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Marissa Elkins

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ARTICLES

MIRANDA ABUSE AND FUNDAMENTAL FAIRNESS UNDER THE MASSACHUSETTS CONSTITUTION: ARTICLE XII IN NON- CUSTODIAL INTERROGATIONS AND EVIDENCE OF PRIOR BAD ACTS, TWO CASE STUDIES

MARISSA ELKINS*

“We have consistently held that [Article XII] requires a broader interpretation than that of the Fifth Amendment.”¹

INTRODUCTION

When it comes to protecting the rights of the criminally accused, the Federal Constitution and federal law provide minimum basic safeguards below which no law enforcement or judicial act in any U.S. civilian jurisdiction may venture, but Massachusetts has long protected the rights of the accused more stringently than federal law requires. In particular, Article XII of the Declaration of Rights has long been held to offer certain protections that the Federal Constitution, as interpreted by the Supreme Court of the United States, does not.²

* Marissa Elkins is the founding partner of Elkins Law Group, LLC in Northampton, Massachusetts, a practice focusing primarily on criminal defense and civil rights litigation. She is president of the Hampshire County Bar Association and serves on the Board of Directors and as vice-chair of the Indigent Defense Committee of the National Association of Criminal Defense Lawyers. She earned her juris doctorate from the University of Connecticut School of Law and her bachelor of arts from Austin College. She thanks Josh Wolk, J.D., Boston University and Alice Kundl, ant. J.D., Western New England University for their invaluable assistance with this article.

1. *Opinion of the Justices to the Senate*, 591 N.E.2d 1073, 1078 (1992) (quoting *Attorney Gen. v. Colleton*, 444 N.E.2d 915 (1982)).

2. Article XII of the Massachusetts State Constitution, which is analogous to the Fifth Amendment of the Federal Constitution, reads as follows:

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of

Two cases recently before the Supreme Judicial Court of Massachusetts (hereinafter “SJC”) have provided opportunities to consider subtle wrinkles in the protections offered by Article XII for rights of the criminally accused.³ Both cases involve the admissibility of evidence against the criminal defendant, one dealing with evidence gathered in police interrogations, and the other dealing with evidence of prior bad acts, or so-called “404(b)” evidence. By the time this article is printed these cases will likely have been decided, but both present issues with significant nuance and their consideration is useful for the criminal practitioner beyond the issue of their specific resolutions.

In the first case, *Commonwealth v. Libby*,⁴ the question is whether the issuing of a *Miranda*⁵ warning by police, and their subsequent request that a suspect waive the rights listed in that warning, affects the rights of a person being questioned.⁶ More specifically, when a suspect is arguably not in police custody (and, recall, whether someone is in custody can be a tricky question about which courts perform a multi-factor *post hoc* analysis) can a *Miranda* warning and a police request for a waiver of the protected rights indicate that the questioning has become custodial?

The United States Supreme Court has failed to clarify whether police, after reciting the *Miranda* warning, have a duty to honor *Miranda* rights in noncustodial interviews. Since some of those rights (particularly the right to court-appointed counsel) do not apply unless a person has been arrested, the *Miranda* warning can be confusingly inaccurate when recited to those who are not under arrest. This has

the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

MASS. CONST., art. XII.

3. The two cases are *Commonwealth v. Dorazio*, and *Commonwealth v. Libby*. *Amicus Announcements*, MASSACHUSETTS COURT SYSTEM, <http://www.mass.gov/courts/case-legal-res/case-information/amicus-announcements/> (last visited June 28, 2015).

4. *Amicus Announcements, November 2014 Announcements, SJC-11749 Commonwealth vs. Jeremy Libby*, MASSACHUSETTS COURT SYSTEM, <http://www.mass.gov/courts/case-legal-res/case-information/amicus-announcements/> (last visited June 28, 2015).

5. *Miranda v. Arizona*, 384 U.S. 436 (1966). This case established a number of rights for individuals in police custody and subject to police interrogation.

6. See the Massachusetts SJC’s *Amicus Announcements*, requesting amicus briefs addressing the issue of whether “[i]n a noncustodial interrogation, where an individual has been given *Miranda* warnings, . . . the police interrogators are required ‘to honor scrupulously [the individual’s] invocation of his or her *Miranda* rights.’” *Amicus Announcements, November 2014 Announcements, SJC-11749 Commonwealth vs. Jeremy Libby*, MASSACHUSETTS COURT SYSTEM, <http://www.mass.gov/courts/case-legal-res/case-information/amicus-announcements/> (last visited June 28, 2015) (quoting *Commonwealth v. Baye*, 967 N.E.2d 1120, 1134 (2012)).

created a morass of conflicting approaches across jurisdictions about the extent of federal protection. Federal and state courts across the country have attempted to discern what effect, if any, the administration of *Miranda* warnings in noncustodial situations may have. Section I of this article will argue that Article XII requires that invocations of *Miranda* rights made during noncustodial interrogations be honored.

The second Article XII case recently before the SJC, *Commonwealth v. Dorazio*, has to do with evidence of prior bad acts, or so-called “404(b)” evidence.⁷ At one point federal law was understood to prevent the admission of evidence of criminal activity for which the suspect was previously acquitted under some combination of the Double Jeopardy Clause, the rules of evidence, and the doctrine of collateral estoppel. Those days ended in 1990 when the Supreme Court of the United States ruled in *Dowling v. United States* that the failure of the state to convict under a reasonable doubt standard did not mean that evidence of the earlier conviction was inadmissible in subsequent proceedings given the lower standard for admissibility, propensity of the evidence, for other evidentiary purposes. Federal Rule of Evidence 404(b), and its Massachusetts counterpart, prevent the admission of such evidence for the purpose of showing the propensity to commit a later crime, but can allow the evidence for other purposes such as showing that an alleged criminal act was not a mistake, that the defendant was indeed the person who perpetrated the crime, or that the defendant had the necessary mens rea for the act to be criminal, among other reasons, if its probative value sufficiently outweighs any unfair prejudice to the defendant.

