Decided fifty years ago, *Miranda v. Arizona* was a watershed event, a precedent of historic dimension. The Supreme Court of the United States appreciated the fact that the case would be a landmark at the time 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.

While 2016 marks the fiftieth anniversary of *Miranda v. Arizona*, it’s worthwhile for just a moment to double that number, to look back one hundred years. Why? Because one hundred years ago, in 1916, one of the greatest Justices was appointed to the U.S. Supreme Court: Louis Brandeis. Justice Brandeis wrote the dissent in *Olmstead v. United States* a case decided in 1928, about twelve years after he had joined the Supreme Court. Writing for the majority, Chief Justice Taft upheld warrantless wiretapping of a bootlegger's home against constitutional challenge asserted under the Fourth Amendment. Taft's view was that the eavesdropping really wasn't wiretapping running afoul of the Fourth Amendment because government agents did not physically enter the home itself. As long as the invasion was going on from somewhere else (it was going on at the phone company where agents tapped into the line), there was no search.

Brandeis dissented, in words that Chief Justice Earl Warren would later quote in the *Miranda* decision. Here is what Brandeis wrote:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws existence of the government will be imperilled [sic] if it fails to observe the law scrupulously.

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means --- to declare that the Government may commit crimes in order to secure the conviction of a private criminal --- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

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1 Justice, Supreme Court of Pennsylvania. Adapted from remarks delivered at Mercer County Law Day, May 2, 2016.
3 277 U.S. 438 (1928).
4 When Brandeis was nominated by President Wilson, one of his most vituperative adversaries for confirmation was William Howard Taft, who had served as President and as Secretary of War, and was then teaching at his alma mater, The Yale Law School. In 1921, President Warren Harding would appoint Taft Chief Justice of the United States. Taft would sit with Brandeis on the Supreme Court, where, interestingly enough, they got along well. Taft came to respect Brandeis greatly, came to realize that he had been quite wrong to oppose Brandeis. Brandeis came to appreciate Taft's virtues, if not as a great jurisprude, certainly as a judicial administrator who achieved remarkable improvements to the working of The Supreme Court of the United States.
5 This is pretty good stuff. In those days, by the way, United States Supreme Court Justices had only one law clerk each, and Brandeis' clerks did not write his Opinions. Brandeis himself wrote them.
Now, why do I quote that? Because it was that 1928 dissent by Brandeis upon which Warren would later rely in *Miranda*, the case whose fiftieth birthday we observe this year.

*Miranda v. Arizona* followed another famous case, one that was decided two years earlier, in 1964. That decision was *Escobedo v. Illinois*⁵. Escobedo was a right to counsel case under the Sixth Amendment. Danny Escobedo was charged with murder. He had been denied access to a lawyer and was then subjected to interrogation. In an opinion authored by justice Arthur Goldber, the Supreme Court of the United States invalidated the interrogation of Escobedo on Sixth Amendment grounds because there was a deprivation of the right to counsel.

Now, fast-forward two years. Justice Goldberg is off the Court, replaced as Justice by Abe Fortas. The Supreme 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 ten days after an eighteen 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.⁶

Prosecuted for rape and kidnapping, Miranda was convicted at trial. His conviction was affirmed by the Arizona Supreme Court.⁷ He filed a petition for writ of certiorari in the Supreme Court of the United States. The Supreme 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 the U.S. Supreme Court.⁸ The four consolidated cases were argued over three days in February and March of 1966.⁹ The Supreme Court of the United States proved quite efficient: three months later, in June of 1966, the *Miranda* opinion, along with the three dissenting opinions, was issued.

