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## Prophylactic Rules and State Constitutionalism

Arthur Leavens<sup>1</sup>

### ABSTRACT

When the post-Warren Supreme Court began trimming back individual rights, some state courts responded by interpreting analogous or cognate state-constitutional provisions to find broader protections, prompting a vigorous debate concerning the legitimacy and interpretive methodology of such state constitutionalism. How can two constitutional provisions, sharing the same language and history, mean different things? This article looks at that question in the context of so-called prophylactic rules—those specific constitutional rules meant to guide the implementation of broader federal constitutional principles. *Miranda*'s warning-and-waiver construct is probably the best known prophylactic rule, but such rules abound, particularly in criminal procedure.

This article argues that even if states ought to defer to the Supreme Court concerning the meaning of cognate constitutional provisions, such deference is not required in considering the reach of prophylactic rules. Such rules, while constitutional in status, are not vessels of constitutional meaning. Rather, they are a pragmatic means to implement more open-ended constitutional norms and thus, by design, are adjustable where necessary to improve their fitness for that task. The Supreme Court makes such adjustments, and there is no reason why states should not also be able to do so where local conditions suggest the need for a more protective rule. A state's expansion of a prophylactic rule leaves untouched the meaning of the underlying federal principle, along with the Supreme Court's prerogative to decide what that meaning is. This article analyzes such rule expansions under Massachusetts law to develop this point concretely.

But recognizing the latitude of states to expand federal prophylactic rules unilaterally does not necessarily mean that it should be the courts that work this expansion. Again using Massachusetts as the example, this article argues that, depending upon the conceptual linkage of the rule to its underlying principle, the designed impact of the rule, and the relative judicial vice legislative

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competence and legitimacy to make the cost-benefit judgments on which rule expansion often rests, the expansion of some prophylactic rules ought to be the province of the state legislature and not the courts. When it is unclear who should decide, this article argues that a state court should not freeze a rule expansion in constitutional principle, but rather should found its decision in state common law, thus leaving open further reconsideration of the rule's reach.

## I. INTRODUCTION

For well over thirty years the phenomenon of “judicial federalism”—a state court interpreting a state constitutional provision to provide broader protections than those afforded by the analogous federal constitutional provision—has become a fixture of American jurisprudence.<sup>2</sup> This development, no doubt prompted by the post-Warren Supreme Court retrenchment regarding the protection of individual rights, has given rise to a rich debate concerning the legitimacy and interpretive methodology of such state constitutionalism.<sup>3</sup> Boiled down, the question is, on what basis does a state court interpret a state constitutional provision, couched in virtually the same language and often with the same history as that of its federal counterpart, and decide that the state provision provides greater protection?

In this article, I examine that question in the context of so-called prophylactic rules—those relatively concrete constitutional rules announced by the Supreme Court to guide lower courts in applying the Constitution's more open-ended standards. Such rules abound, particularly in criminal procedure. To take a familiar example, *Miranda's* warnings-and-waiver rule constitutes the means by which the Fifth Amendment's self-incrimination protection is implemented in the context of police interrogation. Less familiar, at least as a prophylactic rule, is the *Aguilar-Spinelli* two-pronged test meant to guide application of the Fourth Amendment's requirement that a neutral magistrate determine probable cause in issuing a warrant.

While I am among those who think a state court should ordinarily defer to the Supreme Court on the meaning of a provision common to the federal and state constitutions,<sup>4</sup> I take a different view regarding the breadth of

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2. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 177-78 (1998) (cataloging this development).

3. See, e.g., JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS 13-15 (2005); TARR, *supra* note 2; Symposium, *Dual Enforcement of Constitutional Norms: Remarks of Chief Justice William H. Rehnquist*, 46 WM. & MARY L. REV. 1219 (2005). See generally Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265 (2007); Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793 (2000); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997).

4. See Arthur Leavens, *State Constitutionalism: State-Court Deference or Dissonance?*, 33 W. NEW

constitutional prophylactic rules. I will argue here that there is no theoretical impediment to a state's unilateral expansion of federal prophylactic rules. However, this interpretive latitude does not mean that a state's courts should necessarily enjoy that prerogative. I will argue that expansion of at least some of these rules, as a matter of institutional competence and political legitimacy, should be the province of the state's legislature rather than its courts.

My argument accepts the following premises: first, prophylactic rules such as *Miranda's* warnings-and-waiver construct and *Aguilar-Spinelli's* two-pronged test tend to over-enforce the constitutional principles that justify their existence<sup>5</sup>; second, such rules nevertheless have constitutional status; third, provisions common to the federal and a state's constitution ought presumptively to mean the same thing; and fourth, the Supreme Court is the presumptive arbiter of what that meaning is.<sup>6</sup>

Why should a state, presumptively bound by the Supreme Court's interpretation of a constitutional provision, nevertheless be free to expand the

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ENG. L. REV. (forthcoming 2011) (arguing that in interpreting state constitutional provisions which have federal constitutional equivalents, state courts presumptively should defer to Supreme Court concerning meaning and scope of such shared, fundamental norms).

5. See Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 951 (1999). I am principally interested in prophylactic rules, which as a matter of accepted terminology are understood generally to over-enforce the constitutional standard for which they stand. See *id.* I appreciate that such rules constitute but a subset of a larger category of rules created by the Supreme Court to provide guidance concerning the implementation or enforcement of more indeterminate constitutional standards. See *id.* at 950; see also Lawrence Rosenthal, *Against Orthodoxy: Miranda Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 579-80 (2007). Here I make a brief, if obvious, disclaimer that what constitutes over-enforcement of a constitutional standard is often, if not inevitably, in the eye of the beholder. It assumes that we can agree with some precision how a particular, relatively indeterminate standard should "correctly" be applied in a particular factual circumstance. See Rosenthal, *supra*, at 579-80. It is only with such a measuring rod that we can say that the prophylactic rule does or does not over-enforce that standard given those facts. See *id.* As will be developed, however, if the standard's meaning was readily apparent there would be no need for the rule. See *id.* Professor Rosenthal makes an interesting argument that *Miranda's* warning-and-waiver requirements do not over-enforce but rather conform to the Fifth Amendment's protection against compelled self-incrimination in the context of custodial interrogation. See *id.* See generally Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826 (1987) (arguing *Miranda* consistently under-enforces Fifth Amendment protection); Stephen J. Schulhofer, *Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941 (2001).

6. I appreciate that none of these premises represent anything close to a consensus among either courts or commentators that have considered these issues. I nevertheless adopt them with little in the way of analytic defense for two reasons. First, the arguments both for and against each have been well made and my recitation of them seems unnecessary. Second, these assumptions, if anything, impede rather than promote the claim I make. If the rules in question were not federal constitutional commands, there would be little conceptual quarrel with a state court taking a different path under its own constitution. If a rule routinely under-enforced its underlying standard, there would be less about which to complain—the state court would merely be filling in the gap; a gap perhaps purposely left as a matter of comity by the Supreme Court. And, if one takes an expansive view of a state's conceptual legitimacy in unilaterally expanding the protection of a shared constitutional provision in the face of a contrary Supreme Court decision, it would seem to matter little what the nature of the constitutional protection in question is. As an aside, I also adopt these premises because I agree with them, but for purposes of the argument that is quite beside the point.

reach of a prophylactic rule such as *Miranda*'s warning-and-waiver requirement or *Aguilar-Spinelli*'s two-pronged test? The answer lies in the nature of prophylactic rules and their relation to the underlying constitutional standards they implement. Unlike a Supreme Court decision laying out the meaning or scope of a constitutional provision—its “operative proposition” in the words of Mitchell Berman<sup>7</sup>—prophylactic rules<sup>8</sup> are relatively specific, often bright-line rules meant principally to guide lower courts in implementing less determinate constitutional principles such as the Fourth Amendment's requirement that a neutral and detached magistrate determine probable cause in issuing a warrant. How is that requirement supposed to work when the police seek a warrant based on information provided by an informant whose identity is undisclosed? The *Aguilar-Spinelli* two-pronged test was crafted to provide the answer.

Given their pragmatic, instrumental purpose, such prophylactic rules—though surely constitutional—are, of necessity, more mutable than the operative propositions they implement. I will argue that as such, prophylactic rules are properly subject to unilateral state adjustment based on the state's experience with the rule. Because such adjustments often reflect a policy judgment founded at least in part on a cost-benefit, empiricism-based analysis, in some cases the legislature is better equipped than the courts to undertake that analysis and has more legitimacy to impose the resulting policy judgment.

This article will examine these issues concretely, examining the Massachusetts Supreme Judicial Court's (SJC) restoration of the *Aguilar-Spinelli* test under Article XIV of the Massachusetts Declaration of Rights<sup>9</sup> following the Supreme Court's rejection of that test under the Fourth Amendment,<sup>10</sup> and the SJC's expansion of three *Miranda* protections following the Supreme Court's rejection of those protections under the Fifth Amendment.<sup>11</sup> In the first part of this article, adopting Mitchell Berman's terminology, I will review the distinction between constitutional operative propositions and constitutional decision rules (of which prophylactic rules are a subset), and show that *Aguilar-Spinelli*'s two-pronged test as well as *Miranda*'s

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7. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 8-11 (2004) (describing prophylactic rules).

8. *See id.* Prophylactic rules are a subset of what Mitchell Berman calls “constitutional decision rules,” a term which is more neutral and which, for our purposes, can be used interchangeably with “prophylactic rules.” *See id.*

9. *See* Commonwealth v. Upton, 476 N.E.2d 548, 556 (Mass. 1985) (Upton II).

10. *See* Illinois v. Gates, 462 U.S. 213, 230-31 (1983).

11. *Compare* Oregon v. Elstad, 470 U.S. 298 (1985), with Commonwealth v. Smith, 593 N.E.2d 1288, 1295 (Mass. 1992). *Compare* Moran v. Burbine, 475 U.S. 412, 429-30 (1986), with Commonwealth v. Mavredakis, 725 N.E.2d 169, 178 (Mass. 2000). *Compare* United States v. Patane, 542 U.S. 630, 641 (2005), with Commonwealth v. Martin, 827 N.E.2d 198, 203 (Mass. 2005). In the interest of full disclosure, my wife, Laurel Brandt, formerly Assistant District Attorney for Hampden County Massachusetts, was the prosecuting attorney in the *Mavredakis* trial. At no time has she revealed anything to me concerning this case that is not a matter of public record, and she has played no part in the development of this article.

warning-and-waiver construct<sup>12</sup> fall into the latter category.

In the second part of the article, I will argue that these concededly federal prophylactic rules are properly subject to review and enhancement under state law. Massachusetts provides a particularly interesting lens through which to examine this point for two reasons. First, despite the SJC's occasional rhetoric to the contrary, the Supreme Court and the SJC agree on the meaning and scope of the constitutional provisions in question (the Fourth Amendment and Article XIV; the Fifth Amendment and Article XII). With one possible exception, which I will discuss, the federal and state constitutional operative propositions at issue here are essentially identical. Second, the SJC has expressly declined to adopt *Miranda*'s warning-and-waiver construct as a requirement under the state Constitution, regarding it as exclusively a creature of federal law. Nevertheless, I will argue that it is conceptually legitimate for the state to consider expanding that federal decision rule under state law.

In the final part of the article, I turn to the question of which among a state's three constitutional branches should decide whether to expand these prophylactic rules. As I will develop, several factors should be considered to determine whether the courts or legislatures should make this decision. First, the closer the connection between the rule and its underlying operative proposition, the more it should be the courts' prerogative to determine its reach. Second, the closer the focus of the rule's impact is to the judicial function, the more appropriate it is for the courts to define that impact. Third, to the extent that either the legislature or the courts have a comparative advantage in measuring the costs and benefits of expanding a decision rule and in imposing such a rule, it is more appropriate for that branch to be the constitutional arbiter. Of course these factors, when weighed, may not yield a clear answer. In such a case, a court might decide the issue provisionally, in a way that—either expressly or as a practical matter—allows the legislature to reconsider the matter and perhaps reach a different decision. That is, the court could decide the issue as constitutional common law, not in the unalterable script of a constitutional command. If the legislature subsequently adopts a different view, the courts might then be called upon to determine whether the decision should be within its constitutional bailiwick.<sup>13</sup>

I now turn to the arguments, first laying their foundations and then developing them with reference to the Massachusetts experience.

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12. By warning-and-waiver construct, I mean to include not just the requirements set down in *Miranda* itself, but also *Miranda*'s progeny that have given shape to this intricate decision rule, both extending and limiting its reach.

13. Cf. Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001). Professor Klein argues for a more active role for legislative and executive actors—federal and state—in crafting prophylactic rules and incidental or remedial rights, but recognizes that “the Court will, of course, have the final say as to whether alternative prophylactic rules and rights provided by legislators, law enforcement agencies, and state judges sufficiently protect the Bill of Rights in a manner that the Court can effectively oversee.” *Id.* at 1054.

## II. OPERATIVE PROPOSITIONS AND DECISION RULES

Courts and commentators have long recognized that constitutional jurisprudence comprises a broad spectrum of decision-making, ranging from decisions that couch the meaning of constitutional provisions in terms of expansive, often value-laden principles, to decisions that set out specific rules to guide the application of such indeterminate standards.<sup>14</sup> Over thirty years ago, Henry Monaghan made this point in his influential argument that the Court's constitutional jurisprudence should be separated into those decisions that have what he called constitutional status (i.e., have their basis in the interpretation of constitutional provisions) and those that could more productively and realistically be seen as constitutional common law designed to advance particular constitutional interests but that could be overridden by congressional action.<sup>15</sup> Other scholars have since recognized differential constitutional decision making, arguing that constitutional jurisprudence necessarily includes doctrinal rules—often bright-line generalizations—that may reach beyond core constitutional meaning but that nevertheless have constitutional status.<sup>16</sup> Coining terminology that has become accepted in this discourse, Mitchell Berman distinguished between “constitutional operative propositions,” which he describes as “constitutional doctrines that represent the judiciary’s understanding of the proper meaning of a constitutional power, right, duty,” and “constitutional decision rules,” which he terms “doctrines that direct courts how to decide whether a constitutional operative proposition is

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14. See, e.g., *New York v. Belton*, 453 U.S. 454, 460 n.3 (1981) (distinguishing between decisions setting forth “fundamental [constitutional] principles” and those fixing application of such principles “in [a] particular and problematic [context]”); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1310-11 (2006) (distinguishing between constitutional standards and rules); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-14 (1978) (distinguishing between constitutional concepts and constructs).