Even under *Dowling* the admission of such evidence can still be collaterally estopped if it can be shown that the proceeding that led to the earlier acquittal necessarily determined that the criminal act did not occur, or that the accused was not the actor. In practice such estoppel is rare, even where acquittals are based on evidence of innocence, because criminal courts usually issue general verdicts and not specific findings. To deny such evidence on collateral estoppel grounds a court must

7. See the Massachusetts SJC’s request for briefs addressing the issue of whether “[w]here the prosecution offers evidence of a defendant’s prior bad acts – for which he was tried in an earlier case and acquitted – to prove ‘common scheme, pattern of operation, absence of accident or mistake, intent, or motive’ in the current case, . . . the defendant is entitled to any greater protection under State law than under Federal law to prevent admission of this evidence.” *Amicus Announcements, December 2014 Announcements, SJC-11765 Commonwealth vs. Herbert Dorazio*, MASSACHUSETTS COURT SYSTEM, <http://www.mass.gov/courts/case-legal-res/case-information/amicus-announcements/> (last visited June 28, 2015) (quoting *Dowling v. United States*, 493 U.S. 342 (1990)).

consider the record of the previous proceeding to determine if the acquittal could have rested on other grounds, such as a mere failure of the prosecution to overcome the reasonable doubt hurdle. But if a person has been acquitted of a crime in the distant past, and no significant record of the proceeding exists, this determination is not just unlikely—it is impossible. Indeed, the record of the previous proceeding will often be insufficient *because* the defendant was acquitted.⁸

Under such circumstances it is fundamentally unfair for evidence of the alleged prior bad act to be admitted and Article XII's due process protections should prevent it from being heard by the jury. This is a narrow issue, and does not require the SJC to rule contrary to the *Dowling* analysis in a general way. Rather, protecting the criminal defendant's due process rights in this case merely requires the court to find that, in circumstances where the criminal defendant would be required to dig up a skimpy or non-existent record of proceedings from the distant past in order to attempt to suppress evidence of crimes for which he was long ago acquitted, it is a violation of Article XII's due process protections, i.e., protections against fundamentally unfair process, to allow the evidence.

This article will argue that Article XII protects the criminal suspect in both of these situations.

I. THE DANGERS OF MIRANDA WARNINGS IN NOMINALLY NON-CUSTODIAL INTERROGATIONS

The *Miranda* warning is intended to ensure that people in police custody are aware of their right against self-incrimination and their right to an attorney. The warning provides some protection against the coercive effects of police interrogation and serves to limit tactics police may use to gain incriminating evidence from those who might otherwise be unaware of their rights. But what effect does it have on a criminal suspect to be told of the rights and then have those rights ignored?

An interlocutory appeal on a Motion to Suppress recently argued before the SJC in the case *Commonwealth v. Jeremy Libby* involved exactly this situation. Mr. Libby was suspected of a crime and brought to the police station for questioning. Though he was not placed under arrest he was read his *Miranda* rights and asked to sign a waiver of those rights. Because he was not under arrest, and was arguably not legally in police custody, the *Miranda* warning was not necessarily required, but police issued it anyway. Police solicited a waiver of those rights, but

8. See Section II *infra* for expanded discussion of this.

prior to signing, Mr. Libby attempted to invoke the right to court-appointed counsel about which he had just heard. His invocation was ignored and Mr. Libby was pressured to waive and to continue talking with the implication that he might be arrested if he did not cooperate. The police released him after the interview, but arrested him the next day, though they had no significant additional evidence. Again the police issued *Miranda* warnings and asked Mr. Libby to sign a waiver, which he did. Again he invoked his right to court-appointed counsel and was pressured to continue talking, this time with indications that he might get lesser charges if he did not ask for an attorney.

It is the defendant's position that the motion judge correctly ruled that the second interview was custodial, that *Miranda* rights were in full effect, and that the interrogation was inadmissible evidence because of the improper police tactics. But what about the first interview when Mr. Libby had come to the police station voluntarily? The motion judge ruled that evidence of the first interview was also inadmissible—that Mr. Libby's statements were not voluntary because his will was overborne by police. The Commonwealth appealed the motion judge's ruling on both interviews. The SJC sought *amicii* on the question of whether, when police issue *Miranda* warnings in non-custodial interviews, they must "scrupulously honor" invocations of *Miranda* rights.

Police interrogators are keenly aware of *Miranda's* strictures and have learned to conduct interviews in nominally non-custodial settings specifically to avoid losing evidence through a court's later application of the *Miranda* rubric.⁹ In non-custodial situations police often issue the *Miranda* warning to avoid a possible later ruling that the warning was required and not given, but because the interrogation is likely to later be ruled to have been non-custodial, police are significantly freer to ignore invocations of *Miranda* and pressure the suspect to answer questions.¹⁰ In such situations the warning itself become part of the interrogator's toolkit, and can be used by police in various ways, outlined below, to overcome a suspect's desire to remain silent or to seek counsel while police remain within the boundaries of the federal *Miranda* rubric.¹¹

Being informed of rights and then immediately having those rights ignored places the suspect in a confusing situation where she may feel that she does not understand her position and is playing a dangerous

9. For a discussion of police practices designed to circumvent the rights guaranteed by the *Miranda* warning, see Aurora Maoz, Note, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1319-1328 (2012).

10. *Id.* at 1320-22.

11. *Id.* at 1319-28.

game against seasoned players with no clear concept of the rules and no reliable source of information about those rules.¹² This crafty police *Miranda* work-around is fundamentally unfair, and particularly so in the case of the indigent defendant who requires help from the Commonwealth in securing counsel, as will be shown below. The Supreme Court of the United States has failed to articulate whether police must honor the invocation of *Miranda* rights in nominally non-custodial settings after police have issued the warning, but Article XII has historically protected the criminal defendant from such tactics, and should do so here.

A. *Miranda Under the Federal Constitution and Article XII*

The Fifth Amendment to the United States Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”¹³ The Sixth Amendment provides that the criminal defendant shall “have the Assistance of Counsel for his defense.”¹⁴ The United States Supreme Court recognized in *Miranda v. Arizona*¹⁵ that these protections must extend to police custodial interrogations because “without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”¹⁶ In light of the significant risk of coercion present in custodial interrogation, “[p]rior to any questioning, the [suspect] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”¹⁷

For any statement made during custodial interrogation to be admissible against the defendant at trial, both the Federal and State Constitutions require that the prosecution prove that the defendant waived these rights before making the statement.¹⁸ The Commonwealth bears the heavy burden of proving such waiver beyond a reasonable

12. *Id.* at 1325-28.

13. U.S. CONST. amend. V.

14. U.S. CONST. amend. VI.

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

16. *Id.* at 467.

17. *Id.* at 444.

