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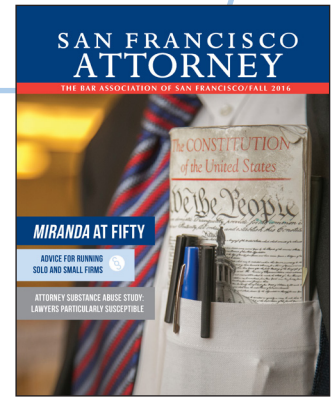
ON OUR COVER

Long-time attorney and past BASF President James Brosnahan carries a copy of the U.S. Constitution in his shirt pocket. Is it for quick reference? Does it remind him of the rights he fights for every day? What's the story?

"We had a case, John Walker Lindh, right after 9/11, 'The American Taliban,'" Brosnahan says. He was in Virginia with his team, and on a rare day off, they visited the home of Thomas Jefferson. "They were selling copies of the Constitution, and a team member bought me one and put it in my pocket." Brosnahan has been displaying it in his pocket ever since.

Photo by Jim Block



MIRANDA AT FIFTY

LANDMARK, BRIGHT LINE, AND HOT-BUTTON RULE

Kathleen Guthrie Woods

Early this summer, a group of middle school students toured San Francisco's Juvenile Justice Center (JJC), where staff members gave short presentations on their roles and responsibilities, the programs offered, and legal processes. In the final segment of their visit, the students met with San Francisco Superior Court Judge Braden Woods for a fun round of "Juvenile Justice Jeopardy" to test their knowledge. "Some struggled to identify photos of important government buildings, such as the Supreme Court in DC, and past political leaders," says Woods, "but *all* of them could recite—without prompting—the *Miranda* warnings."

The *Miranda* warnings have long been part of our social consciousness, and commentators are quick to point out that anyone who has watched *Law & Order* on TV can recite his rights. ("You have the right to remain silent. . . .") But are we aware of the events that led to this historic case? Does a suspect brought in for interrogation truly understand what he or she is entitled to and the repercussions if the suspect waives those rights? Does the current generation of law enforcement officers, defense attorneys, and prosecutors fully appreciate why the landmark 1966 *Miranda v. Arizona* decision still matters?

