

A Republic, If You Can Keep It

*Address by the Honorable Edwin A. Meese III**

Well, thank you very much, John, and thank you, ladies and gentlemen, for your warm welcome.

You know, John mentioned about that speech that I gave. You may not realize this, but I am greatly indebted to Justice Brennan. He may not be the Justice with whom I at that time most agreed, but he did a very beneficial thing. He replied to my speech. If it had not been for his reply, that speech probably would have been gone where most ABA speeches go—forgotten. But instead, he gave a speech in which he responded to my remarks about originalism, and so the fight was on. And so it has been a continuing topic ever since, and they tell me even in law schools that occasionally they discuss this in constitutional law classes.

As a matter of fact, shortly after I had raised this point about the Constitution being important as well as constitutional law, and in that speech I mentioned that in the leading constitutional casebook, the constitutional law casebook, the Constitution didn't make it until Appendix H. And pretty soon, about two weeks later, I got a letter from a professor whose name will go unmentioned. And he said, "You talked about the leading casebook. It must be mine. And I want you to know that in the next edition, the Constitution will be Appendix A." So I thought we made a little progress there.

John [Eastman], I want to certainly thank you for your very kind introduction, but also thank you for all you do. John, as you all know, besides all he does as a professor, now as an administrator, also, with his constitutional work. I always know that John is working because I will wake up in the morning and go to my fax machine and get a brief that he and I were working on. Actually, you know, it's kind of a 99%/1% type of brief. And John will have it there, and the time noted is 2:00 a.m., or 3:00 a.m. I

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think he doesn't sleep at all. But he certainly is a great adjunct to your school here.

And it's great to see my good friend Daniele Struppa, who was such an outstanding administrator. And definitely, Chapman's gain was George Mason's loss. But I know he's very happy here in this entrepreneurial university that you have. And so it's great to see him.

And also Grover Trask, whom I've had the pleasure of working with over the years, most recently when he was Chairman of the American Prosecutors Research Institute, and was really, in my view, the role model of what a responsible professional prosecutor should be. And so it's a pleasure to be with them and others that I know here.

I must confess—this is a day of confessions, no pun intended, but I must confess that I too like *Dirty Harry*. And my kids know that. And so for my birthday last year, I was presented with this collection of *Dirty Harry* movies. There's a box that has five *Dirty Harry* movies. And they presented them to me. And so on several occasions, I must confess that I have been watching it with my 14-year-old grandson.

Now after seeing that, and what I've heard today, I think that every one of those boxes ought to have a warning that says something like this: "If shown to children, please advise that *Dirty Harry's* conduct is not judicially acceptable behavior."

I want to congratulate Chapman Law Review on this conference. Besides the fact that it is being tremendously well-organized and well-run, just the selection of the topic I think is very appropriate. We've had four decades which give us now I think a little perspective on what was at the time a novel policy pronouncement by the Supreme Court in 1966. And it enables us to see some of the results, and also to talk about where we are as a nation, where we are in the criminal justice system today, and to some degree because of that decision.

It's also worthwhile, I think, to examine the *Miranda* rule in the light of what we might call modern legal issues, such as is being done here. Corporate criminality, which will be discussed later on today. The new style of warfare that emerges, as we heard this morning. Concepts of military action and law enforcement, and many other things that are being discussed. The media, which I found all the panels this morning extremely interesting, and look forward to this afternoon.

My topic, as you saw, is "A Republic, if You Can Keep It." As you probably know, that's a play on the comment of Benjamin

Franklin, when the Constitutional Convention had adjourned in 1787, and a lady stopped him on the street and said, "Mr. Franklin, what kind of government have you given us?" And he said, "A republic, if you can keep it."

And the reason I chose that is that I think the founders' concept of ordered liberty, which resulted in our Constitution, served the interests of the people then and continue to serve in terms of having an effective government, and at the same time having freedom and liberty for the people.

And I think it is particularly appropriate to discuss the *Miranda* decision and its progeny in the light of what the founders intended in the Constitution, and where we are today, because I would suggest to you that the *Miranda* decision is the epitome of what was then considered the new jurisprudence of the Warren Court, which from the 1950's, the late 1950's through the 1970's, and then continuing under Chief Justice Berger, impressed a series of novel concepts onto constitutional law.

I'm going to discuss the *Miranda* decision in regard to two questions that we might ask. One is, was it legitimate? And is the *Miranda* doctrine today legitimate. And secondly, is it wise?

Going back to 1787, the founders were very much concerned with this whole idea of liberty and power. Liberty on the part of the people, and power on the part of government. And they felt that liberty had to be contained and had to be harnessed, if you will, because of the tremendous power that inherently government has.

And so to do that, they divided power both horizontally and vertically. Vertically in the sense of allocating certain powers, certain limited powers, to the federal government, to the central government, and then the rest of governmental power to the states, which were diffuse, and would become more diffuse as more states joined the Union. And they devolved it and diffused it horizontally by having three separate powers, three separate locus of powers, the legislative, the executive, and the judicial authority.

And it was this scheme that they thought up, that they felt was important in order to contain the coercive power of government in a way that it would not be used to oppress the people.

Well, I would suggest to you that in some ways, *Miranda* as a decision then and as it has continued, is at odds with both of those concepts. It has—did, in fact, at the time, with its companion decision, the Mapp against Ohio decision, both of which invoked the exclusionary rule—nationalized criminal procedure.

Up until that time it had been for the federal government to handle criminal procedure on national matters, matters before the federal courts, but leaving it to the states pretty much to develop their own jurisprudence, their own criminal procedures where most crime occurred, where most crimes were prosecuted; in state courts, where murders, robberies, rapes, burglaries, and the things that people thought of in general as crimes, were being investigated and prosecuted.

Well, in 1966, state prosecutions at that time were quite different from federal prosecutions. As I mentioned, they had these more serious crimes, the more violent crimes. In those days, federal prosecutions were primarily limited to white collar and administrative offenses, things like violations of the tax law. Probably the most violent type of crime you got had to do with those things, relating to organized crime and interstate crime. That sort of thing.

But by and large, there was pretty much of a dichotomy. And so even the rules that then pertained to the FBI, which were rules of procedure more than constitutional limitations, concerning the warnings they would give when they made arrests and so on, were much easier to apply because they dealt with essentially white collar criminals, and a different type of criminal investigation than what normally took place at the state and local level.

And so the *Miranda* decision essentially violated the traditional concept of leaving state procedures to the state legislatures, and to some extent, to the state courts. But it also violated the separation of powers. Nino Scalia, in the *Dickerson* decision some years later, of course, put it this way. He said that the court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people. Because what they did was essentially take away from the people's representatives—by invoking the Constitution—the ability to determine what the procedures should be in regard to arrests and custodial interrogation.

In effect, the Court provided a single national standard, overruling the states, even though the states were supposed to be, as another justice in a different case said, "laboratories of democracy," so that they could experiment. And indeed, in 1966, the different states were dealing with this problem in different ways. California had the *Dorado* rule, which in effect was very similar in many ways to the *Mapp* rule. Michigan had a little different rule. Other states were trying out other things.

But of course, as the *Miranda* decision came down, it essen-

tially eclipsed what the state was doing, and made a single standard for the entire nation. Likewise, it violated the concept of separation of powers. As the dissent pointed out, the original *Miranda* decision was based on policy grounds rather than constitutional grounds. As a matter of fact, as again stated in the dissent, examined as an expression of public policy, the Court's new regime proves so dubious that there can be no due compensation for its weakness in constitutional law.

And then the author of the dissent went on to say, legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every state and county in the land.

Well, applying the exclusionary rule to the statements of suspects may or may not be a good idea. And indeed, over the years, we've had people on both sides of the criminal process opine on this. We've had some defense attorneys who have been willing to say that they felt that the exclusionary rule was not a good idea, based upon their experience. We've also had prosecutors in some cases and even some police executives say that the exclusionary rule helped professionalize the police.

So there have been arguments on both sides, as indeed we've heard already in the panels today. But I would suggest to you that this is a policy decision that should be left to Congress and the state legislatures. And in effect, the Court compounded what was an arrogation of power and the misuse of their power in the *Miranda* decision when, in the *Dickerson* decision, they deliberately defied the policy decision by Congress on how to deal with interrogations in cases before the federal courts.

As most of you know, and it was referred to in a couple of the talks this morning, Congress, within two years or so after the *Miranda* decision, felt there was a better way, and that was when they passed a statute embodied in 18 U.S. Code section 33501, which provided that federal judges should determine, outside the presence of the jury, whether a particular confession or statement was voluntary or not, based upon several criteria that they set forth in the decision, and looking at a totality of the circumstances.

Well, in considering that statute in *Dickerson*, the Court considered that congressional action was an affront to their exercise of judicial power, and so we got, as a result, the *Dickerson* deci-

sion.

Dickerson was a striking example, in my opinion, of the Court pulling itself up by its own bootstraps to make *Miranda*, the *Miranda* rules, a constitutionally required doctrine. The Court in the original decision had been somewhat tentative, because they knew they were on thin ice, I think, constitutionally. And in numerous subsequent cases, the Court took the position that the *Miranda* rules were not constitutionally required.

They were somewhat ambivalent, as I say, and very hesitant, in the *Miranda* case itself, but in other cases, they talked about the procedural safeguards adopted in *Miranda*, and they said that they were not themselves rights protected by the Constitution, but were instead measures to ensure that the right against compulsory self-incrimination was protected. They talked about the standards as being prophylactic rather than constitutionally required, and so on.

And as a result, they went on to say—they encouraged it, actually—that state legislatures and the Congress should find alternative ways to deal with the problem of preventing involuntary confessions, which was ultimately a question—from common law days on, as we heard this morning in the history of this provision—of involuntary confessions or confessions that were obviously bad and should not be countenanced.

And they said things like this. It is impossible for us, the Court said, to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the states in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.

And yet in *Dickerson*, suddenly the Court abruptly changes this approach and says that the *Miranda* rules are now constitutionally required. Now, the specious reasoning that they used then was a sort of constitutional sleight of hand. Indeed, as was discussed this morning by a couple of the speakers, they first said, well, it must be constitutional because it applies to the states. And if it was not constitutional, we couldn't have authority over the states to apply it.

Now this is kind of being—when I say pulling yourselves up by your own bootstraps, this was, I would suggest, arrogance and speciousness carried to the nth degree. But then they went on to say, as it was—as many people have noted—that stare decisis entrenched the decision. They even admitted this, the Chief Justice

writing in *Dickerson*, saying, "We might not have made the same decision today if we had this before us as a first instance, but it was enacted several decades ago, and so we have, on the basis of *stare decisis*, we won't correct our earlier mistake." He didn't say it quite that boldly, but that was the gravamen of what he had to say.

And so that was the second. And then the third reason, as has been discussed in some detail today, they said: *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. And you heard about Jack Webb, who made the same observation when I read that passage, as well as the others, where it is—I hadn't realized, though, until I heard the excellent presentation this morning, that it's been embedded and now un-embedded in the national culture.

But be that as it may, those were the reasons they gave for making a total change, a major change, in what the constitutional effect of the decision was.

And so as a result of that, we have the situation which we have today. And so I think it's important to say that, in terms of the legitimacy of the *Miranda* decision originally, that the decision initially in *Miranda* raised serious questions as to its constitutional legitimacy. And the case of *Dickerson* raises serious questions as to the ability of a court, essentially exercising its own power. As was said in dissent in *Dickerson*: To justify today's agreed upon result, the Court must adopt a significant new, if not entirely comprehensible, principle of constitutional law. As the Court chooses to describe that principle, statutes of Congress can be disregarded. Such as Section 3501, which was at issue in *Dickerson*.

"Not only when what they prescribed violates the Constitution, but when what they prescribe contradicts a decision of this Court, that 'announced a constitutional rule.'" And then the dissent goes on to say that the only thing that this can possibly mean in the context of this case is that this Court has the power merely to apply the Constitution and to expand it, imposing what it regards as useful prophylactic restrictions upon Congress and the states. And then the conclusion that the author comes to says: That is an immense and frightening anti-democratic power, and it does not exist.

Well, let's turn to the second question that I raised, and that is, is it wise? Justice Scalia raised that question when he wrote in the dissent in *Dickerson*. He said, what is most remarkable

about the *Miranda* decision and what made it unacceptable as a matter of straightforward constitutional interpretation in the *Marbury* sense is in its palpable hostility toward the act of confessions per se rather than toward what the Constitution abhors, which is compelled confession.

We heard a great deal of discussion about the difference of that this morning. I would suggest to you that the exclusionary rule itself is at the bottom of the major problem with both *Mapp* as well as *Miranda*. It appears to me, at least, that it is improper for any court to exclude—it's at odds with the purpose of a criminal trial, and that is that the trial should be a search for the truth. And on that basis, then, to determine the culpability and the liability of an accused person.

But the exclusionary rule deliberately obscures from the trial a portion of the truth, and valid, probative, relevant, and accurate evidence is kept from the decider of fact for policy reasons that are unrelated to the purpose of judicial proceedings.

Now, it's important to state why a statement is important in a case. It's not the fact that a police officer arriving on the scene or apprehending a defendant necessarily expects or is intent just on getting a confession. Sometimes that happens. But what the police officer wants to do is to pin that defendant down to a particular story so that he can't remain silent, and then, when he gets to the trial, make up a story—unfortunately often with the compliance of his attorney—that weaves its way around the evidence the prosecution is able to put forward before the jury.

Whereas if you pin him down at the time, at the scene, or when he's arrested, to a particular story, then he's not able to tell something else in court, which he has made up to try to exonerate himself. And that's why the statement is so important in a police investigation, not merely a confession. And this is something that is often left out when discussion is made about compelled confessions and that sort of thing.

I don't think any of us is in favor of a coerced or a compelled confession. But on the other hand, getting the defendant pinned down. Of course, this thing was compounded—this whole problem was compounded by subsequent decision, including *Griffin* against California and others, which says that a prosecutor can't even comment on the fact that this person, when questioned by the police, refused to explain why he was there or what he was doing, something that any innocent person would logically do. And so you have this *Catch-22* that first of all, you have to give them the warning to discourage them from saying anything, and

then the fact that he acts in a way very different from an innocent person can't even be commented on at the time of trial.

The original *Miranda* conclusion was based on a dubious factual basis. As a matter of fact, if you read *Miranda*, you saw a regurgitation by Earl Warren of a bunch of cases and a bunch of articles that were long since overcome or eclipsed by actual police conduct in the 1960s. They relied on the Wickersham Report from 1931. They relied on an article in *Southern California Law Review* in 1930. They relied on a *Michigan Law Review* article in 1932. They relied on a *University of Chicago Law Review* article in 1936.

I happened to be a prosecutor in 1966. And the things that they were relying on in order to justify this unusual change, major change in criminal procedure, was totally at odds with the District Attorney's Office and the police departments that I knew about, that I worked with every day, and I think with what most of the prosecutors worked with throughout the country.

Now, the impact of *Miranda* on public safety also is a factor that ought to be considered. The dissent in the original case was really prophetic. The dissent said that there can be little doubt that the Court's new code would markedly decrease the number of confessions. And while that has perhaps not been as great as might have been anticipated, there's no question that particularly immediately following the decision and since that time, that there has been a decrease in confessions or at least in statements given by defendants because of the *Miranda* rules, which quite frankly are intended and do have the effect of discouraging a suspect from saying anything.

And then the dissent said: How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy, but we do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control. It went on to say that there was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions and the responsible course of police practice that they represent are to be sacrificed to the Court's own fine-spun confession of fairness, which I seriously doubt is shared by many thinking citizens in this country.

One of the justices writing in dissent said: I have no desire to share in the responsibility for the impact on the present criminal process. And he went on to say: There is, in my view, every reason to believe that a good many criminal defendants who other-

wise would have been convicted on what this court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all, or will be acquitted if the State's evidence minus the confession is put to the test of litigation.

Well, this warning was indeed confirmed by the facts. An econometric analysis of the precipitous drop in clearance rates—that's the rate at which police officers are able to clear through arrest and prosecution—have found that tens of thousands of crimes go unsolved each year as a result of the *Miranda* decision.

Indeed, Paul Cassell, now a judge on the Federal Court, but at that time a professor, did a study of prosecutions and clearance rates, primarily clearance rates, from 1950 to 1995. And he found that in the four-year period immediately after the *Miranda* decision, there was a precipitous drop in clearance rates for violent crimes: in the period between 1950 and 1965 or 1966, anywhere from 60% to 65% of violent crimes were cleared by arrest, whereas immediately after—by 1969, four years later—that had dropped to something in the neighborhood of the 40% area, a drop of over 25% in crimes cleared by arrest.

And finally, I'd like to ask the question in terms of the wisdom of *Miranda*. Is it necessary to accomplish the purpose, which as we know is preventing involuntary or coerced statements? And I would suggest to you that things have changed a great deal, even from 1966, because federal statutes and related bodies of law provide now for civil, criminal, and administrative penalties against police officers who coerce suspects. Almost all of this law has been created since *Miranda*, and certainly has made the legal incentives for non-coercive police questioning almost unrecognizably greater than it was when *Miranda* was decided.

And so as we look at *Miranda* 40 years later, the question is whether *Miranda* really makes sense in terms of the facts. Officers who forcibly extract confessions are now subject to criminal sanctions under 18 U.S. Code, as we all know, sections 241 and 242. We have the Federal Tort Claims Act. We have the *Bivens* cases, and so on.

So that those who coerce confessions, these other disincentives, these other penalties, are much more effective than the *Miranda* decision or the *Miranda* rules, or the exclusion of evidence on the basis of the *Miranda* rules not being followed, because actually, as has been stated, the exclusion of evidence does not apply any direct sanction to the individual officer or the indi-

vidual official whose illegal or alleged illegal conduct is at issue.

And so there's a real question as to whether indeed there is a need in the light of modern circumstances, and certainly that was true at the time of *Dickerson*, but apparently was unavailing to the court as they made that decision.

Well, what does all this mean in view of the *Dickerson* holding and the place of *Miranda* in today's state of criminal procedure? Regretfully, I don't believe the *Dickerson* and *Miranda* cases will be overruled in the foreseeable future. I think I can almost guarantee it in my professional lifetime. By the way, John was kind enough to mention that I was 75. I view that as middle-aged, John. Halfway between 50 and 100.

But nevertheless, I think it's worthwhile considering *Miranda*, and going back and looking at it originally, looking at it in light of *Dickerson*, and looking at it where we are today. I think a conference like ours today is valuable both to critique the original decision as well as to assess its validity and its usefulness in the ensuing decades right up to the present time.

For one reason, first, perhaps an objective evaluation of the original decision done in the perspective of 40 years of experience will be a warning against judicial activism in the future.

Secondly, an analysis of *Miranda* can perhaps prevent its expansion to areas for which it is not appropriate. Such, in my opinion, as the battlefield in time of war. That was discussed, of course, in much detail this morning.

And third, a careful examination of *Miranda* can point towards ways in which the doctrine should be applied and also the ways in which it should be limited to accomplish its purported goal, and that is to protect against coerced and involuntary confessions, while at the same time limiting its negative effect on public safety.

Then, as a result of conferences like this, as a result of give and take, as we have here, from people with very different points of view on *Miranda*, I think we will be carrying out what we should be doing as members of the legal profession and legal education, and that is working to keep our nation safe and free. Thank you.

Does *Miranda* Protect the Innocent or the Guilty?

Steven B. Duke*

*Miranda v. Arizona*¹ is probably the most widely recognized court decision ever rendered. Thanks to movies and television, people the world over know about “*Miranda* rights.” Governments around the globe have embraced *Miranda*-like rights. Suspects in South Korea must receive their “*Miranda* warning” before being interrogated.² So must those in Mexico,³ Canada,⁴ and most European countries.⁵ *Miranda*’s notoriety surely has something to do with the decision’s kaleidoscopic symbolism. To some, *Miranda* embodies the respect due to criminal suspects.⁶

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¹ 384 U.S. 436 (1966).