15. See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 20-23 (1975). Professor Monaghan argued that this constitutional common law generally over-enforced what the Constitution required, and thus could be trimmed by Congress without violence to *Marbury’s* command. See *id.* at 32. Three years later, Professor Lawrence Sager argued that the Court often under-enforced the Constitution’s meaning, leaving room for the states (and presumably Congress) to expand (or not) constitutional commands as they saw fit. See Sager, *supra* note 14, at 1226.

16. See, e.g., John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After Chavez v. Martinez*, 39 GA. L. REV. 733, 781 n.266 (2005) (noting widespread acceptance of constitutional status of “prophylactic rules that protect constitutional rights by creating a buffer zone of prohibited conduct beyond the scope of the actual right”). Professor Parry suggests abandoning the term “prophylactic,” arguing that it interferes with the understanding that such rules are but a part of constitutional doctrine along with judicial decisions concerning “what the law is” and remedies (as to which Congress may have a role). See *id.* at 796-97 & n.327; see also Fallon, *supra* note 14, at 1279 (arguing emergence of gap between meaning and doctrine sometimes acceptable); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (noting such doctrinal rules “capture[] the background principle or policy incompletely and so produce[] errors of over- and under-inclusiveness”). But see, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 869-70 (1999) (arguing such distinction conceptually insupportable). See generally Berman, *supra* note 7 (capturing debate regarding status of prophylactic rules).

satisfied.”<sup>17</sup>

The Court’s decision in *Miranda* epitomizes this dichotomy. On one hand, the Court expanded the reach of the Fifth Amendment privilege against compelled self-incrimination, holding that the privilege applied not only to testimony in formal proceedings but also to police interrogation of suspects in police custody.<sup>18</sup> However, the Court also went on to announce what it characterized as “concrete constitutional guidelines for law enforcement agencies and courts to follow” in observing and enforcing this expanded application of the Fifth Amendment protection.<sup>19</sup> The Court suggested that these “guidelines” were intended to provide but one path among many to safeguard the underlying right,<sup>20</sup> a suggestion that planted the seed for subsequent attacks on the warning-and-waiver rules as being no more than subconstitutional prophylaxis that can be ignored if their costs seem too high.<sup>21</sup> Even in the face of the Court’s reaffirmation of *Miranda* and its warning-and-waiver construct as a constitutional requirement in *Dickerson v. United States*,<sup>22</sup> doubts concerning the constitutional status of *Miranda* persist.<sup>23</sup>

As many have pointed out, however, one does not have to view *Miranda*’s warning-and-waiver construct as subconstitutional to accept that it stands on different ground than a decision setting forth the meaning and scope of the Fifth Amendment itself.<sup>24</sup> Viewing the warning-and-waiver requirements as one of many decision rules that, particularly in criminal procedure, guide the

17. Berman, *supra* note 7, at 9. See, e.g., Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1732 (2008); Klein, *supra* note 13, at 1032-33 (characterizing such rules that over-protect constitutional values as “prophylactic rules,” that under-protect as “safe harbors,” and remedies for violations as “incidental rights”). Professor Berman points out that Monaghan, Sager, and Fallon each articulate distinct and differing views of this process, but that each recognizes “two conceptually distinct components” to constitutional decisionmaking. See Berman, *supra* note 7, at 36.

18. See *Miranda v. Arizona*, 384 U.S. 436, 460-67 (1966); *Michigan v. Tucker*, 417 U.S. 433, 442 (1974) (stating “it was not until this Court’s decision in *Miranda* that the privilege against self-incrimination was seen as the principal protection for a person facing police interrogation”); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1233-36 (1993) (recognizing this expansion of Fifth Amendment’s protection to stationhouse interrogations); see also Berman, *supra* note 7, at 114, 117-18; Klein, *supra* note 13, at 1035-36.

19. *Miranda*, 384 U.S. at 441-42. Professor Fallon characterizes these guidelines as the “epitome of a judicially manageable standard.” Fallon, *supra* note 14, at 1305; see also Berman, *supra* note 7, at 114 (pointing out *Miranda*’s guidelines as decision rules crafted to minimize adjudicatory errors).

20. See *Miranda*, 384 U.S. at 458, 467, 477, 479, 490.

21. See *Oregon v. Elstad*, 470 U.S. 298, 305-09 (1985); *New York v. Quarles*, 467 U.S. 649, 654 (1984); *Tucker*, 417 U.S. at 444-48.

22. 530 U.S. 428, 432 (2000).

23. See *Missouri v. Siebert*, 542 U.S. 600, 623-24 (2004) (O’Connor, J., dissenting) (citing and quoting *Oregon v. Elstad*, 407 U.S. 298, 306 (1985)) (noting “Court has made clear that there simply is no place for a robust deterrence doctrine with regards to violations of *Miranda*,” and that “the ‘*Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself”); *Chavez v. Martinez*, 538 U.S. 760, 770-72 (2003) (four-justice plurality opinion) (Thomas, J.) (recognizing “violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person”). See generally Yale Kamisar, *Foreword: From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879 (2001).

24. See *supra* note 16 and accompanying text.

application of the more amorphous underlying operative propositions offers a sensible perspective on their constitutional role.<sup>25</sup> Constitutional protections like the Fifth Amendment's privilege against compelled self-incrimination or the Fourth Amendment's requirement that searches and seizures be reasonable are not by their terms readily applicable in the field, be it a rapidly unfolding criminal investigation or the more measured pace of a motions session in one or another of the countless criminal courts bound to apply these bedrock principles on a daily basis. Asking judges and the lawyers that appear before them—not to mention police officers on the street—to achieve even a semblance of consistency and fealty to such indeterminate constitutional commands requires the use of some version of such rules, whether one calls them “constitutional decision rules,”<sup>26</sup> “prophylactic” and “safe-harbor” rules,<sup>27</sup> or “concrete constitutional guidelines.”<sup>28</sup> Not surprisingly, such rules abound, though few have attracted the attention of the *Miranda* rules.<sup>29</sup>

To take a transparent example, in *Chimel v. California*,<sup>30</sup> the Supreme Court held that a search incident to arrest is reasonable, and thus lawful under the Fourth Amendment, if it is confined to “the area ‘within [the arrestee’s] immediate control’—construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence.”<sup>31</sup> Concerned that this principle,<sup>32</sup> clear as it might seem, had proved difficult and confusing to

25. I mean here to include not just the requirements set down in *Miranda* itself but also *Miranda*'s progeny that have given shape to this complex decision rule, both extending and limiting its reach.

26. See Berman, *supra* note 7, at 109. While Berman contends that the primary function of such decision rules is to guide the judiciary in its application of the more indeterminate operative propositions, he acknowledges the important secondary role that the rules play in providing actors bound by such constitutional commands, such as law enforcement officers, with sufficiently clear guidance to ensure their conduct will withstand judicial review. See *id.* at 109; see also Landsberg, *supra* note 5, at 959 (citing utilitarian function decision rules play in guiding both lower courts and governmental officials in applying constitutional standards).

27. See Klein, *supra* note 13, at 1037-47.

28. *Miranda v. Arizona*, 384 U.S. 436, 441-42 (1966).

29. See, e.g., Evan H. Caminker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 25 (2001); Klein, *supra* note 13, at 1037-44; Landsberg, *supra* note 5, at 933; Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1669 (2005); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195-207 (1988).

30. 395 U.S. 752 (1969).

31. *Id.* at 763.

32. This is a good example of Berman's concession that it is often not clear where a doctrinal construct falls on the spectrum marked at one end by operative propositions and the other by decision rules. See Berman, *supra* note 7, at 61, 78-79. In *Chimel*, the Court redefined the scope of a search incident to arrest, overruling a prior line of cases that permitted officers to search the area within the arrestee's control, taking a constructive approach to defining control and thus permitting a search of the arrestee's domicile if he was there arrested. See 395 U.S. at 760 & n.4; see also *United States v. Rabinowitz*, 339 U.S. 56, 61 (1950) (setting forth earlier rule), *overruled in part by Chimel v. California*, 395 U.S. 752 (1969). Because *Chimel* strikes out in a new direction by defining the constitutional limits of “reasonable” searches in the context of arrests—relying on the function of the intrusion instead of a more abstract assessment of the connection between the area searched and the arrestee—its holding could fairly be characterized as a new operative proposition as opposed to a different decision rule. In fact, the Court, in *Belton*, described its earlier *Chimel* holding as setting out “the fundamental

apply when the police had arrested the recent occupant of a car, the Court in *New York v. Belton*<sup>33</sup> held that, incident to such an arrest, the arresting officer lawfully could search “the passenger compartment of that automobile . . . [and] examine the contents of any containers found within the passenger compartment . . . whether [such a container] is open or closed.”<sup>34</sup> As a justification for this rule, the Court observed:

[C]ourts have found no workable definition of “the area within the immediate control of the arrestee” when that area arguably includes the interior of an automobile and the arrestee is its recent occupant. Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within “the area into which an arrestee might reach in order to grab a weapon or evidentiary item.”<sup>35</sup>

Underscoring the status of *Belton*’s rule as a constitutional guideline in service of the underlying Fourth Amendment principle—a “decision rule”—the Court went on to say that “[o]ur holding today does no more than determine the meaning of *Chimel*’s principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.”<sup>36</sup>

As the Court recognized in crafting its decision rule in *Belton*, this bright-line approach to constitutional analysis—substituting a generalization for case-by-case, fact-specific applications of underlying constitutional principles<sup>37</sup>—is necessarily imprecise and often under-enforces or over-enforces the constitutional operative proposition.<sup>38</sup> If the Court subsequently identifies a disparity between a decision rule and its underlying operative proposition that has become too glaring, it is appropriate to adjust the rule, notwithstanding its

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principles . . . regarding the basic scope of searches incident to lawful custodial arrests.” *New York v. Belton*, 453 U.S. 454, 460 n.3 (1981). But even if one views the *Chimel* measure of a search incident to an arrest as a decision rule, the analysis of *Belton*’s subsequent rule is unchanged.

33. 453 U.S. 454 (1981).

34. *Id.* at 460-61.

35. *Id.* at 460.

36. *Id.* at 460 n.3. Susan Klein characterizes the *Chimel/Belton* rule as a “safe harbor” that under-protects the Fourth Amendment’s requirement that searches be reasonable but provides police officers with concrete assurance that if they follow its dictates, their searches in such circumstances will be upheld. See Klein, *supra* note 13, at 1044-46. But see *Arizona v. Gant*, 129 S. Ct. 1710, 1720-22 (2009) (striking down search that complied with *Belton*’s rule, announcing modified rule in its place); *infra* notes 40-41 and accompanying text (further discussing modified rule).

37. See Fallon, *supra* note 14, at 1320 (discussing nature and significance of constitutional theories). Fallon notes that virtually all legal or moral rules are “entrenched generalizations” that either under- or over-enforce the values they are crafted to serve. *Id.*

38. See *id.* at 1274, 1278, 1284 (observing such “substantive distortion” of constitutional measures acceptable price to pay for clear rule); see also Landsberg, *supra* note 5, at 951 n.185; Sullivan, *supra* note 16, at 58.

constitutional status.<sup>39</sup> In spite of grumbling about stare decisis,<sup>40</sup> these adjustments are not uncommon.<sup>41</sup> Of course, too much tinkering with constitutional rules undercuts the apparent legitimacy of the Court's interpretive authority,<sup>42</sup> but given their pragmatic and derivative nature, decision rules seem inevitably more mutable than the underlying constitutional principles they are meant to advance—the operative propositions.<sup>43</sup>

### III. DECISION RULES AND STATE CONSTITUTIONALISM

How does this fit into the debate concerning the legitimacy of a state court's expansion of a constitutional protection through a broader interpretation of a state constitutional provision? Even if, for reasons of interpretive legitimacy and uniformity of our basic national law, the meaning and reach of constitutional provisions common to the federal and state constitutions ought presumptively to be the same,<sup>44</sup> there is no good reason why federal and state

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39. See Berman, *supra* note 7, at 113.

40. See *Gant*, 129 S. Ct. at 1723-26 (Justices Breyer and Alito separately dissenting from Court's reworking of *Belton*'s decision rule on grounds of stare decisis).

41. See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009); *Gant*, 129 S. Ct. at 1723-24. Just last year, the Supreme Court adjusted two criminal-procedure decision rules, strengthening the *Belton* rule's protections, but eliminating another decision rule as unnecessary. See *Montejo*, 129 S. Ct. at 2091; *Gant*, 129 S. Ct. at 1723-24. First, in *Gant*, the Court beefed up *Belton*'s decision rule regarding searches incident to arrest of recent occupants of automobiles. See *supra* notes 31-35 and accompanying text (describing Court's holding in *Gant*). The *Belton* rule, as it had come to be applied, permitted automatic searches of cars even though by the time of the search the arrestee was fully in police custody, often handcuffed in a police cruiser. See *Thornton v. United States*, 541 U.S. 615, 618 (2004). In *Gant*, the Court limited searches incident to arrests in such circumstances to cases in which the arrestee "is unsecured and within reaching distance of the passenger compartment at the time of the search," at the same time conceding that this would likely be a "rare case," or in which "it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" 129 S. Ct. at 1719, 1723-24. Second, in *Montejo*, the Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), which had held the following: first, that an arraignment request for counsel effectively invoked the Sixth Amendment right to counsel (which under the *Massiah* decision rule forbade the deliberate elicitation by the police of a statement in the absence of counsel); and second, that once invoked, this right to counsel could not be waived unless the defendant initiated the contact with the police. See *Montejo*, 129 S. Ct. at 2091. In *Montejo*, a five-justice majority opined that this "prophylactic rule" had outlived its usefulness, concluding that the rule's "marginal benefits [were] dwarfed by its substantial costs." *Id.*

42. See Fallon, *supra* note 14, at 1329-30; Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1320 (2008) (arguing legitimacy of judicial decision-making most vulnerable when courts work change on operative propositions as opposed to decision rules); see also Berman, *supra* note 7, at 100-01 (suggesting stare decisis should have less impact in cases reviewing decision rules as opposed to those reviewing operative propositions).

43. See Berman, *supra* note 7, at 113; Roosevelt, *supra* note 42, at 1320. Roosevelt agrees with Berman that decision rules should be less subject to considerations of stare decisis and argues that changes to decision rules should be governed by their apparent workability as guideposts to the implementation of the underlying operative propositions, the reliance that courts have placed in extant rules, the changes in the doctrinal landscape since the rule was announced, and the changes in the factual circumstances that have emerged since the rule was announced. See Roosevelt, *supra* note 42, at 1320; see also Landsberg, *supra* note 5, at 972-73.