18. *See Commonwealth v. Edwards*, 651 N.E.2d 398, 400-01 (Mass. 1995).

doubt.¹⁹ “A confession can be voluntary in the legal sense only if the suspect actually understands the import of each *Miranda* warning,”²⁰ and is not “threatened, tricked, or cajoled into a waiver.”²¹ In deciding whether a defendant’s waiver of the rights described in the *Miranda* warning is valid, “a court must examine the totality of the circumstances, including the characteristics of the accused and the details of the interrogation.”²²

If a suspect in police custody invokes any of the rights enumerated in *Miranda*, the invocation must be scrupulously honored.²³ In an instance where a suspect invokes his right to counsel, “all interrogation must cease until counsel is made available, unless the defendant himself reinitiates further communication with the police.”²⁴ If an interrogation is non-custodial, these protections do not apply.²⁵

There are four factors that Massachusetts courts consider to determine whether an interrogation is custodial:

- (1) the place of the interrogation;
- (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect;
- (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and
- (4) whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest.²⁶

The SJC has held that “[t]here is no specific formula for weighing the relevant factors” and that “[r]arely is any single factor conclusive.”²⁷ Nevertheless, the seasoned defense attorney knows that when a suspect is not placed under arrest it is very rare for an interrogation to be ruled

19. *Commonwealth v. Dustin*, 368 N.E.2d 1388, 1390 (Mass. 1977); *Commonwealth v. Day*, 444 N.E.2d 384, 386-87 (Mass. 1983).

20. *Commonwealth v. Garcia*, 399 N.E.2d 460, 466 (Mass. 1980).

21. *Miranda*, 384 U.S. at 476.

22. *Commonwealth v. Silva*, 477 N.E.2d 646, 651 (Mass. 1983).

23. In order to protect the rights of the accused, “the accused must be adequately and effectively apprised of his rights and *the exercise of those rights must be fully honored.*” *Miranda*, 384 U.S. at 467 (emphasis added).

24. *Commonwealth v. Hoyt*, 958 N.E.2d 834, 842 (Mass. 2011), *citing* *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981).

25. “The requirements of *Miranda* . . . are not triggered unless the interrogation is custodial.” *Commonwealth v. Hilton*, 823 N.E.2d 383, 394 (Mass. 2005).

26. *Commonwealth v. Groome*, 755 N.E.2d 1224, 1233-35 (Mass. 2001); *see also* *Commonwealth v. Sneed*, 796 N.E.2d 1284, 1287-88 (Mass. 2003).

27. *Commonwealth v. Sneed*, 796 N.E. 2d 1284 (2003).

custodial as long as police avoided being overtly aggressive.

Police know this as well. Mr. Libby's case is illustrative of how police interrogation tactics have transformed to accommodate the *Miranda* strictures and still thwart the invocation of the rights *Miranda* sought to protect. Though federal law has failed to keep up with this change, Article XII of the Massachusetts Declaration of Rights should continue to protect criminal defendants more strictly than federal law, as it has for decades.

B. *Greater Protections Under Article XII*

The Declaration of Rights of the Massachusetts Constitution predates and operates independently of the Federal Constitution.²⁸ As a result, Massachusetts has been a leader in expanding the protections of its Constitution beyond the minimum standards set by the Federal Constitution.²⁹ Perhaps the first instance of this³⁰ can be found in the case of *District Attorney for the Suffolk District v. Watson*,³¹ in which the Massachusetts SJC invalidated Massachusetts's death penalty statute, finding that it was "offensive to contemporary standards of decency," "arbitrarily [and discriminatorily] inflicted," and cruel and unusual under the Declaration of Rights, although it may well have been acceptable under the Federal Constitution.³² Article XII, in particular, has been used to justify greater protection under the state constitution of the privilege against self-incrimination, Sixth Amendment rights including the right to counsel, and *Miranda* rights generally.³³

In *Commonwealth v. Mavredakis*,³⁴ the Massachusetts SJC addressed the distinction between Article XII of the Massachusetts Declaration of Rights and the Fifth Amendment to the United States Constitution as they pertain to self-incrimination:

[t]he text of art. 12, as it relates to self-incrimination, is broader than the Fifth Amendment. The Fifth Amendment, in relevant part, states:

28. Robert J. Cordy, *Criminal Procedure and the Massachusetts Constitution*, 45 NEW ENG. L. REV. 815, 820 (2011) (citing *Commonwealth v. Upton* (Upton III), 476 N.E.2d 548, 556 (Mass. 1985)).

29. *Id.* at 815-16.

30. *Id.* at 818.

31. 411 N.E.2d 1274 (Mass. 1980).

32. *Id.*

33. Robert J. Cordy, *Criminal Procedure and the Massachusetts Constitution*, 45 NEW ENG. L. REV. 815, 826-33 (2011). See also *Commonwealth v. Hodge*, 434 N.E.2d 1246, 1249 (Mass. 1982) ("The Massachusetts Declaration of Rights can . . . provide greater safeguards than the Bill of Rights to the United States Constitution.").

34. 725 N.E.2d 169 (Mass. 2000).

“Nor shall [any person] be compelled in any criminal case to be a witness against himself.” Article 12, however, commands that “No subject shall. . . be compelled to accuse, or furnish evidence against himself.” Based on the textual differences between art. 12 and the Fifth Amendment, we have “consistently held that art. 12 requires a broader interpretation [of the right against self-incrimination] than that of the Fifth Amendment.”³⁵

The breadth of Article XII has long been established in Massachusetts case law:

By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner; although not in the course of any pending prosecution.³⁶

Massachusetts courts have not hesitated to adopt additional rules under the Massachusetts Constitution to secure the broader guarantee against self-incrimination afforded by Article XII when Federal law has been found insufficient for the purpose.³⁷ In articulating these additional safeguards, the courts have considered “the need to deter police from ignoring the requirements of *Miranda* where doing so would provide police with a greater chance of obtaining incriminating evidence” an important factor.³⁸ “Another factor that has motivated [the Court] to depart from Federal decisions is the need to preserve bright-line rules in the *Miranda* context.”³⁹

Massachusetts courts have most often felt compelled to articulate additional rules to secure Article XII protections when they have “been confronted by shrinking protections afforded to the Federal right against self-incrimination” in light of specific rulings by the United States Supreme Court.⁴⁰

C. *Miranda and the Right to Counsel in the Non-Custodial Setting*

Though the prophylactic protections of *Miranda* apply only in the

35. *Id.* at 178-79 (quoting Opinion of the Justices, 412 Mass. 1201, 1210 (1992) (quoting *Attorney Gen. v. Colleton*, 387 Mass. 790, 796 (1982))).

36. *In re Emery*, 107 Mass. 172, 181 (1871).