² The Korean Constitution protects the right against self-incrimination and Korean courts have held that, in “the Korean version of *Miranda*,” police must advise suspects of their right to silence prior to interrogation. If police fail to do so, any resulting statement is inadmissible. Kuk Cho, *The Unfinished “Criminal Procedure Revolution” of Post-Democratization South Korea*, 30 DENV. J. INT’L L. & POLY 377, 383 (2002).

³ The Political Constitution of the Mexican United States, art. 20, provides that the defendant has a right not to be compelled to give a statement and to be informed of his right to remain silent. It further provides that any “confession rendered before whatever authority destined by the Public Minister or the judge, or before these without the assistance of counsel of any value shall be prohibited.” INSTITUTO FEDERAL ELECTORAL, POLITICAL CONSTITUTION OF THE MEXICAN UNITED STATES 14 (1994).

⁴ Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT’L L. 171, 198 (1993).

⁵ See generally Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375 (2001) (surveying the rules in more than ten countries); Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925 (2002).

Throughout Europe, there is near-universal recognition of a right to silence . . . that applies to both the pretrial and trial stages of a criminal case. Those aspects of the right . . . that require advice of the right and prohibit adverse inferences from silence also are generally accepted. Most civil law countries of continental Europe have adopted rules that require suspects be informed of the right to remain silent prior to questioning as well as rules that prohibit courts from considering [a] defendant’s silence as evidence of guilt . . .

Id. at 926.

⁶ “*Miranda* . . . allows us to celebrate our values of individualism without paying any real price. As a cultural symbol, *Miranda* stands for the enshrinement of individual rights over the needs of the state for efficiency, equal justice for rich and poor before the law . . .” Patrick A. Malone, “*You Have the Right to Remain Silent*”: *Miranda* after

To others, it represents the professionalism of the police.⁷ Still others regard *Miranda* as a glaring example of the Supreme Court's ambivalence toward law enforcement, its lack of respect for victims, and its willingness to "coddle criminals."⁸ Constitutional lawyers cite *Miranda* as an example of judicial usurpation of the legislative domain.⁹ And so on.

Rather than musing about the symbolic meaning of *Miranda*, I want to examine a more mundane, yet eminently practical, question: whether *Miranda* protects the innocent, the guilty, or neither. That is an empirical question that we cannot answer with entirely convincing proof; we can only debate and opine, which we have already been doing for more than four decades. It is hard to conjure any other subject that has so occupied law reviews, television dramas, talk shows, and op-eds. It may now be impossible to say anything original on the subject and since I have read only some of the debates, I can make no claim here of originality.¹⁰ Nonetheless, some answers seem clear enough that we should focus our concern about confessions in

Twenty Years (1986), reprinted in *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 75, 85 (Richard A. Leo & George C. Thomas III eds., 1998).

⁷ See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 504 (1996).

⁸ See, e.g., Maxwell Bloomfield, *The Warren Court in American Fiction*, 1991 J. SUP. CT. HIST. 86 (1991), available at http://www.supremecourthistory.org/04_library/subs_volumes/04_c09_1.html; Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 244 ("Looking at the ensuing criticism of the decision, one would think that the Court had opened the prisons and handed guns to departing murderers.")

⁹ See, e.g., U.S. DEPT OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION: 'TRUTH IN CRIMINAL JUSTICE' REPORT NO. 1 (1986), reprinted in 22 U. MICH J.L. REFORM 437, 543 (1989) ("*Miranda* violates the constitutional separation of powers and basic principles of federalism. *Miranda's* promulgation of a code of procedure for interrogations constituted a usurpation of legislative and administrative powers . . ."); *Dickerson v. United States*, 530 U.S. 428, 457–61 (2000) (Scalia, J., dissenting).

¹⁰ In an effort to be original, some supporters and critics alike stretch pretty far. Daniel Seidmann and Alex Stein, for example, spend eighty pages arguing that when the guilty exercise the right to silence they help the innocent: if the guilty had to talk, they would lie and their lies would make factfinders more skeptical of the innocents' truthful denials. Thus, even though the right to silence directly protects the guilty, it indirectly protects the innocent as well. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 433–34 (2000). Professor Cassell floated a somewhat contradictory theory, that if the police are stymied in their efforts to obtain confessions from the guilty, they will wring false confessions from the innocent. Ergo, they should be freer to obtain confessions from everyone. Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda*, 88 J. CRIM L. & CRIMINOLOGY 497, 498–99 (1998). For responses to Seidmann & Stein, see Stephanos Bibas, *The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421 (2003) and Van Kessel, *supra* note 5, at 930–31. For a response to Cassell, see Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM L. & CRIMINOLOGY 557 (1998).

other directions. We should give *Miranda* a rest.

Part of what fuels the vast literature about *Miranda* are the multitudinous meanings of the subject of the debate. When we speak of *Miranda*, are we referring to the opinion of the Warren Court in June 1966, which was a mini-treatise on the hows and whys and the good and bad of police interrogation, or to the warnings that *Miranda* requires the police to give suspects during custodial interrogation? Do we also include in that reference the Court's directives about how the police should respond when the suspect invokes his rights? And do we include what the Court said about how the trial court should deal with various eventualities?¹¹ Since most of *Miranda's* dicta have been disregarded by courts and the police in the four decades since the case was decided, should we disregard that dicta as well when debating the present-day impact of *Miranda*?¹²

In contemplating *Miranda's* effects on convicting the guilty and the innocent, we might also ask what assumptions we are making about how the legal landscape relating to police interrogation would look today if *Miranda* had never been decided, or if, as some have been seeking for four decades, it had been overruled.

In some of the debates, *Miranda* is regarded as having clearly established (or "invented," some would say) the Fifth Amendment's applicability to police interrogation. But that is untrue. *Bram v. United States* did that in 1897, when the Court said, "[W]herever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by [the self-incrimination] portion of the Fifth Amendment . . ."¹³ The Court reaffirmed the *Bram* position in *Malloy v. Hogan*,¹⁴ which preceded *Miranda*. If we assume, as some of *Miranda's* critics astonishingly do, that before *Miranda* was decided, the police were free to compel a suspect to answer their questions,¹⁵ we

11 For example, the Court said that the prosecution could not use as evidence at trial the fact that the suspect declined to submit to interrogation, *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966), and could not use a confession obtained without a waiver of the *Miranda* rights. *Id.* at 475-76.

12 For some of that dicta, see *infra* note 18.

13 168 U.S. 532, 542 (1897).

14 378 U.S. 1, 7-8 (1964).

15 See, e.g., Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 683-84, 686 (1986) (reviewing FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (1962)) (noting that historically, the Fifth Amendment only applied to formal judicial proceedings, not to out-of-court investigations, so whatever the police did in interrogations was not "compelled" self-incrimination within the meaning of the Fifth Amendment). See also the famous refutation of these claims in Yale Kamisar, *Equal Justice in the Gate-*

might attribute to *Miranda* some substantial curbs on police activities and a reduction in confessions. But if the only innovation we attribute to *Miranda* is the duty it imposed on the police to deliver the four-part advisement of rights and to respect the suspect's express desire to cut off questioning, a very different conclusion about *Miranda's* effects might emerge. In attacks on *Miranda* as criminogenic or at least hindering law enforcement, the critics are rarely clear about what version or interpretation of *Miranda* they find so friendly to felons.

Professor, now Judge, Paul Cassell is in the vanguard of *Miranda's* critics, writing a dozen or more law review articles attempting to prove that *Miranda* was not only misguided, but perverse.¹⁶ Unlike some of his allies, Paul Cassell is reasonably clear about the *Miranda* that he is criticizing, at least in his more recent articles on the subject. It is the skeletal *Miranda* that has emerged after decades of judicially-inflicted erosion, a *Miranda* that requires no more than the four-part warning and the right to cut off questioning.¹⁷ That was not the *Miranda* that police thought they were trying to comply with in the immediate wake

houses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . ., in CRIMINAL JUSTICE IN OUR TIME 1, 19-36 (A.E. Dick Howard ed., 1965). See also Stephen A. Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat?*, 26 WASHBURN L.J. 1, 14 (1986) (arguing that the drafters of the Self-Incrimination Clause could not have intended to prohibit judges from compelling self-incrimination, but to permit other officials to do so in secret sessions without any judicial protection). *Miranda* also declared that the prosecution could not use as evidence at trial the fact that the suspect declined to submit to interrogation. 384 U.S. at 468 n.37. This extended to the police station the Court's earlier ruling in *Griffin v. California*, 380 U.S. 609, 615 (1965), that no adverse inference can be drawn at trial from the suspect's exercise of his Fifth Amendment right.

¹⁶ See, e.g., Cassell, *supra* note 10, at 503; Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 842-43 (1996).

¹⁷ Since Cassell has himself proposed a set of warnings which include the right to silence, his major objection is not to the warnings themselves but to the suspect's right to cut off questioning. See Cassell & Hayman, *supra* note 16, at 859 ("[I]t appears that most of *Miranda's* harms stem from the cutoff rules, not the more famous *Miranda* warnings."). Cassell's own data suggest, however, that suspects rarely cut off questioning after they have made their initial "waiver." In Cassell and Hayman's study of interrogations in Utah, 83.7% of interrogated suspects waived their rights and only 3.9% changed their minds later. *Id.* at 860. See also similar data cited in note 19, *infra*. Cassell's objections to *Miranda* might therefore appear almost trivial were it not that he also wants to permit the police to continue to interrogate and cajole suspects who invoke their rights at any point in the process, whether from the outset or later. Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 497 (1996). In effect, Cassell's proposal would tell the police that they need not respect the suspect's right to silence and can ignore his attempts to invoke it. Such disrespect for the suspect's *Miranda* rights has never enjoyed support in the Supreme Court. Rather, fairly strict enforcement of the cutoff rules has been the norm. See, e.g., *Michigan v. Mosley*, 423 U.S. 96, 106 (1975); *Arizona v. Roberson*, 486 U.S. 675, 686-87 (1988); *Minnick v. Mississippi*, 498 U.S. 146, 156 (1990).

of the decision. Many thought that *Miranda* made lawful interrogation almost impossible.¹⁸

I. THE LIKELY IMPACT OF NO *MIRANDA* WARNINGS

In the interest of clarity, let us speculate about only one thing: what would be the likely effect on police interrogation, and on convicting the innocent and the guilty, if America repudiated the international movement that it spawned and told the police not only that they were not required to warn suspects of their rights, but that they were forbidden to do so?

About four out of five custodial suspects in the United States who are asked to submit to interrogation do so, while one in five declines. Those who decline usually do so when warned initially, but occasionally do so later in the course of the interrogation.¹⁹ Paul Cassell claims that the *Miranda* warnings cause suspects to clam up (or at least to not confess) and that, as a result, many criminals avoid conviction. Professor Cassell even asserted that "*Miranda* may be the single most damaging blow inflicted on the

¹⁸ The *Miranda* opinion clearly contemplates that in the typical police interrogation the suspect will have counsel at his side. If that were the case, there would be very few interrogations. Many statements in *Miranda* created uncertainty about the continuing viability of custodial interrogation: "[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals," *Miranda v. Arizona*, 384 U.S. 436, 455 (1966); "Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. . . . A mere warning given by the interrogators is not alone sufficient to accomplish that end," *Id.* at 469-70; "[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel," *id.* at 475; "If authorities conclude that they will not provide counsel . . . they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time," *id.* at 474; "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights," *id.* at 476; "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.* As it turned out, none of these statements has current vitality in the courts, but they caused difficulties in police interrogation in the first few years after *Miranda* was decided.

¹⁹ See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY, 266, 302 (1996) [hereinafter Leo, *Inside the Interrogation Room*]; Cassell, *supra* note 17, at 495-96. Although the Court in *Miranda* stated that the suspect has the right to terminate questioning at any time, 384 U.S. at 445, 476 n.45, the Court did not require that the suspect be informed of that right and the police rarely add that bit of advice to the warnings. Whether for that reason or others, if suspects do not invoke silence at the outset, they rarely change their minds and terminate the interrogation midstream. See Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1554-55 (1967); Cassell & Hayman, *supra* note 16, at 860 & tbl.3; Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653 tbl.1 (1996) [hereinafter Leo, *The Impact of Miranda Revisited*] (stating that of 182 Mirandized suspects, 38 invoked their *Miranda* rights but only 2 of those did so after an initial waiver).

nation's ability to fight crime in the last half century."²⁰

Professor Stephen Schulhofer and others have taken issue with Cassell's conclusions.²¹ Studies conducted after the police learned to minimize *Miranda's* strictures and courts began to encourage such minimization provide very little support for Cassell's analysis, most of which is based on "confession rates." Cassell says that the confession rates are somewhat lower in the United States than in England and Canada, where police have long given pre-interrogation warnings that are less detailed than those required by *Miranda*.²² There are, of course, many factors that can influence confession rates that have nothing to do with the content of a pre-interrogation warning or whether one was given. Interrogation rates vary greatly among jurisdictions and police departments within the same state. If, for example, the police interrogate only people whom they have arrested and whom they believe to be guilty, confession rates should be high. If, in contrast, the police frequently interrogate persons whom they have not arrested or against whom they have little evidence, the confession rates will be lower. If police regard interrogation as merely a step in the investigation process, they are less likely to experience a high confession rate than if they regard interrogation as a phase of the prosecution.

Other reasons for variations in interrogation rates include differences in the interrogation expertise of the police, in the time available to the police to conduct interrogations, and the urgency or necessity of the interrogation. Interrogations occur only when the police feel a need to conduct them and are rare where the perpetrator is caught in the act or is in possession of contraband or stolen property shortly after the crime.²³ The need for a confession also varies with the nature of the crimes that are being investigated, and those natures vary over time and jurisdictions. Many crimes simply are not serious enough to warrant custodial interrogation. The difficulties of concluding, based on differences in confession rates, that criminals are being helped by *Miranda* warnings are insuperable.

20 Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1132 (1998).

21 Schulhofer, *supra* note 7, at 547 ("For all practical purposes, *Miranda's* empirically detectable net damage to law enforcement is zero."). See also Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1007-09 & nn.41-51 (2001); George C. Thomas III, *Plain Talk about the Miranda Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 942-43 (1996).

22 See Cassell, *supra* note 19, at 418-22.

23 See Cassell & Hayman, *supra* note 16, at 854-59 (exploring reasons why Utah police did not interrogate); Project, *supra* note 19, at 1582-93.

Some critics focus alternatively on the numbers or proportion of suspects who decline to converse with the police—those who invoke their right to silence. As noted, those rates hover around twenty percent.²⁴ Some seem to assume that whoever refuses to submit to interrogation after being warned of his rights does so *because* of the warning. But that is the *post hoc, ergo propter hoc* fallacy: temporal succession does not establish cause and effect. Some suspects refused to talk to the police before *Miranda*.²⁵

Even before *Miranda*, physical coercion was rare in American police departments.²⁶ Thus, a pre-*Miranda* suspect, even if not informed of his right to silence, often knew that he could not be forced to talk and that if he refused, he would suffer at most an adverse inference and a lost opportunity to talk himself out of trouble. When the *Miranda* warning regime began, the warnings did not tell many suspects much, if anything, that they did not already know.²⁷ Possibly as many as twenty percent of suspects in the pre-*Miranda* era invoked silence.²⁸ More pertinent to the debate today, however, is how many suspects would invoke si-

²⁴ See Leo, *Inside the Interrogation Room*, *supra* note 19, at 302.

²⁵ *Id.* In the New Haven study, of 127 suspects, 20 immediately refused to talk and 18 asked to see a lawyer or friend before receiving any warnings. It is unclear whether the 20 who refused to talk were different than the 18 who asked to see a lawyer or a friend. If they were, then 30% of all suspects invoked their rights without warnings. If they were the same suspects, then about 16% invoked their rights.

²⁶ *Miranda v. Arizona*, 384 U.S. 436, 446–48 (1966) (noting that in the time leading up to *Miranda*, physical brutality was the exception, and that most coercion was psychological); Project, *supra* note 19, at 1549.

²⁷ A pre-*Miranda* suspect might have been unaware that his silence could not be used against him at trial, a rule declared in *Miranda*, *id.* at 468 n.37, but this is not part of the required *Miranda* warnings. Moreover, common sense suggests that whatever the rule about adverse inferences at trial, the police will draw an adverse inference against one who refuses to cooperate, and this is the adverse inference that is uppermost in the suspect's mind.

²⁸ See Project, *supra* note 19, at 1571 n.135 (between 16% and 30% of New Haven suspects invoked silence without being warned). In a pre-*Miranda* study in Philadelphia in 1965, out of 4801 persons arrested, 1550, or slightly less than 32%, "refused to give a statement." However, they were given some warnings, even before *Miranda*, so they cannot all be counted as persons who would have "refused to give a statement" without any warnings at all. *Controlling Crime through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 90th Cong. 200 (1967) (statement of Arlen Specter, District Att'y of Phila.). In one California city, during a three-month period in 1960, detectives conducted interrogations of 399 persons arrested for felonies. Of those, 58.1% gave confessions or admissions. Edward L. Barrett, Jr., *Police Practices and the Law—from Arrest to Release or Charge*, 50 CAL. L. REV. 11, 43 (1962). Barrett does not report how many of the other 41.9% talked and how many refused but it would be surprising if most of that group submitted to interrogation but did not say anything incriminating. The scholarly literature on interrogation practices and consequences pre-*Miranda* is surprisingly sparse. See Ronald H. Beattie, *Criminal Statistics in the United States—1960*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 49 (1960); Caleb Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 17 (1957).

lence if police stopped warning suspects of their rights. That number could approach, or, paradoxically, even exceed the twenty percent who now invoke silence after receiving warnings.

It nonetheless seems almost certain that *Miranda* warnings do cause *some* suspects to reject interrogation.²⁹ Some, perhaps even most, of those silence-invoking suspects are guilty.³⁰ Even if we further assume that because they invoke silence, some of those guilty suspects avoid conviction,³¹ it still does not follow that the net effect of *Miranda* warnings is to impede convicting the guilty.

We must also consider the possibility that the warnings actually *induce* some suspects to talk rather than to remain silent. The warnings implicitly suggest to the suspect that the police are respectful of the suspect's rights, that the police are not only law-abiding, but that they are also fair and objective. If delivered with the proper tone, the warnings could even suggest to the suspect that the investigators are sympathetic, naïve or gullible.³² Surely Patrick Malone is right that “[s]killfully presented,

²⁹ See Project, *supra* note 19, at 1571 tbl.17. This would seem to be true even if the warnings impart no new or significant information to the suspect. They do at least introduce the issue of silence and make it easier for the suspect to invoke silence than if there had been no mention of the matter by the police, requiring the suspect to raise the issue himself.

³⁰ There is, as far as I am aware, no evidence that virtually everyone who invokes silence is guilty, as is sometimes assumed by scholars. See, e.g., Seidmann & Stein, *supra* note 10, at 503. There is evidence that suspects with felony records are much more likely to invoke silence than those whose records are clear, see Leo, *Inside the Interrogation Room*, *supra* note 19, at 286, but concluding that they are more likely to be guilty because they have criminal records seems unwarranted. A different conclusion does seem justified: they invoke silence more often because their previous experience with the police taught them the advantages of silence. See William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975, 993 (2001). While it will often end up to his advantage to cooperate with law enforcement, the guilty suspect should rarely cooperate without a quid pro quo. Hence, it is usually unwise for guilty suspects to cooperate during custodial interrogation. Nonetheless, about 60% to 80% of suspects who submit to interrogation end up confessing or making incriminating statements. See, e.g., Leo, *Inside the Interrogation Room*, *supra* note 19, at 281; James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320, 326 tbl.3 (1973).

³¹ There appear to be no studies correlating silence-invoking with conviction, i.e., what proportion of those who invoke silence are not convicted. Nor do there appear to be any studies attempting to show what proportion of those silence invokers are factually guilty.