44. See TARR, *supra* note 2, at 174-85 (canvassing various approaches). This represents a polar view in the state-constitutionalism debate, a view that is most hostile to state-court activism in interpreting cognate provisions of state constitutions to provide protections beyond those of the Federal Constitution. *Id.* at 180-82.

decision rules must similarly be identical. On the contrary, in our federal system, subordinate state actors should be free to enhance the protection of a decision rule if it appears necessary to achieve a better local fit with its underlying constitutional operative proposition.<sup>45</sup>

Allowing states this leeway marks no incursion on the proper authority of the Supreme Court, even though the decision rule in question is undoubtedly federal. The underlying operative proposition, which is the presumptive prerogative of the Court, remains unchanged.<sup>46</sup> Any enhancement of the decision rule risks only possible over-enforcement of that principle; the operative proposition itself, as well as the protection offered by the Court's more permissive decision rule, remain protected.<sup>47</sup> Even if one is concerned that a federal constitutional provision—particularly one like the Fourth Amendment that explicitly balances state and individual interests on the fulcrum of reasonableness—might be over-enforced to the detriment of effective law enforcement, the risks of state-law over-enforcement seem relatively low. After all, state actors are closer to the action, and are better able to determine how a particular decision rule is or is not working in that state to advance the underlying operative proposition. Furthermore, states are better positioned to assess and take into account local concerns, such as the potential for over-enforcement.<sup>48</sup> Simply put, a state's striking this enforcement balance in its particular locale would be more fine-tuned than a one-size-fits-all decision rule crafted by the Supreme Court.<sup>49</sup>

It is thus no surprise that for many years the Supreme Court did not interfere with state courts' more expansive interpretation of federal decision rules.<sup>50</sup>

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*But see* Sager, *supra* note 14, at 1217-20 (arguing there are good reasons Supreme Court might interpret Constitution in manner that under-enforces its norms, leaving room for state courts and, if appropriate, Congress to fill out reach of its commands).

45. See Roosevelt, *supra* note 42, at 1327-28 (recognizing role for non-Article III actors, including state courts, in adjusting decision rules); see also Klein, *supra* note 13, at 1054 n.108 (agreeing state courts may play proper role adjusting prophylactic rules, but not safe harbor rules); cf. David A. Strauss, *Miranda, the Constitution, and Congress*, 99 MICH. L. REV. 958, 969 (2001) (arguing appropriateness of recognizing suitable role for states and Congress to achieve what they see as right fit, at least in cases involving equal protection); Parry, *supra* note 16, at 789 n.291 (citing authorities).

46. See Roosevelt, *supra* note 29, at 1716-17 (cautioning that recognizing authority of non-Article III actors to work changes in decision rules underscores importance of conceptual distinction between decision rules and operative propositions in order to avoid blurring Court's exclusive prerogative to decide what Constitution means).

47. See Sager, *supra* note 14, at 1248.

48. See Klein, *supra* note 13, at 1054 n.108 (observing *Miranda* explicitly invited such state adjustments to its decision rule, but cautioning that limits to these changes must be congruent with and proportional to underlying constitutional operative proposition); Roosevelt, *supra* note 42, at 1320-22 (arguing nonjudicial or state actors better positioned to assess factual changes contributing to decision rule's "loose fit" with its operative proposition).

49. See Sager, *supra* note 14, at 1255 (observing state courts play important constitutional role because they "may have had substantial exposure to the details of the state experience"). One might suppose this applies equally to state legislatures.

50. See *id.* at 1247-49. Indeed, until 1914, the Court was without jurisdiction to review state decisions

However, the Burger and then the Rehnquist Court shut down this corner of modest state independence, making it clear that the states are required to follow the Court's lead not only concerning what the Constitution means, but also how it is to be applied.<sup>51</sup> That effectively left state courts with state law—principally their respective state constitutions—as the only means for expanding decision rules, and then only if it is clear that the decision rests on an adequate state ground independent of the Constitution.<sup>52</sup> But as long as a state-law expansion of a decision rule does not similarly expand its underlying operative proposition, this unilateral expansion of a federal rule would not constitute an intrusion upon the Supreme Court's presumptive authority to determine the contours of our nation's constitutional norms. The Massachusetts cases discussed below demonstrate how this plays out.

#### A. *The Fourth Amendment and Aguilar-Spinelli's Two-Pronged Test*

The Fourth Amendment facially requires that warrants be founded on probable cause based on oath and affirmation. In a line of cases culminating in *Aguilar v. Texas*,<sup>53</sup> the Supreme Court fleshed out the issuing magistrate's central role in affording this protection, holding that warrants must be based on probable cause determined—as a Fourth Amendment operative proposition—by a neutral and detached magistrate based on “*facts or circumstances* presented to him under oath or affirmation. Mere affirmance of [the affiant's] belief or suspicion is not enough.”<sup>54</sup> As the Court elaborated, a court reviewing the issuance of a warrant, while giving substantial deference to the magistrate's probable-cause determination, “must still insist that the magistrate perform his ‘neutral and detached’ function and not serve merely as a rubber stamp for the police.”<sup>55</sup> To exercise the required independent judgment that there is probable cause, the magistrate must have access to the underlying facts.

The Court subsequently developed a decision rule—the two-pronged *Aguilar-Spinelli* test—to apply this operative proposition in cases in which probable cause is derived from a confidential informant's tip. Under *Aguilar*,

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striking down governmental actions as violative of the Constitution. *See id.* Even after the Court's jurisdiction was extended to permit review of such state decisions, the Court generally declined review in such cases. *See id.* at 1244. As Professor Strauss notes, there seems to be no good reason to preclude Congress or the states from balancing the costs and benefits in gauging the scope of and applying such rules as long as the Fourteenth Amendment's floor, established by the Court's decisions, was not violated. *See Strauss, supra* note 45, at 969.

51. *See Michigan v. Long*, 463 U.S. 1032, 1039-42 (1983). *But see Danforth v. Minnesota*, 552 U.S. 264, 274-81 (2008) (holding states not bound by federal retroactivity standards barring habeas application of “new” federal constitutional rules and may extend such federal protection to prisoners seeking state habeas relief).

52. *See Florida v. Powell*, 130 S. Ct. 1195, 1201 (2010) (reiterating requirement of clear and express statement of separate, adequate, and independent state grounds to insulate state court constitutional decision from Supreme Court review); *Long*, 463 U.S. at 1040-42.

53. 378 U.S. 108 (1964), *abrogated by Illinois v. Gates*, 462 U.S. 213 (1983).

54. *Id.* at 112 (quoting *Nathanson v. United States*, 290 U.S. 41, 47 (1933)).

55. *Id.* at 111.

as elaborated in *Spinelli v. United States*,<sup>56</sup> the Court required the police to include in the affidavit the facts from which the reviewing magistrate could determine both that the informant had demonstrated sufficient veracity to be credible, and that the informant's basis of knowledge was adequate to support the tip. If, under this test, either prong was not satisfied, the magistrate could not find probable cause unless she further determined from facts in the affidavit that the officer's investigative corroboration filled that gap, providing a basis to conclude that the tip was nevertheless reliable.<sup>57</sup>

The *Aguilar-Spinelli* decision rule lasted fifteen years, until a more conservative Supreme Court concluded that the demands of its two-pronged test over-enforced the operative proposition requiring an independent magisterial determination of probable cause. In *Illinois v. Gates*,<sup>58</sup> the Court thus jettisoned this decision rule and directed reviewing courts simply to apply "common sense," taking into account the "totality of the circumstances" set forth in the affidavit, to determine if the magistrate in that case had an adequate basis to find probable cause for the warrant she had issued. Under *Gates*, if the affidavit, viewed from this perspective, contained a sufficient basis to support such a magisterial finding, a reviewing court should defer to that determination.<sup>59</sup>

The SJC did not agree, and in *Commonwealth v. Upton*,<sup>60</sup> it went ahead and applied the defunct two-pronged test to invalidate a search warrant under the Fourth Amendment, explaining that the *Gates* decision had not abandoned the test, but merely adjusted it.<sup>61</sup> The SJC in *Upton* did not disagree with the Supreme Court concerning the meaning or breadth of the requirement that there be independent magisterial determinations of probable cause to satisfy the Fourth Amendment's operative proposition. Its disagreement with the Court was rather that the *Gates*' reliance on an unstructured review of the totality of the circumstances was inadequate to ensure independent magisterial determinations of probable cause based on information provided by an undisclosed tipster. So, the SJC returned to the more demanding *Aguilar-Spinelli* decision rule.<sup>62</sup> The Supreme Court reversed, holding that in applying

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56. 393 U.S. 410 (1969).

57. See *Spinelli*, 393 U.S. at 415; *Aguilar*, 378 U.S. at 114.

58. 462 U.S. 213 (1983).

59. *Id.* at 238-39. The Court also arguably loosened the definition of "probable cause," thereby announcing a new operative proposition, if that is how one reads the opinion. See *id.* at 238 ("fair probability"); *id.* at 244 n.13 ("substantial chance"). Whether or not that is so is beyond the scope of this piece.

60. 458 N.E.2d 717, 720-21 (Mass. 1983).

61. *Id.* In an apparent attempt to stay within the Supreme Court's opinion in *Gates*, the SJC read *Gates* as adjusting the corroboration requirement of *Aguilar* and *Spinelli*'s two-pronged test rather than rejecting the test in favor of a "standardless 'totality of the circumstances' test." See *id.* However, the SJC was clear that if, as turned out to be the case, *Gates* stood for a rejection of the two-pronged test for assessing magisterial determinations of probable cause, it did not agree with that result. See *id.* at 723.

62. *Id.* at 721.

the Fourth Amendment, the SJC was bound by *Gates*, which—it scolded the SJC—rejected the two-pronged test in favor of a totality of the circumstances review.<sup>63</sup> On remand in *Upton II*, the SJC reinstated its holding, this time based on Article XIV of the Declaration of Rights in the Massachusetts Constitution.<sup>64</sup>

Although in *Upton II* the SJC said that Article XIV offered broader protections than the Fourth Amendment, it did not hold that Article XIV had a different meaning (i.e., that its operative proposition was broader than that of the Fourth Amendment).<sup>65</sup> Rather, the SJC held that the *Aguilar-Spinelli* decision rule was necessary to implement that proposition,<sup>66</sup> differing with the Supreme Court’s view that the decision rule over-enforced the standard.<sup>67</sup>

Neither court was clearly correct regarding the necessity of the *Aguilar-Spinelli* test to ensure a neutral and detached magistrate; indeed, both may have been correct. The *Aguilar-Spinelli* approach may be too demanding as a one-size-fits-all, national requirement. At the same time, it could well be that in Massachusetts the *Aguilar-Spinelli* decision rule is necessary to ensure that deputy clerk magistrates in the sixty plus district courts that issue warrants every day have a sufficient basis to independently determine probable cause in tip cases.<sup>68</sup>

Both these approaches could fairly coexist under the Fourth Amendment, making it unnecessary for the SJC to rely on state law to resurrect this decision rule. The Supreme Court was well within its prerogatives to decide, after fifteen years of observation, that the Fourth Amendment does not require the two-pronged test in every case to enforce its mandate of independent magisterial decisionmaking in tip cases,<sup>69</sup> particularly given the Court’s role in

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63. *Massachusetts v. Upton*, 466 U.S. 727, 732-33 (1984).

64. *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985).

65. *See id.* at 556-58. The SJC noted that Article XIV preceded the Fourth Amendment, the latter in some substantial manner being based on Article XIV and both sharing in similar language. *Id.* at 555. The SJC observed that in *Gates*, the Supreme Court had appeared to reformulate the definition of probable cause, but the SJC expressly chose not to differ with the Supreme Court on that question. *See id.* at 554 n.7, 556-57.

66. *See id.* at 557 (noting two-pronged test “aids lay people, such as the police and certain lay magistrates, in a way that the ‘totality of the circumstances’ test never could”). The SJC did not, of course, use the terminology of “decision rules” and “operative propositions,” but the concepts fairly characterize what the court did.

67. *Upton*, 466 U.S. at 732 (emphasizing that *Gates* “rejected [the *Aguilar-Spinelli* two-pronged test] as hypertechnical and divorced from ‘the factual and practical considerations of everyday life on which reasonable men, not legal technicians, act’”).

68. *See Sager, supra* note 14, at 1256 (noting likelihood of superior state court competence in applying federal constitutional norms in particular circumstances of state). As noted, the SJC, in *Upton II*, specifically pointed out the importance of a clear test, which in its judgment the *Aguilar-Spinelli* decision rule provides, to “aid[] lay people, such as the police and certain magistrates [in determining probable cause] in a way that the ‘totality of the circumstances’ test never could.” *Upton*, 476 N.E.2d at 557.

69. *See Illinois v. Gates*, 462 U.S. 213, 230 (1983). Even as it struck down the *Aguilar-Spinelli* two-prong decision rule, the Court observed that its test provides appropriate guidance to magistrates in their probable-cause determinations in tip cases. *See id.*

our federal system of establishing constitutional minima below which no state may go. Considerations of comity may counsel resolving doubts concerning the reach (or even use) of decision rules in favor of under-enforcement, leaving it for the states to be more protective in setting out more demanding decision rules if warranted in that local context.<sup>70</sup> And, the SJC's holding that the two-pronged rule is necessary in Massachusetts courts to ensure proper decisionmaking by its magistrates in this narrow Fourth Amendment context seems equally appropriate. The constitutional operative proposition is the same in either case; the only question is how it should be implemented. But given the Supreme Court's insistence that it alone should decide not just what the Fourth Amendment means but also how that protection should be put in place, the SJC's reluctant turn to the state's parallel constitutional provision for this decision rule<sup>71</sup> was appropriate and did not undercut the Supreme Court's role as final arbiter of federal constitutional values.

### B. *The Fifth Amendment and Miranda*

The Massachusetts experience with *Miranda* is more complex. As noted, *Miranda*'s requirement of warnings and waiver is a decision rule designed to ensure consistent and full enforcement of the Fifth Amendment's protection against compelled self-incrimination in the context of custodial interrogations.<sup>72</sup> It is openly premised on a set of interlocking presumptions that all such interrogation is inherently coercive, that any statement by a suspect during such interrogation is coerced and thus compelled under the Fifth Amendment, and that the only way to overcome this presumed coercion is to administer particular warnings concerning the right to silence and to counsel during the interrogation. However, once the warnings are given and the suspect knowingly, voluntarily and intelligently waives those rights, the presumed coercion disappears and the otherwise compelled statement is presumed to be freely given and not compelled under the Fifth Amendment.<sup>73</sup> These are not rebuttable presumptions, serving to assign burdens of proof in this factually

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70. See Sager, *supra* note 14, at 1249 (noting “[u]nless compelling constitutional concerns are at stake, there would seem to be no occasion for an abiding federal judicial role in policing state courts against overly generous interpretations of federal constitutional values”).

