Decided 50 years ago, *Miranda v. Arizona* was a watershed event, a precedent of historic dimension. Even then, the U.S. Supreme Court justices knew that the case would prove to be a landmark, by virtue of the attention it was getting, by virtue of the amicus curiae briefs that were filed and by virtue of the court’s own language in rendering the decision.

*Miranda* followed another famous case, one that was decided two years earlier, in 1964: *Escobedo v. Illinois*. *Escobedo* was a right-to-counsel case under the Sixth Amendment. Danny Escobedo was charged with murder, had been denied access to a lawyer and was then subjected to interrogation. In an opinion authored by Justice Arthur Goldberg, the Supreme Court invalidated the interrogation of Escobedo on Sixth Amendment grounds because there was a deprivation of the right to counsel.

Now, fast-forward two years. Goldberg is off the court, replaced as justice by Abe Fortas. The court has granted certiorari in the case of Ernesto Miranda, a semi-literate Mexican-American who had dropped out of the ninth grade. Miranda was arrested by the Phoenix police about 10 days after an 18-year-old woman reported being kidnapped and raped. Miranda was identified by the victim and was then interrogated by two Phoenix police officers. He was not provided access to a lawyer, nor was he read any of the rights that would soon carry his name. Unlike *Escobedo*, the *Miranda* case turned upon the Fifth Amendment right to be free from self-incrimination rather than the Sixth Amendment right to counsel.
2016 marks the 50th anniversary of *Miranda v. Arizona*. The Warren court engaged in what must be acknowledged to have been a revolution in the law of criminal procedure.
Miranda was convicted of rape and kidnapping. His conviction was affirmed by the Arizona Supreme Court. He filed a petition for writ of certiorari in the U.S. Supreme Court. The court accepted the case. The chief justice was Earl Warren, a former prosecutor and former governor of California. Miranda’s appeal was one of four cases argued together. In June of 1966 the court issued its Miranda opinion, along with three dissents.

The opinion, of course, famously came out with the “Miranda warnings,” now known to all. The Supreme Court did not create new rights. The right to counsel had been set forth in Gideon v. Wainwright. But never before had the Supreme Court imposed on law enforcement a uniform, blanket rule that would put steel in these rights and create a consequence of suppression in the event the rights were violated.

The Miranda rights were articulated as follows: “You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have that lawyer present while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish, and you can decide at any time to exercise these rights and not answer any questions or make any statements.” As the warnings have been administered over the years, they have customarily included as well the questions, “Do you understand each of these rights as I have explained them to you?” and “Having these rights in mind, do you wish to talk to us now?” Law enforcement officers usually ask the suspect to sign and/or initial each step of this process to ensure that any waiver is set forth clearly and in order to avoid problems down the line.

The privilege against self-incrimination was the basis for the holding written by Warren for the five-justice majority.

It should be noted that, at the time, police officers in varying degrees across the country were giving certain versions of warnings. Interestingly, during oral argument of the consolidated cases, Justice Fortas asked Solicitor General Thurgood Marshall to identify the practice of the FBI concerning interrogation warnings. Marshall promptly contacted FBI Director J. Edgar Hoover, who informed Marshall that for a number of years the FBI had been providing all of the warnings that Warren would end up mandating in the court’s majority opinion.

The majority opinion did something of which the dissenters were quite critical: Warren quoted from, and excerpted at length, a number of police manuals from around the country that were not part of the trial record. He did so in order to identify shortcomings of the interrogation regimes that prevailed across the nation. The backdrop was a concern about what was then often referred to as “the third degree.” The physical-compulsion aspect of police interrogation was something of which the court was aware. The court cited the Brown v. Mississippi case from the 1930s in which the court had occasion to adjudicate a claim that a suspect had been abused during police interrogation. At the time that it issued its Miranda decision the court was also aware of the civil-rights struggle going on in the South. This formed part of the backdrop as well. So the Supreme Court majority referred to physical compulsion but did not premise
its opinion on physical compulsion so much as it did upon psychological pressure and duress — again, “the third degree.”

