all purposes will act

as a still further deterrent. Such a rule would tend to discourage the gathering of such evidence based on the hope that it will reach the jury in one way if not in another." *Fini,* 403 Mass, at 573.

FN184. *Moran v. Burbine,* 475 U.S. 412, 422 (1986) (holding Fifth Amendment does not require that police inform defendant of attorney's efforts to make contact because "[e]vents occurring outside the presence of the suspect and entirely unknown to him surely ... have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right").

FN185. *See id.* at 422-25.

FN186. *See, e.g., Commonwealth* v. *Mencobini,* 28 Mass. App. Ct. 504 (1990), and cases cited.

FN187. 430 Mass. 848, 859-60 (2000).

FN188. In *Mavredakis,* the SJC declined to follow the Supreme Court in *Moran v. Burbine,* 475 U.S. 412 (1986), which held that the police have no duty to in form a suspect in custody that her attorney is trying to contact her. *See also Commonwealth* v. *McKenna,* 355 Mass. 313, 324-25 (1969) (defendant's waiver of rights was invalid where defendant's attorney was at police station and police failed to advise defendant of his counsel's immediate availability). "In essence, a suspect cannot make an informed waiver of his Miranda rights if he is kept ignorant by police of an attorney's attempts to provide him with assistance and advice. If the waiver is not informed, it is not valid." *Commonwealth* v. *Collins,* 440 Mass. 475, 479 (2003). Other states have also declined to follow *Moran* v. *Burbine* on state constitutional or common law grounds. *See, e.g., State* v. *Stoddard,* 207 Conn. 156, 166-67 (1988); *Bryan* v. *State,* 571 A.2d 170, 177 (Del. 1990); *State* v. *Reed,* 133 N.J. 237, 261-62, 269 (1993); *People* v. *Bender,* 452 Mich. 594, 612-13 (1996): *State* v. *Roadie,* 148 N.H. 45, 52 (2002).

FN189. *Commonwealth* v. *Vao Sok,* 435 Mass. 743, 753 (2002).

FN190. In *Commonwealth* v. Sherman, 389 Mass. 287, 295-96 (1983), the SJC held that "where (1) an attorney represents a defendant as to one charge and learns that the police are planning to interrogate the defendant on a second and un related charge as to which the attorney does not represent the defendant; (2) the attorney informs the police of the attorney's desire to be present at the in terrogation of the defendant; (3) the police, nevertheless, within a few hours after the attorney's request inform the defendant of his Miranda rights but do not inform him of the attorney's request to be present; and, (4) the police then interrogate the defendant, who makes a statement inculpating himself as to the second and unrelated charge, we conclude that the statement of the de fendant must be suppressed because, under principles of construction of Mi randa, the failure of the police to inform the defendant of the attorney's request vitiated the defendant's waiver of his Miranda rights."

FN191. Commonwealth v. Collins, 440 Mass. 475, 478 (2003) (quoting Common wealth v. Beland, 436 Mass. 273, 287 (2002)). There is no requirement that counsel must have been formally appointed before the police have the duty to inform a suspect of an attorney's efforts to render assistance. See Common wealth v. Sherman, 389 Mass, at 295 ("it would unduly elevate form over substance to hold that [the officer's] failure to inform the defendant [of an at torney's] request was not constitutionally significant because [the attorney] had not yet been appointed to represent the defendant in the instant cases").

FN192. Mavredakis, 430 Mass, at 861 (quoting State v. Stoddard, 206 Conn. 157, 169, 537 A.2d 446 (1988)).

FN193. 458 Mass. 305, 316-17 (2010).

FN194. 458 Mass, at 317 (quoting Commonwealth v. Vao Sok, 435 Mass. 743, 752 (2002)).

FN195. Id.