71. See *supra* note 61.

72. See *supra* Part II.A; see also Berman, *supra* note 7, at 114 & n.345, 127-28 (noting principal function of *Miranda*'s decision rule is reducing adjudicatory errors).

73. See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). In his dissent, Justice White wondered how the Court on the one hand can hold that stationhouse interrogation is inherently coercive, but on the other can be confident that a suspect's waiver of his rights in such an atmosphere is knowing, voluntary, and intelligent, all without knowing—as the Court concedes—what really goes on during such sessions. See *id.* at 535-36 (White, J., dissenting). Echoing Justice White's skepticism concerning this presumptive coercion, the Court has recently cast the burden on the accused to “unambiguously” invoke the right to silence in order to claim *Miranda*'s protection even if the accused never waived the right other than by ultimately answering questions. See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259-64 (2010).

murky area of stationhouse interrogation. They are irrebuttable, establishing the ultimate fact of whether or not a confession was compelled by proof (or not) of the warnings and waiver that preceded the confession.

Almost from the beginning, this decision rule was thought by many to over-enforce the Fifth Amendment's privilege against compelled self-incrimination in its newly minted expansion into the police station; that is, to function as a prophylactic rule. As developed above, this does not doom *Miranda's* construct as a constitutional command,<sup>74</sup> but to the extent that a decision rule is thought to consistently over-enforce its underlying operative proposition, its apparent legitimacy may be suspect. The SJC seems initially to have shared this skepticism, explicitly declining to adopt *Miranda's* warning-and-waiver decision rule under Article XII, the provision in the Declaration of Rights protecting against compelled self-incrimination.<sup>75</sup>

Relatively soon, the Supreme Court itself (with changed membership led by Chief Justice Burger) set out to trim *Miranda's* warnings-and-waiver decision rule, characterizing it as a "prophylactic rule" not required by the Fifth Amendment.<sup>76</sup> Among its adjustments to the rule, the Court held that statements taken in violation of *Miranda* could be used to impeach the defendant if he testified inconsistently with his custodial statement,<sup>77</sup> that certain derivative fruits of a *Miranda* violation are not subject to the exclusionary rule's bar,<sup>78</sup> that an unwarned statement taken to protect public safety does not violate *Miranda*,<sup>79</sup> and that a suspect's waiver of the right to counsel is valid even if the suspect is not informed that counsel is readily available to consult with prior to questioning.<sup>80</sup> These decisions seemed to indicate that *Miranda* would be overturned,<sup>81</sup> but that, of course, did not come

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74. See *supra* Part II.A.

75. See *Commonwealth v. Morrissey*, 222 N.E.2d 755, 758-59 (Mass. 1967) (declining to accept Supreme Court's suggestion that it was free to adopt *Miranda's* warning-and-waiver requirements under state law even though decision not retroactive as matter of federal law). That refusal to adopt *Miranda's* decision rule as one required under Article XII of the Declaration of Rights continues through the present. See *Commonwealth v. Martin*, 827 N.E.2d 198, 204 (Mass. 2005); *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1368 (Mass. 1992). Indeed, early on, the SJC was explicitly grudging in its enforcement of *Miranda* even under the Fifth Amendment. See *Morrissey*, 222 N.E.2d at 759 (declining to exercise discretion to apply *Miranda* where not required by federal principles of retroactivity).

76. The Court's first such reference was in *Michigan v. Tucker*, 417 U.S. 433, 444 (1974), decided eight years after *Miranda*. It was repeated thereafter in cases cutting back on the warning-and-waiver decision rule. See *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985); *New York v. Quarles*, 467 U.S. 649, 653-54 (1984).

77. See *Harris v. New York*, 401 U.S. 222, 225-26 (1971).

78. See *Elstad*, 470 U.S. at 314 (noting confession obtained soon after similar unwarned confession); *Tucker*, 417 U.S. at 452 (providing testimony of witness identified through statement taken in violation of *Miranda*). After *Dickerson*, the Supreme Court reaffirmed and broadened its holding that a *Miranda* violation required only suppression of the statement, not any fruits of that statement. See *United States v. Patane*, 542 U.S. 630, 636-37 (2005).

79. See *Quarles*, 467 U.S. at 655.

80. *Moran v. Burbine*, 475 U.S. 412, 422 (1986).

81. It is perhaps worth noting that not all of the Court's adjustments or clarifications of *Miranda's* requirements cut back on its protections; some fortified those protections. So, the Court held that *Miranda*

to pass. In *Dickerson v. United States*,<sup>82</sup> the Court reaffirmed *Miranda*'s decision rule, explicitly confirming its constitutional foundation, at the same time reaffirming those post-*Miranda* decisions that limited its reach.<sup>83</sup>

Putting the rhetoric aside and looking at *Miranda* as a decision rule necessary to the enforcement of the Fifth Amendment's self-incrimination protection in the difficult context of police interrogation, *Dickerson* and the earlier decisions that it left in place seem justifiable.<sup>84</sup> *Miranda*'s decision rule (really, web of decision rules) is, like other such rules, founded on pragmatism, and is, and should continue to be, subject to reshaping as its costs and benefits become more apparent.<sup>85</sup> But if pragmatism justifies the Supreme Court's contextual adjustments to *Miranda*'s constitutional decision rule, states should be similarly free to consider further pragmatic adjustments as long as these rule expansions are more protective of the underlying privilege and do not intrude on the Supreme Court's authority to interpret the Fifth Amendment's meaning. The three cases to which I now turn, *Commonwealth v. Smith*,<sup>86</sup> *Commonwealth v. Mavredakis*,<sup>87</sup> and *Commonwealth v. Martin*,<sup>88</sup> demonstrate this point.

*Smith* dealt with *Miranda*'s decision rule in the context of a serial-interrogation technique in which the police first question a suspect but only administer the warnings and seek a waiver after the unwarned suspect confesses. The officers then reinterrogate the suspect, typically leading the newly warned suspect to repeat and even embellish his prior unwarned admissions. Prior to *Smith*, the SJC had joined many courts across the country in holding that this tactic violates *Miranda*. Even though the second statement was preceded by the required warnings and waiver, the cat was already out of the bag by the time of the second statement. Thus, the suspect—unless he knew that the first, unwarned statement was not admissible at trial—had no reason to think that the rights of which he had now been advised were anything but empty formalities.<sup>89</sup> Courts, including the SJC, thus held that the second,

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applies not just to express questioning but also to its functional equivalent, *Rhode Island v. Innis*, 446 U.S. 291, 292 (1980), that a suspect's invocation of the right to cut off questioning must be "scrupulously honored," *Michigan v. Mosely*, 423 U.S. 96, 104 (1975), that a suspect's invocation of the right to counsel bars further questioning unless the suspect himself initiates further conversation, *Edwards v. Arizona*, 451 U.S. 477, 482 (1981), barring even unsolicited questioning by different police about an unrelated crime, *Arizona v. Roberson*, 486 U.S. 675, 682-85 (1981), or such questioning even after the suspect has consulted with a lawyer, *Minnick v. Mississippi*, 498 U.S. 146, 156 (1990).

82. 530 U.S. 428 (2000).

83. *See id.* at 443-44.

84. *See Klein, supra* note 13, at 1060-63 (accepting conceptual validity of limitations on *Miranda*, with possible exception of *Quarles*' emergency exception, but noting that, as practical matter, no right is absolute).

85. *See Strauss, supra* note 45, at 966-69 (arguing Court's trimming of *Miranda*'s construct in *Harris, Tucker, Elstad* and *Quarles* based on cost-benefit analysis and did not detract from constitutional status of decision rule).

86. 593 N.E.2d 1288 (Mass. 1992).

87. 725 N.E.2d 169 (Mass. 2000).

88. 827 N.E.2d 198 (Mass. 2005).

89. *See Commonwealth v. Haas*, 369 N.E.2d 692, 699 (Mass. 1977); *Commonwealth v. Mahnke*, 335

warned statement was presumptively tainted by the first, unwarned statement and therefore should be suppressed unless the prosecution could show that there was an intervening event that cleansed the second interrogation of the impact of the first, unlawful interrogation.<sup>90</sup>

This was all framed as a matter of federal law, required by the Fifth Amendment. Or so the courts thought. In *Oregon v. Elstad*,<sup>91</sup> the Supreme Court held otherwise, opining that in such a situation, *Miranda* required no more than proof of warnings and waiver prior to the second statement. Under *Elstad*, the second, warned statement is admissible unless the reviewing court finds that the police used “deliberately coercive or improper tactics in obtaining the initial statement.”<sup>92</sup> *Elstad* marked the first time that the Supreme Court weighed in on this application of *Miranda*’s decision rule, but to many, *Elstad* constituted a trimming back of its reach.<sup>93</sup> Following *Elstad*, the SJC revisited the issue in *Smith*, holding as a matter of state common law that this practice violated *Miranda*, and explicitly restoring *Miranda*’s decision rule to its pre-*Elstad* state.<sup>94</sup>

Similarly, in *Mavredakis*, the SJC decided that another apparent loosening of *Miranda*’s decision rule by the Supreme Court left the privilege against compelled self-incrimination under-protected. *Mavredakis* dealt with the scenario in which police interrogate a suspect whose lawyer is readily available and has requested but been denied an opportunity to consult with the suspect prior to or during the interrogation. The SJC had held under the Fifth Amendment that in such a case, the suspect’s waiver would not satisfy *Miranda* unless the suspect was told not only that he had a right to counsel during the interrogation but that a lawyer was actually requesting an opportunity to speak with him.<sup>95</sup> The Supreme Court subsequently disagreed, holding, in *Moran v. Burbine*,<sup>96</sup> that *Miranda* required no such additional warning and waiver.<sup>97</sup>

The SJC reconsidered this issue in *Mavredakis*, restoring the rule that *Burbine* had rejected and returning *Miranda*’s decision rule to its pre-*Burbine*

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N.E.2d 660, 673-74 (Mass. 1975). Indeed, taken on their face, the warnings tell the subject that “anything you say may be used against you in court,” and thus reinforce the notion that by his earlier statement the suspect has given up the game. See Parry, *supra* note 16, at 757.

90. See *Smith*, 593 N.E.2d at 1291-92 (citing cases so holding).

91. 470 U.S. 298, 308 (1985).

92. *Id.* at 314.

93. The Supreme Court itself encouraged that view, characterizing the warning-and-waiver construct as prophylactic only; not required by the Fifth Amendment itself. *Id.* at 308-09 (O’Connor, J.). The Court subsequently backtracked on that rhetoric, conceding that the warning-and-waiver construct was imposed on state courts to guide their enforcement of the Fifth Amendment’s protection against compelled self-incrimination. See *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

94. *Commonwealth v. Smith*, 593 N.E.2d 1288, 1296 (Mass. 1992).

95. See *Commonwealth v. Mavredakis*, 725 N.E.2d 169, 176 (2000) (citing SJC cases so holding).

96. 475 U.S. 412 (1986).

97. *Id.* at 422.

contours.<sup>98</sup> Unlike its decision in *Smith*, however, the court framed *Mavredakis* in terms of Article XII, not state common law, suggesting, if not holding, that Article XII provides greater protection than the Fifth Amendment against compelled self-incrimination.<sup>99</sup> If the SJC intended what it appeared to say—that Article XII’s operative proposition forbidding compelled stationhouse self-incrimination is broader than that of its federal counterpart—this was both unnecessary to the decision and an incorrect reading of existing precedent. *Mavredakis* (like *Smith*) represents a more expansive view than that of the Supreme Court concerning the decision rule necessary to implement the protection against compelled self-incrimination in the stationhouse. Neither *Mavredakis* nor *Smith*, however, depend on a state constitutional protection against self-incrimination that is broader than that of the Fifth Amendment.<sup>100</sup> Moreover, a review of the history and precedents of Article XII and of the Fifth Amendment demonstrate that, at least insofar as they apply to police interrogation, their respective operative propositions concerning compelled self-incrimination are essentially the same.<sup>101</sup> Once *Mavredakis*’s unnecessary

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98. See *Burbine*, 475 U.S. at 422; *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Mavredakis*, 725 N.E.2d at 176-77.

99. *Mavredakis*, 725 N.E.2d at 177-78.

100. Interpreting Article XII to provide greater protection against compelled self-incrimination than the Fifth Amendment in order to justify resurrection of the SJC’s pre-*Burbine* version of *Miranda*’s rule not only misread Article XII’s history and prior interpretation; it needlessly conflated the common operative proposition of two constitutional provisions protecting against compelled self-incrimination with the web of decision rules intended to guide the application of that operative proposition. The problem is not simply one of conceptual elegance, for this anchoring of *Mavredakis*’s expanded decision rule in the meaning of Article XII “calcifies” this rule, making further adjustments in light of unforeseen consequences, changed circumstances, or a reassessment of the rule’s wisdom beyond the reach of any decision maker but the SJC, and even for the SJC, considerably more difficult than necessary.

101. See Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right”* in *Chavez v. Martinez*, 70 TENN. L. REV. 987, 987 n.1, 1008 & n.118 (2003). The two constitutional provisions have common historical roots, Article XII being a predecessor of, and one of the models for, the Fifth Amendment. Article XII’s terms, “[n]o subject shall . . . be compelled to accuse, or furnish evidence against himself,” are different, and seem broader, than those of the Fifth Amendment, that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V; MASS. CONST. pt. I, art. XII. However, authorities agree that no difference was intended; the terms “furnish evidence” and “be a witness” being “virtually synonymous” to the Framers. See Davies, *supra*, at 1008 n.118 (noting Article XII among eight state constitutional provisions that served as models for Fifth Amendment). Professor Davies’ exhaustive review of historical materials demonstrates that the textual differences between the Fifth Amendment’s self-incrimination clause and that of Massachusetts were stylistic and not substantive. See *id.* at 998-1018, 998 n.62. From an historical standpoint, both Article XII and the Fifth Amendment were aimed at pre-accusation judicial examinations of persons not charged with—or maybe even suspected of—any crime. The earlier English experience with such inquisitorial “fishing expeditions” by ecclesiastical courts and the Court of the Star Chamber, formally examining uncharged persons in an effort to use the power of the oath, known as “ex-officio oath,” to force self-accusation, was the core concern, not investigatory questioning by constables or other executive officers. See *id.* at 1000-07. Indeed, at the time both constitutional provisions were written and adopted, there were no police to speak of, with criminal investigation and prosecution still largely in private hands. *Id.* The Framers’ core concern—that of John Adams particularly—was to preserve the accusatory nature of the criminal process by prohibiting judicially compelled self-accusation. *Id.* at 1001 n.77, 1010 n.123. Both privileges tracked each

rhetoric is stripped away, it does not expand Article XII's protection against compelled self-incrimination beyond that of the Fifth Amendment. Rather, it is no more than a restoration of one aspect of *Miranda's* decision rule implementing that protection.