What made the case such a watershed was that for the first time the Supreme Court said emphatically — as a blanket matter rather than as a case-by-case inquiry — that if these warnings are not given, the statement is inadmissible and will be suppressed.

So the concerns of the U.S. Supreme Court when it confronted the *Miranda* case included the question of how to put flesh on the bones of precedents such as *Gideon*, how to provide that, rather than having an idiosyncratic and unpredictable case-by-case adjudication of challenges to interrogations, one could ensure that the Fifth Amendment would be protected in a meaningful or systematic way. So, again, what was new was not so much the right but rather its blanket implementation in a class of cases.

Under *Miranda*, law enforcement officers cannot assume waiver. That’s why the *Miranda* advice that law enforcement officers give to suspects is always going to include the solicitation of waiver. The waiver may not be presumed. The waiver must be clear. At trial, the burden of proving waiver, Warren wrote, is on the prosecution. It’s not on the defendant. That the *Miranda* right was waived is something the prosecution must prove. If you read Warren’s opinion in *Miranda* you will find repeated reference to compulsion, to “the compelling nature of the interrogation.” Warren, the former prosecutor, was concerned with the susceptibility of the interrogation environment to coercion.

The Warren court was engaged in what must be acknowledged to have been a revolution in the law of criminal procedure. The American Law Institute, a number of law schools, a number of scholars and a number of bar associations and other organizations were in that era examining and re-examining many aspects of our rules of criminal procedure, our criminal laws.

And so the Supreme Court suppressed Ernesto Miranda’s confession. The case was sent back. Miranda was retried in Arizona for the rape and the kidnapping, without the use of the confession. He was convicted again. He served time. He was paroled in 1972. He was killed in a bar fight in 1976.

Under Article I, Section 9, of the Pennsylvania Constitution, our state law against self-incrimination is co-extensive with the Fifth Amendment of the U.S. Constitution prohibiting self-incrimination. When we look to *Miranda* and its progeny, we adhere in Pennsylvania to the same jurisprudence in our state courts. There is no greater right to be free from self-incrimination afforded by the Pennsylvania Constitution than there is in the U.S. Constitution’s jurisprudence under the Fifth Amendment.

There are limits and exceptions to the *Miranda* principle. First of all, the suspect must invoke his or her *Miranda* rights. If the suspect doesn’t invoke, law enforcement is free to continue questioning. Although waiver may not be presumed, invocation of the right may not be presumed either. So law enforcement officers must read the suspect his or her rights if the suspect is in custody and is under interrogation. If the suspect doesn’t say, “I want to talk to my lawyer” or “I’m going to keep quiet and I’m not going to talk to you,” then the police are permitted to keep trying to interrogate the suspect.

There’s another limitation. It concerns application of the Fourth Amendment’s exclusionary rule, in particular the fruit of the poisonous tree. If you break down a suspect’s door and it’s an illegal search and the suspect has all kinds of drugs and paraphernalia, illegal firearms or other contraband, you can’t use those against him or her in a prosecution. The search was illegal. You can’t use the fruits of the illegal search. But there is no such thing under *Miranda*, under the Fifth Amendment. Suppose the
Police fail to give a suspect *Miranda* warnings and the suspect proceeds to give a statement. That statement may not be used. It’s going to be suppressed. It’s not admissible. But the government may still prosecute the suspect. If the suspect told the police officers where he or she put that stash of guns and drugs, the government can use those guns and drugs in a prosecution. They’re not fruit of the poisonous tree. So there’s an important difference: There is no fruit-of-the-poisonous-tree doctrine under *Miranda* as there is under the Fourth Amendment.