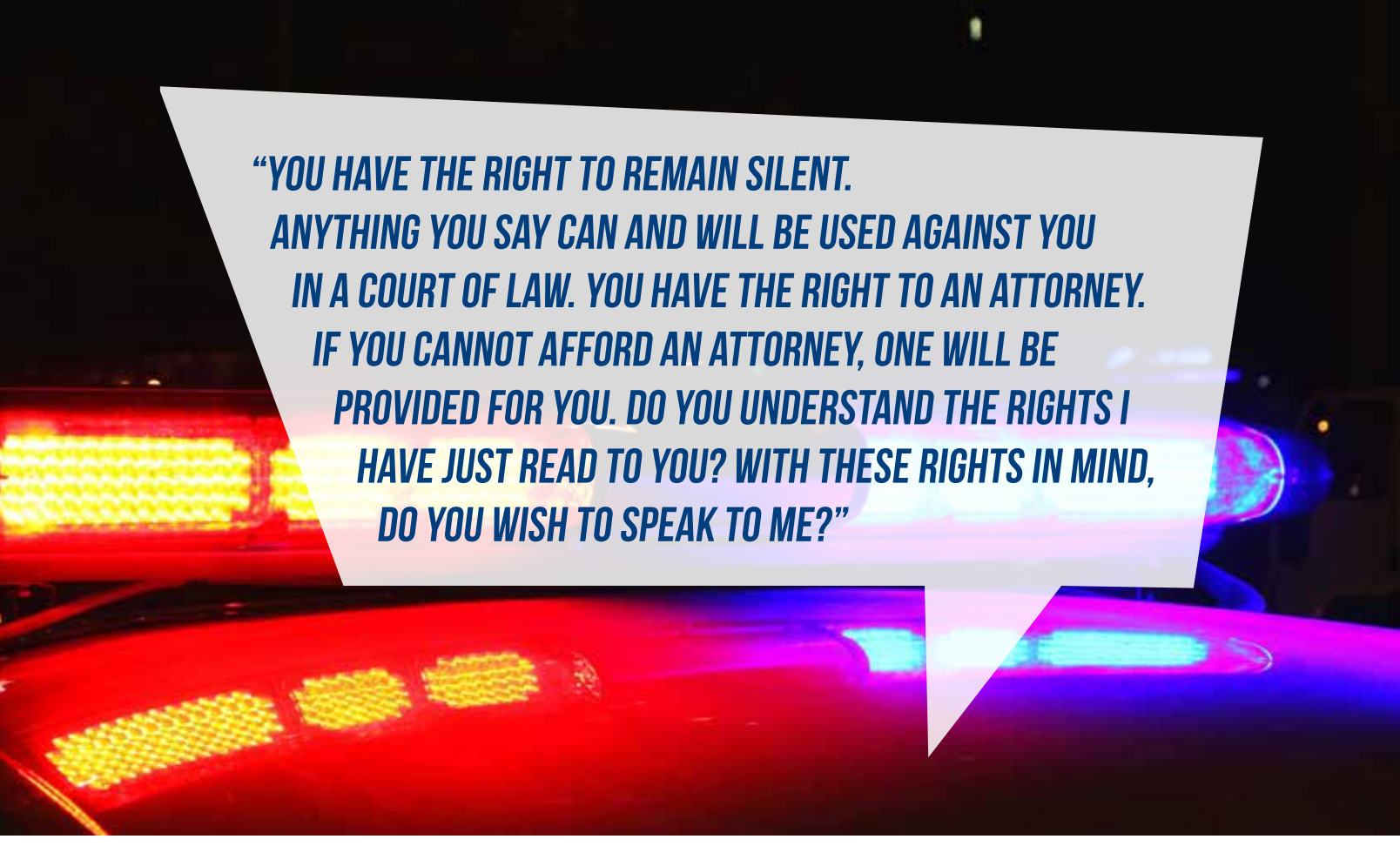
After the fiftieth anniversary of *Miranda* in June of this year, *San Francisco Attorney* magazine invited sharp local legal minds to share their opinions. You'll find they're quite passionate about this topic.

THE HISTORICAL CONTEXT

To understand better the impact of the *Miranda* decision, it is important to remember the historical context. In the post–Civil War South and during the height of the Civil Rights Movement (1958–1964), police brutality was widespread.

"Starting in the 1930s, you see a concern with the coerciveness of police tactics," says Magistrate Judge Laurel Beeler of the U.S. District Court for the Northern District of California. She cites two pivotal cases that came before the Supreme Court and addressed the issue of voluntariness: *Brown v. Mississippi* (1936), in which a man was repeatedly whipped and hanged—but not to death—until he gave a false confession, and *Ashcraft v. Tennessee* (1946), in which a suspect was subjected to thirty-six hours of nonstop interrogation while in police custody.

Using violence to coerce a confession was accepted practice. "San Francisco police had a room in the Hilton Hotel for 'special interrogations,'" says 1977 BASF President



Every U.S. jurisdiction has its own regulations regarding what precisely must be said to a person arrested or placed in a custodial situation. The above represents a typical warning, courtesy of MirandaWarning.org.

James Brosnahan, who worked in the U.S. Attorney's Office until 1966, then switched sides to defend criminal cases. "Physical abuse did happen. Psychological abuse did happen—for hours and days." The Supreme Court ruled that a confession rendered under abuse by the police cannot be used as evidence, and furthermore, it violates the due process clause of the Fourteenth Amendment of the U.S. Constitution.

"What I find interesting is its [*Miranda*'s] roots in voluntariness in the 1930s," says Beeler, who co-taught a course in criminal procedure at UC Hastings College of the Law. "It shows how the process of law evolves. It's not an isolated example of judicial decision making; *Miranda* was grounded in precedence." Two cases that also expanded the rights of defendants, and had bearings on the Court's *Miranda* decision, were *Mapp v. Ohio* (1961)—evidence obtained without a warrant cannot be used in a criminal trial—and *Gideon v. Wainwright* (1963)—defendants have the right to counsel.