37. *See* *Commonwealth v. Simon*, 456 Mass. 280, 303 (2010) (Botsford, J., dissenting).

38. *Id.* at 292.

39. *Commonwealth v. Simon*, 456 Mass. 280, 294 (2010), citing *Commonwealth v. Martin*, 444 Mass. 213, 223 (2005); *Commonwealth v. Smith*, 412 Mass. 823, 836-837 (1992) (holding that “one of the purposes of the ‘bright-line’ *Miranda* rule” is “to avoid fact-bound inquiries into the voluntariness of confessions.”).

40. *Commonwealth v. Martin*, 444 Mass. 213, 221 (2005).

custodial situation,⁴¹ the rights articulated by the standard *Miranda* warning are generally guaranteed at all times by the United States Constitution and Massachusetts Declaration of Rights.⁴² Citizens retain at all times their right to remain silent in the face of governmental accusation and to the assistance of counsel in asserting that right.⁴³ Custody is not required for invocation of these rights.⁴⁴ Rather, an individual's status as in custody or not presently under arrest dictates the means available to the accused to invoke his or her rights.

In a noncustodial situation where *Miranda* warnings have been given, Article XII should require police to honor scrupulously an individual's invocation of her *Miranda* rights. It is the United States Supreme Court's failure to clarify that has created ambiguity regarding the extent of Federal protection. In the absence of guidance from the Supreme Court, courts in various jurisdictions have struggled to discern what effect, if any, the administration of *Miranda* warnings in noncustodial situations may have.

An individual who is not in custody, and who understands that she is free to leave at any time, may invoke her right to silence or to seek the assistance of counsel not only by saying so and affirmatively refusing to answer any further questions, but also by leaving the place of interrogation and obtaining counsel. On the other hand, an indigent individual's ability to invoke the right to counsel for pre-arraignment questioning may only be effectuated with the assistance of the Commonwealth.⁴⁵ If, in fact, the police cannot honor such an invocation and actually provide counsel, the individual must be told as much and the interrogation should end without further cajoling and attempts to coerce the individual into recanting the invocation. Absent these affirmative measures, the right to the assistance of counsel as guaranteed

41. *Miranda v. Arizona*, 384 U.S. 436, 473-475 (1966).

42. See Robert J. Cordy, *Criminal Procedure and the Massachusetts Constitution* 45 NEW ENG. L. REV. 815, 828-29 (2011).

43. See *Miranda v. Arizona*, 384 U.S. 436, 442 (1966) (holding that the right to be free from self-incrimination and the assistance of counsel are "precious rights . . . fixed in our Constitution only after centuries of persecution and struggle . . . secured 'for ages to come, and designed to approach immortality as nearly as human institutions can approach it.'") (quoting *Cohens v. Virginia*, 6 Wheat 264, 387; 5 L.Ed. 257 (1821)). See also *Commonwealth v. Sazama*, 339 Mass. 154, 157 (1959) (holding that Article 12 guarantees that "[a] man, being interrogated under circumstances which reveal that he is suspected of a crime, even if not under arrest, certainly may properly assert his constitutional right to consult counsel and may refuse, on the advice of counsel or otherwise, to make statements.")

44. See *Miranda v. Arizona*, 384 U.S. 436, 442 (1966); *Commonwealth v. Sazama*, 339 Mass. 152, 156-57 (1959).

45. See MASS. GEN. LAWS. ch. 211D, §§ 5, 8.

by the Fifth Amendment and Article XII has no force or meaning to the indigent person accused, but not yet formally charged, with a crime. A failure to honor these protections may also discourage individuals subject to police questioning from attempting to assert their rights in the present interview or in the future.⁴⁶

Many courts have chosen not to deter the issuing of the warning by holding that the warning has no legal effect on the rights of a person who is not in police custody. Specifically, if a suspect is given the warning when not in custody, and then requests appointed counsel, police in many jurisdictions can ignore the request and continue asking substantive questions and developing evidence that will be admissible in court. In Massachusetts the SJC has held that, where a person being questioned is in police custody and invokes the right to counsel, police must cease asking substantive questions and must limit further questioning to the issue of whether the arrestee is refusing to answer further questions without counsel present.⁴⁷ But where a person is not in custody, police have no such duty in Massachusetts, at least not as of this writing.⁴⁸ In other words, the police can inform a person that they have a right to appointed counsel and then ignore an attempted invocation of that right and continue pressing for substantive answers.

Courts generally cleave to this rule on the theory that police should not be deterred from informing people of their rights in situations where the law does not necessarily require them to be so informed. Police, it is argued, should not have to explain (and may not even understand, or so this argument leads us to believe) the nuances of the custody analysis, and should be encouraged to err on the side of caution and give the warning. This argument implies that more information about rights cannot be anything but good for the criminally accused. What this analysis fails to consider is the effect it may have on a suspect to be told of certain rights, and then to have those rights immediately ignored.⁴⁹ At a minimum, it is confusing. But more worrisome, perhaps, is the fact that police can be savvy enough to use this confusion to their advantage, and to the suspect's detriment.

46. See *Commonwealth v. Clarke*, 461 Mass. 336, 350 (2012) (quoting *Davis v. United States*, 512 U.S. 452, 472-473 (1994) (Souter, J., concurring) ("When a suspect understands his (expressed) wishes to have been ignored . . . in contravention of the 'rights' just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation.")).

47. *Commonwealth v. Clarke*, 461 Mass. 336, 341-45 (2012).

48. *Commonwealth v. Hilton*, 443 Mass. 597, 608 (2005).

49. Aurora Maoz, Note, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1320-21 (2012).

As others have argued, a common police strategy is to intentionally keep an interrogation nominally non-custodial for strategic purposes.⁵⁰ That is, knowing the legal hallmarks of custody, police can narrowly avoid creating a legally custodial situation, issue *Miranda* warnings, seek a waiver of the *Miranda* rights, and then try to gather as much information as possible (or get the suspect on the record telling a false story). Though the suspect may feel compelled to answer questions (as Mr. Libby did due to the threat of arrest if he did not cooperate) the police maintain the non-custodial status of the interview by telling the suspect he is not under arrest at that time. In such a scenario, the *Miranda* warning serves the opposite of its intended purpose. Rather than informing the person of his rights so that he may exercise them, the reading of the rights serves to cause the person to feel significantly intimidated. Though told he is not under arrest, he is read his rights - a hallmark of police process of the criminally charged. Furthermore, when he tries to exercise those rights, he finds himself in the Kafkaesque situation of having had rights explained and then ignored by the functionary who just explained them.