There is another important limitation or exception of which lawyers should be aware: the *Quarles* case, which arose in New York. It’s a public-safety case. Police don’t have to Mirandize a suspect if they respond to an emergency and it seems that the suspect knows where the loaded gun or the ticking time bomb is. They can ask the suspect, “Hey, where’s the ticking time bomb?” or “Where’s the gun you left in the nursery school?” The emergency exempts the inquiry from the *Miranda* rule. Of course, the courts are going to scrutinize invocation of this emergency concept. The law doesn’t want the exception to swallow the rule.

Although *Miranda* is now 50 years old, there remain many issues that beg for further development and examination. Waiver, for example. What is a waiver? Is a gesture a waiver of *Miranda* rights? A shrug? Does it have to be emphatic? Are there magic words? Waiver in the juvenile context is especially interesting. There have been many cases dealing with the question of whether the juvenile must have an interested adult with him or her. When I use the term “interested adult,” I’m not being euphemistic. Those are actually the words employed. This is because the category is not limited to a parent. It must be someone with some connection to the child. Is the presence of an interested adult enough to allow that juvenile to waive his or her *Miranda* rights? The current law in Pennsylvania and in the United States generally applies a totality-of-the-circumstances test. There is no single criterion. It’s not sufficient that there simply be an interested adult. We look as well to the age and maturity of the juvenile, as well as other factors. This area of law is still developing.

Another issue: language interpreters. In Pennsylvania there are more and more people coming into the criminal justice system for whom English is not the first language. Is there a mandate that the officer appreciate or ascertain that the suspect can speak and understand the English language? Many *Miranda* cards have Spanish on the reverse side, for example. It’s not entirely clear across jurisdictions what the ultimate demands of the Constitution are in connection with foreign language in all circumstances. In the *Garibay* case, the 9th U.S. Circuit Court of Appeals held inadmissible a confession given where the suspect was a Spanish-speaker of low IQ and there was murkiness as to whether he understood the rights that were being read to him. This is an area that is going to be adjudicated and litigated.

A very hot topic — believe it or not, it still gets litigated — is how to define interrogation. We know that it is more than a mere encounter in which a police officer is walking down the street and says, “Good morning, how are you doing?” That’s not a custodial interrogation. The officer doesn’t have to read *Miranda* rights to the person he greets. A custodial interrogation is generally either arrest or a circumstance in which the suspect is not free to leave. And the way that we see this question arising from time to time is in the context of something short of arrest. Is the suspect free to leave? Is he or she being detained? It’s not always clear, and that’s a case that gets litigated because once there is a custodial interrogation the right attaches. The officer does not have to Mirandize a suspect the second that he or she is in custody. The officer has to Mirandize the suspect once the custody is accompanied with interrogation. Conceivably, one could have some fairly significant lapse of time be-
tween the moment the suspect comes into custody and the moment the law requires that he or she be Mirandized. This is an area that gets litigated, and it’s going to continue to be litigated.

One can imagine all kinds of constructs that we might deem custodial. What is custodial? You can let your imagination run wild. If an officer tells you, “Go over there,” are you in custody or not in custody?

A really confusing area even for many experienced criminal lawyers and judges is the issue of pre- and post-arrest silence. There are basically four different time periods involved, with different permutations, and the case law continues to evolve. A starting point is the case of *Commonwealth v. Molina*, decided by the Pennsylvania Supreme Court in 2014. The U.S. Supreme Court still has not spoken authoritatively to the issue or at least to the full ambit of the pre-arrest/post-arrest silence dichotomy.

Another area of controversy: harmless error. The reference by the prosecution to the defendant’s silence may violate the Fifth Amendment, but this may nonetheless be harmless error. In an opinion I wrote for the Superior Court, *Commonwealth v. Kuder*, 62 A.3d 1038 (Pa. Super. 2013), a sex-crime prosecution, I found the defendant’s Fifth Amendment rights were violated by reference to his silence, but in context this was harmless error by reason of other evidence in the case. The amount of play that should be given to harmless error is a hot topic in the criminal law because if every error is harmless, then there is no error. This is something that’s going to continue to percolate.