THE CASE OF ERNESTO MIRANDA

Ernesto Miranda was accused of the abduction, rape, and robbery of an eighteen-year-old woman. He was brought into the Phoenix Police Department for questioning, where he signed a confession stating he had been advised of his rights. While it is agreed he was not physically abused, there are some doubts about whether he was psychologically or emotionally pressured to confess. Twenty-three years old, Miranda had only a ninth-grade education and suffered from an "emotional illness," possibly schizophrenia. He was convicted, but the voluntariness of his confession came into question.

Brosnahan, now senior trial counsel at Morrison & Foerster, started his career as a federal prosecutor in 1961 in Arizona and knew John Frank and John Flynn, the attorneys whose firm, Lewis Roca Scoville Beauchamp & Linton, represented Miranda between 1965 and 1970. Frank and Flynn would take his case to the U.S. Supreme Court. They were a dream team when it came to this case, for, as

> In 1966, not everyone was on board with the new rules. . . . Would it inhibit police work? Would criminals go free? Were the warnings enough to safeguard the viability of confessions? It was no longer enough for police to behave properly. Now they had to warn suspects affirmatively of their rights for the confessions to be admissible.

Brosnahan says, "they saw the issue. Flynn was in criminal court all the time, his natural habitat. Frank's natural habitat was appellate court." Together they sought to "protect the liberty of all peoples, all defendants," says Brosnahan.

JUDICIAL DECISION MAKING AND THE CONSEQUENCES

"America was late to the game," says Chad DeVeaux, associate professor of constitutional law at Concordia University School of Law (previously a litigation associate at DLA Piper in San Francisco). "Great Britain started doing these warnings [Judges' Rules] in 1912." The U.S. Supreme Court looked to English and Scottish procedures, including the Star Chamber of the late fifteenth to midseventieth centuries, and even the FBI for models of protection against "compelled testimony" and denial of counsel. "J. Edgar Hoover—who is so vilified today—was head of the FBI," says retired San Francisco Assistant District Attorney Laura vanMunching,[1] "but at that time, even the FBI advised suspects of some of their rights."

"*Miranda*," says vanMunching, "is a marriage of the Fifth and Sixth Amendments." The Court ruled 5–4 that a defendant's statements made while in police custody would be admissible only if it's proven the defendant was informed of, understood, and waived his or her rights as outlined in what became known as the *Miranda* warnings. Chief Justice Earl Warren wrote the majority opinion, with a focus on human dignity. "It was a watershed decision," says vanMunching. "Now in a police custodial interrogation, we *must* give you this protection."

Corene Kendrick, a staff attorney at the nonprofit Prison Law Office who also sits on the Board of Directors of the Pacific Juvenile Defender Center, takes it a step further. "[*Miranda* matters] because it is a decision that puts the brakes on police and law enforcement," she says. "It provides guidance; it's a bright-line rule," says vanMunching. And today, says Brosnahan, "three generations of

Miranda at the U.S. Supreme Court

1966

Miranda v. Arizona
The Supreme Court held that statements resulting from police interrogation of defendants could not be used in court unless the police demonstrated the use of procedural safeguards "effective to secure the privilege against self-incrimination."

1968

Greenwald v. Wisconsin
When Greenwald was arrested for burglary he was interrogated by police, and, during that process, was denied food, sleep, and medication, and his assertion that he was "entitled" to a lawyer was ignored. He ultimately confessed to the crimes because he thought "they weren't going to leave me alone until I did," and was convicted. He appealed his conviction, and the Supreme Court ruled that his confession was not voluntary.

police officers know it by heart."