Further, suppose this routine occurs in more than one interrogation with the same suspect, as it did with Mr. Libby. In the first interrogation Mr. Libby was informed of his rights and had those rights ignored; he requested an attorney but police keep asking questions anyway and indicating that if he didn't answer there would be negative consequences. Eventually the police convinced him that it is in his interest to answer some questions, and he signed a waiver of his *Miranda* rights, and answered. Even though the interrogation occurred with many of the trappings of a custodial interrogation, i.e., at the police station with Mr. Libby the obvious focus of the police investigation, the interrogation was likely to be ruled noncustodial. But the questioning did not lead to immediate arrest, and Mr. Libby was allowed to leave at the end of the interview. Then, less than twenty-four hours later, after a sleepless night wondering if he would be arrested, Mr. Libby was indeed arrested and interrogated again.

In the second interrogation Mr. Libby was unquestionably in custody—he had been arrested. He was again informed of his rights and asked to sign a waiver. Any suspect in Mr. Libby's situation couldn't help but be affected by the events of the day before. Having been through the same routine less than twenty-four hours earlier a suspect is now likely to sign a waiver more readily, particularly if police make it

50. *See id.* at 1320-29.

seem like some benefit will accrue if he does. Imagine the police say something like, “We haven’t decided what to charge you with yet, and you can still help yourself in this situation, but if you ask for an attorney, this interview is over,” as they did in Mr. Libby’s case.

The suspect has no reason to believe that his rights are different in this second interrogation from those he had the day before when he was told he had the right to remain silent and to have an attorney present but the police kept pushing him to answer. Suppose the suspect, confused and fearful that he will miss some opportunity to cooperate and get lesser charges, again answers the police questions. Without protection from Article XII, these answers are admissible evidence. The various rights that protect the suspect against self-incrimination have been thwarted and the *Miranda* warning itself has played a significant role in establishing the intimidation and confusion necessary to make this successful.

The officer questioning Mr. Libby may well have, by design, sought to question him in the most coercive setting available while still maintaining a “nominally noncustodial” situation.⁵¹ Additionally, police deploy on a regular basis a number of tactics that serve to ensure that the administration of *Miranda* warnings operates to their benefit in the investigation rather than to serve a suspect’s guaranteed rights.⁵² These tactics have a “corrosive effect on [the broader rights embodied in Article XII], undermine the respect [this Court] ha[s] accorded them, and demean their importance to a system of justice chosen by the citizens of Massachusetts in 1780.”⁵³

What effect should the police’s actions in the first interview - issuing *Miranda* warnings, requesting a waiver of *Miranda* rights, ignoring attempted invocations of those rights - have on the admissibility of evidence from the second interview? Are police savvy enough to use this set of circumstances to their advantage? If you think not, you have likely not read many transcripts of police interviews of suspects. How can Article XII prevent this without forcing police to second-guess whether *Miranda* warnings are appropriate in custodial grey areas? The

51. Aurora Maoz, Note, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1320 (2012).

52. Aurora Maoz, Note, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1320-1322 (2012)(detailing a number of coercive police tactics including conducting formal interviews in “noncustodial environments,” administering *Miranda* warnings but downplaying their significance, and reminding suspects that they are not required to talk not as a warning, but in an effort to engender trust with a suspect).

53. *Commonwealth v. Martin*, 827 N.E.2d 198, 203 (Mass. 2005).

following section offers a suggested rule that would solve the problem.

Troubling police interrogation practices designed to elude the strictures of *Miranda* have given Massachusetts courts considerable pause in the past.⁵⁴ Article XII's broad protection against self-incrimination and guarantee of the right to the assistance of counsel, extending as it does "to all investigations of an inquisitorial nature, . . . putting suspected parties upon their examination in respect thereto, in any manner"⁵⁵ even when "not in the course of any pending prosecution"⁵⁶ demand fairer treatment."⁵⁷

D. *A Road Forward: The Administration of Miranda Warnings Coupled with the Solicitation of a Waiver of Those Rights Should Create a Rebuttable Presumption of Custody for the Purposes of Miranda.*

Sanctioning the police practice of ignoring a suspect's invocation of rights guaranteed by Article XII in any situation—particularly where the suspect has been advised of those rights and waiver was explicitly sought—is an anathema to the Commonwealth's Constitution. The existing jurisprudence surrounding the admissibility of statements under voluntariness standards and *Miranda* offer a number of potential roads forward.⁵⁸ It appears that only one jurisdiction has adopted a blanket rule that where *Miranda* has been given, any invocation of those rights must be honored regardless of custody status or voluntariness.⁵⁹

Among the potential rules that Massachusetts courts could articulate to address situations such as the one experienced by Mr. Libby, courts could consider adopting a rebuttable presumption of custody where

54. Commonwealth v. Simon, 923 N.E.2d 58, 71 (Mass. 2010).

55. *In re Emery*, 107 Mass. 172, 181 (1871).

56. *Id.*

57. Other states' constitutions provide such protection. For example, the New Hampshire Supreme Court has construed that state's constitution to require police to honor an invocation of the right to counsel even in the absence of *Miranda* warnings. See *State v. Tapply*, 470 A.2d 900 904 (N.H. 1983)(construing article 15 of the New Hampshire Bill of Rights).

58. See Aurora Maoz, Note, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1328-39 (2012) (detailing a number of potential treatments of the administration of *Miranda* warnings in noncustodial situations).

59. *Ex parte Comer*, 591 So.2d 13, 15-16 (Ala. 1991). Here, the Alabama Supreme Court held that "once a police officer informs a person of his or her rights under *Miranda*, the police must honor that person's exercise of those rights even if the individual is not in custody" due to "the coercive effect of continued interrogation" and the likelihood that this would cause a person to believe that police could and would continue to violate the person's constitutional rights. *Id.* (quoting *Tukes v. Dugger*, 911 F.2d 508, 516 n. 11 (11th Cir. 1990)).

Miranda warnings are administered and waiver is explicitly sought.⁶⁰ Most significantly, this solution fits squarely in the *Miranda* rubric, which emphasizes the coercive circumstance that arises when people are unsure of their custody status—a situation that can be purposefully manipulated by police. Also, it provides the kind of bright-line rule favored by the Court in dealing with *Miranda* issues, especially where the Court is articulating a higher Article XII standard.⁶¹ Finally, to the extent the issue could be considered an open question under federal law, this solution does not assume or foreclose on the possibility that this kind of improper police practice may still be a violation of federal law as well.