Another area to watch, and for some of you to participate in as the years go by, is the interplay of *Miranda* and the Fifth Amendment with technology. If you were reading *The New York Times* on May 1, 2016, you might have read about a former police officer in Philadelphia who was...
arrested on federal child-pornography charges in an adjoining county. He found himself in federal custody on contempt charges because he would not unlock his laptop. Shades of Apple v. FBI. He appealed to the 3rd Circuit, claiming this violated his right against self-incrimination. This was not directly a Miranda issue, but it was very much a Fifth Amendment issue and the kind of case that technology can pose. In other words, the defendant is saying, “You can prosecute me, but I don’t have to do your work for you.” People take both sides on these issues.

Here are some take-away thoughts. Justice is a process, not a result. If we polled everyone on any particular issue or concern and then asked, “What is justice?” we might get many different answers. Justice is a set of rules that apply equally. Each and every one of us might in some way have a different conception of justice. But each and every one of us should be bound by the same rules, the same process. Not more process, not less process; the same process. That is what justice is. Hopefully, if the process is fair and applies equally to everyone, then the result you think is justice and then go back and jury-rig the process to generate that result. That’s not justice. That’s tyranny. That’s why we fought the Revolution. That’s why we have the Constitution. That’s why we celebrate Law Day. We don’t apply the Miranda rules only to Ernesto Miranda; we apply them to you, me, everyone. The same rules apply to each and every one of us whether it’s about our Miranda rights or any other rights under our Constitution. That’s what America is all about.

It is inevitable that some bad guys will get away with their bad actions, some guilty people will go free. In the context of the victims, there can perhaps be no greater travesty of justice. And yet, writ large, such travesties hopefully will be far fewer by many orders of magnitude than the just results generated broadly and overall by a process that applies the rules fairly each and every time to each and every person regardless of demographics, regardless of personal characteristics, etc.

When the rules are broken, the rules must be vindicated. Some of you remember from law school hearing the maxim “fiat justitia, ruat caelum,” meaning “let justice be done though the heavens fall.” The idea is that the same law applies even to presidents. Even presidents must answer to the law, consequences be damned.

We don’t decide a case based on, “This is a good guy” or “This is a bad guy” or “This is a good company” or “This is a bad company.” Miranda was a bad guy. He was convicted of rape and kidnapping. He went to prison. He got out and he was killed in a bar fight. Escobedo was not a good guy. Everyone talks about the Gideon right to counsel. Gideon was not a good guy. A lot of the people upon whom our greatest cases are founded were not good guys. In our history, sometimes the government, the state, has taken vindictive action because we are so righteous about the bad actions of the bad guy that we forget the rules. We don’t need to forget the rules. We need to play by the rules.

If justice is not a process and if instead justice is a result, then we pick the result we want and judges who are in a position to impose their will on the rest of us will do so. I don’t think anyone would say that’s justice, would say simply because you have been elected a judge you can preordain the result you think is justice and then go back and jury-rig the process to generate that result. That’s not justice. That’s tyranny. That’s why we fought the Revolution. That’s why we have the Constitution. That’s why we celebrate Law Day. We don’t apply the Miranda rules only to Ernesto Miranda; we apply them to you, me, everyone. The same rules apply to each and every one of us whether it’s about our Miranda rights or any other rights under our Constitution. That’s what America is all about.

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Editor’s note: This article was adapted by Justice Wecht from remarks he delivered during the celebration of Mercer County Law Day on May 2. During the year the PBA supported the American Bar Association 2016 Law Day theme, “Miranda: More than Words,” in recognition of the 50th anniversary of the U.S. Supreme Court decision in Miranda v. Arizona. Find more information on the PBA Law Day 2016 webpage, www.pabar.org/public_education/lawday/16lawdayinformation.asp, and on the ABA website at www.americanbar.org/groups/public_education/initiatives_awa...