FN196. See Commonwealth v. Vao Sok, 435 Mass. 743, 753 (2002) (it was violation of Massachusetts rule for police officer to contact prosecutor about telephone call from defendant's counsel before informing defendant). In Commonwealth v. McNulty, 458 Mass. 305 (2010), two justices expressed reservations about the implication of the majority opinion that the police have a constitutional obligation to communicate legal advice from an attorney to a defendant. See id., 458 Mass, at 331 (Cordy, J., concurring); 458 Mass, at 331-32 (Gants, J., dissenting). In his dissenting opinion, Justice Gants, who believes the constitutional obligation of the police extends only to informing the defendant that an attorney is trying to contact him, observed that

> [t]he duty to inform was meant to be a straightforward "bright-line rule," Mavredakis, supra at 860, requiring only that the police inform a suspect of an attorney's availability, but its bright line will be dulled if it includes a duty to inform a suspect of the attorney's legal advice. Once we open that door, we cannot be assured that the legal advice an attorney will ask to be forwarded will always be as simple as "don't speak to the police." It potentially could include advice as to what the client should do or say if he intended to disregard the attorney's advice to remain silent, or what subjects the client should not discuss. Do the police owe a duty to inform a suspect of all legal advice provided by the attorney? What if the police incorrectly relayed some of that legal advice? We have not before needed to address these questions because of the limited scope of the duty to inform; we will soon need to know that we have expanded that scope to include a duty to communicate legal advice.

The majority of the court addressed this concern by suggesting that only communications from counsel relating to the defendant's Miranda warnings must be conveyed to him by the police. 458 Mass, at 316 n.12.
FN197. See Commonwealth v. McNulty, 458 Mass. 305, 315-16 (2010).

FN198. Commonwealth v. Anderson, 448 Mass. 548, 553-54 (2008) (citations omit ted) (quoting Maine v. Moulton, 474 U.S. 159, 171 (1985) (government's sur reptitious recording of defendant's discussion with cooperating codefendant after indictment and in absence of counsel circumvented Sixth Amendment)).

FN199. Fellers v. United States, 540 U.S. 519, 523 (2004); United States v. Wade, 388 U.S. 218, 227-28 (1967).

FN200. See Commonwealth v. Torres, 442 Mass. 552, 570 (2004). In Commonwealth v. Anderson, 448 Mass. 548 (2007), discussed below, the SJC declined to hold that under Article 12 of the Declaration of Rights the right to counsel attaches as soon as a lawyer is assigned to a case or files an appearance.

FN201. "The mere fact that a criminal charge has been approved by a magistrate or that an arrest warrant is outstanding does not constitute the commencement of adversary judicial proceedings. "[T]he right to counsel attaches, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Rothgery v. Gillespie County, 554 U.S. 191 (2008), quoting United States v. Gouveia, 467 U.S. 180, 188 (1984), quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion). See Commonwealth v. Torres, 442 Mass. 554, 571 n. 13 (2004) ("Because of the nature of complaint and arrest warrant procedure in Massachusetts, a procedure that is ... entirely ex parte ... and that does not necessarily result in a prosecution of the charge, we have held that that procedure does not trigger the Sixth Amendment right to counsel"); Commonwealth v. Smallwood, 379 Mass. 878, 884-85 (1980) ("complaint and arrest warrant procedure ... does not amount to an adversary judicial proceeding, nor does anything occur at this stage which could impair a defense"). In Massachusetts, a complaint and/or a warrant for a person's arrest may issue at the request of a private party, but in such a case the prosecutor has the right to terminate the prosecution.

FN202. See Brewer v. Williams, 430 U.S. 387, 400-01 (1977); Commonwealth v. Hilton, 443 Mass. 597, 614 (2005).

FN203. Commonwealth v. Torres, 442 Mass. 554, 572-75 (2004) (applying federal law).

FN204. 475 U.S. 625, 635 (1986), overruled, Montejo v. Louisiana, 556 U.S. 778 (2009).

FN205. The Supreme Court stated: "We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." Jackson, supra, 475 U.S. at 636.

FN206. 487 U.S. 285 (1988).

FN207. Id. at 290.

FN208. Id. at290n.3.

FN209. Id. at 291, 108 S. Ct. 2389. The Court explained, that "[preserving the integ rity of an accused's choice to communicate with police only through counsel is the essence of Edwards and its progeny—not barring an accused from making an initial election as to whether he will face the State's officers dur ing questioning with the aid of counsel, or go it alone. If an accused 'know ingly and intelligently' pursues the latter course, we see no reason why the uncounseled statements he then makes must be excluded at his trial."

FN210. Id. at 291 (citations and quotations omitted).