Applied to circumstances such as the ones experienced by Mr. Libby, a rebuttable presumption of custody would be impossible for the Commonwealth to overcome given the many factors already present supporting custody, particularly the extended clash of wills sparked by Mr. Libby's invocation of right to counsel.⁶²

II. DUE PROCESS RIGHTS UNDER ARTICLE XII AND THE ADMISSION OF ACQUITTED CONDUCT AS PRIOR BAD ACT EVIDENCE

The SJC has taken up *Commonwealth v. Dorazio*,⁶³ for Further Appellate Review to examine whether Article XII requires greater protection than federal law regarding the treatment of previously acquitted conduct when the Commonwealth seeks to introduce the prior allegations as “404(b)” evidence.⁶⁴ Specifically, the case presents the

60. Maoz favors a rebuttable presumption of custody as well (though without the requirement that explicit waiver be sought to trigger it) as a solution for the current morass of federal law surrounding this situation. She argues, “this approach most closely aligns with the [Supreme] Court’s current approach and the evidence indicating a strong association between the *Miranda* warnings and formal arrest . . .” Aurora Maoz, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1329 (May 2012).

61. *Commonwealth v. Martin*, 444 Mass. 213, 223 (2005).

62. See *Davis v. Allsbrooks*, 778 F.2d 168, 172 n.1 (1985) (noting that “[t]here are . . . circumstances where a clash of wills over a suspect’s desire to remain silent would create custody through overbearing police behavior.”) (emphasis added).

63. *Commonwealth v. Dorazio*, No. SJC-11765, WL 541595 (Mass. 2005).

64. Mass. Guide to Evidence, §404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, nature of relationship, or absence of mistake or accident.”). Though the Massachusetts Guide to Evidence is not a set of formally adopted rules, the Guide has been promulgated by the SJC Advisory Committee on Massachusetts Evidence Law with the goal of “reflect[ing] the most accurate and clear statement of current law as possible. Ultimately, the law of evidence in Massachusetts is what is contained in the authoritative decisions of the Supreme Judicial Court and of the Appeals Court, and the statutes duly enacted by the Legislature.” *Introduction to the 2014 Edition*, SUPREME JUDICIAL COURT ADVISORY COMMITTEE, <http://www.mass.gov/courts/case-legal->

question, “[w]here the prosecution offers evidence of a defendant’s prior bad acts—for which he was tried in an earlier case and acquitted—to prove ‘common scheme, pattern of operation, absence of accident or mistake, intent, or motive’ in the current case . . . [whether] the defendant is entitled to any greater protection under State law than under Federal law to prevent admission of this evidence.”⁶⁵ In other words, is there any continuing vitality, in Massachusetts (to be found under Article XII’s due process guarantees or elsewhere, of the collateral estoppel doctrine as articulated by the Supreme Court of the United States in *Ashe v. Swenson*⁶⁶ after it has been considerably narrowed in criminal cases under federal constitutional law in a subsequent case, *Dowling v. United States*?⁶⁷

In *Dorazio*, the defendant was convicted in 2010 of sexual crimes against two children who came forward with allegations more than ten years after the abuse allegedly occurred. At the trial, the Commonwealth introduced evidence that in 1998 the defendant had been accused of inappropriately touching another child in a Chuck E. Cheese restaurant (the “CEC evidence”). The defendant, however, had been acquitted of charges related to those allegations after a jury trial twelve years prior to the second trial.⁶⁸ His appeal argued, in pertinent part, that the evidence of the crime for which he had been acquitted should not have been allowed.

Despite the Supreme Court’s *Dowling* decision, Massachusetts should honor the spirit of the collateral estoppel doctrine, particularly in cases where, as in *Dorazio*, it is impossible to determine (because of an

res/guidelines/mass-guide-to-evidence/statement-from-the-supreme-judicial-court-and-introduction.html. “[I]t has been cited as a source of authority by the Appeals Court and by the Supreme Judicial Court in both published and unpublished opinions more than 500 times since it was first published in 2008.” *Id.*

65. See the Massachusetts SJC’s request for amicus briefs *Amicus Announcements, December 2014 Announcements, SJC-11765 Commonwealth vs. Herbert Dorazio*, MASSACHUSETTS COURT SYSTEM, <http://www.mass.gov/courts/case-legal-res/case-information/amicus-announcements/> (last visited June 28, 2015).

66. 397 U.S. 436 (1970).

67. 493 U.S. 342 (1990). Prior to *Dowling*, a majority of federal circuits applied *Ashe* to cases involving 404(b) evidence. See *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 583-84 (1st Cir. 1987); *U.S. v. Cala*, 521 F.2d 605 (2d Cir. 1975); *U.S. v. Salmone*, 869 F.2d 221 (3d Cir. 1989)(reversed in light of *Dowling*); *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972); *U.S. v. Johnson*, 697 F.2d 735 (6th Cir. 1983); *King v. Brewer*, 577 F.2d 435 (8th Cir. 1978); *Buck v. Maschner*, 878 F.2d 344 (10th Cir. 1989).

68. It was actually alleged in the 1998 trial that the defendant inappropriately touched two girls, but the Commonwealth only sought to introduce evidence from one of the complainants in 2010. This is a significant fact because the complainant they did not seek to present in 2010 had not, in 1998, been able to produce testimony of any touching, which surely played a significant role in the 1998 acquittals on all counts related to both girls.

insufficient record of the earlier trial) whether the earlier acquittal was based upon a determination that the defendant did not indeed commit the acts alleged. The promise of fundamental fairness inherent in due process guarantees in Article XII requires as much.

A. *Unfair Prejudice and 404(B)*

As an initial matter, under Massachusetts common law, extrinsic, or more commonly, prior bad acts are not admissible at trial as proof of unrelated allegations. In general, evidence of bad acts extrinsic to the crime charged may not be offered solely for the prohibited purpose of proving bad character and thus, inferentially, a propensity toward crime.⁶⁹ Extrinsic bad act evidence is only admissible if it is “substantially relevant to the offense charged; [is] inadmissible when its relevance is insignificant; and, in borderline cases, admissible when its relevance outweighs the undue prejudice that may flow from it”⁷⁰

Bad act evidence, however, may be admissible if relevant to issues of “motive, opportunity, intent, preparation, plan, knowledge, identity, nature of relationship, or absence of mistake or accident.”⁷¹ These exceptions, however, are not without limitation.⁷² Evidence of uncharged sexual misconduct with a person other than the complainant in a case involving a sexual crime is considered to be particularly prejudicial and prone to misuse by a jury.⁷³ For this reason, if such evidence is to be admissible, it “must be closely related in time, place, and form of acts to show a common course of conduct by the defendant toward the [multiple alleged victims] so as to be logically probative.”⁷⁴

“If the judge finds that the evidence in question meets the above requirements, he or she next must determine whether its probative value is outweighed by a risk of undue prejudice to the defendant.”⁷⁵ If such evidence is improperly admitted, it “diverts the attention of the jury from the [crime] immediately before it; and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may

69. *Commonwealth v. Barrett*, 418 Mass. 788, 793 (1994).