The way that Warren wrote the majority opinion for the Supreme Court was to set forth

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⁶ There was much going on during the Warren Court years. One year after *Miranda*, in 1967, the Supreme Court of the United States decided *Katz v. United States*, 389 U.S. 347 (1967), a wiretapping case. *Katz* overturned *Olmstead*, thereby resuscitating Brandeis' forty year old dissent. The law of the land would now provide that wiretapping was in fact subject to the strictures of the Fourth Amendment.
⁷ The academy's preoccupations notwithstanding, most cases are state cases. The bulk of law in our country is state law. The vast majority of cases, be they civil, criminal, family law, estates, are tried in our state courts. That's not by accident. It's by design of the framers of our Constitution. They envisioned our national government as a government of limited powers. Under the Ninth and Tenth Amendments to our United States Constitution, all powers not specifically confided to the national government are left to the states or to the people themselves. The national government is a government of limited powers. Most cases arise in state courts, as did Ernesto Miranda's.
⁸ Three of those four appeals were state cases. The fourth had started as a state prosecution and had transitioned (for reasons irrelevant here) into a federal case. That federal appeal was *Westover v. United States*. Do you know who argued the case for the United States in *Westover*, at the same time that Miranda was argued? The answer is Thurgood Marshall, then Solicitor General of the United States. Within a couple of years Thurgood Marshall became the first African-American appointed to serve as Justice on the U.S. Supreme Court. The cases take their name from Miranda, which was the first appeal listed; they were actually consolidated for argument.
⁹ Advocates spoke at greater length in those days. Of course, one hundred years earlier than that, in the pre-television, pre-radio days of Daniel Webster, they spoke at even greater length.
the principles and the analysis of law, reviewing at length the precedents and the relevant constitutional and statutory provisions; only at the end, and in very brief and summary fashion, Warren applied the holdings of the Court to the fact patterns of the four individual cases themselves. The opinion, of course, famously came out with the "Miranda warnings", now known to all. In its Miranda opinion, the Supreme Court did not create new rights. After all, the right to counsel had been set forth in Gideon.¹⁰ The other rights had been articulated in previous cases as well. But never before had the Supreme Court of the United States imposed on law enforcement a uniform, blanket rule, a rule which would enforce 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 represent 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 Chief Justice Warren for the five-Justice majority. The Fifth Amendment provides, among other things, that no person shall be compelled in any criminal case to be a witness against himself. Prior understandings of this clause of the Fifth Amendment had taken different approaches. For example, among the dissenters, Justice White was of the view that this language of the Amendment generally applies to the trial only, or at least not as a blanket matter to pretrial interrogation. There was a strong dissent from Justice John Marshall Harlan and a brief concurring and dissenting opinion from Justice Tom Clark.

It should be noted that, at the time, police officers in varying degrees across the country were giving certain versions of warnings. But there were great disparities in practice. In some jurisdictions there were more robust warnings, and in some there was little or nothing in the way of warning. 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 did not know; he promised to find out and report the answer. And so Thurgood Marshall promptly contacted J. Edgar Hoover, the long-time FBI Director. Readers might be surprised to learn that Hoover 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. Marshall conveyed this information to the Court.

The majority opinion did something interesting, something of which the dissenters were quite critical: Chief Justice Warren quoted from, and excerpted at length, a number of police manuals from around the country that were not part of the trial record. Warren did this in order to identify shortcomings of the interrogation regimes that prevailed across many

law enforcement agencies in the nation. The backdrop to that was a concern held by the majority about what was then often referred to (now it seems somewhat quaint) 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 1930's, 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 also was 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."

The Miranda Rule, and this was what made the case such a watershed, was that now for the first time the Supreme Court of the United States said emphatically - - as a blanket matter rather than as a case-by-case inquiry, rather than saying we will look at the particular circumstances and determine voluntariness - - , if these warnings are not given, the statement is inadmissible and will be suppressed. This means, not that the defendant will be discharged, but rather that the case will go forward without the prosecution being able to use the statement.

I mentioned the dissent by Justice Brandeis in the Ohmstead case. But there was an even older precedent to which Chief Justice Warren referred in his Miranda majority. That was a case involving a fellow named John Lilburne, who was subjected to the Star Chamber in England in the 1600's. It was everything you would imagine the Star Chamber would be, in which the defendant or suspect had no rights that the law lords were not inclined to give. Lilburne's case marked the genesis of a movement in England that in turn spurred many of the Enlightenment thinkers, such as Locke and others, to start germinating ideas which later were embraced by people like Jefferson, Madison, and of course the now wildly popular Hamilton.