³² Since courts are permissive in allowing the police to preface the warnings with their own observations and even to intermix their own observations with the warnings, see, e.g., *Duckworth v. Eagan*, 492 U.S. 195, 201–05 (1989), the police can suggest during the warning process that they are sympathetic to the suspect, that the victim “got what she deserved” or “I would probably have done the same thing.” This signals to the suspect that he is among sympathetic interrogators. The belief, or hope, that they can talk their way out of trouble is a major motivator for suspects to submit to interrogation. See Saul M. Kassir & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of*

the *Miranda* warnings themselves sound chords of fairness and sympathy at the outset of the interrogation. The interrogator who advises, who cautions, who offers the suspect the gift of a free lawyer, becomes all the more persuasive by dint of his apparent candor and reasonableness.³³ If a cop tells the suspect that he need not answer, that he can have an attorney if he wants, is that not reassuring? The Court repeatedly said so in its *Miranda* opinion.³⁴ The Court's notion that a mere warning would transform the interrogation from one of "inherent coercion" to an occasion for the suspect "to tell his story without fear" was astonishingly naïve, since the warnings lose most of whatever significance they have once the interrogation begins.³⁵ However, there was some truth to the Court's observation that the warnings serve to reassure and calm the suspect into waiving his rights at the outset of the interrogation. The warnings may also increase the suspect's bravado during the early stages of interrogation, which of course facilitates the interrogators.³⁶ So, against the guilty who are induced *not* to talk by the warnings, we have to compare the guilty who *are* induced to talk.³⁷ Which is the larger group? Nobody knows. It seems reasonable to

Innocence, 28 LAW & HUM. BEHAV. 211, 215–16 (2004); George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1111 (2003) (reviewing WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS* (2001)). For other techniques police use to encourage waivers, see Leo, *supra* note 21, at 1019.

³³ Malone, *supra* note 6, at 79. A similar point is made in George C. Thomas III, *Is Miranda a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821, 831 (1996).

³⁴ The Court suggested that the warnings would "relieve the defendant of the anxieties [the police] created in the interrogation rooms," 384 U.S. 436, 465 (1966), would enable him "under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process," *id.* at 466, and are "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." *Id.* at 468.

³⁵ "[O]nce suspects agree to talk to the police, they almost never call a halt to questioning or invoke their right to have assistance of counsel." Stuntz, *supra* note 30, at 977. "Once the interrogator recites the fourfold warnings and obtains a waiver . . . *Miranda* is irrelevant to both the process and the outcome of the subsequent interrogation. Any protection that *Miranda* might have offered a suspect typically evaporates as soon as an accusatory interrogation begins . . ." Leo, *supra* note 21, at 1015. See also *supra* note 19. *Miranda's* naïveté has often been repeated by the Supreme Court. In *Davis v. United States*, for example, the Court said, "[T]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves" and that "comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." 512 U.S. 452, 460 (1994) (quoting Moran v. Burbine, 475 U.S. 412 (1986)).

³⁶ The New Haven study provides some support for this speculation. Law students observed all police interrogations in New Haven during the summer of 1966. Suspects who were warned of their rights made incriminating statements far more often (in 57% of the interrogations) than those who were not warned (30%). See Project, *supra* note 19, at 1565. A major motivator for suspects to waive their rights is their hope that they can talk themselves out of trouble. See *supra* note 32.

³⁷ A similar point is alluded to in Thomas III, *supra* note 33, at 831.

speculate, however, that after four decades of living with *Miranda*, the small number of suspects who are induced to remain silent by the administration of the warnings is getting even smaller while the number encouraged to talk is at least remaining stable.

Let us assume arguendo that the number of those induced to remain silent by the warnings exceed those who are induced to talk. If so, then the number of suspects who actually submit to interrogation is somewhat reduced by the *Miranda* warnings—albeit much less than is commonly supposed.³⁸ There is little reason to assume that this number is more than three or four percent of those who are interrogated. Assuming such a net figure, however, still does not answer the question of whether the guilty are helped or hurt by *Miranda* warnings.

If slightly fewer suspects submit to interrogation because of *Miranda* warnings, there is no reason to doubt that those who do submit continue to confess or make incriminating statements (including provable lies) at the same or at a higher rate than would have been the case without warnings.³⁹ Once the police obtain a waiver, the trickery and psychological coercion that the Court noted in *Miranda*, together with any new interrogating tricks learned since then, can continue as before.⁴⁰ As long as the police do not physically torture the suspect or threaten him with immediate bodily harm, virtually anything goes.⁴¹

II. THE COUNTERWEIGHT OF COGENCY

Assuming that a fraction of guilty suspects who would otherwise incriminate themselves do not do so because of the *Miranda* warnings, and that because they invoked their right to remain silent they cannot be convicted, there are two strong counterbalancing effects of the warnings that almost certainly

³⁸ Despite *Miranda* warnings, most suspects who are warned (78% to 96%) waive their rights. Richard A. Leo, *Miranda and the Problem of False Confessions*, in THE *MIRANDA* DEBATE, *supra* note 6, at 271, 275.

³⁹ It is often assumed that the guilty are more likely to invoke silence than the innocent. See, e.g., Leo, *Inside the Interrogation Room*, *supra* note 19, at 279 n.71. If so, there might be a slight reduction in the harvesting of incriminating statements if the proportion of silence-invokers were slightly increased by the giving of warnings. But that would be true only if (1) the guilty make incriminating statements more often than the innocent (we certainly hope this is true!), and (2) the reduction in the numbers of suspects submitting to interrogation is not more than offset by the ill-advised bravado and garrulity that the warnings engender.

⁴⁰ See Leo, *supra* note 21, at 1003.

⁴¹ See Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001).

outweigh those losses.⁴² The first is the cogency effect of the warnings and the waiver. A jury is more likely to believe that a defendant's incriminating statements were truthful if he received *Miranda* warnings. One who receives warnings but nonetheless "waives" his rights to silence and to have a lawyer present thereby makes his incriminating statements appear more clearly voluntary and reliable than if he made them without any warnings or waivers. According to the *Miranda* court, the warnings serve to dilute or even to eliminate the coercive nature of police interrogation.⁴³ A Mirandized suspect who talks is arguably doing so without coercion, even if interrogated for half a day,⁴⁴ whereas one who is not Mirandized is, according to the Supreme Court, being interrogated in an "inherently coercive" atmosphere.⁴⁵ When coercion is seemingly eliminated or reduced, the suspect's incriminating statements acquire more cogency. Although the Supreme Court's view of the power of a simple warning to calm and comfort the suspect throughout a lengthy interrogation was extremely naïve, prosecutors are free to make the same argument to juries who will surely find it persuasive. In sum, although *Miranda* warnings may deter a small fraction of suspects from incriminating themselves, those who are not deterred are more likely to be convicted because their incriminating statements acquire cogency from the warning and the waiver. In its power to produce convictions, this cogency effect could outweigh the evidence lost, if any, by the *Miranda* warnings.

Miranda's contribution to the cogency of a confession may be unnecessary, since juries are likely to believe a confession under almost any circumstances.⁴⁶ However, while confessions are obtained in many interrogations, they are by no means the typical result of an interrogation. According to Richard A. Leo's study of 182 interrogations in the early 1990s, incriminating statements

⁴² The first counterbalancing effect is discussed in this Part. The second is discussed in Part III.

⁴³ See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). As the Court noted in *Miranda*, the pre-*Miranda* interrogation manuals suggested that if a suspect is reluctant to discuss the matter, he should be told that he has a right to remain silent and "[t]his usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator." *Id.* at 453-54 (quoting from FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 111 (1962)).

⁴⁴ See *State v. LaPointe*, 678 A.2d 942, 949, 964 (Conn. 1996) (holding that confessions obtained from a suspect with a congenital brain defect during a nine-and-a-half hour interrogation was voluntary, even though detectives wrote the confessions he signed).

⁴⁵ *Miranda*, 384 U.S. at 467.

⁴⁶ See *infra* note 86.

were obtained in 64%, but only 24% produced full confessions.⁴⁷ Thus, nearly two-thirds of the incriminating statements resulting from interrogations are not confessions and need the help of the cogency counterweight.

III. THE COUNTERBALANCING EFFECT OF *MIRANDA* ON JUDGES

A second weighty counterbalance is the effect that *Miranda* warnings have on judges: psychologically, politically and doctrinally. If warnings were delivered by the police and a waiver was given or signed, it is almost impossible to persuade a judge that the resultant confession or admission is "involuntary."⁴⁸ The warning/waiver not only helps to persuade the jury of the defendant's guilt, it helps the trial judge deny the defendant's motion to suppress.⁴⁹ The focus of the pre-*Miranda* judicial inquiry has been shifted from whether the confession was voluntary to whether the *Miranda* warnings were given and a waiver executed. This shift makes granting a motion to suppress difficult and makes denying it easy.⁵⁰ I do not think the waiver adds much, if anything, to the voluntariness of a confession, but I am not a judge who would be the target of the public clamor that inevitably follows a judicial ruling suppressing incriminating evidence despite police compliance with *Miranda*. *Miranda* is a substantial factor in the twenty-first century reality that the suppression of confessions by trial judges on involuntariness grounds is almost as rare today as four-legged chickens.⁵¹

⁴⁷ Leo, *Inside the Interrogation Room*, *supra* note 19, at 280.

⁴⁸ White, *supra* note 41, at 1220.

⁴⁹ As the Court observed in *Dickerson v. United States*, 530 U.S. 428 (2000), when the police have "adhered to the dictates of *Miranda*," the accused can rarely make even "a colorable argument that a self-incriminating statement was 'compelled.'" *Id.* at 444 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984)).

⁵⁰ As Professor Leo notes, "[T]rial judges have learned to use *Miranda* to simplify the decision to admit interrogation-induced statements and to sanitize confessions that might otherwise be deemed involuntary if analyzed solely under the more rigorous Fourteenth Amendment due process voluntariness standard." Leo, *supra* note 21, at 1027.

⁵¹ In a study of 7035 cases in three states, Professor Nardulli found only five (.07%) cases that were lost as a result of a court's suppression of a confession. Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 601. In a subsequent study of 2759 cases in Chicago, judges suppressed confessions in only .04% of all cases. Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 227, 232. In a Westlaw search of all federal and state cases decided in 1999 and 2000, Welsh White found only nine cases in which the courts held a post-waiver confession involuntary. Four of those cases were expressly based on state law rather than the Due Process Clause. White, *supra* note 41, at 1219 n.54. It seems likely, moreover, that violations of *Miranda*'s warning and waiver rules were present in some of those cases. I asked a long-time trial judge recently if he had ever suppressed a confession. He said, with apparent pride, "yes." I asked him for the details and he explained that the police had questioned the suspect without administering any *Miranda* warnings. "Did the State lose the case?" I asked. "No," he replied. "After

IV. DIMINISHED CONCERN FOR THE INNOCENT

Before *Miranda*, a major concern of the Supreme Court was the voluntariness of confessions. The Court was developing some rather stringent (if unclear) requirements on the admissibility of confessions.⁵² *Miranda*, however, has been a major contributor to the demise of that concern and to an inversion of the law governing involuntary confessions. Many confessions that would have been found involuntary in 1966 are considered voluntary today.

The currently-applied tests for voluntariness are less demanding than the pre-*Miranda* tests.⁵³ Even more important than its articulation of voluntariness criteria is the message the Supreme Court sends to the lower courts in its case selection and decision patterns. In the three decades prior to *Miranda*, the Supreme Court held that confessions were involuntary in at least twenty-three cases.⁵⁴ In the four decades since *Miranda*, however, the Court has decided only three voluntariness cases, and has only held two confessions involuntary: *Mincey v. Arizona*⁵⁵ and *Arizona v. Fulminante*.⁵⁶ The Court has also moved from a voluntariness test related to the reliability of the confession to a doctrine that explicitly rejects such a concern. Police misconduct, not reliability, is now the sole determinant of involuntariness.⁵⁷

they got the confession, they Mirandized him and got another confession, which was admissible. He was convicted." Cf. *Oregon v. Elstad*, 470 U.S. 298, 300 (1985). For an especially unusual case, an *appellate* ruling holding a confession involuntary, see *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 518 (Mass. 2004), where a conviction for burning a building, in which no one was injured, rested largely on the defendant's confession, which was obtained through lies about nonexistent evidence, expressions of sympathy, and minimization of the offense with implicit offers of leniency. Perhaps four-legged chickens are slightly *more* common than judicial findings of involuntariness. See Posting of Bart Dabek to Science & Technology, <http://www.aboutmyplanet.com/index.php?s=four-legged+chicken> (Mar. 15, 2007).

⁵² See generally Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 741 (1963); Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2008–20 (1998).

⁵³ Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 745–46 (1992) (stating that because the Supreme Court is not interested in reviewing voluntariness cases, "lower courts have adopted an attitude toward voluntariness claims that can only be called cavalier"); White, *supra* note 51, at 2009 ("[P]olice interrogators have in some respects been afforded greater freedom than they were during the era immediately preceding *Miranda*.").

⁵⁴ White, *supra* note 41, at 1220.

⁵⁵ 437 U.S. 385, 401 (1978).

⁵⁶ 499 U.S. 279, 282 (1991). The third case was *Colorado v. Connelly*, 479 U.S. 157, 159 (1986), discussed *infra*.

⁵⁷ Professor Godsey observes that prior to *Miranda*, the Court in its voluntariness decisions emphasized the subjectivities of the suspect, such as his age, background, strength of character, and mental condition at the time of the interrogation, but *Miranda* made these concerns virtually irrelevant to its "waiver" questions. Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Com-*

Although the Court in *Miranda* took full note of the coercive pressures of custodial interrogation and the effectiveness of psychological coercion, including the power to obtain confessions from the innocent,⁵⁸ the remedy the Court fashioned to counteract those pressures is almost totally ineffective. In what has become essentially a faux remedy, the *Miranda* warning regime has virtually replaced a vibrant and developing voluntariness inquiry that took into account the vulnerabilities of the particular suspect as well as the inducements and conditions of the interrogation. As far as the Supreme Court is concerned, that protection of the innocent has vanished from the law of confessions.

In its immediate aftermath, the *Miranda* decision was commonly believed to do much more than prescribe a set of warnings and related rights. Some thought that defense lawyers would have to be assigned to police stations and to participate in all interrogations.⁵⁹ Many thought that this would virtually eliminate confessions as tools for convicting the guilty.⁶⁰ There is language in the opinion that supported many of these fears and predictions.⁶¹ But none of them came to pass. As others have noted in countless law review articles, the courts have pretty much cut the flesh out of the *Miranda* opinion and left it with only its skeleton—the four-part warnings and the right to cut off questioning.⁶²

The *Miranda* court explained at length how police use psychological coercion to obtain confessions without using force or

pelled Self-Incrimination, 93 CAL. L. REV. 465, 489–90 (2005). As a result, the tests of confession admissibility after *Miranda* had virtually nothing to do with reliability. See also White, *supra* note 52, at 2021–23 (1998). The rejection of reliability concerns was made complete and total in *Colorado v. Connelly*, 479 U.S. 157, 159 (1986), where the Court held that a confession that was ordered by the “voice of God” and made by a psychotic was nonetheless “voluntary.”

⁵⁸ *Miranda v. Arizona*, 384 U.S. 436, 455 n.24 (1966).

⁵⁹ Leo, *The Impact of Miranda Revisited*, *supra* note 19, at 672.

⁶⁰ As Donald Dripps observes, *Miranda* was preceded by *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964), in which the Court held that there is a Sixth Amendment right to counsel whenever the police begin to “focus” on the suspect. This “implied the end of police interrogation.” DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 75 (2003). *Miranda* implicitly rejected both the Sixth Amendment’s application and the “focus” test, and thereby “saved police interrogation from the jaws of *Escobedo*.” *Id.* at 76. By substituting the Fifth Amendment for the Sixth, the *Miranda* court allowed interrogation with its dubious holding that one who is in an “inherently coercive” environment can nonetheless waive the right to silence.

⁶¹ See *supra* note 18.

⁶² What survives the four-decade erosion of *Miranda* are the following requirements: (1) to give the four-part warnings prior to obtaining an admissible confession in a custodial setting, (2) to respect the suspect’s invocation of silence, and (3) to respect his request for the assistance of counsel. In (2) or (3), all “interrogation must cease.” *Miranda*, 384 U.S. at 473–74.

threats of force—how they lie to the suspects, create phony accusatory witnesses, falsely accuse suspects of other crimes, promise leniency and employ phony expressions of sympathy—and the Court seemingly disapproved of these methods.⁶³ Yet lower courts have, with virtual unanimity, condoned them all.⁶⁴ Once the *Miranda* warnings are given, the old techniques continue. Some new ones have been added, like asking the suspect, who denies guilt, to imagine or dream about how he might have done it if he had done it—as in O.J. Simpson's recent unpublished book, *If I Did It*.⁶⁵ Once the suspect articulates a fanciful scenario of guilt, he then is pressured to admit that the fantasy is truth. That sometimes succeeds with innocent suspects.⁶⁶

As has been repeatedly demonstrated, there are serious threats to the innocent in contemporary interrogation techniques and their judicial condonation. People confess to crimes that they did not commit.⁶⁷ Some do this for publicity and attention,⁶⁸ others because “God” told them to,⁶⁹ others to escape the pressures of interrogation,⁷⁰ others because the police persuaded

⁶³ *Id.* at 449–55.

⁶⁴ See White, *supra* note 41, at 1217–18.

⁶⁵ See Edward Wyatt, *Publisher Calls Book a Confession by O.J. Simpson*, N.Y. TIMES, Nov. 17, 2006, at C1.

⁶⁶ See, e.g., JOAN BARTHEL, A DEATH IN CANAAN 49–140 (Dell Publishing Co., Inc. 1977) (1976) (detailing the interrogation of Peter Reilly about the death of his mother); JOHN GRISHAM, THE INNOCENT MAN 87–93 (2006). A related technique, not noted by the Court in *Miranda*, is to suggest to the suspect that he must have “blacked out” or had a “memory problem” that does not allow him to consciously recall what he did. GISLI GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 228 (1992).

⁶⁷ GUDJONSSON, *supra* note 66, at ch. 10; Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004). The basic strategy of modern interrogation is to persuade the suspect that it is in his interest to confess. The first stage in that process is to convince him that his conviction is certain regardless of what he says or does. The second is to offer him inducements to persuade him that it will be beneficial to him to confess. *Id.* at 914–15.

⁶⁸ Among the confessions that are internally generated and not in any sense the product of interrogation pressures are those motivated by a desire for notoriety. See GUDJONSSON, *supra* note 67, at 226. About 200 people confessed to the Lindbergh kidnapping. See Alan W. Schefflin, Book Review, 38 SANTA CLARA L. REV. 1293, 1296 (1998) (reviewing CRIMINAL DETECTION AND THE PSYCHOLOGY OF CRIME (David V. Canter & Laurence J. Alison eds., 1997)). A recent example is John Mark Karr, who confessed to the murder of JonBenet Ramsey but was released when it was determined that there was no corroboration and he could not even be placed in Colorado when the crime occurred. See Judith Graham, *Confession Raises More Questions than Answers: Prosecutor Cautious as Doubts Are Raised on Suspect's Story*, CHI. TRIB., Aug. 18, 2006, at A1, A8.

⁶⁹ *Colorado v. Connelly*, 479 U.S. 157, 161 (1986).