70. *Commonwealth v. Yelle*, 19 Mass. App. Ct. 465, 472 (1985) (citations omitted) (noting that there is no discretion to admit evidence in the second category).

71. Mass. G. Evid. §404(b) (2013).

72. *Commonwealth v. Trapp*, 396 Mass. 202, 206 (1985).

73. *Commonwealth v. Barrett*, 418 Mass. 788, 795 (1994).

74. *Commonwealth v. Barret*, 418 Mass. 788, 794 (1994). *Accord* *Commonwealth v. King*, 387 Mass. 464, 472 (1994); *Commonwealth v. Gallison*, 383 Mass. 659 (1981); *Commonwealth v. Cokonougher*, 32 Mass. App. Ct. 54, 58 (1992).

75. *Barrett*, 418 Mass. at 794 (1994).

cause injustice to be done him.”⁷⁶

Introduction of evidence from a prior acquittal “imposes on the defendant the burden of relitigating [that the act occurred and that the defendant was the actor] and thereby increases the likelihood of an erroneous conviction on the charged offense” that Article XII demands that the Commonwealth be collaterally estopped from introducing such evidence.⁷⁷

[O]ne of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense. This danger is particularly great where . . . the extrinsic activity was not the subject of a conviction; the jury may feel the defendant should be punished for that activity even if he is not guilty of the offense charged.” Alternatively, there is the danger that the evidence ‘may lead [the jury] to conclude that, having committed a crime of the type charged, [the defendant] is likely to repeat it.’⁷⁸

Where such evidence is presented at trial, the defendant is faced with the proposition of mounting a defense to an entirely different set of highly inflammatory and prejudicial allegations than the ones for which he is on trial. Even if possible to mount a defense,⁷⁹ it is so fundamentally unfair and contrary to any notion of due process that it should never be allowed.⁸⁰

B. *Article VII’s Due Process Protections Should Prevent the Use of Evidence of Prior Acquitted Acts Where Those Acts are Highly Prejudicial and There is an Insufficient Record of the Previous Trial to Ascertain Whether the Defendant was Innocent of the Earlier Crime.*

In *Dorazio*, the defendant has argued strenuously that it was a violation of the his rights to due process of law and a fair trial as

76. *Commonwealth v. Triplett*, 398 Mass. 561, 563 (1986) (quoting *Commonwealth v. Jackson*, 132 Mass. 16, 20–21 (1882)).

77. See *Dowling v. United States*, 493 U.S. 342, 356 (1990) (Brennan, J., dissenting). *Accord State v. Scott*, 413 S.E.2d 787 (N.Car. 1992). The United States Supreme Court has held that because of the different standard of proof, the introduction of such evidence does not violate the collateral estoppel component of the double jeopardy clause of the United States Constitution. *Dowling*, 492 U.S. at 351.

78. *Dowling v. United States*, 493 U.S. 342, 361-62 (1990) (quoting *United States v. Beechum*, 582 F.2d 898, 914 (CA5 1978)).

79. Mounting a defense to prior allegations becomes increasingly difficult with the passage of time.

80. *Accord McMichael v. State*, 638 P.2d 402, 403 (Nev. 1982) (“[C]onsiderations of fair play underlying the double jeopardy principle militate strongly against the . . . admissibility [of such evidence].”).

guaranteed by Article XII of the Massachusetts Declaration of Rights to admit that evidence for any purpose given that he had been acquitted of the related charges twelve years prior.⁸¹ Mr. Dorazio's trial is a stark example of the unfairness that flows from use of prior acquitted conduct under these circumstances and it plays out just as Justice Brennan predicted.⁸² More than a decade after the original trial, the defendant was faced with the proposition of mounting a defense to entirely different set of highly inflammatory and prejudicial allegations than the ones for which he was on trial.⁸³ Even if it were possible to mount a defense under these circumstances, it is so fundamentally unfair and contrary to any notion of due process that it never should have been allowed.⁸⁴ In response to this fundamental unfairness, the defendant here urged the SJC to impose a limitation where introduction of evidence from a prior acquittal "imposes on the defendant the burden of relitigating [that the act occurred and that the defendant was the actor] and thereby increases the likelihood of an erroneous conviction on the charged offense" Article XII demands that the Commonwealth be

81. The constitutionality under Massachusetts law of admission of prior bad acts for which a defendant has previously been acquitted was not raised or reached in *Commonwealth v. Barboza*, 76 Mass. App. Ct. 241 (2010). In any case, the contested evidence in *Barboza* would still be admissible under the rule Mr. Dorazio now urges because it was relevant to the issue of motive whether the defendant had been acquitted or convicted.

82.

'[O]ne of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense. This danger is particularly great where . . . the extrinsic activity was not the subject of a conviction; the jury may feel the defendant should be punished for that activity even if he is not guilty of the offense charged.' Alternatively, there is the danger that the evidence 'may lead [the jury] to conclude that, having committed a crime of the type charged, [the defendant] is likely to repeat it.'

Dowling v. United States, 493 U.S. 342, 361-62 (quoting *United States v. Beechum*, 582 F.2d 898, 914 (CA5 1978)).

83. The fact that it had been the subject of a trial and acquittal more than ten years earlier worked a unique prejudice upon Mr. Dorazio. In 1998, Mr. Dorazio waged a vigorous and full-throated defense of the CEC allegations, developing exculpatory evidence through investigation and cross-examination at trial. Mounting an equally vigorous defense in 2010 was made virtually impossible due to the passage of time. And, of course, there was no record of testimony from the 1998 trial, undermining any real opportunity for Mr. Dorazio to meaningfully confront and cross-examine witnesses who appeared in both 1998 and in 2010. See *State v. Darling*, 419 P.2d 836, 843 (Kan. 1966) (quoting *State v. Little*, 350 P.2d 756, 763-64 (Ariz. 1960) ("[W]here the significance of such evidence must, if the doctrine of res judicata or collateral estoppel is to be given any effect, be determined in the light of the record and verdict of the former trial, evidence of such former offense tends to become remote, speculative or confusing.")).