FN211. 556 U.S. 778 (2009).

FN212. Id. at 299-300.

FN213. Contrast State v. Forbush, 332 Wis.2d 620, 796 N.W.2d 741 (2011) (4-3) (declining to apply Montejo waiver rationale to defendant who retained counsel ollowing arraignment and who was then questioned by police in absence of counsel).

FN214. 77 Mass. App. Ct. 298, 301-02 (2010).

FN215. Id. at 302 ("We recognize that the defendant's waiver of his Sixth Amend ment right does not mean that he also necessarily waived his parallel right under art. 12 of the Massachusetts Declaration of Rights. Although the de fendant asserted his art. 12 right below, on appeal he relied entirely on the Sixth Amendment in arguing that his statements to the Canton police should have been suppressed, even though Montejo had been decided a month before his brief was filed. Moreover, despite the fact that the Commonwealth cited to Montejo in its opposition brief, the defendant did not file a reply brief seeking to raise art. 12 issues. We therefore conclude that the issue whether the defendant waived his art. 12 right to counsel, and the issue whether the questioning by the Canton police infringed upon that right, are not properly before us.").

FN216. 448 Mass. 548 (2007).

FN217. Id. at 549-52.

FN218. Id. at 555-56. The SJC did note that the result would have been different if the police had not made the defendant aware of the appointment of counsel based on the state constitutional law rule announced in Commonwealth v. Mavredikis, 430 Mass. 848, 861-62 (2000).

FN219. Id. at 555-56 (citations and quotations omitted).

FN220. Id. at 556-57. This is the position taken by the New York Court of Appeals under the New York state constitution. See People v. Hobson, 39 N.Y2d 479, 481 (1976).

FN221. 377 U.S. 201 (1964).

FN222. See Fellers v. United States, 519, 524 (2004) (government agents who went to defendant's home with arrest warrant issued after his indictment and in formed defendant that they were there to discuss his involvement in distribu tion of drugs and his association with persons named as coconspirators vio lated Massiah doctrine). "[K]nowing exploitation by the state of an oppor tunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the state obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." Maine v. Moulton, 474 U.S. 159, 176 (1985) (government's surreptitious recording of defendant's discussion with cooperating codefendant after indictment and in absence of counsel circumvented Sixth Amendment).

FN223. Id. at 206.

FN224. See Maine v. Moulton, 474 U.S. 159, 171 (1985) ("police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel").

FN225. See, e.g., Commonwealth v. Garvin, 456 Mass. 778 (2010); Commonwealth v. Murphy, 448 Mass. 452 (2007); Commonwealth v. Young, 73 Mass. App. Ct. 479 (2009).

FN226. 501 U.S. 171, 175 (1996).

FN227. In McNeil v. Wisconsin, 501 U.S. 171 (1996), the Supreme Court explained that in determining what criminal charges are encompassed by the term "charged offenses" courts are not bound by the language of the charging doc ument, but rather courts should use the test employed for determining double jeopardy questions. Thus, if a person is convicted of crime A and that convic tion would preclude his prosecution for crime B, then the Sixth Amendment right to counsel attaches as to crime B as soon as it attaches as to crime A. Id. at 172-73.

FN228. U.S. 162(2001).

FN229. Id. at 173. The significance of Cobb is affected by Montejo v. Louisiana, 556 U.S. 778 (2009). As a result of Montejo, which held that a waiver of Miranda is sufficient to establish a valid waiver of the Sixth Amendment right to coun sel, defendant Cobb's waiver of Miranda rights after his indictment for the burglary offense would suffice to waive his Sixth Amendment rights as to any other charges that his right to counsel had attached to regardless of the theory used to define the moment of attachment.

FN230. Cobb, 532 U.S. at 168-73; id., 532 U.S. at 168 n.l (citing Commonwealth v. Rainwater, 425 Mass. 540, 556 (1997)), cert, denied, 522 U.S. 1095 (1998).

FN231. See Commonwealth v. Murphy, 448 Mass. 452,468 & n.12 (2007).

FN232. 540 U.S. 519 (2004).

FN233. Fellers, 540 U.S. at 521.