⁷⁰ See Innocence Project, *Understand the Causes*, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Apr. 2, 2007).

them that it was in their interest to falsely confess,⁷¹ and still others because they have been at least temporarily persuaded of their guilt by skilled practitioners of coercive persuasion, i.e., police interrogators.⁷² We have no way to quantify reliably what percentage of all confessions given are false, since there is rarely any DNA or other forensic evidence to refute the confession. However, in several studies of innocents wrongly convicted, stretching over nearly a century, false confessions have been obtained in 14–25% of the cases.⁷³ Among those persons who have been convicted and later exonerated by DNA results, about one-fourth had confessed.⁷⁴

Stripped of its muscle by narrowing interpretations, *Miranda* not only provides no significant protection for suspects, guilty or innocent, it actually assists the police in their efforts to convict whomever they believe to be guilty.⁷⁵ If the Court had not imposed the warnings on the police, they would eventually have discovered their value and given them anyway. It is no aberration that *Miranda* is being copied all over the world and that the police and prosecutors like it.⁷⁶ *Miranda* no longer has anything significant to say about the legality of interrogation methods or the reliability of confessions. Yet since *Miranda* has been a major focus of debates about confessions, it serves mainly to distract lawyers, scholars and judges from considering the real problem of interrogation, which is how to convict the guilty while

⁷¹ *Id.*

⁷² *See id.*

⁷³ Drizin & Leo, *supra* note 67, at 902.

⁷⁴ Innocence Project, *supra* note 70.

⁷⁵ The problem of false confessions is exacerbated by the apparent fact that police, who typically presume guilt of the suspect until persuaded otherwise, surprisingly, have no special skill in evaluating credibility. Chet Pager reports the following on that subject:

One widely cited 1991 study assessed the lie detection ability of 509 subjects, including officers from the CIA, FBI, National Security Agency, Drug Enforcement Agency, California police, judges, psychiatrists, and college students. Accuracy rates ranged from 53% to 58%, with no expert group performing significantly better than untrained college students. Previous studies involving federal law enforcement officers, police, detectives, and investigators found similar accuracy results, which fell in the mid-fifties. Despite their increased confidence, experts are no better than inexperienced civilians at distinguishing truth from falsehood, and some studies have found that experts, despite (or because of) their years of experience, perform even *worse* than laypersons.

Chet K.W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373, 380–81 (2005).

⁷⁶ *See* All Experts, *Miranda* Warning: Encyclopedia, http://en.allexperts.com/e/m/miranda_warning.htm (last visited Apr. 2, 2007); Richard A. Leo, *The Impact of Miranda Revisited*, *supra* note 19, at 666 (1996). In 1988, an American Bar Association survey found that an overwhelming majority of police, prosecutors and judges surveyed reported that compliance with *Miranda* did not hinder law enforcement efforts. Leo, *supra* note 21, at 1022.

protecting the innocent.⁷⁷

Many scholars have proposed changes in the law to increase the reliability of confessions and to reduce the pressures of interrogation. They include putting time limits on interrogation,⁷⁸ putting lawyers in the interrogation room,⁷⁹ and prohibiting some or all police fraud and trickery.⁸⁰ These proposals have varying merit in that some would reduce risks to the innocent while interfering minimally with efforts to convict the guilty, while others, such as putting lawyers in the interrogation room, would gravely curtail the utility of police interrogation. An overarching problem with all of these proposals is the presumed remedy for their violation: suppressing the defendant's statements. Such a drastic remedy chills much of what might otherwise be warm support for some of these proposals.

IV. MORE NUANCED REMEDIES ARE NEEDED

We need to face the fact that judges simply are not going to throw out confessions just because psychological coercion was used or some rule relating to interrogation was not fully obeyed.⁸¹

⁷⁷ Some might quibble that the "real problem" is not convicting the guilty while protecting the innocent but rather protecting the right of the suspect to be free from coercion that renders his statement "involuntary." I acknowledge that this is a problem, too, but I do not think it is of the same magnitude as my version. In any event, the two problems overlap considerably. Another bothersome concern, outside the scope of this article, is the "distributive justice" problem described by William Stuntz. Noting that *Miranda* substitutes a right of silence for a system that regulates interrogations, he argues that this substitution rewards sophisticates who understand the interrogation system and does virtually nothing for those who, by reason of limited education, inexperience, and other disadvantages, do not know what they are getting into when they agree to be interviewed. Stuntz, *supra* note 30, at 978.

⁷⁸ Apart from mentally ill people who confess for irrational reasons, the innocent who confess usually do so only after lengthy interrogation. Professor White recommended an upper limit on interrogation of six hours, after earlier suggesting a five-hour limit. Compare White, *supra* note 52, at 2049, with Welsh S. White, *False Confessions and the Constitution: Safeguards against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 145 (1997). See also *infra* notes 111-14 and accompanying text, stating that over 90% of interrogations last no more than two hours whereas the interrogations that produce false confessions typically last three times that long, or more.

⁷⁹ Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842 (1987); see also Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 858 (1995) (allowing a judge to compel answers from the defendant).

⁸⁰ Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 602 (1979). But see Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?* 99 MICH. L. REV. 1168, 1209 (2001) (arguing that "additional limits on deception are unwarranted").

⁸¹ The same fate can be predicted for proposed "reliability hearings," where, as a condition to admissibility, the trial judge holds a hearing and finds the defendant's statement to be reliable. For details of one such innovative proposal, see Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 241-43 (2006). I support pretrial reliability hearings not be-

The conventional remedy for “involuntary” confessions, *Miranda* violations, and other illegal interrogation methods is to exclude the confession from evidence⁸² and, in at least some cases, to exclude derivative evidence as well.⁸³ An exclusionary ruling keeps probative evidence from the jury and sometimes threatens to destroy the prosecution’s case and free a guilty and dangerous defendant. That probably does not happen three times a year, despite more than a million felony prosecutions.⁸⁴ Focusing on *Miranda* compliance and an undemanding “voluntariness” requirement assures that virtually all confessions will be admissible in evidence, but does nothing to help the jury determine how much weight to give to incriminating statements made by the accused. We need to think about more nuanced remedies that will help the jury accurately evaluate the reliability of such statements. Three candidates—videorecording, expert testimony and cautionary instructions—are briefly discussed below.

Although it is possible to convict many defendants without their confessions, there is no doubt that confessions are often necessary for convictions.⁸⁵ They are powerfully incriminating: juries almost always convict a defendant who has confessed, even when there is little or no corroborating evidence and even where there is evidence of innocence.⁸⁶ Jurors are not aware of how unreliable evidence of confessions or incriminating statements can be.⁸⁷ First, there is uncertainty about what the defendant actually said to the police and in what context. This is true even if a written confession is obtained. If the only way to reconstruct the interrogations and their context is through the memory of those present—the police and the defendant—there is great risk of er-

cause I think they will result in exclusion of unreliable confessions—they will not—but because they will provide pretrial discovery that will help the defendant attack the reliability of the statement before the jury. If the interrogation is recorded, however, the need for other evidence related to the interrogation will be minimized.

⁸² *Minnick v. Mississippi*, 498 U.S. 146, 156 (1990).

⁸³ See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391–92 (1920) (holding that information obtained illegally cannot be used for any purpose). But see *Oregon v. Elstad*, 470 U.S. 298, 307 (1985), where the Court distinguishes between “prophylactic” violations of *Miranda*, to which the “fruit of the poisonous tree” prohibition does not apply, and “coercion of a confession,” to which the prohibition does apply.

⁸⁴ See *supra* note 51.

⁸⁵ Virtually all who write about confessions concede this. Confessions are less important where there is strong corroboration and much more important where there is little, and it is in the latter case that the primary risk of false confession exists.

⁸⁶ Drizin & Leo, *supra* note 73, at 962; Leo & Ofshe, *supra* note 67, at 481; Saul M. Kassir & Katherine Neumann, *On the Power of Confession Evidence: An Empirical Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 470 (1997); Saul M. Kassir & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27, 42 (1997).

⁸⁷ Leo & Ofshe, *supra* note 87, at 962.

ror.⁸⁸ Memories of the details of conversations are shockingly unreliable—worse by far than eyewitness identification memories.⁸⁹ Apart from inaccuracies, testimony about interrogations is necessarily incomplete. The subtle pressures, assurances and deceptions that accompany police interrogation will inevitably be left out of the story or at least minimized.⁹⁰ This is exacerbated by the fact that the defendant is often neither very bright nor very articulate, and he rarely has anyone to corroborate his story.

A. Videorecording

Perhaps the least controversial remedy for abuses in the interrogation room is compulsory videorecording of the interrogation.⁹¹ This has been done in England since 1984.⁹² Alaska requires it as a matter of due process and has been videorecording for more than two decades.⁹³ Many police departments throughout the country have long been videorecording selectively.⁹⁴ An Illinois Commission headed by Thomas P. Sullivan recently spoke to 238 law enforcement agencies in thirty-eight states that currently record custodial interviews in at least some felony investigations. The Commission found that “[t]heir experiences have been uniformly positive.”⁹⁵ Among the advantages to law enforcement are that the detectives can focus on the suspect rather than taking copious notes while interrogating;⁹⁶ when the police review the recordings later, they often observe incriminat-

⁸⁸ “Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.” *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

⁸⁹ Steven B. Duke, Ann Seung-Eun Lee & Chet K.W. Pager, *A Picture’s Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1 (2007).

⁹⁰ The temptation of the police to “testily” (that is, to lie on the witness stand) to support the admissibility or reliability of evidence is also a factor that cannot be ignored. See generally Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 234 (1998).

⁹¹ See Yale Kamisar, *Foreword: Brewer v. Williams—A Hard look at a Discomfiting Record*, 66 GEO. L.J. 209, 236–43 (1977); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 735–37 (1997). See also cases and other authorities collected in *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 529–31 (Mass. 2004). “Videotaping” is no longer the appropriate description since videorecording is increasingly done digitally.

⁹² Johnson, *supra* note 91, at 745.

⁹³ *Stephan v. State*, 711 P.2d 1156, 1159 (Alaska 1985).

⁹⁴ William A. Geller, *Videotaping Interrogations and Confessions* (1992), reprinted in *THE MIRANDA DEBATE*, *supra* note 6, at 303, 304–05.

⁹⁵ THOMAS P. SULLIVAN, NORTHWESTERN UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> [hereinafter SULLIVAN REPORT].

⁹⁶ *Id.* at 10.

ing statements that they would have forgotten or not perceived in the first place,⁹⁷ recordings “dramatically reduce the number of defense motions to suppress statements and confessions,”⁹⁸ and increase the number of guilty pleas.⁹⁹ Judges prefer the recordings to having to hear and resolve conflicts in testimony about the interrogation and its results.¹⁰⁰ It appears that the only opposition from law enforcement is from those who have not tried videorecording.¹⁰¹

A common objection to a recording requirement for custodial interrogations is that when suspects are informed or realize the session is to be recorded, they will refuse to be interviewed or will at least “clam up” and become untalkative. But according to the Sullivan Report, these concerns are “unfounded.”¹⁰² First, most states do not require that the suspect be informed that he is being recorded.¹⁰³ Even when the suspects are informed, they usually do not object to being recorded and there is little evidence that their responses to interrogation are adversely affected by knowledge of the recording. Once the interviews get underway, initial hesitation fades and the suspects focus on the subject of the interview.¹⁰⁴ In those rare instances when suspects object to the recording, the interview can proceed without recording, provided the objection is documented.¹⁰⁵

Another concern frequently heard is that the police will try to circumvent the requirement by conducting their interrogations off camera and will only use the recording to preserve the results of the earlier interrogations, a “recap.” If the entire custodial interrogation is required to be videorecorded, however, the recap approach would be unlawful and it is unlikely that the recap could be passed off as an entire interrogation. Thus, the only effective way to circumvent the recording requirement would be to interrogate in a non-custodial setting. This might be considered analogous to interrogating “outside of *Miranda*,” getting the confession, then Mirandizing the suspect and having him repeat

97 *Id.* at 11. This would seem especially important where the credibility of the confession rests on the claim that the suspect provided details of the crime that he could not have learned anywhere but at the crime scene.

98 *Id.* at 8.

99 *Id.* at 12.

100 *Id.* at 13.

101 An earlier study found the same thing: law enforcement opposition to taping came mostly from those who were unfamiliar with the practice. Geller, *supra* note 94, at 305.

102 SULLIVAN REPORT, *supra* note 95, at 20. Cassell & Hayman, *supra* note 16, at 897 (finding no inhibiting effects when suspects in their sample were recorded).

103 SULLIVAN REPORT, *supra* note 95, at 20.

104 *Id.*

105 *Id.* at 22.

it.¹⁰⁶ Some courts have disapproved of that stratagem¹⁰⁷ and similar rulings could be made when recording is involved. On the other hand, as the Court in *Miranda* correctly implied, the dangers of involuntary confessions are relatively remote in non-custodial interrogations. I see no profound objection to allowing the police to interrogate briefly on the street or in a suspect's home and to using the fruits thereof either as evidence at trial or to facilitate on-camera interrogations in a custodial setting.

The temptations to evade recording requirements seem not to be a major problem in those jurisdictions that require the recording of interrogations. The advantages of recording the actual interrogation rather than merely its fruits are substantial. For one thing, it avoids claims of off-camera threats, promises and other improprieties.¹⁰⁸ If a suspect begins the interrogation with evasions and lies, then admits the crime without extensive prodding and cajolery, a stronger piece of evidence has been created than if merely the results are recorded.¹⁰⁹ More than ninety percent of normal interrogations last less than two hours¹¹⁰ and it seems unlikely that in most of those interrogations it was necessary for the police to employ techniques that were extreme or despicable.¹¹¹ In a typical interrogation, incriminating state-

¹⁰⁶ Another way police go "outside *Miranda*" is to continue to question the suspect after he invokes his right to silence or to consult counsel. If an incriminating statement follows, it can be used to impeach the suspect at trial. See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 189-92 (1998).

¹⁰⁷ See, e.g., *Missouri v. Seibert*, 542 U.S. 600 (2004).

¹⁰⁸ SULLIVAN REPORT, *supra* note 95, at 17. Even where recording was not mandatory, the consensus of law enforcement officers queried by the Sullivan Commission was that recording the entire interrogation rather than the final statements was preferable. In addition to avoiding claims of off-camera skullduggery, full recording also defeats a defense claim that "negative inferences should be drawn because the entire session could have been recorded by the flick of a switch, whereas the detectives chose instead to record only a rehearsed final statement." *Id.* at 17-18.

¹⁰⁹ A dramatic example of the importance of recording the entire interrogation is the Central Park Jogger Case, where the police conducted unrecorded interrogations followed by taped final confessions. The defendants in that case were later shown to have been convicted falsely. See *Crime, False Confessions and Videotape*, N.Y. TIMES, Jan. 10, 2001, at A22; Saul Kassin, *False Confessions and the Jogger Case*, N.Y. TIMES, Nov. 1, 2002, at A31.

¹¹⁰ Leo, *Inside the Interrogation Room*, *supra* note 19, at 279 (noting that of 182 police interrogations observed in the early 1990s, more than 70% lasted less than an hour; 92% less than two hours); Barrett, Jr., *supra* note 28, at 42 (noting that nearly half of all pre-*Miranda* interrogations were completed in 30 minutes or less, nearly three-quarters in an hour or less, 95% in less than two hours).

¹¹¹ In a study of 182 actual interrogations in a major urban police department, conducted by forty-five different detectives, Richard A. Leo observed and catalogued the tactics employed. Most involved some negative incentives (suggestions that there is no other plausible course of action) and positive incentives (suggestions that the suspect will feel better or otherwise benefit if he confesses). In 90% of the interrogations, the detectives confronted the suspect with incriminating evidence, usually true (85%) but sometimes false (30%). The longest interrogation lasted four-and-a-half hours. Leo, *Inside the Inter-*

ments are obtained without extreme conduct that would seriously embarrass the police or that would create grave doubt about the voluntariness or reliability of the statements.¹¹² Therefore, to interrogate and then recap and record is, in most cases, a duplication of effort. The kind of interrogation that is likely to produce a false confession—a lengthy interrogation¹¹³ suffused with trickery, cajolery, good guys and bad guys, fake evidence and so forth—is surely uncommon in most police departments and the police will rarely, if ever, expect to engage in such an interrogation at the outset. Accordingly, when they would wish to interrogate off camera, it is usually too late: the interrogation has already occurred on camera.

Videorecording will not always help the defendant. Experience strongly suggests that more often it will help the prosecution convict him. But in those exceptional cases where intense psychological pressure has been employed or there is little corroborating evidence, there is no substitute for a videorecording of the entire interrogation. Courts should not wait for legislatures to require such recording. They should encourage it either by holding that it is required by due process, as the Alaska Court did,¹¹⁴ or in the exercise of their supervisory power, as the Minnesota Supreme Court did,¹¹⁵ or as in Massachusetts, by instructing juries that “because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant’s alleged statement with great caution and care.”¹¹⁶

rogation Room, *supra* note 19, at 278–79. Some police fear that these common tactics, especially minimizing the moral seriousness of the offense, will have to be curtailed if they record. This concern does not loom large in the Sullivan Report. SULLIVAN REPORT, *supra* note 95, at 22.

¹¹² Of the 182 interrogations observed by Richard A. Leo in the early 1990s, only four of them involved what Leo regarded as “coercive” methods. Leo, *Inside the Interrogation Room*, *supra* note 19, at 282–83.

¹¹³ In a study of 125 “proven false confessions,” Steven Drizin and Richard Leo found that in the 44 confessions in which the length of interrogation was determinable, 84% lasted more than six hours, “34% between six and twelve hours; 39% between twelve and twenty-four hours; 7% between twenty-four and forty-eight hours; 2% between forty-eight and seventy-two hours; and 2% between seventy-two and ninety-six hours. The average length of interrogation was 16.3 hours and the median length of interrogation was twelve hours.” Drizin & Leo, *supra* note 67, at 948–49.

¹¹⁴ *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985). It would not be a major stretch to find a due process violation in the failure to record an interrogation. The Supreme Court has intimated that it would be a due process violation to destroy or fail to preserve evidence if the police did so in order to gain an advantage over the defendant. See *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

¹¹⁵ *State v. Scales*, 518 N.W. 2d 587, 589 (Minn. 1994).

¹¹⁶ *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533–34 (Mass. 2004). A Canadian court recently held that a failure to record an interrogation warrants a jury instruction that the failure constitutes “an important factor to consider in deciding whether

B. Expert Witnesses

Given the ignorance of juries about the innocents' propensity to confess falsely and the evidence that such confessions are much more common than was supposed prior to the DNA revolution, one might expect courts routinely to admit the testimony of psychologists in cases where there is a plausible claim that the confession was coerced, or in any event unreliable because of the methods and circumstances under which it was obtained. Such an expectation would be premature.

The strongest case for admissibility of expert confession testimony would appear to be the psychiatrist or psychologist who treated the confessor before he was interrogated or at least conducted extensive psychological testing and examinations thereafter. Such an expert could testify to the psychological traits of the defendant that would incline him toward giving a false confession. Is he pathologically gullible or deferential? Does he have a perverse need to please his interrogators, such that he might confess to a crime just to please them? How intelligent is he? Such testimony would certainly provide the jurors with evidence that would not otherwise be known to them and that any rational person would consider relevant in assessing the reliability of the confession. The Supreme Court declared such evidence immaterial, however, on the issue of voluntariness. In *Colorado v. Connelly*, the Court held that coercive police activity alone determines involuntariness.¹¹⁷ Unless the police were aware of some special vulnerability of the suspect and exploited it, the Court stated, his vulnerabilities have nothing to do with whether his confession is voluntary or involuntary. In *Connelly*, the defendant approached a police officer and confessed to a murder. Later, at the police station, he confessed to a child's murder. The following day, he told the police he had confessed because voices had told him to do so. A psychiatrist who examined him testified that he was psychotic and was following instructions from the "voice of God." Accordingly, the psychiatrist testified, these

to rely on the officer's version of the statement." *R. v. Wilson*, No. C42952, [2006] O. J. No. 2478; 2006 ON.C. LEXIS 2388, at *18 (Ont. Ct. App. June 21, 2006). In *Arizona v. Youngblood*, the police failed to refrigerate semen samples in a sexual assault case. One factor that led Justice Stevens to concur in the Court's judgment that due process was not violated was the fact that the trial judge instructed the jury, "If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest." *Youngblood*, 488 U.S. at 59-60 (Stevens, J., concurring). Given the ease with which interrogations can be videorecorded, a similar instruction, adapted to the evidence lost by failure to record, would seem appropriate in most cases where interrogations were not recorded.