Reduced to their essentials, then, both *Smith* and *Mavredakis* represent no more than a state striking a different and more protective balance than that struck by the Supreme Court in crafting the decision rule implementing self-incrimination protection in the context of police interrogation. Neither decision depends on a more expansive Article XII version of the underlying operative proposition than that of the Fifth Amendment. These state law adjustments of *Miranda's* decision rule thus do not undercut the premise that the Supreme Court presumptively ought to be the final arbiter concerning the meaning and

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other during the century and a half that their respective protections were mutually exclusive, the Fifth Amendment applying only to federal cases and Article XII only to state cases. The SJC interpreted Article XII's privilege against compelled self-incrimination to include not only protection against using the ex-officio oath to compel self-incrimination, but also the common-law extension of that privilege barring compelled testimony at one's own trial (or the trial of others). See *Emery's Case*, 107 Mass. 172, 181 (1871) (noting "[t]his branch of the constitutional exemption [Article XII's privilege] corresponds with the common law maxim, *nemo tenetur seipsum accusare* [no man is bound to criminate (accuse) himself]"); see also *Davies, supra*, at 1001-02 nn.78-79 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 68 (1st ed. 1765)). The Supreme Court, in a like manner, extended the Fifth Amendment protection against self-incrimination to include this common law, "nemo tenetur" rule, barring the introduction of judicially compelled confessions at trial. See *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892) (holding privilege extended generally to testimony compelled under oath, whether or not proceeding was criminal trial at which witness stood accused), *overruled in part by Kastigar v. United States*, 406 U.S. 441 (1972). The Court, in *Counselman*, cited the SJC's opinion in *Emery's Case* and observed:

It is impossible that the meaning of the [Fifth Amendment's privilege against self-incrimination] can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

*Id.* at 562. The Court arguably went further in *Bram v. United States*, striking down a confession produced by coercive police interrogation on the grounds that it was not voluntary and thus was barred by the Fifth Amendment privilege. See 168 U.S. 532, 543-65 (1897). However, the *Bram* decision was strongly criticized by Wigmore for, in his view, conflating the privilege against judicially-compelled self-accusation in formal proceedings with the common-law protection against involuntary confessions. See *Davies, supra*, at 1038; Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 170-71 (1992). *Bram* lay dormant as precedent until almost seventy years later, when the Court dusted it off in *Miranda*. See *Miranda v. Arizona*, 384 U.S. 436, 461-62 (1966). Whether or not Wigmore was correct in his criticism of *Bram*, the matter is moot after the Supreme Court's explicit extension of the privilege against compelled self-incrimination to police questioning of suspects in custody. Cf. *Herman, supra*, at 170-95 (arguing common-law protection against coerced confessions largely subsumed in common-law "nemo tenetur" protections once applied under Fifth Amendment to governmental agents other than judges). That, of course, is the holding of *Miranda*, and the SJC asserts not that Article XII's self-incrimination privilege stops short police interrogation, but that it somehow goes farther. See *Commonwealth v. Martin*, 827 N.E.2d 198, 203 (Mass. 2005); *Commonwealth v. Mavredakis*, 725 N.E.2d 169, 178 (Mass. 2000).

scope of a shared constitutional provision.<sup>102</sup>

*Martin*, the third case, is different, although it too marks an expansion of *Miranda* appropriate for a state to consider. *Martin* addressed the question of remedy, specifically whether, in addition to any statement unlawfully obtained, the derivative fruits of a *Miranda* violation (in *Martin*, a gun that the police found as a result of an unwarned statement) must be suppressed. The Supreme Court, in *United States v. Patane*,<sup>103</sup> earlier held that suppression of an unwarned statement fully vindicates the Fifth Amendment's protection against compelled self-incrimination and that the derivative fruits of a *Miranda* violation—in that case also a gun found as a result of the unwarned statement—should not be suppressed.<sup>104</sup> The SJC disagreed in *Martin*, holding that the gun as well as the unwarned statement must be suppressed.<sup>105</sup>

The SJC explicitly grounded *Martin* in its view that police failure to administer warnings to suspects prior to custodial interrogation is “illegal,”<sup>106</sup> “an improper police tactic” that is strongly to be discouraged.<sup>107</sup> In order to advance what it called “*Miranda*’s prophylactic purpose,”<sup>108</sup> the court held as a matter of state common law that derivative fruits of *Miranda* violations must be suppressed. “To do otherwise,” in the words of the court, “would countenance precisely the kind of police interrogation we have intended to deter.”<sup>109</sup> Such an instrumental use of the suppression remedy, what Susan Klein has called a “constitutional incidental right,”<sup>110</sup> seems plainly to be a proper prerogative of a state, even where both the decision rule and its underlying operative

102. The fact that the SJC has declined to adopt *Miranda*’s decision rule as one required by Article XII does not foreclose the state-law expansion of that rule in *Smith* or *Mavredakis*. See *supra* note 75. The refusal to adopt *Miranda* as an Article XII requirement came in cases in which the SJC held that *Miranda*’s rule adequately implemented the Fifth Amendment’s protection against compelled self-incrimination—protection the same as that mandated by Article XII and that the Fourteenth Amendment requires the SJC to enforce. See *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1368 (Mass. 1992) (declining to extend *Miranda*’s requirements under Article XII to public school principal’s questioning of student). In such cases, as the SJC put it, “[t]here has been no need to consider the question [of whether Article XII separately requires *Miranda*’s decision rule] because *Miranda* warnings furnish information about State constitutional rights as well as rights contained in the Constitution of the United States.” *Id.* The SJC went on to note that should *Miranda* be deemed inadequate to protect the state constitutional privilege, the SJC could look to common law to provide that additional protection. See *id.* This is precisely what the court did in *Smith* and what it could have done in *Mavredakis*.

103. 542 U.S. 630 (2004).

104. *Id.* at 636-37.

105. *Commonwealth v. Martin*, 827 N.E.2d 198, 200 (Mass. 2005).

106. *Id.* at 203 (quoting *Commonwealth v. Haas*, 369 N.E.2d 692, 699 (Mass. 1977)) (basing holding on Fifth Amendment principles).

107. *Id.* (quoting *Commonwealth v. Smith*, 593 N.E.2d 1288, 1288 (1992)).

108. *Id.*

109. *Martin*, 827 N.E.2d at 203.

110. See Klein, *supra* note 13, at 1047 (characterizing “constitutional incidental rights” as judicially created “rights which are not themselves mandated by the constitutional clause the right is designed to further” and offering as prime example exclusionary rule suppressing evidence illegally seized under Fourth Amendment in order to deter police violations of Amendment’s operative command, as opposed to restoring privacy interests that have been irreparably breached).

proposition are federal. The SJC's decision in *Martin* does not conflict with the Supreme Court regarding either the meaning of the Fifth Amendment's self-incrimination clause or the reach of the decision rule applying it in the police station. The SJC differs with the Supreme Court only on what is necessary to encourage the police to follow the rule—a difference that marks no incursion on the Supreme Court's role as the presumptive arbiter on issues of constitutional meaning. It is thus no surprise that there is a longstanding history of state independence in crafting remedies for federal constitutional violations as long as those remedies are at least as protective as those that the Supreme Court has held are required by the Constitution.<sup>111</sup> If *Martin* is what it purports to be—an adjustment of the *Miranda* remedy to encourage full police compliance with its requirements—it presents no conceptual problem as a state-law construct.

But there is another plausible theory justifying the suppression of the gun in *Martin*, one resting on an interpretation of Article XII providing broader protection than that of the Fifth Amendment. In *Patane*, the Supreme Court (at least a three-judge plurality) characterized the Fifth Amendment's protection against compelled self-incrimination as a "trial right," fully vindicated by excluding a governmentally compelled statement at its maker's criminal trial.<sup>112</sup> In contrast, for well over a century the SJC has interpreted Article XII to provide for an apparently broader privilege, one that protects against not just the use of compelled statements at trial but against compelled self-accusation generally.

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111. See *Wolf v. Colorado*, 338 U.S. 25, 26-27 (1949) (holding Fourth Amendment protections against unreasonable searches and seizures incorporated into Fourteenth Amendment's due process clause, and thus binding on states, but allowing states to determine appropriate remedy for Fourth Amendment violation), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961). In declining to require suppression as the remedy for a Fourth Amendment violation, Justice Frankfurter wrote,

[T]he ways of enforcing such a basic right raise questions of a different order [than does the nature of the right itself]. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that [should be left to] . . . varying solutions which spring from an allowable range of judgment.

*Id.* at 28. Of course, twelve years later the Court reversed course in *Mapp v. Ohio*. 367 U.S. 643 (1961) (overruling *Wolf*). In *Mapp*, the Court held that the remedy of exclusion is required by the Fourth Amendment. *Id.* at 655. But the important point for our purposes is not the Fourth Amendment holding, but that the Court recognized a legitimate role for the states in crafting remedies for federal constitutional violations. Even today, when the Court has become far more zealous in its prerogative as keeper of the Constitution, the remnants of this longstanding tradition—that states may craft their own respective remedies for federal violations—remain. See *Danforth v. Minnesota*, 552 U.S. 264, 275-82 (2008) (holding states free under state habeas law to extend "new federal rule" to petitioners seeking habeas review of their convictions, though such relief barred under federal habeas law).

112. See *United States v. Patane*, 542 U.S. 630, 637, 641 (2004); see also *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (Thomas, J.) (writing for four-judge plurality similarly characterizing Fifth Amendment protection against compelled self-incrimination as "trial right").

In *Emery's Case*,<sup>113</sup> decided in 1871, the SJC reviewed a statute that required witnesses in particular legislative proceedings to testify, explicitly providing that such compelled testimony could not be used against such a witness at any subsequent criminal trial. The SJC held that this immunity was insufficient to protect Article XII's privilege, observing that Article XII protects a witness not just against such trial use of compelled statements but also against being compelled ahead of trial "to disclose the circumstances of his offence, the sources from which, or the means by which evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction."<sup>114</sup> Even if never offered against the witness at trial, such compelled disclosures, the court noted, "might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the *corpus delicti* itself."<sup>115</sup> The court held that Article XII's protection forbade such a result.<sup>116</sup> In the court's view, the only immunity that would adequately protect against being compelled not just to confess, but also to give over the means by which his criminality might be proved, was transactional immunity, which the court thus held was necessary to overcome Article XII's privilege.<sup>117</sup>

This view of Article XII arguably requires—as a necessary corollary of its constitutional privilege protecting against compelled self-accusation—suppression of physical evidence disclosed by compelled statements. Just as Emery was constitutionally privileged to avoid handing over his papers that had been subpoenaed,<sup>118</sup> now that the privilege extends to custodial interrogation, Martin should similarly be privileged to avoid being compelled to direct the police to his gun. Forced by subpoena to hand over his papers, Emery was protected by transactional immunity, which put him in the same position as he would have been if he not been compelled to testify and there to deliver his

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113. 107 Mass. 172 (1871).

114. *Id.* at 182.

115. *Id.*

116. *Id.*

117. *Emery's Case*, 107 Mass. at 185. This Article XII requirement of transactional immunity remains in force. See *Attorney Gen. v. Colleton*, 444 N.E.2d 915, 918-20 (Mass. 1982). In contrast, the Supreme Court long ago cut back the Fifth Amendment immunity requirement from transactional to derivative use. See generally *Kastigar v. United States*, 406 U.S. 441 (1972).

118. See *Commonwealth v. Hughes*, 404 N.E.2d 1239 (Mass. 1980). In *Hughes*, the SJC struck down a court order that the defendant produce a gun the Commonwealth alleged he had used in a charged assault by means of a dangerous weapon. See *id.* at 1240-41. The SJC reasoned that production of the weapon would constitute an implicit statement concerning the "existence, location and [defendant's] control" of the gun, and that forcing such a statement through a court order backed by the power of contempt violated the defendant's privilege against compelled self-incrimination. See *id.* at 1244-45. The SJC founded its decision in the Fifth Amendment, but noted that if the Fifth Amendment did not require this result, Article XII of the Constitution of the Commonwealth's Declaration of Rights would, citing *Emery's Case*. *Id.* at 1246. If a court cannot, consistent with the privilege, compel a suspect to produce a gun, it is no great leap to say that neither may a police officer. If that order to produce the gun is unlawful, the resulting gun would seem to be that order's direct, and suppressible, fruit.

papers. Of course, when questioned, Martin had no practical access to transactional immunity, and so any physical evidence to which his unwarned statement led arguably must be suppressed. This suppression is not to deter police but to put Martin and those like him in the same position as they would have been had their statements not been compelled.<sup>119</sup> The suppression remedy is a measure of, and is measured by, the privilege ignored.<sup>120</sup>

If this were the basis for the SJC's decision, it nevertheless would not constitute state-court defiance of the Supreme Court concerning the meaning of a shared constitutional provision. The SJC reached this result under Article XII in 1871, two decades before the Supreme Court first addressed the issue under the Fifth Amendment,<sup>121</sup> and over 130 years before the Court appeared to retrench on the reach of the self-incrimination provision in *Patane*.<sup>122</sup> In sum, whether as an instrumental "incidental right" crafted as a way to buttress *Miranda*'s decision rule, or as a remedy that is a necessary corollary to Article XII's longstanding protection against self-accusation, there is no conceptual roadblock to the state-law enhancement of the remedy in *Martin*.

Now the final question: who should decide?

#### IV. WHO SHOULD DECIDE: COURT OR LEGISLATURE?

I assume it is too plain for argument that the executive is not a candidate for this constitutional decisionmaking. Where the decision rules are ones of criminal procedure, the executive has a stake in the outcome and therefore would have no claim to legitimacy. Decision rules must be crafted by either the court or the legislature. Given the pragmatic cast of decision rules and their derivative relationship to the operative propositions they are meant to apply, determining which of the two is best suited to expand a particular decision rule depends on three factors.

First is the relationship between the decision rule in question and the operative proposition it is intended to apply. As noted, constitutional decisionmaking occurs along a spectrum, with operative propositions and decision rules constituting polar categories. In the middle, it may be difficult to characterize a particular decision as either one or the other. The closer a decision rule is to the operative proposition that underlies it, or in other words,

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119. As noted above, the fact that the SJC has never adopted *Miranda*'s decision rule under Article XII does not foreclose its decision here to expand the reach of that rule to implement Article XII's apparently broader protection that includes the privilege. See *supra* note 101. Until the Supreme Court's decisions in *Patane* and *Chavez*, the SJC had every reason to think that the privilege was a part of the Fifth Amendment as well as Article XII, both protected by *Miranda*'s decision rule. See *United States v. Patane*, 542 U.S. 360 (2004); *Chavez v. Martinez*, 538 U.S. 760 (2003); *supra* note 100.