FN234. United States v. Fellers, 285 F.3d 721, 724 (8th Cir. 2002), rev'd, 540 U.S. 519 (2004), aff'd, 397 F.3d 1090 (8th Cir. 2005), cert, denied, 126 S. Ct. 415 (2005).

FN235. Fellers, 540 U.S. at 524.

FN236. Id.

FN237. See Commonwealth v. Murphy, 448 Mass. 452, 460 (2007) ("The United States Supreme Court has not clearly defined the point at which agency aris es. Agency was not a contested issue in Kuhlmann v. Wilson, All U.S. 436, 439 (1986) (police deliberately placed informant in cell with defendant); Maine v. Moulton, 474 U.S. 159, 164-65 (1985) (codefendant wore wire transmitter); or Massiah v. United States, 377 U.S. 201, 202-03 (1964) (codefendant allowed federal customs agents to install transmitter in car and to listen to conversations with defendant). However, in United States v. Henry, 447 U.S. 264, 266, 270-71 (1980), the Court held that a jailhouse informant paid on a contingent fee basis was acting as an agent for the government. See United States v. LaBare, 191 F.3d 60, 65 (1st Cir. 1999) (circuits of U.S. Court of Appeals divided concerning agency). See also Ayers v. Hudson, 623 F.3d 601, 610-11 (6th Cir. 2010) (describing different tests used to determine agency).

FN238. 447 u.s. 264 (1980).

FN239. Mat271.

FN240. Id.

FN241. Id. at 274; accord Maine v. Moulton, 474 U.S. 159, 176 n.12 (1985) (indicat ing that evidence that the government "must have known" that its agent was likely to obtain incriminating statements from the defendant is sufficient to establish a Sixth Amendment violation).

FN242. See id. at272n.lO.

FN243. Commonwealth v. Reynolds, 429 Mass. 388, 393 (1999).

FN244. See Mass. Guide Evid. § 104(a) (Flaschner ed. 2012); see Commonwealth v. Hilton, 443 Mass. 597, 614-15 & n.8 (2005).

FN245. 443 Mass. 597, 614-15 & n.8 (2005).

FN246. Id.

FN247.. Id. at 615 (quoting Kuhlmann v. Wilson, All U.S. 436, 459 (1986)).

FN248. 446 Mass. 563, 563-64, 567, 569 (2006).

FN249. Id. at 393; see Commonwealth v. Young, 73 Mass. App. Ct. 479, 483 (2009).

FN250. 429 Mass. 388 (1999).

FN251. Id. at 394. The court remanded the matter to give the trial judge an opportuni ty to make findings as to when the cooperation agreement came into exist ence. Significantly, the SJC noted that it did not matter that the cooperation agreement was with a different prosecutor's office concerning a criminal case involving the informant in a different county.

FN252. 448 Mass 452 (2007).

FN253. Id. at 454-59. On Appeal, the SJC observed that there was no controlling precedent from the Supreme Court on when an agency relationship com mences in this context. The SJC noted that the Court of Appeals for the First Circuit

took a narrow view of the issue in United States v. LaBare, 191 F.3d 60 (1st Cir. 1999), where it held that a jailhouse informant who is asked by the government to report "incriminating statements by anyone but has in no way focused ... attention on an individual defendant" is not an agent of the government for purposes of the Massiah doctrine. Accord United States v. Wallace, 71 Fed. Appx. 868 **2 (1st Cir. 2003); United States v. Johnson, 388 F.3d 918, 921 (8th Cir. 2003).

FN254. Murphy, 448 Mass, at 462-65, discussing Kuhlmann v. Wilson, 411 U.S. 436 (1986) (Massiah violation found based on evidence that police deliberately placed informant in defendant's cell even though informant was told not to question other individuals).

FN255. Id. at 465 (quotation omitted).

FN256. Murphy, 448 Mass, at 469.

FN257. Id. at 470.

FN258. See Commonwealth v. Hampton, 457 Mass. 152, 155 (2010) (citing Com monwealth v. Rivera, 441 Mass. 358, 374-75 (2004)).

FN259. See Commonwealth v. LeBeau, 451 Mass. 244, 257 (2008); Commonwealth v. Callendar, 81 Mass. App. Ct. 153, 161 n.6 (2012).

FN260. Id. at 258 (citing Commonwealth v. Scoggins, 439 Mass. 571, 578 (2003)).