¹¹⁷ 479 U.S. 157, 167 (1986).

"command hallucinations" deprived the defendant of his own volitional abilities.¹¹⁸ The Colorado courts held that the confessions were involuntary but the Supreme Court reversed, holding that it does not matter how psychotic the defendant is or if he acted on God's orders. His confessions were still voluntary, as were his *Miranda* waivers, as long as there was no police overreaching, threats or intimidation.¹¹⁹ Thus, psychological evidence will rarely be admissible on the issue of the voluntariness of a confession.

Fortunately, the Court also held, in *Crane v. Kentucky*, that there is a due process right to introduce evidence that a confession is not credible.¹²⁰ Whether a confession is voluntary is one issue; whether it is true is quite another. Even though the trial judge may determine voluntariness on her own and not put that issue to the jury, she may not arrogate to herself the reliability issue. According to the Court, the right to present a defense "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence."¹²¹ It seems clear, therefore, that any competent expert evidence bearing on the particular defendant's vulnerabilities or propensities as they relate to the reliability of his confession should be admissible. In *United States v. Shay*, for example, the defense sought to elicit testimony from a psychiatrist that Shay suffered from "pseudologia fantastica," a symptom of which was to "spin out webs of lies which are ordinarily self-aggrandizing and serve to place him in the center of attention."¹²² The First Circuit held that such evidence is admissible to attack the credibility of a confession. The Seventh Circuit reached a similar conclusion in *United States v. Hall*.¹²³ In both cases, however, the testimony held admissible was "medical" testimony, describing symptoms of a "mental disorder." A defendant whose gullibility or suggestibility falls short of an identifiable, recognized pathology still might find himself without admissible expert assistance about his psychological propensities.¹²⁴

118 *Id.* at 161.

119 *Id.* at 162, 167.

120 476 U.S. 683, 690-91 (1986).

121 *Id.* at 690.

122 57 F.3d 126, 129-30, 132 (1st Cir. 1995).

123 93 F.3d 1337, 1345-46 (7th Cir. 1996) (holding that the defendant was entitled to present evidence that he had a personality disorder that made him pathologically susceptible to suggestion).

124 *United States v. DiDomenico*, 985 F.2d 1159, 1164 (2d Cir. 1993). Evidence of an abnormally low intelligence, however, is often admitted. See *People v. Gilliam*, 670 N.E.2d 606, 614 (Ill. 1996). There are some instances where the courts are correct in ex-

Also problematic is testimony offered by a psychologist primarily to educate the jury about the psychological factors that sometimes lead to false confessions. Some courts think such testimony "invades the province of the jury" because it does not tell the jurors anything that they do not already know.¹²⁵ This is, of course, nonsense and many courts are beginning to admit this evidence, subject to some limitations. In *United States v. Hall*,¹²⁶ for example, the district court on remand found that the testimony of social psychologist Richard Ofshe met the requirements of Federal Rules of Evidence 702 and *Daubert*¹²⁷ because it was "based upon systematic observation of data to which the jury is not privy,"¹²⁸ and permitted him to testify "that false confessions do exist, that they are associated with the use of certain police interrogation techniques, and that certain of those techniques" were used in the defendant's case.¹²⁹

The reasoning of the decisions admitting expert testimony in confession cases is impressive and the trend seems clearly in the direction of admissibility.¹³⁰ However, although most people who falsely confess are neither mentally ill nor cognitively impaired, "the vast majority of reported false confessions are from cognitively and intellectually normal individuals."¹³¹ The interrogation techniques that produce most false confessions were developed for, and are employed against, rational suspects. Thus, the defense will often have to rely on the testimony of a social psychologist rather than a psychiatrist and on generalizations rather than specific, case-related factors with medical terminology.

One reason that such testimony does not often arise is that most of the relevant facts concerning the interrogation, to which the psychological principles can be applied, are not available.

cluding the evidence, e.g., testimony from an expert that the threat of death by electrocution can lead to a false confession. Upholding exclusion of the testimony, the Florida court said, "[T]he jury was capable of assessing without the aid of an expert witness that the threat of death in the electric chair may have a coercive effect . . ." *Bullard v. State*, 650 So. 2d 631, 632 (Fla. Dist. Ct. App. 1995). Some courts create something akin to a Catch-22 when they refuse to allow an expert to opine on the reliability or falsity of the particular confession before the court, see *People v. Page*, 2 Cal. Rptr. 2d 898, 899 (Cal. Ct. App. 1991), and when they exclude the proffered testimony because it does not opine on the unreliability or falsity of the confession, see *State v. Tellier*, 526 A.2d 941, 944 (Me. 1987); *State v. Wilson*, 456 N.E.2d 1287, 1293 (Ohio 1982).

¹²⁵ E.g., *State v. Cobb*, 43 P.3d 855, 869 (Kan. Ct. App. 2002); see also *State v. Davis*, 32 S.W.3d 603, 608–09 (Mo. Ct. App. 2000).

¹²⁶ 974 F. Supp. 1198, 1205 (C. D. Ill. 1997).

¹²⁷ *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

¹²⁸ *Hall*, 974 F. Supp. at 1206.

¹²⁹ *Id.* at 1205.

¹³⁰ Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 262–63 (2005).

¹³¹ Drizin & Leo, *supra* note 67, at 920.

The police deny that there was much in the way of psychological coercion and the defendant either does not testify at all or, because he is inarticulate, unintelligent and unattractive—and because of his obvious self-interest—is of little value to the defense in reconstructing the interrogation. As the police begin to record their interrogations, the importance of social psychologist testimony will grow considerably. Many recorded interrogations will provide fodder for expert testimony.

Another consideration, often unstated but omnipresent, is the expense factor. About eighty-five percent of criminal defendants are indigent.¹³² If they are to have expert assistance in attacking their confessions, the experts will have to be provided at state expense. The viewing and analysis of the video and the related expert testimony will sometimes also consume considerable court time. That may explain why the judiciary appears less than enthusiastic about psychological experts in confession cases.

C. Cautionary Instructions

One remedy for unreliable confessions that neither takes up much time nor costs any money is cautionary jury instructions. Much of the experience of miscarriages of justice and the findings of social psychological experiments can be distilled in a jury instruction, once judges have taken judicial notice of such experience and findings. Counsel can then argue the applicability of the principles to the particular facts of the case. As videorecording of interrogations becomes more common and expert analysis thereof admissible, the value of alternative cautionary instructions in confession cases will become obvious. Scholars and judges should get together and work out some appropriate instructions to guide the jury in its evaluation of the credibility of confessions and incriminating statements.

CONCLUSION

Miranda, on balance, helps neither the guilty nor the innocent avoid conviction. When we consider not only the effect *Miranda* has on interrogations but its impact on juries and judges, it is clear that *Miranda* created a large lacuna where protections against unreliable statements attributed to the accused are badly needed. Rather than tweaking *Miranda*, reformulating the warnings or tightening waiver requirements, we should focus on ways to help the jury determine whether incriminating statements were made and what weight should be given to them. Re-

¹³² S. REP. NO. 104-179, at 30 (1995).

quiring videorecording, liberalizing admissibility of experts, and delivering specific cautionary instructions are far more promising remedies.

Against Orthodoxy: *Miranda* is Not Prophylactic and the Constitution is Not Perfect

Lawrence Rosenthal*

INTRODUCTION

In the four decades since the decision in *Miranda v. Arizona*,¹ two points of consensus have emerged about that decision. In the discussion that follows, I mean to take on both.

The first area of agreement is that *Miranda*'s rationale for requiring its now-famous warnings is wrong, or at least dramatically overstated. In *Miranda*, the Court, applying to police interrogation the Fifth Amendment's admonition that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself,"² concluded that "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."³ That view of the inherently coercive nature of custodial interrogation, however, did not survive.

In *Michigan v. Tucker*,⁴ the Court first labeled *Miranda* warnings as "prophylactic standards."⁵ By this the Court meant that "*Miranda* warnings . . . are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'"⁶ Ac-

* Associate Professor of Law, Chapman University School of Law. I am immensely grateful for the comments provided by Katherine Darmer, Steven Duke, Scott Howe, and Yale Kamisar. Any errors that remain are my own despite their best efforts to set me straight. Special thanks are due to Tom Bell and the Committee on Teaching, Evaluation and Scholarship at Chapman University School of Law for arranging a workshop presentation of this article at which I received many valuable suggestions. My thanks also to Andrew Bugman and Michael Riddell for highly capable research assistance.

1 384 U.S. 436 (1966).

2 U.S. CONST. amend. V.

3 384 U.S. at 467.

4 417 U.S. 433 (1974).

5 *Id.* at 446. For a largely accurate prediction of the implications of *Tucker*, see Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 115-25.

6 *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *Tucker*, 417 U.S. at 444

cordingly, “[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself.”⁷ Thus, the Court has habitually characterized *Miranda* warnings as “prophylactic.”⁸ This is despite the fact that *Miranda* itself never characterized its holding as prophylactic, and within three years of *Miranda*, the Court expressly reaffirmed that decision and added that the use of “admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*.”⁹

This view of *Miranda* has had dramatic results. While it is settled that under the Fifth Amendment, compelled statements may not be used for any purpose—including impeachment of the declarant’s subsequent testimony,¹⁰ or as a source of investigative leads¹¹—*Miranda*’s prophylactic nature is thought to permit the use of unwarned statements made during custodial interrogation for impeachment,¹² as well as physical evidence or subsequent *Mirandized* confessions that are obtained as a consequence of antecedent *Miranda* violations.¹³ The prophylactic characterization of *Miranda* has also led the Court to conclude that its requirements are inapplicable to contexts in which the costs of exclusion are deemed to be particularly high, such as when police officers are facing an exigency that threatens public safety.¹⁴

(alterations in original)).

⁷ Oregon v. Elstad, 470 U.S. 298, 306 (1985).

⁸ E.g., United States v. Patane, 542 U.S. 630, 638–41 (2004) (plurality opinion); Chavez v. Martinez, 538 U.S. 760, 770–73 (2003) (opinion of Thomas, J.); Davis v. United States, 512 U.S. 452, 457–58 (1994); Withrow v. Williams, 507 U.S. 680, 690–91 (1993); Duckworth v. Eagan, 492 U.S. 195, 203 (1989); Arizona v. Roberson, 486 U.S. 675, 680–81 (1988); Connecticut v. Barrett, 479 U.S. 523, 528 (1987); *Elstad*, 470 U.S. at 308; New York v. Quarles, 467 U.S. 649, 654 (1984); Edwards v. Arizona, 451 U.S. 477, 491–92 (1981) (Powell, J., concurring in result). There is no small debate over the meaning of the term “prophylactic” in this context. See, e.g., Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387, 411 n.147 (2001). For present purposes, it will suffice to utilize that term in the sense that it has appeared in the Court’s post-*Miranda* decisions—a rule is “prophylactic” if it grants relief without a finding that a litigant’s own constitutional rights have been violated. See, e.g., *Elstad*, 470 U.S. at 306–07. Perhaps the best explication of this meaning of prophylaxis has been offered by Brian Landsberg: “I use the term ‘prophylactic rules’ to refer to those risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned or required rules.” Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999).

⁹ See Orozco v. Texas, 394 U.S. 324, 326 (1969).

¹⁰ See, e.g., Braswell v. United States, 487 U.S. 99, 117 (1988); New Jersey v. Portash, 440 U.S. 450, 458–59 (1979); Mincey v. Arizona, 437 U.S. 385, 401–02 (1978).

¹¹ See, e.g., United States v. Hubbell, 530 U.S. 27, 29–30, 38 (2000); Michigan v. Harvey, 494 U.S. 344, 351 (1990); Hoffman v. United States, 341 U.S. 479, 486 (1951).

¹² See, e.g., Oregon v. Hass, 420 U.S. 714 (1975).

¹³ See *Patane*, 542 U.S. at 639–44; *id.* at 644–45 (Kennedy, J., concurring in the judgment); *Elstad*, 470 U.S. at 307–09.

¹⁴ See New York v. Quarles, 467 U.S. 649, 655–58 (1984).

Where this freewheeling cost-benefit analysis may lead in the future is anybody's guess.

For their part, *Miranda's* advocates do not spend much time defending its conception of unwarned custodial interrogation as inherently coercive. Even Stephen Schulhofer, perhaps *Miranda's* most vigorous proponent, concedes that *Miranda* rests on what he characterizes as a "conclusive presumption" that custodial interrogation involves compulsion within the meaning of the Fifth Amendment.¹⁵ Instead, *Miranda's* defenders argue for the propriety of prophylactic constitutional law,¹⁶ despite vigorous protests from *Miranda* opponents.¹⁷ David Strauss, for example, defends prophylactic constitutional law by arguing that when there is a sufficiently high risk of a constitutional violation, the Court has frequently concluded that a prophylactic rule is warranted.¹⁸ To demonstrate that *Miranda* is no innovation in constitutional law, he likens *Miranda* to what he characterizes as a prophylactic rule of First Amendment law forbidding discrimination on the basis of content when regulating speech or other expressive activities because of the risk that content regulation will be motivated by a censorial hostility to disfavored ideas.¹⁹

Professor Strauss's analogy to First Amendment jurisprudence is contestable. It is unclear whether the First Amendment rules on which Professor Strauss relies are properly characterized as "prophylactic"; perhaps they are more fairly characterized

15 See Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 446–53 (1987). If there is any more vigorous *Miranda* advocate than Schulhofer, it is Yale Kamisar, who has endorsed this position as well. See Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 943–50 (2000).

16 See, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 114–66 (2004); Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1 (2001); David Huitema, *Miranda: Legitimate Response to Contingent Requirements of the Fifth Amendment*, 18 YALE L. & POL'Y REV. 261, 280–89 (2000); Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 471–76 (1999); Kamisar, *supra* note 8, at 410–25; Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 481–88 (1994); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 181–88 (1998).

17 See, e.g., *Dickerson v. United States*, 530 U.S. 428, 457–61 (2000) (Scalia, J., dissenting); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985). These attacks have not left *Miranda's* supporters unmoved; George Thomas, for example, so despairs of any justification for *Miranda* as a prophylactic rule of Fifth Amendment law that he has come to advocate for *Miranda* as a due process requirement instead. See George C. Thomas III, *Separated at Birth But Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1093–117 (2001).

18 See Strauss, *supra* note 16, at 192–95; David A. Strauss, *Miranda, the Constitution, and Congress*, 99 MICH. L. REV. 958, 966–68 (2001).

19 See Strauss, *supra* note 16, at 195–204; Strauss, *supra* note 18, at 963–65.

as “bright-line” rules selected for ease of administration.²⁰ It is equally unclear that strict scrutiny of laws that regulate the content of speech is fairly characterized as prophylactic because such laws can be invalidated without proof of a censorial motive; after all, the First Amendment forbids all laws “abridging the freedom of speech,”²¹ not merely “censorship.” It may be that all inadequately justified restrictions on speech should be deemed to violate the First Amendment regardless of the presence of a censorial motive, whether likely or actual; the principal significance of content regulation is that it demonstrates that the government’s justification for a regulation is suspect when it is not applied uniformly.²² Even if Professor Strauss is right to characterize the First Amendment skepticism about content discrimination as prophylactic, the Court has consistently applied the rule against content discrimination whenever an unacceptable censorial risk is thought to be present.²³ When it comes to *Miranda*, however,

²⁰ For a quite helpful effort to explicate the difference between prophylactic and bright-line rules, see Landsberg, *supra* note 8, at 950–51.

²¹ U.S. CONST. amend. I.

²² In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), for example, the Court observed that “[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government’s rationale for restricting speech in the first place.” *Id.* at 52. Indeed, in what was probably the high-water mark of the Court’s suspicion of content regulation, *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court applied the rule against content discrimination to invalidate a prohibition on picketing near schools that exempted labor picketing, *see id.* at 99–102, yet surely no one thought that Chicago was attempting to censor all views except those of teachers’ unions. Instead, the exemption was used to undermine Chicago’s proffered justification for the regulation on the ground that “Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school.” *Id.* at 100. On the question whether the First Amendment is properly understood as prohibiting only censorial motives, compare, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) (identifying censorial motive as the linchpin for First Amendment analysis), and Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767 (2001) (same), with John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103 (2005) (rejecting motive as dispositive), Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737 (2002) (same), and Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005) (same). Although in *Dickerson*, the parties defending *Miranda* took Professor Strauss’s view that many rules of constitutional law are properly understood as prophylactic, the Court refrained from endorsing that position, and Justice Scalia’s dissent argued that of all the assertedly prophylactic rules pressed on the Court, only the rule that an increased sentence imposed after a successful appeal should be deemed vindictive and hence violative of due process could properly be characterized as prophylactic, and for that reason was an anomaly. *See Dickerson v. United States*, 530 U.S. 428, 457–61 (2000) (Scalia, J., dissenting). Even this concession may be too generous; the presumption of vindictiveness upon resentencing may simply define what constitutes adequate proof of a vindictive motive rather than prophylaxis as that concept was used in *Miranda*. *See, e.g., Alabama v. Smith*, 490 U.S. 794, 798–801 (1989). For a contrary argument that the doctrines pressed upon in *Dickerson* are properly characterized as prophylactic, see Kamisar, *supra* note 8, at 410–25.

²³ *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 387–90 (1992).

the Court has been willing to limit its reach and remedial force even in circumstances that it acknowledges contain the very risk of coercive interrogation that gave rise to the *Miranda* rule.²⁴ No arguably prophylactic First Amendment doctrine has been circumscribed in a similar way.²⁵

Moreover, even assuming the prevalence of prophylactic rules of constitutional law, in the particular world of Fifth Amendment prophylaxis, *Miranda* is unique. Prophylactic Fifth Amendment rules are not unknown; for example, even though the Fifth Amendment, by its terms, prohibits only compelling a “witness” to testify in a “criminal case,”²⁶ a seemingly prophylactic Fifth Amendment rule requires that even those asked to testify in noncriminal proceedings, who fear that their statements could later be used to incriminate them, must be given immunity to ensure that there is no later use of that testimony in a criminal case.²⁷ When testimony is immunized in this fashion, however, the Fifth Amendment is thought to require that it not be used for any purpose in a subsequent criminal case.²⁸ In contrast, *Miranda*, as we have seen, does not carry a prohibition of the use of unwarned statements for impeachment or investigative leads.²⁹ Thus, the label “prophylactic” has made *Miranda* a particularly lame constitutional duck.

²⁴ See, e.g., *New York v. Quarles*, 467 U.S. 649, 655–57 (1984).

²⁵ Professor Strauss argues that the limitations on the scope of *Miranda* are no different than the limitations that the Court has placed on First Amendment doctrines, noting, as an example, that “the constitutional rules governing defamation of public officials are different from the rules governing defamation of private individuals, which are in turn different from the rules governing defamation that addresses no subject of public interest.” Strauss, *supra* note 18, at 968. But the threat that defamation liability will stifle public discussion and debate is thought to be particularly great when the allegedly defamatory statement concerns a public official or a matter of public concern. See, e.g., *R.A.V.*, 505 U.S. at 421 (Stevens, J., concurring in the judgment); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14–16 (1990); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 771–75 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–61 (1985) (plurality opinion). Thus, as with First Amendment content discrimination doctrine that limits strict scrutiny to circumstances in which the threat to First Amendment values is thought to be high, see *R.A.V.*, 505 U.S. at 387–90, the Court has also granted enhanced First Amendment protection against defamation liability only in circumstances in which the threat to First Amendment values posed by potential defamation liability is thought to be high. In the *Miranda* context, in contrast, as noted above, even when the precise danger that gave rise to *Miranda* is present—the coercive pressures of custodial interrogation—the Court has nevertheless limited both the scope and the remedial efficacy of *Miranda*.