A police officer since 2004 (and currently a sergeant with the San Francisco Police Department Homicide Detail), Chris Canning[2] is of a generation for whom the *Miranda* warnings are firmly engrained. "Early on in my career, I looked at it [*Miranda*] as a mechanism to have the ability to interview someone detained and to obtain evidence. It was a rule I had to follow to be able to have them talk to me," he says. "As an investigator, a detective, it personally helps me understand my role—that I am an extension of the government, and I have respect and reverence for the power we have. That might seem like a progressive view as a police officer, but it helps." Not that it necessarily makes his job easier. "Definitely there are times when it's frustrating. In certain cases, the greatest evidence is the statement, admission, confession."

In 1966, not everyone was on board with the new rules. "The decision was far less than both parties wanted," says vanMunching. "Police and prosecutors wanted no warning, no lawyer present," she says. On the defense side, there was a call for a station house attorney to be present during all interrogations. The decision was a "big innovation," she says. "You say 'I want a lawyer,' and the interrogation stops." Would it inhibit police work? Would criminals go free? Were the warnings enough to safeguard the viability of confessions? It was no longer enough for police to behave properly. Now they had to warn suspects affirmatively of their rights for the confessions to be admissible.

WHATEVER HAPPENED TO...?

Ernesto Miranda was stabbed in a bar fight in 1976, and he died from his wounds. In a twist of fate, when the two men suspected of the murder were arrested, they were Mirandized. Both suspects soon fled, and there was never a conviction for the crime. At the time of his death, Miranda had several *Miranda* warnings cards in his pocket.

1977

Oregon v. Mathiason

An Oregon state police officer suspected Mathiason of burglary and asked him to come to the police station for questioning. Mathiason came freely, spoke with the officer, and was not arrested at the time. He was arrested later and a trial court used evidence from the questioning to convict him. The court admitted the evidence since Mathiason was not in custody during the questioning. Even if the police coercively pressured Mathiason during the interview, he came to the police station freely and was free to leave at any time. Therefore *Miranda* rights did not apply.

1980

Rhode Island v. Innis

During a conversation in the police car on the way to the station for questioning, Innis led authorities to a weapon used in a robbery. Prior to the conversation, however, Innis had been advised of his *Miranda* rights and asked for a lawyer. The Supreme Court considered whether or not the conversation violated Innis's rights. The Court ruled that *Miranda* safeguards applied to "questioning or its functional equivalent." Innis's conversation with police did not qualify as "questioning," the Court ruled.

STILL CONTROVERSIAL

Although the *Miranda* rules are now, fifty years later, supported by a majority of Americans and considered fundamental, they are still hotly debated. "I think its most significant impact has been its effect on the public consciousness. It's the one aspect of constitutional law that everyone knows," says DeVeaux. "Even before they know the First Amendment, they know they have the right to remain silent. [They know it] almost like the Pledge of Allegiance." The question remains, do they understand those rights?

"A[nother] downside," says DeVeaux, "is it creates a 'magic word' litmus test," one that "inoculates police," says Kendrick. In other words, once those rights have been read, it signals an okay to use whatever trickery the interrogator wants to get the confession. "It's a prophylactic," says Beeler, "but that still doesn't mean confessions are voluntary." It's still up to the judge and jury to determine the reliability and validity of the confession.

Many concerns revolve around juvenile suspects' understanding of their rights. With young age come immaturity, fear, as well as lower reading levels. "Both hearing and reading [the *Miranda* rights], adults have had trouble," says Kendrick, "so imagine being amped up and stressed about being arrested and interrogated. Youth are so vulnerable, [and this can lead to] false confessions." One possible solution is proposed in California's pending Senate Bill 1052. It would require that anyone under the age of eighteen be able to consult with an attorney prior to a custodial interrogation, and that a minor cannot waive any right—including this one—until he or she first talks with an attorney.