FN261. Commonwealth v. Williams, 456 Mass. 857, 866 (2010); see Commonwealth v. Garcia, 409 Mass. 675, 686 (1991) (defendant who chooses to make tele phone call pursuant to G.L. c. 276, § 33A within obvious earshot of police officers enjoys no expectation of privacy).

FN262. 452 Mass. 409, 413-14 (2008).

FN263. See Mass. Guide Evid. § 801(d)(2)(A) (Flaschner ed. 2012).

FN264. 391 U.S. 123, 137 (1968).

FN265. Commonwealth v. Caillot, 454 Mass. 245, 254-55 (2009) (quoting Bruton, 391 U.S. at 135).

FN266. See Bruton, 391 U.S. at 135-37.

FN267. See Commonwealth v. Adkinson, 442 Mass. 410, 412-16 (2004); Common wealth v. Montgomery, 52 Mass. App. Ct. 831, 833 (2001) ("by effectively assenting to the introduction of the videotape at trial, the defendant has waived his appellate claims of prejudice, erroneous admission of hearsay ev idence and violation of his right of confrontation"). See also Commonwealth v. Masonoff, 70 Mass. App. Ct. 162, 168 n.6 (2007) ("a motion to sever can be filed at any time during the trial. Smith, Criminal Practice and Procedure, § 1051 [2ded. 1983 & Supp.2006]").

FN268. Compare Commonwealth v. Bacigalupo, 455 Mass. 85 (2009) (new trial or dered), with Commonwealth v. Caillot, 454 Mass. 255 (2009) (harmless error).

FN269. 481 U.S. 200, 208-09 (1987).

FN270. 523 U.S. 185,193-96 (1998).

FN271. Commonwealth v. Caillot, 454 Mass, at 255, and cases cited.

FN272. See Commonwealth v. Anderson, 445 Mass. 195, 211 (2005), quoting Com monwealth v. Colon-Cruz, 408 Mass. 533, 543 (1990).

FN273. Commonwealth v. Santos, 463 Mass. 273, 291 (2012).

FN274. See Commonwealth v. Lay, 63 Mass. App. Ct. 27, 32-33 (2005).

FN275. See, e.g., Commonwealth v. Vasquez, 462 Mass. 827 (2012).

FN276. See Commonwealth v. Vasquez, 462 Mass. 827, 841 & n.13 (2012); Com monwealth v. James, 424 Mass. 770, 781 & n.20 (1997).

FN277. See Commonwealth v. Dwyer, 442 Mass. 122, 132 (2006).

FN278. 57 Mass. App. Ct. 80 (2003).

FN279. See Commonwealth v. Simon, 57 Mass. App. Ct. 80, 87 (2003), and cases cited. See also Minnesota v. Murphy, 465 U.S. 420, 435 n. 7 (1984); State v. Camp bell, 833 A.2d 1228 (R.I. 2003).

FN280. Id. at 87.

FN281. Seelig v. Harvard Cooperative Soc'y, 355 Mass. 532, 541 (1969); see, e.g., County of Henrico v. Ehlers, 237 Va. 594, 379 S.E.2d 457 (1989) (by its own terms, Fifth Amendment is not applicable in civil proceedings and, because there could not therefore be a Fifth Amendment violation, the protection af forded by Miranda was never called into play); Levan v. Commonwealth, Pennsylvania Game Comm'n (1981), 59 Pa. Commw. 348, 429 A.2d 1241 (even if Levan was unfairly influenced to sign field receipts, the defect was only applicable to finding of guilt in criminal proceeding and could not sub sequently be attacked in civil action to revoke hunting license); Knight v. Michigan (1980), 99 Mich. App. 226, 297 N.W.2d 889 (statements obtained in violation of Miranda are not automatically excluded in civil proceeding but where the defendant was mentally retarded, highly suggestible, and easily in timidated by police, trial court properly exercised discretion to exclude the evidence); Terpstra v. Niagara Fire Ins. Co. (1970), 26 N.Y.2d 70, 308 N.Y.S.2d 378, 256 N.E.2d 536 (insured's arson confession is admissible in civil action involving fire insurance claim even though confession had been excluded in criminal prosecution).

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