This reaction against coercion, and this embrace of many other liberties, is at the heart of our annual celebration of Law Day. Not only the Fifth Amendment, but the Bill of Rights overall, traces its genesis to the Enlightenment thinking that grew out of the evolution of views in England. So the concerns of the Supreme Court of the United States when it confronted the Miranda case, included the question of how to put flesh on the bones of precedents such as Gideon. That is, 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 its blanket implementation in a class of cases.

Under Miranda law enforcement officers cannot assume waiver. That's why the Miranda colloquy, 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. Why? Because, at trial, the burden of proving waiver, Chief Justice Warren wrote, is on the prosecution. It's not on the defendant. That the Fifth Amendment Miranda right was waived is something the prosecution must prove. This is one of the other things with which the dissenters disagreed. They did not feel that the prosecution should carry that burden. If you read Chief Justice Warren's opinion in Miranda, you will find repeated reference to

11297 U.S. 278 (1936).
compulsion, to "the compelling nature of the interrogation". Warren was concerned - - and he was a former prosecutor - - with the susceptibility of the interrogation environment to coercion.

In dissent, Justice White worried about the impact on law enforcement in the field. He was concerned that standards and mandates should be allowed to percolate up from the laboratory of legislation. Justice White noted that a significant amount of study concerning criminal procedure was ongoing at the time. The Warren Court was engaged in something that, with the benefit of hindsight, 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. While Justice White acknowledged the glacial pace of legislation, he nonetheless believed that this type of reform was better left to the political branches. Warren disagreed. He (along with four others) decided that this was the way that the right should be enforced.

And so, the Supreme Court of the United States 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.

It’s interesting to note that Pennsylvania’s Constitution dovetails in this regard with the U.S. Constitution, which was ratified several years later. There are some rights set forth in the Pennsylvania Constitution which don’t exist in the U.S. Constitution, such as the right to clean air and pure water. The Fourth Amendment to the United States Constitution protects against unlawful search and seizure. The exclusionary Rule under the Fourth Amendment is tied, according to the U.S. Supreme Court, to deterrence, to preventing law enforcement misbehavior. By contrast, our Pennsylvania Supreme Court, interpreting Article 1, Section 8 of the Pennsylvania Constitution, which codifies Pennsylvania’s right against unlawful search and seizure, premises our state exclusionary rule on the right to privacy. Under the Edmunds\textsuperscript{12} analysis that we perform, Pennsylvania’s exclusionary rule has a broader reach than the deterrent principle of the federal exclusionary rule. I mention this as a counterpoint to the Fifth Amendment jurisprudence. Under Article 1, Section 9 of the Pennsylvania Constitution, our state law against self-incrimination is co-extensive with the Fifth Amendment of the United States Constitution prohibiting self-incrimination.

So, 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 (at this point in the development of our jurisprudence at least) than there is in the U.S. Constitution's jurisprudence under the Fifth Amendment.

There are limits and exceptions to the \textit{Miranda} principle. First of all, the suspect must invoke his or her \textit{Miranda} rights. If the suspect doesn't invoke these rights, the law enforcement agents are free to continue questioning. In other words, 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 under

interrogation, that is to say, if this is a custodial interrogation. But, if the suspect doesn't take the bait, doesn't say "yes 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 unless and until he or she invokes those rights. That's the teaching of the Salinas case decided by the U.S. Supreme Court a few years ago.\(^\text{13}\)

Now, there's another limitation. It concerns application of the exclusionary rule, with which you are familiar under the Fourth Amendment of the U.S. Constitution. You know about the fruit of the poisonous tree. If you break down a suspect's door and it's an illegal search and the suspect's got all kinds of drugs and paraphernalia, firearms that the suspect is not supposed to have, or other illegal contraband, you can't use those against him or her in a prosecution because it's the fruit of the poisonous tree. 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. What do I mean by that? Suppose the police fail to give a suspect Miranda warnings, and, the suspect proceeds to give a statement. That statement may not be used against the suspect. 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 that gun and drugs. That's 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. This is the Quarles case - it arose in New York.\(^\text{14}\) That's the public safety case involving a gun and a grocery store. Police officers 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 police that exception, no pun intended. The courts are going to scrutinize invocation of this emergency concept. The law doesn't want the exception to swallow the rule.