120. See Parry, *supra* note 16, at 783-85 (arguing remedy is "cash value" of a right, and should be considered part and parcel of it).

121. See *supra* note 100.

122. As noted, this conception of the Fifth Amendment protection as a "trial right" first appeared in *Chavez*, also in a plurality opinion by Justice Thomas. See 538 U.S. at 767.

the tighter the correspondence between the two, the more its adjustment would seem to be the legitimate prerogative of the court—the institution vested with the authority to interpret the constitution.<sup>123</sup> Stated differently, to the extent that the expansion of a decision rule is justified by a principled, integral connection to its underlying operative proposition, it seems legitimate as a judicial decision; to the extent that such expansion is driven by policy based in empiricism, it seems more properly a legislative function.<sup>124</sup>

Second is the impact of the decision rule in question. Adjustment of decision rules that principally impact the adjudicative process should be the prerogative of the courts. So, the responsibility for adjusting decision rules designed to reduce adjudicatory error in applying the underlying operative proposition<sup>125</sup> should fall to the courts. Not only is it the courts that apply these rules in adjudication, but identifying instances of adjudicatory error necessarily requires first determining what the operative proposition means or how it is meant to apply. Such interpretive determinations are quintessentially a judicial function. On the other hand, decision rules primarily meant to guide non-judicial actors such as law enforcement officials in their application of operative propositions “on the street,” would seem less the exclusive prerogative of the courts. Using a decision rule as a “stick” to ensure police compliance with an operative proposition likely involves empirical judgments and assessment of extra-judicial costs that may more properly fall to the legislature as a matter of both legitimacy and competence.

Third, the institutional competence to identify and assess the costs and benefits of a decision rule’s expansion and the political legitimacy to make the judgments that justify that expansion is the final factor to be considered.<sup>126</sup> If a branch has an apparent competence or legitimacy advantage, it is better

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123. Professor Fallon makes the point well, arguing that while judicial review may lack democratic legitimacy due to its counter-majority nature, it promotes overall governmental legitimacy to the extent that it protects against violations of, mostly, individual rights. See Fallon, *supra* note 17, at 1716-18. In that view, the legitimacy of judicial review in cases such as we are considering (which surely involve individual rights) depends on a principled connection between the decision rule at issue and the underlying operative proposition. Cf. Berman, *supra* note 7, at 101-03 (asserting legislature’s role in crafting constitutional rules should be confined to decision rules); Klein, *supra* note 13, at 1051 & n.97 (contending constitutional operative propositions not subject to legislative revision, unlike prophylactic rules).

124. See Roosevelt, *supra* note 42, at 1308-09 (distinguishing judicial authority from legislative authority by observing judicial departures from precedent require justification in recognized principles).

125. Mitchell Berman argues that this is the principal function of, and strongest claim to legitimacy for, a decision rule. See Berman, *supra* note 7, at 154.

126. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1360 (2006) (arguing courts have no demonstrable competency advantage over legislatures in determining what constitutional rights people have); see also Berman, *supra* note 6, at 103-05; Roosevelt, *supra* note 29, at 1658-61 (noting difference in judicial and legislative competence on particular kinds of questions as factor in whether courts ought to create decision rules); *supra* note 16 and accompanying text. But see Fallon, *supra* note 17, at 1709 (asserting “courts are likely to have a perspective that may make them more sensitive than legislatures to some possible rights violations . . . [due in part to] judges’ professional training and mission [that] involves a solicitude for rights as they have historically been understood”).

positioned to decide if and how the decision should be adjusted.

I do not mean to suggest that these factors are independent of one another; they plainly are not. A decision rule meant to guide police in applying a constitutional command, for example, requires identifying the underlying operative proposition. It also likely implicates adjudication of the proposition through claims that the police have violated it in enforcing the law. Each decision rule may involve costs and benefits that are both adjudicatory (e.g., trade-offs in fit with the operative proposition for clarity of application) and not (e.g., the degree to which effective law enforcement should be sacrificed in order to ensure greater police compliance with an operative proposition). Balancing factors in a particular case may point with reasonable clarity to one branch or the other. In another case, however, the balance may be not at all clear, counseling a court to decide the issue but leaving it open to the legislature to address the issue anew. So, how does this play out?

#### A. *The Fourth Amendment and Aguilar-Spinelli's Two-Pronged Test*

*Aguilar-Spinelli's* decision rule, that a tip-based warrant must be founded upon an affidavit that allows the magistrate to assess both an informant's veracity and basis of knowledge, is a decision rule that is completely appropriate for a court to impose.

First, the two-pronged test is closely related to its underlying operative proposition, which requires an independent determination of probable cause by a neutral and detached magistrate. In the SJC's view, both prongs of the test—the first focused on the veracity of the informant from whom the tip came and the second focused on the basis for the informant's information—are essential to assessing probable cause based on a tip, and thus “each element of the test must be separately considered and satisfied or supplemented in some way.”<sup>127</sup> Without this test, in the eyes of the SJC, the Fourth Amendment's and Article XIV's core protection against searches without probable cause would be reduced to dependence on untested, potentially unreliable tips.<sup>128</sup>

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127. See *Commonwealth v. Upton*, 476 N.E.2d 548, 557 (Mass. 1985).

128. See *Commonwealth v. Upton*, 458 N.E.2d 717, 723 (Mass. 1983), *rev'd*, 466 U.S. 727 (1984). In *Gates*, the Supreme Court did not dispute that the *Aguilar-Spinelli* decision rule was closely related to its underlying operational proposition. See *Illinois v. Gates*, 462 U.S. 213 (1983). Indeed, the Court conceded that “a conscientious assessment of the basis for crediting [informant] tips is required by the Fourth Amendment.” *Id.* at 238. The two prongs of the test are “relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable cause determinations.” *Id.* at 233. Recognizing that the *Aguilar-Spinelli* rule “[left] virtually no place for anonymous citizen informants,” the Court rejected the test as too demanding. *Id.* at 238. This was the point of disagreement. To the Supreme Court, the two-pronged test is a prophylactic rule that detrimentally overprotects the underlying operative proposition requiring independent magisterial determinations of probable cause; to the SJC, it is a decision rule necessary to ensure compliance with that constitutional command. See *Upton*, 476 N.E.2d at 557 (holding independent consideration and satisfaction of both prongs of two-pronged test necessary and observing that enforcing test “will tend to reduce the number of unreasonable searches conducted in violation of Article XIV”).

Second, the impact of the decision rule is directed at the determination of probable cause based on informant information, and the rule is principally intended to guide judicial officials who must make that determination (and, secondarily, to instruct the law enforcement officers who seek such warrants) regarding the proper framework for that decision—a supervisory task that lies at the heart of a court’s competence and legitimate authority. Particularly in Massachusetts, where not only the police but many of the magistrates who issue warrants may be persons without formal legal training, the SJC’s determination that the two-pronged test for determining tip-based probable cause “aids lay people, such as the police and certain magistrates, in a way that the ‘totality of the circumstances’ test never could”<sup>129</sup>—an entirely appropriate judicial task. The court was explicit in its expectation that maintenance of the *Aguilar-Spinelli* test as opposed to its abandonment “will tend to reduce the number of unreasonable searches conducted in violation of Article XIV.”<sup>130</sup>

Finally, the SJC seems as well if not better positioned than the legislature, as a matter of both institutional competence and political legitimacy, to assess the costs and benefits attending the rule and to weigh these considerations in determining whether to maintain the two-pronged test under Article XIV. In its decision, the court noted the successful experience of Massachusetts police over the prior twenty years in complying with the demands of the test.<sup>131</sup> That is a historical fact discernible from the court’s experience reviewing warrant applications that the court seems competent to determine. Even more plainly within the court’s competence is its conclusion that the test had not, over those twenty years, interfered with the deference that reviewing courts are supposed to give to magisterial determinations of probable cause.<sup>132</sup> After all, observing that deference (or the asserted lack thereof) and measuring it against the appropriate legal standard is quintessentially within the purview of a state’s highest court, both as a matter of competency and legitimacy. While the court’s assessment that the number of cases in which evidence had been suppressed during the prior twenty years of *Aguilar-Spinelli*’s existence “has not been substantial in relation to the number of challenges made to the adequacy of the applications for search warrants”<sup>133</sup> depends on the eye of the beholder, it appears the court would have the best access to facts underlying that conclusion.

Whether or not one agrees with the SJC on the merits, the court was well within its competence and legitimate prerogatives in restoring a decision rule designed to ensure the effectiveness of the operative proposition requiring independent judicial determinations of probable cause.

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129. *Upton*, 476 N.E.2d at 557.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Commonwealth v. Upton*, 476 N.E.2d 548, 557 (Mass. 1985).

### B. *The Fifth Amendment and Miranda*

In contrast to the SJC's decision to maintain the *Aguilar-Spinelli* decision rule, the three SJC decisions expanding *Miranda's* decision rule raise questions concerning their legitimacy as judicial acts. At least one, and perhaps two, of these decision-rule expansions seem more properly the prerogative of the legislature. Only in *Commonwealth v. Smith*,<sup>134</sup> is it reasonably clear that the SJC was the appropriate governmental branch to expand *Miranda's* protections.

#### I. *Smith: A Defensible Judicial Expansion of Miranda*

In *Smith*, it will be recalled, the SJC addressed the serial-interrogation technique in which police question a suspect without administering the *Miranda* warnings, elicit an incriminatory statement, then—after a brief break—administer the warnings, elicit a waiver, and then a repeated recitation of the pre-warning incriminatory statement, often embellished.<sup>135</sup> The Supreme Court held in *Elstad* that such intermediate warnings satisfied *Miranda*, and thus that the subsequent statement was not compelled under the Fifth Amendment unless the police used “deliberately coercive or improper tactics in obtaining the initial statement.”<sup>136</sup> The SJC's rejection of *Elstad's* approach, while not so clearly so as its restoration of the *Aguilar-Spinelli* test in *Upton II*, was an appropriate exercise of judicial authority.

The relationship between *Smith's* elaboration of *Miranda's* decision rule and *Miranda's* underlying operative proposition extending the self-incrimination privilege to the stationhouse is closer than might first appear. To be sure, the SJC in *Smith* was plainly interested in deterring *Miranda* violations, fashioning a “presumed taint” that attaches to any statement that follows a *Miranda* violation to achieve that end. From this perspective, the *Smith* rule looks more like a means to achieve police compliance with *Miranda's* decision rule requiring warnings and waiver than a requirement integral to *Miranda's* underlying operative proposition extending the privilege against compelled self-incrimination to police interrogations. However, the core of the court's concern was the possibility that police could systematically use the serial-interrogation technique to circumvent *Miranda's* requirements,<sup>137</sup> resulting in statements that: (1) under *Miranda* are “by definition coerced,”<sup>138</sup> and (2) in the case of a suspect such as *Smith*—who was young, poorly educated, isolated, and uninformed of his rights—are in a very real sense compelled.<sup>139</sup>

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134. 593 N.E.2d 1288 (Mass. 1992).

135. See *supra* notes 88-89 and accompanying text; see also *Smith*, 593 N.E.2d at 1290-91.

136. *Oregon v. Elstad*, 470 U.S. 298, 314 (1985).

137. See *Smith*, 593 N.E.2d at 1292.

138. *Id.*

139. The court did not quite go this far, but its expressed concern about the effect of this serial technique on *Smith* justifies this characterization. See *id.* at 1295; see also *Parry*, *supra* note 16, at 807-10 & nn.366-78

These concerns seem real, so much so that in *Missouri v. Seibert*,<sup>140</sup> the Supreme Court itself backtracked from *Elstad*, tightening its rule to avoid the worst of these serial-interrogation tactics.<sup>141</sup> So seen, *Smith* is less an instrumental belt-tightening of *Miranda*'s decision rule and more an effort to plug a potentially gaping hole in the heart of the rule; a hole that even the Supreme Court has come to agree threatens the efficacy of the sole means by which the privilege against compelled self-incrimination is implemented in the context of stationhouse questioning. There is, then, a direct relationship between the rule that *Smith* advances and the operative proposition that justifies that rule—a factor suggesting that it is appropriate for the court to render this decision.

Turning to the impact of *Smith*'s enhanced decision rule, the SJC's explicit reason for restoring the Massachusetts rule to its pre-*Elstad* contours was to deter police from strategically circumventing *Miranda*'s requirements. The rule seems aimed principally at non-judicial actors, seeking to alter their behavior, and thus not so plainly the prerogative of the court. However, the type of police behavior at which *Smith*'s rule is aimed has the potential to significantly reduce the effectiveness of *Miranda* as a decision rule, thus risking an increase in governmentally compelled statements being offered into evidence in criminal trials. So, while it is true that unlike the *Aguilar-Spinelli* rule, the primary conduct affected by *Smith*'s rule occurs in the stationhouse and not the courthouse, the rule applies to a particular interrogation technique, the apparent purpose of which—to use artifice to avoid *Miranda*'s protections—provides evidence of its potential for compelled confessions. Avoiding this potential for compelled confessions to seep into evidence at criminal trials provides the court with a plausible, although not dispositive, claim to legitimacy in making this decision. And, as the SJC noted, restoring the bright-line presumption that the subsequent, warned statement is tainted avoids the very difficult fact questions about the “deliberately coercive or improper police tactics” in the interrogation process,<sup>142</sup> thus reducing the potential for judicial error in the lower courts' adjudication of self-incrimination claims arising out of serial interrogations.<sup>143</sup>

Finally, the balance of institutional competence to assess costs and benefits

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(cataloging concerns regarding reliability and actual coerciveness of stationhouse interrogation); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329 (1991) (arguing privilege protects innocent defendants, and supporting this argument with data suggesting some correlation between defendants who assert privilege and their ultimate acquittal).

140. 542 U.S. 600 (2004).

141. *Id.* at 611-12 (holding in “question first and warn later” scenario, government must show that warnings “function[ed] . . . effectively [to] advise the suspect that he had a real choice about giving an admissible statement at [the time of his ensuing interrogation]”).

142. *Commonwealth v. Smith*, 593 N.E.2d 1288, 1295-96 (Mass. 1992).