²⁶ U.S. CONST. amend. V.

²⁷ See *United States v. Patane*, 542 U.S. 630, 638 (2004) (plurality opinion); *Chavez v. Martinez*, 538 U.S. 760, 770–73 (2003) (plurality opinion); *id.* at 777–78 (Souter, J., concurring in the judgment).

²⁸ See, e.g., *Lefkowitz v. Cunningham*, 431 U.S. 801, 804–06 (1977); *Lefkowitz v. Turley*, 414 U.S. 70, 84–85 (1973).

²⁹ See *supra* text accompanying notes 12–13.

The second point of agreement is that *Miranda* has turned out to be a failure combating the coercive nature of custodial interrogation.³⁰ Despite *Miranda*, coerced confessions are said to be ubiquitous.³¹ Thus, we are told that stronger medicine is needed, such as videotaping custodial interrogation,³² requiring counsel during interrogation,³³ strengthening constitutional regulation of the admissibility of confessions,³⁴ forbidding interrogation techniques thought to be particularly likely to produce false or coercive confessions,³⁵ or abolishing custodial interrogation entirely.³⁶

³⁰ See, e.g., WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 139–86 (2001); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 740, 745–46 (1992); William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975 (2001); George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091 (2003); Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001).

³¹ See, e.g., Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 36, 44–47 (Saundra D. Westervelt & John A. Humphrey eds., 2001); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, app. B, tbls.1–2 & 5–8 (1987); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 901–62 (2004); Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544–46 (2005); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 512–520; Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998).

³² See, e.g., YALE KAMISAR, *Brewer v. Williams—A Hard Look at a Discomfiting Record*, in *POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY* 113, 132–37 (1980); WHITE, *supra* note 30, at 190–95; Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 977–78 (1997); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 486–97 (1996); Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223 (2000); Drizin & Leo, *supra* note 31, at 966–1001; Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 808–09, 815 (2006); Leo, *supra* note 31, at 49–50; Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 681–92 (1996); Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 261–66; Stephen J. Schulhofer, *Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 955 (2001); Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003); Stuntz, *supra* note 30, at 981; Wayne T. Westling, *Something Is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537 (2001).

³³ See, e.g., Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826 (1987); Schulhofer, *supra* note 32, at 955.

³⁴ See, e.g., KAMISAR, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, in *POLICE INTERROGATION AND CONFESSIONS*, *supra* note 32, at 77; Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 231–52 (2006); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1115–22 (1997); Stuntz, *supra* note 30, at 995–98.

³⁵ See, e.g., WHITE, *supra* note 30, at 196–215; Alschuler, *supra* note 32, at 967–78; Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the*

My task will be to demonstrate that both points of consensus are wrong. On the first, I will argue that *Miranda* was quite right to conclude that custodial interrogation inherently involves compulsion within the meaning of the Fifth Amendment. Thus, *Miranda* is not prophylactic—its warnings are required only when a suspect is compelled to incriminate himself, and they ensure that incriminating statements are received in evidence only when a suspect has validly waived the right to be free from compelled self-incrimination. On the second, I will argue that *Miranda* should be measured by whether it has produced greater compliance with the Fifth Amendment, and on that score, *Miranda* is a resounding success. *Miranda*'s required warnings succeed in producing valid waivers of Fifth Amendment rights, and therefore prevent what would otherwise be unconstitutional interrogations. Although suspects may frequently misgauge their own interests in deciding whether to submit to custodial interrogation, the Fifth Amendment does not protect suspects from themselves—it is not aimed at “[p]reventing foolish (rather than compelled) confessions,” to use Justice Scalia’s typically memorable formulation.³⁷ Perhaps *Miranda* is a failure from the standpoint of those who think that the Constitution condemns any tactic that might smack of overreaching or risk convicting the innocent, but the Constitution does not demand perfection. The Fifth Amendment, in particular, prohibits only compulsion; and once a suspect validly waives his right to be free from compelled self-incrimination, the Fifth Amendment does not protect a suspect from his own improvident decision to submit to interrogation. As for the Due Process Clause, although it is hardly indifferent to the risk of wrongful conviction, it surely does not demand that the risk of error in criminal litigation be zero—a risk of error inheres in virtually any investigative tactic, from eyewitness testimony to fingerprints. For the most part, however, the critics of police interrogation as currently practiced cannot demonstrate that the tactics that they would forbid under the rubric of due process pose any greater risk of convicting the innocent than any others. We are far from the day when an em-

Legality of Deceptive Interrogation Techniques, 33 *FORDHAM URB. L.J.* 791 (2006); Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 *CAL. L. REV.* 465, 515–39 (2005); Alan Hirsch, *Threats, Promises, and False Confessions: Lessons of Slavery*, 49 *HOW. L.J.* 31, 54–59 (2005); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 *CONN. L. REV.* 425 (1996).

³⁶ See, e.g., Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 *J. CRIM. L. & CRIMINOLOGY* 699, 723–28 (1988); Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 *N.C. L. REV.* 69, 109–14 (1989).

³⁷ *Dickerson v. United States*, 530 U.S. 428, 449 (2000) (Scalia, J., dissenting).

pirical case can be made that interrogation tactics that are considered appropriate under current law should be condemned because they create what is thought to be an undue risk of error—a truly prophylactic approach to constitutional criminal procedure. In short, for constitutional purposes, a confession obtained after a valid waiver of Fifth Amendment rights is good enough.

I. *MIRANDA* IS NOT PROPHYLACTIC: A CONSTITUTIONAL DEFENSE OF *MIRANDA*

The Supreme Court's first encounter with the intersection of the Fifth Amendment and custodial interrogation was *Bram v. United States*.³⁸ That case involved the interrogation of Bram, the first officer on an American ship, who was suspected of murdering the ship's captain, the captain's wife, and the second mate.³⁹ After Charles Brown, who was at the ship's wheel on the night of the murders, told his shipmates that he had seen Bram murder the captain, Bram was put in irons and subsequently placed in police custody when the ship reached Halifax.⁴⁰ In Halifax, Bram was brought before a police detective, who stripped Bram of his clothing, which he then searched.⁴¹ At that point, the detective later testified that he told Bram:

"Bram, we are trying to unravel this horrible mystery." I said: "Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder." He said: "He could not have seen me; where was he?" I said: "He states he was at the wheel." "Well," he said, "he could not see me from there." I said: "Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But," I said, "some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." He said: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it."⁴²

This testimony was subsequently offered and received at Bram's trial as a false effort at exculpation reflecting Bram's consciousness of guilt.⁴³

If Bram's interrogation sounds familiar, it should. The tactics in play in *Bram* are not dissimilar to the police tactics considered in *Miranda* itself. The police manuals that the Court famously reviewed essentially advised interrogators to induce

³⁸ 168 U.S. 532 (1897).

³⁹ *Id.* at 534–37.

⁴⁰ *Id.* at 535–37.

⁴¹ *Id.* at 538.

⁴² *Id.* at 539.

⁴³ *Id.* at 541–42.

suspects to believe that it was in the suspect's interest to confess by minimizing or excusing the suspect's conduct, leading him to believe that his conviction is a certainty, or assuring him that his cooperation will be rewarded.⁴⁴ Even after *Miranda*, these tactics continue to be used; while the requisite warnings are now given, interrogators still try to convince suspects that they will be better off if they confess.⁴⁵

This was certainly the approach that I took when I participated in interrogations during my years as a prosecutor, usually in an effort to "flip" a potential cooperator upon arrest. I never met a suspect who was eager to confess—the suspects I encountered uniformly wished to stay out of jail. In my experience, suspects cooperated with interrogation only if they perceived it to be in their interest to do so. So before beginning an interrogation, I would make a few "let-me-tell-you-why-I'm-here" remarks, which I carefully prefaced with an admonition that I wanted the suspect not to respond so as to avoid engaging in unwarned custodial interrogation.⁴⁶ In those remarks, I would convey to the suspect that he was in a lot of trouble, characterizing things in as dire a fashion as a plausible view of the evidence would allow. Then, I would give the requisite warnings, and if I obtained a waiver, I would stress my ability to help the suspect if he cooperated. Thus, I tried to use the threat of sanctions to induce cooperation, just as the manuals instruct.

The question posed by *Bram*—and by my own interrogations—is whether an implicit threat to send someone to prison for as long as possible unless he agrees to submit to interrogation is a form of compulsion within the meaning of the Fifth Amendment. To me, this has never seemed like a very hard question; nor did the Court see it as particularly difficult in *Bram*. In that case, the Court concluded that *Bram*'s statements were inadmissible because they "must necessarily have been the result of either hope or fear, or both, operating on the mind."⁴⁷ The Court explained:

It cannot be doubted that . . . the result was to produce upon [*Bram*']s

⁴⁴ *Miranda v. Arizona*, 384 U.S. 436, 449–55 (1966). See also, e.g., KAMISAR, *What Is an "Involuntary" Confession?*, in *POLICE INTERROGATION AND CONFESSIONS*, *supra* note 32, at 1; WHITE, *supra* note 30, at 25–36.

⁴⁵ See, e.g., WHITE, *supra* note 30, at 76–101; Leo, *supra* note 31, at 39–41; Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 *LAW & SOC'Y REV.* 259 (1996); Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 *MINN. L. REV.* 397, 431–50 (1999). See also FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 232–80 (4th ed. 2001).

⁴⁶ See *Rhode Island v. Innis*, 446 U.S. 291, 300–02 (1980).

⁴⁷ *Bram*, 168 U.S. at 562 (emphasis added).

mind the fear that if he remained silent it would be considered an admission of guilt . . . and it cannot be conceived that the converse impression would not also have naturally arisen, that by denying there was hope of removing suspicion from himself.⁴⁸

There are those who believe that the Fifth Amendment's prohibition on compelled self-incrimination was intended to do no more than codify the common law privilege against compelled oaths.⁴⁹ On this view, *Bram* went wrong in extending the Fifth Amendment to unsworn interrogation and improperly conflating the privilege against compelled self-incriminatory testimony with the common law rule that forbade the reception of an involuntary confession in evidence.⁵⁰ But once one agrees that the Fifth Amendment extends to admitting the results of an unsworn interrogation into evidence at a subsequent trial, on the ground that the declarant who was under compulsion to confess becomes a "witness" within the meaning the Fifth Amendment,⁵¹ it is hard to argue with the concept of compulsion embraced in *Bram*.

The appropriate starting point, of course, is to define compulsion for purposes of the Fifth Amendment. There is general

⁴⁸ *Id.*

⁴⁹ See, e.g., AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 70–88 (1997); JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 123–43 (1993); 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 823 (Aspen Law & Business 1970) (1904); William T. Pizzi & Morris B. Hoffman, *Taking Miranda's Pulse*, 58 VAND. L. REV. 813, 842–44 (2005).

⁵⁰ See, e.g., Godsey, *supra* note 35, at 477–88. Other commentators, however, argue that the Fifth Amendment incorporated elements of both the privilege and the evidentiary rule. See, e.g., LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 325–32, 405–32 (1968); Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 92–109 (1989); Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right against Self-Incrimination as a "Trial Right" in Chavez v. Martinez*, 70 TENN. L. REV. 987 (2003); Lawrence Herman, *The Unexplored Relationship between the Privilege against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497, 529–50 (1992); Stephen A. Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 4–8 (1986).

⁵¹ Even before *Bram*, the Court had taken this position in *Boyd v. United States*, 116 U.S. 616, 634–35 (1886). For arguments in support of this conclusion, see, e.g., KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Procedure* (1965), in POLICE INTERROGATION AND CONFESSIONS, *supra* note 32, at 27 [hereinafter KAMISAR, *Equal Justice*]; KAMISAR, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test* (1966), in POLICE INTERROGATION AND CONFESSIONS, *supra* note 32, at 41, 41–68 [hereinafter KAMISAR, *A Dissent*]; Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2667–72 (1996); Herman, *supra* note 50, at 529–50. Indeed, even Justice Scalia and Justice Thomas, the two *Miranda* foes now sitting on the Court, see *Dickerson v. United States*, 530 U.S. 428, 461–65 (2000) (Scalia, J., joined by Thomas, J., dissenting), have concluded that the term "witness," at least within the meaning of the Fifth Amendment, includes not only one who gives testimony but also anyone who furnishes evidence to the prosecution that it later uses at trial. See *United States v. Hubbell*, 530 U.S. 27, 49–56 (2000) (Thomas, J., joined by Scalia, J., concurring).

agreement that the paradigmatic form of compulsion that was forbidden by the privilege against compelled self-incrimination as it was understood at the time of the Fifth Amendment's ratification was the compelled oath.⁵² An accused who declined to take the oath risked conviction, contempt, or other sanctions.⁵³ The original meaning of compulsion, then, is the use of a threat of criminal sanctions to obtain testimony. Indeed, the most natural reading of the term "compulsion" is the threat of adverse consequences—such as the historically paradigmatic sanction of conviction or contempt—as a form of coercive pressure on a suspect to become a "witness" against himself.⁵⁴ The textual prohibition on compelled self-incrimination in the Fifth Amendment, however, is not limited to those who are compelled to take oaths, nor to those subjected to torture or other specified techniques for eliciting confessions. In particular, unlike the Sixth Amendment's Compulsory Process Clause, which addresses only the compulsion that inheres in requiring a witness to testify at a trial,⁵⁵ the Fifth Amendment is triggered by any form of compulsion, not merely the obligation to obey compulsory process requiring one to appear and testify at a judicial proceeding. This suggests that the holding in *Bram* was correct; *Bram* was subjected to compulsion—the threat of criminal sanctions—during his interrogation, and that threat was used to induce him to submit to interrogation.

To be sure, the threat of conviction or contempt for a refusal to take a mandatory oath is a more direct form of compulsion than the future risk of sanctions facing *Bram*, but again, the Fifth Amendment's text prohibits any quantum or form of compulsion, not just compulsion through direct, immediate, and relatively certain sanctions to be imposed in an already pending proceeding. As the Court wrote in *Bram*,

A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind

⁵² See, e.g., GRANO, *supra* note 49, at 124–31; LEVY, *supra* note 50, at 205–404; Godsey, *supra* note 35, at 477–85; John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1072–85 (1994); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086 (1994).

⁵³ See, e.g., LEVY, *supra* note 50, at 130–33, 269; Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 108, 134–35 (1992); Langbein, *supra* note 52, at 1073.

⁵⁴ Mark Godsey, although a critic of *Bram*, provides a particularly helpful account in support of just this view of compulsion. See Godsey, *supra* note 35, at 491–97.

⁵⁵ "In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." U.S. CONST. amend. VI.

of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.⁵⁶

It was through the threat of a prosecution for murder that Bram was induced to accuse Brown while denying that Brown could have seen him, and that is compulsion in the same sense that persons were once compelled to testify under oath by the threat of contempt. As the Court observed, Bram could not have decided whether to respond to the detective's queries without necessarily considering the peril he faced. Similarly, when I succeeded in obtaining cooperation from my interrogees, they necessarily had to consider the magnitude of sanctions that they faced if they failed to cooperate. Thus, whatever else might amount to compulsion within the meaning of the Fifth Amendment, *Bram* correctly concluded that threatening a suspect with criminal sanctions during custodial interrogation falls within the scope of the Fifth Amendment's protection against compelled self-incrimination.⁵⁷

At the outset, I promised to defend the proposition that custodial interrogation always involves compulsion within the meaning of the Fifth Amendment. Even if I am right that Bram's interrogation, or my own, involved Fifth Amendment compulsion, that does not mean that every instance of custodial interrogation

⁵⁶ *Bram v. United States*, 168 U.S. 532, 543 (1897) (quoting 3 SIR WM. OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (Horace Smith & A.P. Perceval Keep eds., 6th ed. 1896)). For a fascinating discussion of the evolution of the rule against promises of leniency during interrogation between the seventeenth and nineteenth centuries and how it led some jurisdictions to a solution much like *Miranda*, see Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and Miranda-Like Warnings in the Nineteenth Century*, 81 TUL. L. REV. 777, 786-810 (2007).

⁵⁷ The Supreme Court has occasionally, and without citing historical evidence, characterized torture as the chief evil against which the right against compelled self-incrimination was directed. See, e.g., *McKune v. Lile*, 536 U.S. 24, 41 (2002). Although the historical basis for this focus on torture as opposed to compulsory oaths is questionable, even under the Court's own precedents, see, e.g., *Miranda*, 384 U.S. at 442-43, treating torture as the paradigm of compulsion does not blunt the force of the argument advanced above. Torture, like the sanctions that following from refusing to take a compulsory oath, was a form of punishment that followed from a refusal to cooperate with interrogation. The text of the Fifth Amendment, moreover, does not identify only a single form of compulsion that is forbidden. Instead, any form of compulsion—be it torture or any other type of punitive sanction based on a refusal to submit to interrogation—renders a subsequent statement inadmissible. That said, it is beyond the scope of the current project to attempt a comprehensive account of Fifth Amendment compulsion. For present purposes, it is sufficient to observe that the original meaning of the text supports *Bram*'s view that a threat of a criminal prosecution amounts to compulsion, whatever else might also constitute compulsion for purposes of the Fifth Amendment. For a more extended discussion of what types of adverse governmental actions might amount to compulsion within the meaning of the Fifth Amendment, see, for example, GRANO, *supra* note 49, at 59-83; Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 250-56 (2004); Godsey, *supra* note 35, at 491-97; Peter Westen & Stuart Mandell, *To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of "Preferred Response"*, 19 AM. CRIM. L. REV. 521, 535-40 (1982).

involves compulsion within the meaning of the Fifth Amendment. Of course, once *Bram* had established that the law cannot endeavor to measure the effect of compulsion on the mind of a prisoner, it was perhaps only a small step to *Miranda's* holding that custodial interrogation inherently involves compulsion, but it is surely possible to argue that custodial interrogation sometimes occurs in the absence of anything fairly characterized as compulsion. In his dissenting opinion in *Miranda*, Justice White made the point this way: “[U]nder the Court’s rule, if the police ask [an arrestee] a single question such as ‘Do you have anything to say?’ or ‘Did you kill your wife?’ his response, if there is one, has somehow been compelled Common sense informs us to the contrary.”⁵⁸ Most commentators seem to find this point unanswerable.⁵⁹ But when a public official, with a badge and a gun, deprives a suspect of his liberty, places him in custody, and then asks, “do you have anything to say?” is it really the case that there is no compulsion to respond?

One thing that is unquestionably inherent in custodial interrogation is an assertion of the state’s power to deprive suspects of their liberty. When the state exercises this power, and then begins to interrogate the detainee, compulsion to respond to the interrogation is an inevitable result. After all, implicit in custodial interrogation is the threat that the detention and accompanying interrogation will be followed by a criminal prosecution with its attendant sanctions. That kind of threat, in turn, is the hallmark of Fifth Amendment compulsion, as we have seen. Of course, some detainees will have the fortitude to ignore their jailer’s questions, but if the interrogator’s questions go unanswered, there has been no Fifth Amendment violation because the suspect has not been compelled to become a witness against himself.⁶⁰ When the suspect submits to interrogation, however,

⁵⁸ 384 U.S. at 533–34 (White, J., dissenting).

⁵⁹ See, e.g., GRANO, *supra* note 49, at 59–83; Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1446–58 (1985); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 U.C.L.A. L. REV. 839, 919 (1996); George C. Thomas III, *An Assault on the Temple of Miranda*, 85 J. CRIM. L. & CRIMINOLOGY 807, 818–22 (1995) (reviewing JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* (1993)); Anthony P. Bigornia, *Supreme Court Review, The Supreme Court’s Cost-Benefit Analysis of Federal Habeas Review of Alleged Miranda Violations*, 84 J. CRIM. L. & CRIMINOLOGY 915, 934–35 (1994). See also Schulhofer, *supra* note 15, at 448.