84. *Accord McMichael v. State*, 638 P.2d 402, 403 (Nev. 1982) ("[C]onsiderations of fair play underlying the double jeopardy principle militate strongly against the evidence's admissibility.").

collaterally estopped from introducing such evidence.⁸⁵

C. *Collateral Estoppel, Double Jeopardy, and Fundamental Fairness*

In theory, the doctrine of collateral estoppel is an application of the Fifth Amendment's guarantee against double jeopardy and prevents the relitigation of issues already decided in earlier proceedings. This protection can be afforded to the criminal defendant seeking to suppress 404(b) evidence of previous crimes for which he has been acquitted. But in practice, and despite Justice Stewart's admonition in *Ashe* "that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality,"⁸⁶ the protection relative to 404(b) evidence was effectively gutted by the Supreme Court's ruling in *Dowling v. United States*. That case held that acquittal did not create a per se bar against the use of the alleged acquitted conduct where "it is presented in a subsequent action governed by a lower standard of proof."⁸⁷

Dowling did not purport to overrule *Ashe*, but did clarify that in order to avail himself of the constitutional protection of the collateral estoppel doctrine it is the defendant who bears the burden of "demonstrat[ing] that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding."⁸⁸ In essence, although the Court did not explicitly hold that collateral estoppel could never be relied upon to preclude the introduction of 404(b) evidence of crimes of which the defendant had previously been acquitted,⁸⁹ it created a virtually unscalable procedural obstacle to its use. As presaged by Justice Stevens in the *Ashe* decision, the Court's "more technically restrictive" decision in *Dowling* "simply amount[ed] to a rejection of the

85. *Com. v. Shagoury*, 6 Mass. App. Ct. 584, 590 (1978). The United States Supreme Court has held that because of the different standard of proof, the introduction of such evidence does not violate the collateral estoppel component of the double jeopardy clause of the United States Constitution. *Dowling v. United States*, 493 U.S. 342, 351 (1990). See *Dowling v. United States*, 493 U.S. 342, 365-57 (1990) (Brennan, J., dissenting). *Accord State v. Scott*, 413 S.E.2d 787 (N.Car. 1992).

86. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970).

87. *Dowling v. United States*, 493 U.S. 342, 349 (1990).

88. *Id.* at 350 (1990).

89. *Id.* at 343-54 (Justice Brennan's dissent presumes that the Court did presumptively say collateral estoppel wasn't available to contest admission of 404(b) evidence, but the fact that the majority (Justice White) engaged the inquiry regarding whether the defendant in *Dowling* had met the burden suggests that its holding did not go as far as Brennan feared and, in any case, there is nothing in the majority's reasoning regarding the differing standards of proof which would negate the constitutional impropriety of allowing relitigation of something that must have been decided by the previous jury, regardless of the standard.)

rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.”⁹⁰

As articulated in *Ashe*,

Where the prior proceeding against the defendant results in a general verdict of acquittal, the court must examine the evidence, pleadings and other relevant material from the prior proceeding to determine whether a rational jury could have grounded their verdict upon some issue other than that which the defendant seeks to foreclose from consideration in the later proceeding.⁹¹

Unfortunately for Mr. Dorazio, there no longer existed in 2010 any detailed record of his 1998 trial, and this was the case precisely because he was acquitted. Because there was no conviction to appeal, there was no need to ever produce a transcript of the trial and the court stenographers’ notes of the trial were ultimately lost.

Under circumstances such as those in *Dorazio*, where a defendant bears the burden of proving that his earlier acquittal necessarily determined that he did not commit the acts now being offered as evidence in a trial on different charges, and where no record of the acquittal exists there exists, it is fundamentally unfair for the evidence to be introduced. This is especially so in the case of sexual crimes against children where the alleged acts (whether of the crime for which the defendant now faces trial or the earlier similar alleged acts) are so highly inflammatory that the danger of unfair prejudice is extraordinarily high. This last point is arguably more pertinent to the 404(b) balancing of probative value and unfair prejudice, but should also weigh in the application of a due process analysis of fundamental fairness. Ultimately, though the case presents the SJC an opportunity to articulate under Article XII a broader protection than the Fifth Amendment now affords after *Dowling*, it is more likely that the simple, fact-specific promise of a fair trial guaranteed by Article XII will offer the defendant here greater opportunity for relief.

CONCLUSION

Massachusetts has a significant history of steadfastly protecting the rights of the criminally accused where federal law has failed or ceased to do so. The two cases considered in this article present the SJC with

90. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970).

91. *Commonwealth v. Shagoury*, 6 Mass. App. Ct. 584, 589-90 (1978) (citing *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)).

opportunities to parse defendants' rights carefully, and to find that those rights are protected by core principles established in the Massachusetts Declaration of Rights. Regardless of the Court's ruling, the issues allow practitioners of criminal law to consider fine points of procedure and principle that carry important lessons and important consequences for defendants.

Police officers have a significant advantage over the people they question: officers are in a position of power; they are up to date on existing information in a case; and they are frequently more familiar with the law than many of the individuals they encounter. This last fact—that police have better general knowledge about the rights a suspect does or does not have—is often used by police to their own advantage (and, in many cases, to the detriment of the person being questioned). It is against the interest of the Commonwealth and its citizens to allow police to create an environment in which individuals believe they may be in custody, inform individuals of their rights, request that they waive those rights, and then attempt to deprive an individual of those rights through misrepresentation or obfuscation. For this reason, Massachusetts courts should interpret the provisions of Article XII to offer protection to suspects as soon as *Miranda* warnings are read.

Similarly, the right to a fair trial dictates that once a person has been acquitted of acts in the distant past, they are not forced to relitigate their innocence a second time in a different trial. This is particularly true where the acts alleged are of a highly inflammatory nature and where the hearts and minds of juries may be swayed by their emotional response to evidence, and not the facts of the case. And, perhaps more troubling, it should not be allowed when the extensive, obviously exculpatory evidence that had been previously adduced at a trial resulting in acquittal cannot be or is not provided to the defendant and the trial judge prior to its use. The Massachusetts Declaration of Rights should prevent a defendant from having to prove, for a second time, that he is innocent of a crime for which he has already been acquitted in order to demonstrate his innocence in a later trial. The due process protections of Article XII would otherwise be abrogated unfairly.