143. See Berman, *supra* note 7, at 154 (arguing avoidance of adjudicatory error strongest justification for decision rules).

of the rule seems to favor the court over the legislature as the decision maker on this issue. Although the police practice at which the rule is aimed takes place beyond judicial eyes, its effectiveness as a tool to avoid *Miranda*'s application of the protection against compelled self-incrimination seems self-evident and thus within the ken of both the court and legislature to assess. The SJC seems better positioned to judge the likely impact of *Elstad* on criminal trials, determining whether or not *Smith*'s restoration of the state's pre-*Elstad* decision rule is necessary to shield the jury from compelled confessions. This judgment must take into account, as it did in *Smith*, the parallel protections offered by the due process voluntariness doctrine and the Commonwealth's common-law humane practice rule, which requires that before considering a confession the jury must find it voluntary beyond a reasonable doubt.<sup>144</sup> And the SJC seems to enjoy a competence and legitimacy advantage over the legislature in assessing the need for the bright-line rule that it restored in *Smith* as a means of reducing error by the lower courts in adjudicating self-incrimination claims arising in this context.

Last but not least, the SJC took a classically restrained, supplemental approach to state constitutionalism that does not foreclose future review—legislative or judicial—if circumstances merit it.<sup>145</sup> The court was careful to frame the rule as one of common law, avoiding the relative permanence of a constitutional command, thus maintaining the mutability appropriate for a decision rule. However one may feel about the merits of *Smith*'s rule, the decision appears to be an appropriate exercise of the SJC's decisionmaking authority.

## 2. *Mavredakis*: A *Miranda* Expansion for the Legislature

*Mavredakis* is a different kettle of fish—a case involving an expansion of a *Miranda* decision rule better left for the legislature. The *Mavredakis* case involved an attorney's attempt to speak with his client prior to police interrogation. The question was whether, in addition to the standard *Miranda* warnings, the police also have to notify a suspect of his lawyer's presence and request to confer in order for his ensuing waiver of the right to counsel to be valid.<sup>146</sup> As noted above, the Supreme Court earlier held, in *Moran v. Burbine*, that withholding such information did not affect the validity of a suspect's waiver and that the ensuing confession was not taken in violation of the

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144. See *Smith*, 593 N.E.2d at 1296 (citing humane practice rule and noting consistency with rule announced by court).

145. See Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U. L. REV. 887, 889 (1980) (then-Justice Wilkins observing that nonconstitutional grounds for rules permit "greater flexibility" that may allow "further adjustments [to the rule] without altering constitutional principles, and, in areas not within the court's exclusive province, the legislature can participate in the process of fixing standards").

146. See *supra* Part II.

*Miranda* rules.<sup>147</sup> In *Mavredakis*, the SJC disagreed, concluding that Article XII imposed a “duty to inform a suspect of an attorney’s efforts to render assistance [, a duty which] is necessary to actualize the abstract rights listed in *Miranda*.”<sup>148</sup>

Although the SJC explicitly tied its holding to *Miranda*’s “abstract rights,” the decision rule of *Mavredakis* bears only a tangential relationship to *Miranda*’s underlying operative proposition—the protection against compelled self-incrimination. Noting its preference “to view the ‘role of the lawyer . . . as an aid to the understanding and protection of constitutional rights,’ rather than ‘as a nettlesome obstacle to the pursuit of wrongdoers,’” the *Mavredakis* Court explicitly required that the police inform a suspect in custody about the presence of his lawyer in order to prevent “police interference with the attorney-client relationship.”<sup>149</sup> That may be good policy, but Article XII’s privilege against compelled self-incrimination does not provide for a right to stationhouse counsel, much less any attorney-client relationship.<sup>150</sup>

*Miranda*, of course, includes within its warnings a right to counsel during any custodial interrogation and a right to have counsel appointed if the suspect cannot afford to retain counsel. *Miranda*’s decision rule—as elaborated by the Supreme Court in a series of cases beginning with *Edwards v. Arizona*<sup>151</sup>—goes on to forbid further questioning by police once a suspect invokes that right, including questioning about other crimes,<sup>152</sup> even after the suspect has consulted with a lawyer.<sup>153</sup> The police cannot resume the interrogation unless the suspect, on his own initiative, agrees to do so.<sup>154</sup> This elaboration of *Miranda*’s decision rule draws a bright line of protection around a suspect who declines to undergo custodial interrogation without the assistance of counsel,

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147. *Moran v. Burbine*, 475 U.S. 412, 422 (1986).

148. *Commonwealth v. Mavredakis*, 725 N.E.2d 169, 179 (Mass. 2000). The SJC decision was supported in this regard in earlier, pre-*Burbine* SJC precedent to the same effect. See *Commonwealth v. Sherman*, 450 N.E.2d 566, 566 (Mass. 1983); *Commonwealth v. Mahnke*, 335 N.E.2d 660, 715-17 (Mass. 1975).

149. *Mavredakis*, 725 N.E.2d at 179 (quoting Justice Stevens’ dissent in *Moran v. Burbine*, 475 U.S. 412, 443 (1986)).

150. Two years prior to *Miranda*, in *Escobedo v. Illinois*, the Supreme Court briefly extended the Sixth Amendment’s right to counsel to suspects who had become the focus of police investigation. See 378 U.S. 478, 490-91 (1964). However, the Court almost immediately pulled back from that approach, reserving the Sixth Amendment’s right to counsel for cases in which formal proceedings had begun. See *Massiah v. United States*, 377 U.S. 201, 204-06 (1964). In place of *Escobedo*’s broader Sixth Amendment right to stationhouse counsel during investigation, the *Miranda* Court turned to the warnings-and-waiver rule as a means to apply the Fifth Amendment’s protection against self-incrimination in the stationhouse. The SJC was bound to, and did, follow the Supreme Court’s lead in these decisions, but it never suggested, much less held, that Article XII’s privilege against compelled self-incrimination included any right to counsel beyond *Miranda*. See *supra* note 148 (citing pre-*Burbine* SJC cases, both of which grounded right to counsel in *Miranda*’s Fifth Amendment decision rule).

151. 451 U.S. 477 (1981).

152. See generally *Arizona v. Roberson*, 486 U.S. 675 (1988).

153. See generally *Minnick v. Mississippi*, 498 U.S. 146 (1990).

154. See *Edwards*, 451 U.S. at 484-85. This protection lasts so long as the accused remains in custody. Fourteen days after a break in custody, *Edwards*’ protection no longer applies. See *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010).

effectively declaring such a suspect off-limits to police interrogators. However, it does not create a categorical right to a lawyer as part of the operative proposition protecting against compelled self-incrimination.<sup>155</sup> The point of this corner of *Miranda*'s decision rule is not to ensure the presence of a lawyer during custodial interrogation, but rather to provide the suspect with a measure of control, giving him an iron-clad out when the pressure of interrogation becomes greater than he is willing to handle by himself.<sup>156</sup> To be sure, the police can respond by arranging for a lawyer to consult with such a suspect, but they can also—and almost always do—simply leave him alone. If *Miranda*'s “right to counsel” means more than this, then every stationhouse statement given in the absence of counsel would be suspect.<sup>157</sup>

Where does that leave us? The right to counsel that the SJC seeks to “actualize” in *Mavredakis* is not embedded in Article XII's privilege against compelled self-incrimination; indeed, it is less a right to counsel than a means to empower isolated suspects to avoid going it alone during custodial interrogation. There surely is a cognizable relationship between this “right” and the operative proposition it is meant to advance, but the two are hardly congruent. As such, any claim that *Mavredakis*' expansion of the decision rule is integrally related to the meaning of the constitution, and thus the exclusive prerogative of the court, is suspect.<sup>158</sup>

Turning to the impact of *Mavredakis*' expanded rule, like all *Miranda* rules it necessarily affects police officers. However, unlike *Smith*'s rule, which plausibly impacts the adjudicatory function as well, the impact of the rule requiring the additional warning that a lawyer is present seems to stop with the police. That is because there does not seem to be even a colorable argument that the additional warning mandated by *Mavredakis* would have any significant impact on the likelihood that a compelled confession would find its way into evidence at a criminal trial. The SJC in *Mavredakis* does not claim that in the general run of cases *Miranda*'s standard warning-and-waiver construct under-enforces Article XII's privilege against compelled self-incrimination. Any claim that the extra warning required by *Mavredakis* would in some systematic way reduce compelled confessions has to be based on a conclusion that a suspect whose lawyer (unbeknownst to the suspect) actually appears at the police station is, for that reason, no longer adequately protected by the standard warnings against compelled self-incrimination.

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155. See William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975, 982 n.21 (2001).

156. See *id.* at 981-82.

157. See Ogletree, *supra* note 5, at 1830; Schulhofer, *supra* note 5, at 953-55. The point here is not the wisdom or effectiveness of *Miranda*'s decision rule(s), but rather the particular role counsel plays in them and the relationship of that role to the underlying operative proposition protecting against compelled self-incrimination in the stationhouse.

158. See Landsberg, *supra* note 5, at 964 (arguing legitimacy of judicially created prophylactic rule proportional to clarity of operative proposition it advances and conceptual connection of rule to underlying proposition).

It is hard to imagine how this could be so. To be sure, if the suspect is informed of his lawyer's presence, he may be less likely to waive his right to counsel,<sup>159</sup> thus reducing the likelihood of a confession, either because the lawyer was given access<sup>160</sup> or because questioning ceased. But that says nothing about whether a confession taken after a warning that did not include notice of the lawyer's presence would have been compelled. Unless there is something different—in a way that makes a difference with regard to compelled self-incrimination—about a suspect whose lawyer unexpectedly shows up, as compared to the more ordinary and less lucky suspect for whom no lawyer appears, the impact of this new rule seems random and arbitrary rather than necessary to correct an under-protective decision rule. Couple this randomness with the relatively small number of cases in which the lawyer does appear at the station during interrogation, and the constitutional impact of this rule in the courtroom seems negligible.

Neither is there any claim that the *Mavredakis* restoration of *Miranda*'s warning-and-waiver requirements would reduce adjudicatory error. The required notice that a lawyer is available is not a bright-line substitute for difficult and potentially inconsistent fact-finding in which lower courts would otherwise have to engage, as was so in *Smith*. Rather, it is simply an addition to the required warnings that applies on those occasions when a lawyer seeks to consult with a potential subject of police interrogation. In *Mavredakis*, the SJC did not suggest that this additional warning reduces the potential for adjudicatory error, and it is hard to see how it might.

Of course, that is not the end of the question. Given the pragmatic reasons justifying decision rules in general, a rule expansion such as that wrought by *Mavredakis*, even though only tangentially connected to its underlying operative proposition and aimed exclusively at non-judicial actors, would still be justifiable if its benefits in guiding the application of the operative proposition outweigh its costs. But given that the courts have no exclusive claim, arising from the nature of the rule or its impact, to make this judgment, identifying the appropriate decision maker would have to be based solely on institutional competence in assessing that cost-benefit balance and political legitimacy in imposing the revamped rule. Here, the legislature rather than the courts seems better suited to assess the need for, and to impose, any new rule.

The beginning of any such cost-benefit analysis would be a determination that the standard *Miranda* warning-and-waiver requirements under-enforce the Article XII privilege when a lawyer shows up at the police station and seeks to

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159. Interestingly, when the police did tell Mavredakis (while he was writing out his confession) that his lawyer wanted to speak with him, Mavredakis replied that he wanted first to finish his confession. See *Commonwealth v. Mavredakis*, 725 N.E.2d 169, 174 (Mass. 2000).

160. Justice Harlan, in his *Miranda* dissent, observed that if a suspect had access to a lawyer "worth his salt," there would rarely be a confession. *Miranda v. Arizona*, 384 U.S. 436, 516 n.12 (1966) (Harlan, J., dissenting).

consult with her unknowing client. As noted above, reason alone does not explain how this apparent happenstance changes anything about the effectiveness of the standard warning-and-waiver as a decision rule, causing *Miranda*'s protections to lose their force for that class of suspects but not for unrepresented suspects. If there really is a difference here that suggests the tightened rule, it could only be substantiated through a broad empirical inquiry that a legislature would be far better equipped to handle than a court. Maybe a review of actual interrogation experience, expert testimony from interrogation specialists, psychologists, social scientists, and the like would reveal a basis for such a distinction that is not readily apparent. But whatever such an inquiry might reveal, it seems reasonably clear that the case-by-case regimen of judicial decisionmaking provides an inapt set of tools for such empiricism.

There is another, more plausible, justification for the *Mavredakis* rule flowing from the pragmatic character of decision rules. Such rules are, at best, imperfect in implementing the operative propositions that justify their existence, and thus it would not be inappropriate to craft a rule that risks over-enforcement of an operative proposition—particularly one protecting an important individual right—in order to ensure against its under-enforcement.<sup>161</sup> One might argue that *Miranda*'s warning-and-waiver construct is a pragmatic compromise that is acceptable to prevent most stationhouse compulsion, but that a lawyer would be better (albeit too expensive on a system-wide basis). However, if a lawyer is actually available (at no expense to the Commonwealth), there is little harm and—in that case at least—much to gain by telling the suspect about the lawyer as part of the required warnings. Assuming that this is a proffered justification for expanding the decision rule, does it lie with the court—or should it be reserved for the legislature—to make such a judgment? I think the legislature is, again, the more appropriate decision maker in this instance. Why?

We start again with the premise that if there is any under-enforcement by *Miranda* of Article XII's operative proposition, it is sufficiently modest to be generally acceptable. The SJC did not, in *Mavredakis*, challenge this premise, and so it seems fair to assume that any problem of *Miranda*'s general under-enforcement is not constitutionally compelling.<sup>162</sup> If the legislature did

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161. See Caminker, *supra* note 29, at 8-20, 25-26; Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 57 (1997); Parry, *supra* note 16, at 785.

162. Of course, if one does conclude that a lawyer's presence, coupled with a required warning to the suspect of that presence, corrects a significant under-enforcement of the operative proposition protecting against compelled self-incrimination, surely the state would have to reconsider *Miranda*'s asserted compromise concerning the right to counsel which *Mavredakis* corrects. Otherwise, an appropriate level of enforcement of this core constitutional right would be limited to those lucky (or rich) enough to have a lawyer show up. The alternative would seem to be a general system of appointed, available stationhouse counsel. I suppose one could argue that all that really is at stake is the warning, not the lawyer that stands behind the warning. The arbitrary distribution of *Mavredakis*' upgraded warning could be solved by requiring that every suspect be told not just that he has a right to counsel but that such a lawyer—indeed, his lawyer if you like—is available and

nothing, there would be little if any cost to efficacy of the privilege.

But what of the costs and benefits of adopting the rule? Assuming that a suspect told of his lawyer's presence would invoke his right to counsel and that the police would allow the consult (as opposed to simply ending the interrogation), one benefit would be that suspects with access to counsel would have a better understanding of their constitutional rights at a time when they could use such advice. That benefit, however, would be limited to the relatively few suspects whose lawyers show up, and, to the extent that this benefit would be generally—if not inevitably—confined to those rich enough to have counsel readily available, the benefit would be unfairly distributed. If the cure to the benefit's modest reach or unfair distribution is to provide counsel to all similarly situated—establishing a categorical right to counsel during interrogation—that would mark a major departure from *Miranda* and from Article XII, unjustified by precedent and conceptually distinct from the operative proposition *Miranda*'s decision rules are meant to implement. That is, such an extension of the right to counsel sounds more of legislation than judicial interpretation.<sup>163</sup> Moreover, any such categorical right to counsel would carry its own costs, not the least of which is paying for such appointments; surely a legislative prerogative.