⁶⁰ In this respect, it bears remembering that *Miranda* does not prohibit unwarned interrogation per se, it only addresses the admission of evidence derived from the unwarned interrogation in a subsequent criminal case. See *Chavez v. Martinez*, 538 U.S. 760, 770–73 (2003) (plurality opinion); *id.* at 789 (Kennedy, J., concurring in the judgment). See also *New York v. Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting). Indeed, in *Miranda* itself, the Court framed its holding in terms of the admissibility of evidence: “[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of

at least absent extraordinary circumstances, I see no plausible way to deny that the suspect has been compelled to respond to his captor's questions within the meaning of the Fifth Amendment by virtue of the compulsive power of custody and the inherent threat that it will continue unless the jailer is somehow satisfied. As *Bram* recognizes, the hope of pleasing one's jailer—convincing him that he is holding an innocent person, or at least to be lenient—cannot help but enter into the calculations of one subjected to custodial interrogation. Conversely, the threat that the jailer, if unsatisfied by the suspect, will ultimately seek criminal sanctions is equally implicit in any assertion of the state's power to detain and interrogate.⁶¹

To be sure, one can imagine bizarre cases in which the use of custodial interrogation bears no causal relation to an ensuing confession, such as a suspect who suffers under some form of mental illness that produces a desire for confession or who otherwise decides to confess before he is taken into custody. It may be that in an appropriate case, the Court will carve out such cases from *Miranda*. The Court has already characterized *Miranda's* holding as establishing a "presumption of coercion" "inherent in custodial interrogations,"⁶² perhaps it will eventually hold that this presumption can be rebutted by proof that there was no causal relationship between an incriminating statement and custodial interrogation.⁶³ But surely the potential for bizarre outliers in which there is no relationship between cus-

procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. Thus, if an officer engages in unwarned interrogation and is ignored, there may be no compulsion within the meaning of the Fifth Amendment, but there is no *Miranda* violation either.

⁶¹ For an example of a suspect who seems to have suffered from a form of mental illness that instilled a desire to confess even before he was taken into custody, see *Colorado v. Connelly*, 479 U.S. 157, 161–62 (1986).

⁶² *United States v. Patane*, 542 U.S. 630, 639 (2004) (plurality opinion); *id.* at 646 (Souter, J., dissenting); *Arizona v. Roberson*, 486 U.S. 675, 686 (1988); *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

⁶³ Indeed, the Court has already held that there are some situations that involve technical custody but in which questioning is so routine and noncoercive that no compulsion in the constitutional sense is present. Thus, the Court has held that questioning during a routine traffic stop does not trigger *Miranda*, see *Berkemer v. McCarty*, 468 U.S. 420, 435–41 (1984), and that routine booking questions also fail to trigger *Miranda*, see *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990). Indeed, even the officer's question about the location of the suspect's gun upon apprehending a suspect in the just-completed armed rape at issue in *New York v. Quarles*, 467 U.S. at 651–52, may not involve Fifth Amendment compulsion; the events unfolded so quickly and spontaneously that the suspect may well not have been subject to the kind of compulsion that is present when a suspect must necessarily contemplate the risks inhering in remaining silent while under interrogation. See *id.* at 655–58. Given the Court's willingness to limit the scope of *Miranda* to contexts in which its presumption of compulsion holds, it is likely that *Miranda* will not reach cases in which the suspect confesses for reasons unrelated to the existence of custodial interrogation.

todial interrogation and an ensuing confession is no reason to doubt that absent extraordinary circumstances, the existence of the custodial relation between interrogator and interrogee exerts compulsion within the meaning of the Fifth Amendment. If the worst that can be said of *Miranda* is that it envisions the usual case rather than the bizarre outlier, then it should be thought to fare pretty well in the canon of constitutional criminal procedure.

It is doubtless true that Justice White's hypothetical interrogation involves only a bit of compulsion—far less than the compulsion that inheres in physical punishment⁶⁴ or the other tactics considered impermissible when the Court was assessing confessions under the Due Process Clause's "voluntariness" test.⁶⁵ Once the Court left the vagaries of due process behind and held that the Fifth Amendment's prohibition on compelled self-incrimination was applicable to the states,⁶⁶ however, the pertinent constitutional question, even as applied to state prosecutions, was whether compulsion was used to obtain an incriminating statement. And, as we have seen, the Fifth Amendment forbids the admission of any confession obtained through compulsion, whether a little or a lot, as the Court held in *Bram*. Thus, *Miranda's* holding on the coercive nature of custodial interrogation is not only defensible, it was not even much of an innovation in Fifth Amendment jurisprudence.⁶⁷

Accordingly, there is little if any prophylaxis in the view that compulsion within the meaning of the Fifth Amendment is inherent in the process of custodial interrogation. Indeed, that view

⁶⁴ See *Brown v. Mississippi*, 297 U.S. 278 (1936).

⁶⁵ See, e.g., *Lynumn v. Illinois*, 372 U.S. 528 (1963) (inducing confession by threats that defendant would lose custody of her children); *Payne v. Arkansas*, 356 U.S. 560 (1958) (holding suspect three days incommunicado with little food and threats of lynching); *Leyra v. Denno*, 347 U.S. 556 (1954) (obtaining confessions after questioning ill defendant repeatedly over three days and using hypnosis to suggest guilt); *Watts v. Indiana*, 338 U.S. 49 (1949) (questioning suspect repeatedly and persistently over six days); *Malinski v. New York*, 324 U.S. 401 (1945) (stripping suspect naked for three hours and then questioning; questioning continued over three days during which defendant was held incommunicado); *Ward v. Texas*, 316 U.S. 547 (1942) (questioning repeatedly as suspect was moved from jail to jail over a three-day period and told of threats of lynching); *Chambers v. Florida*, 309 U.S. 227 (1940) (interrogating repeatedly over five days culminating in an all-night session). For discussions of the relative breadth of the due-process concept of voluntariness as compared to the Fifth Amendment's concept of compulsion, see Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195 (1996); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309 (1998).

⁶⁶ See *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁶⁷ Indeed, in *Miranda* itself, the Court observed that the applicability of the Fifth Amendment to custodial interrogation "could have been taken as settled in federal courts almost 70 years ago [in *Bram*]." 384 U.S. at 461. To be sure, *Bram* had been rarely invoked by the Court prior to *Miranda*, but the Court decided only a single case involving the application of the Fifth Amendment to custodial interrogation between *Bram* and *Miranda*, and in that case, it treated *Bram* as controlling. See *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924).

was not invented in *Miranda*; in fact the Court's principal pre-*Miranda* advocate of unwarned interrogation, Justice Jackson, took nearly that position more than two decades before *Miranda*. Dissenting in *Ashcraft v. Tennessee*,⁶⁸ Justice Jackson objected to the majority's concern with coercion in its analysis of the admissibility of a confession under the Due Process Clause because, in his view, coercion was always present in custodial interrogation:

The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is 'inherently coercive.' Of course it is. And so is custody and examination for one hour. Arrest itself is inherently coercive, and so is detention. When not justified, infliction of such indignities upon the person is actionable as a tort. Of course such acts put pressure upon the prisoner to answer questions[,] to answer them truthfully, and to confess if guilty.⁶⁹

The careful reader will note that Justice Jackson used the term "coercive," a concept that the Court had applied in its due process jurisprudence concerning the admissibility of confessions in state prosecutions before it held the Fifth Amendment applicable to the states, rather than the Fifth Amendment concept of compulsion. Still, it was but a small step from his acknowledgement that custodial interrogation is inherently coercive to *Miranda*'s conclusion that custodial interrogation involved compulsion as that concept is understood under the Fifth Amendment.⁷⁰

The account of Fifth Amendment compulsion that I have advanced is rejected by nearly all commentators, but for strikingly unpersuasive reasons. Albert Alschuler, for example, has written that "[a] person can influence another's choice without compelling it; to do so she need only keep her persuasion within appropriate bounds of civility . . ." ⁷¹ Perhaps so, but the "appropriate bounds of civility" surely does not include imprisoning the object of one's attempts at persuasion; as Justice Jackson acknowledged, that form of "persuasion" goes into the realm of the tor-

⁶⁸ 322 U.S. 143 (1944).

⁶⁹ *Id.* at 161 (Jackson, J., dissenting). In a similar vein, Joseph Grano argued that one cannot assess the impact of any interrogation tactic without developing normative standards to define what tactics should be deemed permissible. See GRANO, *supra* note 49, at 59-83.

⁷⁰ For an account of the meaning of compulsion under the Fifth Amendment, see *supra* text accompanying notes 52-55. The term "coercion," as it came to be used in the due process cases, had no especially precise meaning. It appeared to denote methods involving a degree of psychological or physical pressure on a suspect that gave rise to an unacceptable risk of a false confession, or methods that were inconsistent with normative standards that the Court was prepared to impose governing the amount of pressure that interrogators would be permitted to utilize. See Penney, *supra* note 65, at 341-46. Whatever its precise meaning, this due-process concept of coercion is plainly not far from the Fifth Amendment's conception of compulsion. See Hancock, *supra* note 65, at 2223-32.

⁷¹ Alschuler, *supra* note 51, at 2626.

tious.⁷² Mere persuasion, under *Bram* or in ordinary parlance, is unaccompanied by actual or threatened deprivation of liberty.

Commentators also argue that *Miranda's* concept of compulsion and waiver is inconsistent; they argue that if the threat of criminal sanctions were deemed compulsion, a defendant could never validly waive his Fifth Amendment rights because a waiver given while a suspect is subject to compulsion could never be voluntary.⁷³ But that does not follow.

Miranda applied settled principles of waiver as it held that to introduce the results of custodial interrogation into evidence, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel," adding that "[t]his Court has always set high standards of proof for the waiver of constitutional rights."⁷⁴ The standards for waiver, however, do not require that the defendant face no risks if he chooses to assert his rights. We know this from the guilty-plea cases, which characterize a plea of guilty as a waiver, among other things, of the right against compelled self-incrimination,⁷⁵ but add that an accused can nevertheless make a

⁷² See *supra* text accompanying note 69. Professor Grano, in contrast, argued that noncustodial interrogation frequently involves tactics every bit as compulsive as custodial interrogation. See Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 186 (1988). For noncustodial interrogation, however, there is force to Professor Alschuler's claim that the police are undertaking what is properly characterized as persuasion as opposed to compulsion. In any event, even if *Miranda* can fairly be accused of under-enforcing the Fifth Amendment by limiting its holding to custodial interrogation, that accusation hardly undermines the thesis that *Miranda* is not prophylactic.

⁷³ See, e.g., DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 81, 119–20 (2003); Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 671–72 (1986) (reviewing FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (1986)); Seidman, *supra* note 30, at 740, 744; Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 10 (1986). Similarly, Professor Thomas argues that Fifth Amendment compulsion cannot include the threat of conviction or the Fifth Amendment would prevent a defendant from testifying at trial in his own defense in order to avoid conviction because such testimony is necessarily compelled. See Thomas, *supra* note 59, at 820–21. These arguments echo Justice White's *Miranda* dissent:

But if the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the Court will appoint?

384 U.S. at 536 (White, J., dissenting).

⁷⁴ 384 U.S. at 475.

⁷⁵ See, e.g., *Florida v. Nixon*, 543 U.S. 175, 187–88 (2004); *United States v. Ruiz*, 536 U.S. 622, 628–29 (2002); *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996); *Godinez v. Moran*, 509 U.S. 389, 397 n.7 (1993); *Parke v. Raley*, 506 U.S. 20, 28–29 (1992). This rule emerged in *Boykin v. Alabama*, 395 U.S. 238 (1969), in which the Court held that because a guilty plea involves a waiver of constitutional rights, including the right against com-

knowing, voluntary, and intelligent decision to seek the advantages of a negotiated disposition despite the pressure created by a potentially greater sentence if the accused asserts the right to trial.⁷⁶ Indeed, even if a plea bargain ultimately turns out to be a poor deal, the waiver is still considered valid.⁷⁷ Similarly, when a defendant elects to waive his right to remain silent and testify at trial, he does so under the threat that the prosecution's case, if left un rebutted, will likely result in conviction. This kind of pressure has also never been thought to amount to a violation of the Fifth Amendment. Rather, "it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify."⁷⁸ Similarly, a suspect asked to waive his right to remain silent during custodial interrogation may decide to do so even though he faces the threat of a criminal prosecution.

It follows that *Miranda* warnings provide the ingredients for a valid waiver of Fifth Amendment rights; in this sense as well, *Miranda* worked no innovation, but merely applied settled law. Long before *Miranda*, it had been settled that "courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'"⁷⁹ It had been equally settled that a valid waiver is "an intentional relinquishment or abandonment of a known right or privilege."⁸⁰ *Miranda* applied these rules as it fashioned its warnings in order to guarantee that suspects receive the information necessary to make a knowing and intelligent waiver of Fifth Amendment rights.⁸¹

pelled self-incrimination, there must be affirmative evidence of a knowing, intelligent, and voluntary waiver in the record. *Id.* at 242-43.

⁷⁶ See, e.g., *United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995); *Alabama v. Smith*, 490 U.S. 794, 802-03 (1989); *Corbitt v. New Jersey*, 439 U.S. 212, 225 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357, 363-64 (1978); *Chaffin v. Stynchcombe*, 412 U.S. 17, 30-32 (1973); *Brady v. United States*, 397 U.S. 742, 749-55 (1970).

⁷⁷ See, e.g., *Bradshaw v. Stumpf*, 545 U.S. 175, 186 (2005); *Mabry v. Johnson*, 467 U.S. 504, 508 (1984); *Brady*, 397 U.S. at 757.

⁷⁸ *McGautha v. California*, 402 U.S. 183, 215 (1971). Although some cases, in rather conclusory terms, characterize the pressure that a defendant experiences when deciding whether to testify as something other than "compulsion" within the meaning of the Fifth Amendment, see, e.g., *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286-87 (1998); *Williams v. Florida*, 399 U.S. 78, 83-85 (1970); that view is strikingly unpersuasive. As we have seen, *Bram* properly concluded that a suspect facing the threat of criminal prosecution if he does not speak is subjected to compulsion within the meaning of the Fifth Amendment. A view that denies the existence of similar compulsion during a criminal trial—when the threat of conviction is even closer at hand—comports with neither *Bram*, the historically understood meaning of compulsion, or common sense.

⁷⁹ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citations omitted) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937)).

⁸⁰ *Id.*

⁸¹ 384 U.S. at 444, 475.

Miranda requires that an individual in custody be advised of his right to remain silent, that anything he says can be used against him, and of his right to have counsel present during interrogation.⁸² These rights are nowhere to be found in the Fifth Amendment itself, but this advice ensures that a defendant understands that he has no obligation to participate in custodial interrogation. The right to counsel, in particular, informs the suspect that if he wishes expert advice as he assesses whether to participate in custodial interrogation, it may be had. Advising the suspect of the availability of expert legal advice clearly provides a far more comprehensive offer of aid in assessing the risks of submitting to interrogation than any formulaic warning that the Court could have advised. The right to counsel is perhaps the most debatable of the *Miranda* rights, since that right seems to inhere in the Sixth and not the Fifth Amendment.⁸³ But if one rigorously applies the rule that indulges every reasonable presumption against waiver, it is quite defensible to conclude that suspects cannot be expected to make knowing and intelligent decisions if they are unaware of the availability of expert legal advice.⁸⁴

Once advised of these rights, moreover, a suspect's decision to submit to custodial interrogation is properly characterized as an intentional relinquishment of a known right.⁸⁵ The Fifth Amendment, after all, secures no more than a right to be free from compelled self-incrimination. The *Miranda* warnings ensure that the suspect knows that he need not participate in interrogation and is being asked to surrender that right. For purposes of the Fifth Amendment, no more is required to obtain a valid waiver, at least under the settled principles of waiver law that *Miranda* applied. As we have seen, a waiver is valid as long as a suspect intentionally relinquishes a known right, and the *Miranda* warnings ensure that a suspect knows that he has a

⁸² *Id.* at 444, 467–72.

⁸³ See, e.g., Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman, and Beyond*, 54 VAND. L. REV. 359, 397–403, 434–38 (2001).

⁸⁴ Precisely because the *Miranda* right to counsel can be defended only based upon a rather generous presumption against a knowing and intelligent waiver, it may be that there are some circumstances, such as interrogation overseas where competent counsel is not readily available, in which this rule for waiver becomes overgenerous and should be abandoned. For additional consideration of the applicability of *Miranda* to interrogation overseas, see M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 345–54 (2003); M.K.B. Darmer, *Lessons from the Lindh Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 271–86 (2002); Mark A. Godsey, *Miranda's Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden and a Proposal for a New Miranda Exception Abroad*, 51 DUKE L.J. 1703, 1770–80 (2002).

⁸⁵ See *North Carolina v. Butler*, 441 U.S. 369, 372–75 (1979).

right to remain silent and is facing a decision whether to relinquish his right when he is asked to waive. Thus, while *Miranda* does not eliminate the compulsion inherent in custodial interrogation, it instead produces a valid waiver of the right to be free from that compulsion.

Understanding *Miranda* warnings as a recipe for valid waiver explains as well the Court's invitation for "potential alternatives for protecting the privilege" that are "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it . . ."⁸⁶ There is no single form of words necessary for a valid waiver; any advice that enables a suspect to make a knowing and intelligent decision about Fifth Amendment rights will comport with constitutional standards.⁸⁷ That does not make the warnings prophylactic; it makes them one among many alternatives that could produce a valid waiver of constitutional rights.⁸⁸

To be sure, many interrogators are adept at using some combination of threats and inducements to convince suspects to submit to interrogation—and even to confess—regardless of whether it was in the suspect's interest to do so. I certainly tried to do just that when I was a prosecutor. Thus, I freely acknowledge that if they are to protect their own legal interests most efficaciously, suspects would probably be well advised to consult with an attorney before deciding to submit to interrogation.⁸⁹ It is also probably true that many suspects have undeserved confidence in their ability to talk their way out of their troubles.⁹⁰ Perhaps it

⁸⁶ 384 U.S. at 467.

⁸⁷ Indeed, the Court has tolerated some variation in the language of the required warnings that is not thought to dilute their efficacy. See *Duckworth v. Eagan*, 492 U.S. 195 (1989); *California v. Prysock*, 453 U.S. 355 (1981) (per curiam).

⁸⁸ Thus, in some sense the warnings amount to a "safe harbor." See Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 81–85. The safe harbor, however, is within the law of waiver, and is not based on an absence of compulsion. The warnings do not eliminate the compulsion inherent in custodial interrogation by creating a safe harbor of voluntariness; if they did, then the Court would have held that the warnings without more could produce an admissible statement. To the contrary, the Court made plain that even with the requisite warnings, a statement is inadmissible unless the government can discharge its burden of proving a valid waiver. See 384 U.S. at 475–77. See also *Tague v. Louisiana*, 444 U.S. 469, 470–71 (1980) (per curiam); *Butler*, 441 U.S. at 373.

⁸⁹ Even this rule of thumb is not unqualified. In my experience, both prosecutors and judges make a special effort to acknowledge cooperation that was offered from the start, without need of counsel or a negotiated arrangement. It is, in my view, at least a modest overstatement to claim that a suspect is never well-advised to cooperate with the authorities during uncounseled custodial interrogation.