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Recent cases have challenged *Miranda*'s right to remain silent. "You think, 'I'll shut up, I'll be quiet, I won't say anything,'" says vanMunching, but that silence has been used against suspects in recent cases. In *Berghuis v. Thompkins*

1984

New York v. Quarles

During the arrest of a rape suspect, the police officer found an empty shoulder holster and asked the suspect where the gun was. The suspect nodded in the direction of the gun and said, "The gun is over there." The suspect later argued that his statement about the gun was inadmissible in evidence because he had not first been given the *Miranda* warning. Since the gun was found as a direct result of the statement, he argued that the presence of the gun was also inadmissible. In a 5–4 decision, the Supreme Court found that the jurisprudential rule of *Miranda* must yield in "a situation where concern for public safety must be paramount," thus establishing the "public safety" exception to *Miranda*.

2000

Dickerson v. United States

The Court struck down a law passed by Congress in 1968 designed to overturn *Miranda*. The provision 18 U.S.C. Section 3501 stated that "a confession shall be admissible in evidence if it is voluntarily given" regardless of whether or not the defendant had been made aware of his or her *Miranda* rights. The Court held that *Miranda*, not Section 3501, governed the admissibility of statements in court. "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," wrote Chief Justice William Rehnquist.

(2010), the U.S. Supreme Court ruled a suspect must *express* his or her intent; it no longer suffices to simply imply this intent by saying nothing. *Salinas v. Texas* (2013) and California's *People v. Tom* (2014) also placed the burden on the suspect to invoke this right. "There's a paradox at the heart of it," says Kendrick. "The only way you can assert your silence is to break your silence."

Appellate lawyer Amitai Schwartz, Law Offices of Amitai Schwartz, brings up the possibility of skirting the rules, for example, in how courts determine whether or not a defendant said the *correct* words to invoke rights and halt an interrogation. "Did he '*clearly*' indicate he wanted a lawyer or to stop questioning? [If not], then the lower court finds cops didn't do anything wrong," he says. Schwartz, who began his career working with civil rights organizations and then as a staff lawyer at the ACLU, adds, "In my view, it really is a struggle to extract information from people when they don't know and understand their rights. Lower courts have to give more respect to what the Supreme Court did fifty years ago."

The bottom line, Schwartz says, is "if there's any indication that the defendant didn't understand their rights or tried to assert their rights, courts should come down on protecting the Fifth Amendment."

STILL RELEVANT

Not only does *Miranda* clarify the role of the interrogator as an agent of the government, Canning says, it also addresses any concerns a citizen would have about his or her rights while being interrogated. "While the crime may be heinous, there still need to be checks in place," he says. "I don't think the language has to change; the rules need to be followed," says Schwartz, "and the defendant must have the benefit of the doubt, must have his rights protected," for "the battle for fairness is eternal in criminal work," says Brosnahan.

Certainly there's still a fear that the guilty will go free, "but when we look at cost, the toll on humans, the decades in prison," says Kendrick, "that's not a price our society is willing to pay." It's *Miranda*'s intention, she says, that "we do have rights, and these rights should be respected."

Freelance writer Kathleen Guthrie Woods is married to Judge Braden Woods and swears he voluntarily contributed his story to this article.

Disclaimers

1. Laura vanMunching's opinions are her own and do not represent those of the San Francisco District Attorney's Office.
2. Chris Canning's opinions are based on his personal experience, and for purposes of this article, he does not represent the San Francisco Police Department or San Francisco Police Officers Association.

Timeline adapted with permission from Law Day 2016—Miranda: More than Words *by the American Bar Association*

2010

Maryland v. Shatzer

The Court ruled that police may reopen questioning of a suspect who has asked for counsel if there has been a fourteen-day break, or longer, between incidents of questioning and police custody. Thus, the suspect must reassert the right to counsel during the second questioning incident, as it constitutes a new incident.

2011

Howes v. Fields

The Court held that investigators do not have to read *Miranda* rights to inmates during jailhouse interrogations about crimes unrelated to their current reasons for incarceration.

2013

Salinas v. Texas

Salinas was convicted of murder and claimed that the prosecution's use of his silence during police questioning as an indicator of deception violated his Fifth Amendment rights. The Court held that a witness generally must expressly invoke the Fifth Amendment privilege against self-incrimination in order to benefit from it. In other words, Fifth Amendment protections do not extend to individuals who simply choose to stay silent during police questioning.