It talk about this as if the law of Miranda is sort of a closed set, or closed-ended. It's not. One of the beauties of our law, and this is a good theme for Law Day and for thinking about our Constitution, is that it's so rich, so fertile in its susceptibility to intellectual growth and conversation. Every time we think we resolve something, we come up with more questions. Human experience generates more inquiries. Were it otherwise, those of us who make our living in law would be bored to tears. Everything would be prescribed as if by the Napoleonic Code. Perish the thought. Instead, we see the law grow organically, step-by-step-by-step. Sometimes we need a retrenchment or re-evaluation because we have gone off on a wild frolic or detour.

This is a long-winded way of saying that, although Miranda is now fifty years old, there remain many issues that beg for further development and examination. For example: waiver. Generally, what is a waiver of Miranda rights? Is a gesture a waiver of

Miranda rights? Is a shrug? Or, does it have to be emphatic? Are there magic words? More interestingly: waiver in the juvenile context. 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 is somebody 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 and go ahead and answer the questions of the law enforcement officers? The current law in Pennsylvania and in the United States generally applies a totality of the circumstances test. There is no one single criterion. It's not enough or 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 is an area of law that 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 - - - and the U.S. Supreme Court to my knowledge has not adjudicated a case exactly deciding what the ultimate demands of the Constitution are in connection with foreign language in all circumstances. I can tell you that in the Garibay case, in the U.S. Court of Appeals for the Ninth Circuit, in an opinion by Judge Pregerson, the Ninth Circuit held inadmissible a confession given where the suspect (who had arguably waived his rights) was a Spanish speaker of low I.Q. 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, what is custodial interrogation? We know that it is more than a mere encounter. So 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 the person he greets his or her Miranda rights. But, what is custodial interrogation? It 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. So, conceivably, one could have some fairly significant lapse of time between the moment within which the suspect comes into custody and the moment at which the law requires that he or she be Mirandized. That's 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 are you not in custody?

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15 United States v. Garibay, 143 F.3d 5344, 537-40 (9th Cir. 1998).
A really confusing area even for many experienced criminal lawyers and judges is the issue of pre-arrest and post-arrest silence. I'm not going to wander too far down that path; there are basically four different time periods involved here, with different permutations, and the case law continues to evolve. A good starting point to review the law in that area 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 that issue, or at least to the full ambit of the pre-arrest I 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 that the defendant's Fifth Amendment rights were violated by reference to his silence, but that 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 a debate that judges and lawyers have; this is something that is going to continue to percolate in the law.

Another area that is going to be exciting 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. So, if you were reading The New York Times on May 1, 2016, you might have read a case about a former police officer in the City of 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 Third Circuit, claiming this violated his right against self-incrimination. This was not directly a Miranda issue, but 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 of these issues.

Here are some take-away thoughts, in no particular order. I believe, and this is not an original insight, that law is a process. It's not a result. If we polled everybody in this room about any particular issue or concern and then asked "what is justice?" in that particular context - we might get many different answers. Justice is a process, not a result. It 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 everybody, then the result nine times out of ten, or ninety-five times out of a hundred, will resemble something like what we would say hopefully justice would be. Stated differently, if we have a process that follows the rules, preordained to apply equally to everybody, then the fact-finder will usually "get it right."

It is inevitable that, in such a regime, some "bad guys" will get away with their bad actions - - some guilty people will go free. In the context of the victims of those bad persons' bad actions there can perhaps be no greater travesty of justice. And yet, writ large, those travesties hopefully will be far fewer, by many orders of magnitude, than the just results that are 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 that rape and kidnapping. He went to prison. He got out, and he was killed in a bar fight. He was not a good guy. Escobedo was not a "good guy". Everybody 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 we judges who are in a position to impose our will, we impose our will on the rest of you. I don't think there is anybody here that would say that's justice, that would say just because you have been elected a judge you can pre-ordain the result that you think is justice, and then you can go back and jerry-rig the process to generate that result by your fiat. 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 as we celebrate today. When we look back on a case like Miranda, we don't only look back on this guy Miranda - - again, not a good guy, a bad guy. We don't only apply the Miranda rules to Ernesto Miranda; we apply them to you, you, me, you, you, everybody here. The same rules will 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.