Another cost of a categorical right to stationhouse counsel would likely be the loss of some number of confessions. Under the assumptions on which *Miranda* is based, after the standard warnings and ensuing waivers, none of these confessions would have been compelled. Each confession would constitute relevant, often compelling, evidence in a criminal prosecution. Of course, suspects might routinely waive this enhanced right to counsel, just as they now often waive *Miranda*'s more general right to counsel. But if they do not, there will be fewer interrogations, either because the interrogations will stop or because lawyers given access will advise suspects not to confess—advice that will likely be heeded. The legislature is in the best position to identify and weigh those potential costs and benefits to the polity as a whole, and to act on that assessment.

As a matter of both institutional competence and legitimacy, then, the legislature seems to be the branch of government best positioned to decide the *Mavredakis* issue. It is not just that the legislature is elected whereas the

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ready to give counsel, whether or not that is true. If the suspect nevertheless waives this reified right to counsel, interrogation could proceed. If he does not, interrogation would cease, just as it now does. The lawyer is never going to be given access; all that is at issue is what "bucking up" of the suspect is necessary to overcome the coercion inherent in stationhouse questioning. Such an artifice, although perhaps no greater than that now in place, does not seem to be what the SJC had in mind when, in *Mavredakis*, Justice Ireland spoke for the court and held that the announced rule was "necessary to actualize the abstract rights listed in *Miranda*." See *Mavredakis*, 725 N.E.2d at 178.

163. See Roosevelt, *supra* note 42, at 1308-09 (observing what separates nature of judicial power from legislative power is that departures from precedent require conceptual justification as opposed to sheer policy judgments).

judges, at least in Massachusetts, are appointed with life tenure (although democratic legitimacy counts for something). It is also that the costs and benefits of this policy decision to extend *Miranda*'s decision rule in this limited context are not tightly connected to the core operative proposition it is designed to advance—preventing compelled self-incrimination. Rather, the underlying concerns seem to involve a more general right to legal counsel, gauging whether it is fair or practical to recognize such a right given its apparent random application, considering the fiscal and law-enforcement costs of extending its reach, and exploring whether there are alternatives that could address the problem in a less expensive or apparently unfair way (e.g., providing for videotaped interrogations if a primary concern is being certain that there is not undue coercion brought to bear). These are quintessentially legislative judgments, not ones for a court.

One might argue, however, that neither the court nor the legislature have a plainly superior claim to decide this issue, and that this is one of those cases in which the court could appropriately expand the decision rule, leaving it open for the legislature to consider the issue, perhaps in response to the court's decision. Unfortunately, in *Mavredakis*, the SJC foreclosed that option, grounding its expansion of *Miranda*'s decision rule in what it asserted was Article XII's "higher standard of protection [against compelled self-incrimination] than that provided by [the Supreme Court's interpretation of the Fifth Amendment in] *Moran* [*v. Burbine*]." <sup>164</sup> This "calcification" <sup>165</sup> of the new rule was as unnecessary as it was unjustified under Article XII precedent.

Taking the latter point first, the SJC asserted that the text, history, and prior precedent of Article XII justified its claim that the operative proposition of this state provision—protecting against compelled self-incrimination—is broader than that of the Fifth Amendment. As noted above, <sup>166</sup> this vastly over-reads Article XII. Its operative proposition may be broader, but only insofar as Article XII is not limited to a trial right and includes the privilege itself. That expansive aspect of Article XII has no apparent application in the *Mavredakis* issue. Quite simply, the text, history and prior precedent of Article XII together demonstrate that, other than as just noted, the operative propositions of Article XII and the Fifth Amendment are the same insofar as the protection against compelled self-incrimination through police interrogation.

Turning to the necessity that the decision be cast in terms of Article XII, there is no reason, other than a mistaken conflation of the decision rule and its underlying operative proposition, <sup>167</sup> for this approach. Unless the court felt that

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164. *Mavredakis*, 725 N.E.2d at 178.

165. Professor Roosevelt so refers to decisions immunized from legislative, or even subsequent judicial, review by virtue of their asserted constitutional foundation. See Roosevelt, *supra* note 29, at 1692-93.

166. See *supra* note 100 and accompanying text.

167. See Roosevelt, *supra* note 29, at 1692 (observing courts sometimes conflate these two kinds of constitutional decisions, needlessly injecting decision rules with inflexibility).

it needed the fig leaf of broader constitutional cover to shore up the otherwise nebulous connection between Article XII's self-incrimination protection and its proposed extension of *Miranda's* decision rule, it could have announced the new rule as a matter of state common law. That would have given effect to the court's judgment that the decision rule needed to provide additional protection, at the same time leaving the issue open for further consideration by the legislature or perhaps even the court itself.

### 3. Martin: *The Easiest and Hardest Case*

*Martin*, it will be recalled,<sup>168</sup> asks whether a gun, which the police found as the result of an unwarned statement elicited from Martin in violation of *Miranda*, should be suppressed. In *Patane*, the Supreme Court had previously held, on virtually identical facts, that a gun should not be suppressed, but the Court did so by reasoning that arguably cut back on the scope of the Fifth Amendment's operative proposition, conceptualizing the protection against compelled self-incrimination as a trial right fully satisfied once the compelled statement is barred from evidence. This view of the Fifth Amendment, essentially reducing the privilege to a decision rule necessary to implement the trial right, seems inconsistent with Supreme Court precedent and, more to the point, is inconsistent with longstanding SJC precedent construing Article XII to include the privilege within its operative proposition. As noted, the Article XII privilege protects against not just a governmental act compelling a statement but against compelling a witness through his statements to lead the government to witnesses or evidence that might incriminate him.<sup>169</sup>

If that is what *Martin* stands for—reading Article XII to prevent the police from forcing Martin to lead them to the gun that incriminates him—the question of whether to suppress the gun is plainly one for the court. The remedy of suppression flows directly from, indeed, seems required by, the operative proposition itself—a reaffirmation and modest extension of the SJC's century-old interpretation of Article XII in *Emery's Case*. That is what courts are supposed to do—tell us what the constitution means.

*Martin*, of course, does not involve a direct application of Article XII's privilege but rather its application through *Miranda's* decision rule, and from that perspective the issue is one of remedying a decision rule violation. Who should decide that is more complicated, particularly because in *Martin* the SJC seemed far more concerned with using the remedy of suppression to deter police misconduct rather than as a measure to ensure that Martin received the full protection of Article XII's privilege against compelled self-incrimination. Of course, we are not bound by the way in which the SJC framed the remedy

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168. See *supra* notes 105-111 and accompanying text (describing circumstances and rationale of *Martin* decision).

169. See *supra* note 101 and accompanying text.

question, and if Article XII's privilege protects Martin against being compelled by the government to lead the authorities to the gun,<sup>170</sup> then suppressing the gun—even as a remedy for a *Miranda* violation—seems an integral part of the constitutional protection it implements. From that perspective, the decision to expand *Miranda*'s remedy to include derivative fruits is a wholly appropriate judicial act.

But conceptualizing the issue as the SJC did in *Martin*—suppressing the gun to deter police from ignoring *Miranda*'s decision rule—makes the remedy no more than a means to advance the underlying constitutional interest.<sup>171</sup> So seen, suppression of the gun is not Martin's right at all; neither is it a decision rule designed to guide lower courts in applying the operative proposition. It is a tool intended to prod non-judicial actors—the police—to obey *Miranda*'s requirements. From this perspective, it is not at all clear that the court enjoys a special claim to impose the remedy of suppression. The right is clear; the decision rule that implements that right is clear; the only purpose of the expanded remedy is the policy to encourage police to respect and apply *Miranda* when interrogating suspects. This sounds like a legislative task as much as a judicial one.

Turning to the question of institutional competence and political legitimacy, this factor, too, depends on how one characterizes the nature of the remedy. If we see the remedy as tightly wound into the privilege itself, integral to the protection against being compelled to lead the authorities to incriminating evidence, the court has the edge in competence and legitimacy. In this view, the remedy of suppression fits tightly with the operative proposition, and it is the court that should make this decision—as both a competence matter and a normative matter.

But if the remedy is no more than a stick to encourage police compliance with *Miranda*'s decision rule, the remedy represents a policy choice with costs and benefits that the legislature—as a matter of empirical competence and democratic legitimacy—ought to make. What are the costs? The major cost, as opponents of the exclusionary rule are quick to point out,<sup>172</sup> is lost evidence,

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170. See *supra* text accompanying note 106.

171. See Klein, *supra* note 13, at 1047-48.

172. Indeed, this was the basis on which Justices Kennedy and O'Connor concurred in *Patane*, never reaching the question of whether the Fifth Amendment is no more than a trial right. See *United States v. Patane*, 542 U.S. 630, 645 (2004) (Kennedy, J., concurring). This debate concerning the exclusionary rule as an appropriate remedy for a constitutional violation continues unabated in the Fourth Amendment context. See *Herring v. United States*, 129 S. Ct. 695, 700 (2009). The *Herring* Court, 5 to 4, held that an arrest based on a warrant that had been recalled did not require suppression of contraband seized during the ensuing search incident to that arrest because, due to a negligent bookkeeping error by a police clerical employee, the arresting officer reasonably believed there was an outstanding warrant. *Id.* at 697-98. Couched in terms of the good-faith exception to the exclusionary rule, this decision was but another adjustment to the incidental right to suppression as a remedy for constitutional error, and the cost-benefit deterrence arguments concerning this remedy are rehearsed once again. Compare *id.* at 701-03 (majority opinion), with *id.* at 707-10 (Ginsburg, J., dissenting).

in this case (and in the case of most derivative fruits of *Miranda* violations) relevant and highly reliable physical evidence. The corresponding benefit is giving police the incentive to obey *Miranda*'s requirements—certainly an important interest. It may be that there is incentive enough, as many argue,<sup>173</sup> in the certain suppression of a statement taken in violation of *Miranda*, and that the additional suppression of the gun exacts too high a cost for the marginal incentive thereby purchased. But maybe not. If an officer calculates that without the unwarned question he will not find the gun, why not question without the warnings? While the resulting statement will be suppressed, as long as the gun is safe from suppression it seems like a good bet. Is that how police officers think? Is that how they act?

These are the basic assessments on which the incidental right or remedy of suppression rest, and they do not seem to be assessments that require any special judicial expertise.<sup>174</sup> They also involve issues in which the public and their elected representatives have an abiding interest. To be sure, the court has a claim to legitimacy as well. The privilege against compelled self-incrimination—implemented in the stationhouse solely by *Miranda*'s decision rule—is an important protection to the individual against serious governmental overreaching. And while the public has an interest in how this question of remedy is resolved, giving legitimacy to a legislative resolution, the collective right to majoritarian decisionmaking at some point gives way to ensuring the protection of individual rights, which is a traditional and legitimate judicial function.<sup>175</sup> In the end, it may be that this question is one as to which it is unclear who the decision maker should be. In that instance, the SJC's path in *Martin* seems defensible even if analytically murky. The issue presented itself and the court made the call; however, it did so not in the calcified script of a constitutional requirement but as a common law remedy that promotes the Article XII privilege.<sup>176</sup> That way, as was so in *Smith*, it remains open for the legislature or the court to take a second look.

## V. CONCLUSION

The term “prophylactic rule” has received something of a bad reputation, mostly due to its pejorative use by conservatives in their decades-long effort to roll back *Miranda*'s warning-and-waiver requirements. But it provides a useful way to look at constitutional doctrine, including, as I have argued, the interaction between state and federal constitutionalism. Commentators,

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173. Justice Kennedy, in his concurrence joined by Justice O'Connor, so argued in *Patane*, delivering the two votes necessary for a majority on that basis. See *Patane*, 542 U.S. at 645 (Kennedy, J., concurring).

174. See Strauss, *supra* note 45, at 969 (arguing no good reason for precluding Congress and states from trying to balance costs and benefits attributable to particular decision rules).

175. See Fallon, *supra* note 17, at 1709, 1713.

176. See *Commonwealth v. Martin*, 827 N.E.2d 198, 204-05 (2005).

lawyers and judges may never agree about the legitimacy of state courts interpreting state constitutional provisions to mandate broader operative propositions than the Supreme Court finds in virtually identical federal provisions, but there is no reason a state should be precluded from broadening the protections of a decision rule (adopting Mitchell Berman's more general and less provocative term) if circumstances within that state suggest it. This is so even where—as with Massachusetts and *Miranda*—a state's courts have expressly declined to adopt the federal decision rule under the state's constitution.

Decision rules, while surely constitutional, are, by design, instruments to implement constitutional provisions, not vessels of their meaning, and as such they are fairly subject to periodic adjustment. Recognizing a state's authority to work such an adjustment, as long as the adjusted decision rule is no less protective of its underlying operative proposition than the rule it modified, has no impact on the Supreme Court's exclusive authority to decide what the Constitution means; the operative proposition remains the same, if anything more fully enforced. Whether the decision rule is expanded as a matter of federal law or state law, the operative proposition remains unchanged.

These are useful distinctions as a state court considers whether it should invoke its constitution to go beyond the protections that the Supreme Court has held the Constitution to require, distinctions on which the Massachusetts SJC and many state courts have not focused. What kind of constitutional expansion is at issue—a decision rule (or a doctrinal cousin such as a remedy/incidental right) or an operative proposition? If it is a decision rule, *Miranda* being the prime example, there should be no objection to looking to state law for the necessary adjustment.

But just because a proposed constitutional expansion involves a decision rule does not mean that a state court should enjoy *carte blanche* to consider that expansion. In many instances, as a matter of institutional competence and/or political legitimacy, the state's legislature ought to decide the issue. If a decision rule or its remedy is being used more to regulate non-judicial actors, such as police, than to provide a means to guide courts in implementing an operative proposition, such as the privilege against self-incrimination, and if the contours and justification of the rule depend more on balancing perceived costs and benefits than on applying interpretive principles, it may well be that a court should defer to a legislative judgment concerning its proper reach. At the very least, unless it is plain (as few constitutional matters are) that such a judgment is one exclusively for the court, a decision to expand a decision rule ought not to be in the unalterable script of the constitution but rather should take the form of constitutional common law, open to possible reconsideration by the legislature or future courts. After all, possible reconsideration is part and parcel of the beast.