⁹⁰ See Thomas, *supra* note 30, at 1106–12. There is at least some empirical evidence to support this view. Using volunteer subjects under laboratory conditions, Saul Kassin and Rebecca Norwick found that the most likely reason simulated suspects gave for waiving their *Miranda* rights was their belief that they could convince their interrogators of their innocence. See Saul M. Kassin & Rebecca J. Norwick, *Why People Waive their*

is even true that most persons in custody feel intimidated and are reluctant to invoke their rights.⁹¹ But once a suspect has waived his right to be free from compelled self-incrimination, an insistence on further safeguards is vulnerable to Justice Scalia's charge that under the Fifth Amendment, the Court may not properly concern itself with "[p]reventing foolish (rather than compelled) confessions."⁹²

In particular, when a suspect waives his rights under *Miranda*, the suspect has knowingly and intentionally decided to make his own assessment of the risks and benefits of submitting to custodial interrogation without expert advice. A decision to proceed with interrogation without counsel under such circumstances may be foolish, but it nevertheless satisfies the settled standards for a valid waiver.⁹³ As we have seen, the traditional standard for waiver merely requires an intentional relinquishment of a known right. Thus, a valid waiver does not require

Miranda Rights: The Power of Innocence, 28 LAW & HUM. BEHAV. 211 (2004). Although caution is necessary in treating laboratory experiments involving volunteers who face stakes that are much lower than those in the criminal justice system as indicative of the behavior of actual suspects, this supposition is corroborated by evidence that unsuccessful experience with the criminal justice system makes suspects less likely to submit to interrogation. Leo found that suspects with felony records were almost four times more likely to invoke their rights during custodial interrogation than suspects with no record, and almost three times more likely to invoke than suspects with only a misdemeanor record. See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286-87 (1996). It would make sense that if suspects' belief in their ability to convince interrogators of their innocence motivates most waivers, then suspects who have learned that they are unable to persuade interrogators of their innocence are less likely to waive. My own experience was that suspects had a wide variety of reasons for wanting to talk with interrogators, but a belief in their ability to talk their way out of trouble was certainly one of the most common motives that I perceived.

⁹¹ See, e.g., Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 880-82 (1981) (reviewing YALE KAMISAR, *POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY* (1980)).

⁹² *Dickerson v. United States*, 530 U.S. 428, 449 (2000) (Scalia, J., dissenting).

⁹³ This point also demonstrates the non-prophylactic character of the secondary protection offered by the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), that when a suspect invokes the right to counsel recognized in *Miranda*, the authorities may not subsequently communicate with the suspect unless communication is initiated by the suspect. *Id.* at 484-85. Once an accused has indicated that he doubts his own ability to make a waiver decision in the absence of expert assistance, the presumption against waiver amply supports the conclusion that the suspect should not be pressed to make such a decision. The suspect's invocation is itself powerful evidence that the suspect cannot make a knowing and intelligent waiver decision in the absence of counsel. As the Court has put it, "the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (quoting *Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring in the result)). When a suspect invokes only the right to silence but expresses no desire for expert assistance in assessing his options, there is no similar basis for doubting the suspect's knowing and intelligent desire to make a waiver decision without advice, and hence a different standard is in order. See *Roberson*, 486 U.S. at 683; *Mosley*, 423 U.S. at 109-10 (White, J., concurring in the result).

that the defendant be able to correctly assess his interests or free himself from the pressures created by a potential prosecution or conviction; it only requires that a defendant make an intentional decision to surrender a right of which he is aware.⁹⁴ A valid waiver requires that the defendant knows he has an identified right and intends to waive it; but the defendant need “not know the *specific detailed* consequences of invoking it.”⁹⁵ Indeed, the Court has “never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.”⁹⁶

Thus, the *Miranda* warnings rest on a traditional conception of waiver. It may be that most suspects make bad decisions about whether to submit to custodial interrogation, but settled waiver law instructs us that this provides no basis for invalidating a waiver.⁹⁷ Indeed, under the guilty-plea cases, even if the accused and his counsel misapprehend the strength of the prosecution’s case or the availability of defenses, a guilty plea is still considered a valid waiver.⁹⁸ A *Miranda* waiver is certainly no

⁹⁴ See, e.g., *Iowa v. Tovar*, 541 U.S. 77, 90–92 (2004); *Patterson v. Illinois*, 487 U.S. 285, 292–93 (1988); *Fare v. Michael C.*, 442 U.S. 707, 724–25 (1979).

⁹⁵ *United States v. Ruiz*, 536 U.S. 622, 629 (2002).

⁹⁶ *Moran v. Burbine*, 475 U.S. 412, 422 (1986). For example:

The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. The Fifth Amendment’s guarantee is both simpler and more fundamental: A defendant may not be compelled to be a witness against himself in any respect. The *Miranda* warnings protect this privilege by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him.

Colorado v. Spring, 479 U.S. 564, 574 (1987) (citations omitted).

⁹⁷ See *supra* text accompanying notes 74–78.

⁹⁸ See, e.g., *Ruiz*, 536 U.S. at 630; *United States v. Broce*, 488 U.S. 563, 571–72 (1989); *McMann v. Richardson*, 397 U.S. 759, 769–70 (1970); *Brady v. United States*, 397 U.S. 742, 756–57 (1970). Thus, although Robert Mosteller has argued that any type of what could be characterized as official deception should be forbidden prior to the time that a waiver is obtained (see Robert P. Mosteller, *Police Deception Before Miranda Warnings: The Case for a Per Se Prohibition Against an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEXAS TECH. L. REV. 1239, 1263–72 (2007)), this approach is difficult to reconcile with traditional principles of waiver. Waiver law asks whether the suspect knew of the rights at issue and intended to surrender them and not whether he was able to accurately assess his interests at the time of the waiver. Deception as to, say, the strength of the evidence against the suspect may lead him to overvalue the benefits of submitting to interrogation, but this type of error has never been thought to impair a waiver. To the contrary, it has long been settled that “the Constitution permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.” *Ruiz*, 536 U.S. at 630. Applying these principles, the Court has held that a *Miranda*

less valid if the suspect somehow misapprehends his own best interests. To be sure, defendants undertaking plea bargaining usually have counsel at their side, while suspects undergoing custodial interrogation usually do not.⁹⁹ Still, *Miranda* grants suspects subject to custodial interrogation a right to counsel, and we have seen that waiver of this right under *Miranda* comports with traditional waiver principles.¹⁰⁰ Nor is there any plausible basis to treat the right to counsel as nonwaivable; indeed, it is now settled that even the Sixth Amendment's right to counsel can be extrajudicially waived by an uncounseled defendant as long as the waiver has been preceded by *Miranda* warnings.¹⁰¹

One can disagree with the traditional rules for waiver, but *Miranda* is faithful to them, and one cannot criticize *Miranda* on this basis without developing a new and as-yet unprecedented conception of waiver of constitutional rights.¹⁰² After all, the

waiver is valid even though, prior to obtaining the waiver, federal agents failed to disclose to a suspect arrested on a weapons charge that the true object of the investigation was an unsolved murder in which the arrestee was a suspect. See *Colorado v. Spring*, 479 U.S. 564, 573–79 (1987). While there was no affirmative misrepresentation in that case, it is difficult to understand why deception by omission has any different consequences for the knowing, intelligent, or voluntary character of a waiver than deception through affirmative misrepresentation.

⁹⁹ *Brady*, 397 U.S. at 753–54.

¹⁰⁰ See *supra* text accompanying notes 74–96.

¹⁰¹ *Patterson v. Illinois*, 487 U.S. 285, 292–97 (1988).

¹⁰² Professor Godsey proposes that in addition to traditional *Miranda* warnings, suspects be further advised that silence cannot be used against them, that they have a right to stop questioning at any time, and that warnings be readministered during lengthy interrogations. See Godsey, *supra* note 32, at 810, 813–15. See also Mark Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1054–61 (1988) (contending that waivers should be readministered during lengthy interrogations or when the topic of interrogation shifts). At least some aspects of this proposal are hard to support under current law. As for an admonition that a suspect's silence cannot be used against him, it is hard to identify this as a right that a suspect must knowingly and intelligently waive when he receives warnings. When *Miranda* warnings are administered, a suspect is not being asked to waive a right he then enjoys, i.e., not to have silence used against him, because pre-*Miranda* silence can be used to infer a suspect's guilt. See *Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam); *Jenkins v. Anderson*, 447 U.S. 231 (1980). There is instead only a right not to have post-*Miranda* silence used as evidence of guilt. See *Doyle v. Ohio*, 426 U.S. 610 (1976). It may be that knowledge of the post-*Miranda* right is useful to a suspect when deciding whether to assert his right to remain silent, but as we have seen, the Supreme Court has never required that a suspect, when deciding whether to invoke a constitutional right, must "know the *specific detailed* consequences of invoking it." *Ruiz*, 536 U.S. at 629. Nor has the Court "require[d] that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Moran v. Burbine*, 475 U.S. 412, 422 (1986). This same point suggests that waiver law does not require that a suspect be permitted to reassess the tactical value of waiver whenever the subject of interrogation shifts or during lengthy interrogations. Moreover, a right to have warnings readministered is difficult to support under traditional waiver law, which, as we have seen, requires only that the decision to waive be knowing and intelligent, not that the suspect be encouraged to revisit that decision periodically. See *Wyrick v. Fields*, 459 U.S. 42 (1982) (per curiam). Nevertheless, in *Miranda* the Court stressed that warnings must be an effective means of "apprising accused per-

Fifth Amendment protects suspects against compulsion, not improvidence. If a suspect is willing to submit to interrogation under compulsive circumstances, it is unclear at best why the Fifth Amendment should be thought to forbid him from doing so merely because the waiver is likely to be improvident. Whatever one might be protecting by insisting on some new and more demanding test for waiver, it certainly is not the right to be free from compelled self-incrimination. Thus, when the Court explains that it has “never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights,”¹⁰³ it is far from apparent what is wrong with that conception of waiver, at least for purposes of protecting Fifth Amendment rights.¹⁰⁴

Thus, the non-prophylactic account of *Miranda* that I have offered involves rather settled Fifth Amendment and waiver law. As I have demonstrated, *Miranda* rests on a conception of com-

sons of their right of silence and in assuring a continuous opportunity to exercise it” 384 U.S. at 467. That might support an additional admonition that a suspect can invoke his right to remain silent at any time, or a need for repeated warnings during lengthy interrogations, although it is worth noting that in *Miranda* itself the Court did not think that its reasoning required the additional warnings advocated by Professor Godsey. Accordingly, if there is a justification for doctrinal reform in order to support these proposals, it is presumably a prophylactic one. Professor Godsey, however, adduces little empirical support for such reform in the interests of prophylaxis. Although Professor Godsey claims that suspects frequently fail to invoke their *Miranda* rights because they believe that an assertion of rights will be taken as an admission of guilt, see Godsey, *supra* note 32, at 793–96, the supporting evidence he cites reveals that the only empirical evidence derived from actual interrogations consists of the interview of a single suspect. See Ofshe & Leo, *supra* note 34, at 1002. We have seen, however, that other empirical evidence suggests that suspects choose to submit to custodial interrogation because they believe that they can persuade interrogators of their innocence, see *supra* note 90, and not because they fear that their silence will be used against them, believe that they lack the right to stop questioning, or forget their rights during the course of lengthy interrogation. Moreover, Professor Godsey’s proposal might actually encourage suspects to waive their rights imprudently in the belief that they will be free to retract the waiver. In the absence of empirical study, it is hard to know whether this additional warning would make suspects’ decisions more or less considered. Eugene Milhizer goes even further, arguing that in addition to advising a suspect of his right to stop questioning at any time, the warnings should be reformulated to advise the suspects of the potential benefits of truthful cooperation. See Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects’ Dignity*, 41 VAL. U. L. REV. 1, 99–107 (2006). We have seen, however, that requiring that a suspect not only know his rights but receive helpful information in order to assess his own interests would require a rather dramatic reformulation of the law of waiver. In any event, if there is an argument for additional prophylactic protection of a suspect’s ability to engage in careful balancing of the tactical considerations relating to interrogation, his ability to invoke his right to have counsel present during interrogation would seemingly be the most efficacious means of protecting that interest.

¹⁰³ *Burbine*, 475 U.S. at 422.

¹⁰⁴ For helpful elaboration on this point, see Berger, *supra* note 102, at 1042–51. I consider the case for greater regulation of interrogation under the Due Process Clause in Part II *infra*.

pulsion traceable to *Bram*, and an equally settled conception of waiver.¹⁰⁵ Treating *Miranda* as a form of prophylactic constitutional law, in contrast, is a far more radical approach than that outlined here, and far less faithful to *Miranda* itself.¹⁰⁶ It is remarkable that courts and commentators alike have so readily accepted the reinterpretation of *Miranda* as prophylactic that began in *Tucker*—in other words, that custodial interrogation does *not* inherently involve compulsion—without any apparent recognition of the tension between such an assumption and both *Bram* and the concept of “compulsion” under the Fifth Amendment.

II. THE CONSTITUTION IS NOT PERFECT: THE FLAWED CASE FOR ADDITIONAL CONSTITUTIONAL REGULATION OF INTERROGATION

The available empirical evidence on the implementation of *Miranda*,¹⁰⁷ although limited, indicates that suspects subjected to

¹⁰⁵ A non-prophylactic conception of *Miranda* would not even necessarily require alteration of the scope of the *Miranda* exclusionary rule, at least when it comes to impeachment evidence. When an unwarned statement is sufficiently reliable to have probative value as impeachment, it is far from clear that the government has “compelled” a defendant to become a witness against himself when the statement becomes admissible only because the defendant has elected to testify inconsistently with the statement. Indeed, before the Court began referring to *Miranda* as a prophylactic rule, it held that unwarned but reliable statements were admissible for impeachment purposes. See *Harris v. New York*, 401 U.S. 222 (1971). For a lengthier argument in favor of this conclusion, see Donald Dripps, *Is the Miranda Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT. 19, 27–43 (2000). The argument for derivative use of unwarned statements in the prosecution’s case-in-chief, however, is considerably stronger. See, e.g., Yale Kamisar, *Response: On the “Fruits” of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995). Indeed, on the originalist view that the term “witness” includes anyone who provides the prosecution with physical or documentary evidence, even when no testimonial use is made of the act of production and only the physical or documentary evidence itself is introduced at trial, see *United States v. Hubbell*, 530 U.S. 27, 49–56 (2000) (Thomas, J., concurring). The Fifth Amendment itself would prohibit the introduction of the nontestimonial fruits of any compelled provision of evidence to the prosecution.

¹⁰⁶ In *Miranda* itself, the Court acknowledged that it “might not find the defendants’ statements [in the four consolidated cases at bar] to have been involuntary in traditional terms.” 384 U.S. at 457. This should not be taken as an acknowledgement that the Court was departing from traditional Fifth Amendment standards. The voluntariness test is anchored in the Due Process Clause, which provides protection against the admission into evidence of an involuntary confession separate and apart from the Fifth Amendment right against compelled self-incrimination. See *Withrow v. Williams*, 507 U.S. 680, 688–89, 693–94 (1993); *Miller v. Fenton*, 474 U.S. 104, 109–10 (1985). But by the time of *Miranda*, as we have seen, the Fifth Amendment had become applicable to state prosecutions. Thus, “involuntary in traditional terms” refers to the due process test.

¹⁰⁷ In invoking empirical evidence, I do not mean to enter the debate over the effects of *Miranda* on rates of confession and crime-solving. For a useful summary of the evidence on that point, see George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: “Embedded” in our National Culture?*, in 29 CRIME AND JUSTICE: A REVIEW OF RESEARCH 203, 232–45 (Michael Tonry ed., 2002). In my view, this is one of those debates that turns to a critical degree on whether *Miranda* is prophylactic. If it is, then consideration of its costs and benefits is amply warranted, as Professor Strauss has argued, see Strauss, *supra* note 18, at 967; if not, then even if *Miranda* has adversely affected law enforcement, that is a price that the Constitution requires be paid.

custodial interrogation invoke their right to halt the interrogation about twenty percent of the time, with the vast majority of invocations occurring at the point at which warnings are administered.¹⁰⁸ One of the most prominent members of the *Miranda*-is-a-failure school, William Stuntz, thinks that this evidence means that *Miranda* fails to effectively regulate interrogation because the rate of invocation is so low, and because invocations are so concentrated at the time warnings are given, that *Miranda* provides too little regulatory bite over the course of the subsequent interrogation.¹⁰⁹ He contends that *Miranda's* approach is to combat police overreaching by relying on suspects to invoke their rights, but the data, he argues, demonstrates that "suspects cannot do the kind of sorting that *Miranda* doctrine calls for."¹¹⁰

Professor Stuntz's critique is puzzling. As we have seen, the only "sorting" that *Miranda* expects of suspects is that they will knowingly and intelligently decide whether to waive their Fifth Amendment rights, and under settled waiver principles, suspects facing interrogation are perfectly competent to engage in such "sorting." In any event, it is unclear what kind of abuses Professor Stuntz thinks are going on during post-warning custodial interrogation that cry out for additional regulation. The Fifth Amendment, as we have also seen, is satisfied by a valid waiver under *Miranda*. To be sure, a suspect who has waived *Miranda* rights has not also waived his analytically distinct due process right to exclude from evidence an involuntary confession.¹¹¹ But Richard Leo's study, which Professor Stuntz himself labels as "the most thorough to date,"¹¹² establishes not only that levels of

¹⁰⁸ Cassell & Hayman, *supra* note 59, at 859–60; Leo, *supra* note 32, at 653. There were a number of studies in the immediate wake of *Miranda* that also reflected about a twenty percent invocation rate. See Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 495–96 (1996). There was a puzzling lack of further empirical study of *Miranda* until the mid-1990s. Cassell & Hayman, *supra* note 59, at 843–49. As Professor Schulhofer notes, there is cause for concern about the reliability of the immediate post-*Miranda* studies since they cover a period in which *Miranda* was still novel and the police had not yet adapted their tactics to its commands. See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 506–10 (1996). Nevertheless, the consistency of the invocation rate in the post-*Miranda* and later studies suggests that at least on this point, the earlier studies may be reliable indications of *Miranda's* current effects. The most recent study of juveniles also found about a twenty percent invocation rate. see Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 82 (2006), although an earlier study of juveniles had found that they invoke their rights at a rate of less than ten percent. See THOMAS GRISSO, *JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* 35–36 (1981).

¹⁰⁹ See Stuntz, *supra* note 30, at 986–92.

¹¹⁰ *Id.* at 991.

¹¹¹ See, e.g., *Withrow v. Williams*, 507 U.S. 680, 688–89, 693–94 (1993); *Miller v. Fenton*, 474 U.S. 104, 109–10 (1985); *Mincey v. Arizona*, 437 U.S. 385, 397–98 (1978).

¹¹² Stuntz, *supra* note 30, at 990.

compliance with *Miranda* are high,¹¹³ but also that the incidence of coercion during custodial interrogation is low, only about two percent.¹¹⁴ Even a study of judicial opinions available on West-law involving challenges to confessions—hardly a random sample—found no reason to doubt Professor Leo's findings on coercion.¹¹⁵

My own experience with custodial interrogation is consistent with this data, but does not lead me to Professor Stuntz's conclusion. My rough guess is that perhaps twenty percent of the custodial interrogations in which I participated as a prosecutor produced invocations, although my memory is vague; it could have been as high as one-third. But I very clearly remember that in every case, invocations occurred when the warnings were administered. In my experience, that pattern reflects the potency of the warnings—as I still vividly recall, the moment at which I administered warnings and solicited a waiver was the point in the process where I always felt a striking loss of control. At that point in the process, I could not advocate for cooperation; I had to stop and let the suspect ponder both the warnings and my request for a waiver. Small wonder that invocations cluster at that point. If suspects attached little meaning or significance to *Miranda* warnings, or if interrogators were somehow able to deemphasize them, invocations would occur in a more random pattern throughout the course of questioning.

¹¹³ See Leo, *supra* note 90, at 275–76. Accord Cassell & Hayman, *supra* note 59, at 888–90; Feld, *supra* note 108, at 71; George C. Thomas III, *Stories about Miranda*, 102 MICH. L. REV. 1959, 1975 (2004). There is, however, some evidence that some police departments have engaged in unwarned questioning as a matter of policy, providing warnings only after incriminating statements are obtained and then inducing the suspects to repeat those statements in compliance with *Miranda*. See Weisselberg, *supra* note 16, at 136–39. It is difficult to characterize this as police misconduct, since this tactic was seemingly sanctioned in *Oregon v. Elstad*, 470 U.S. 298, 314 (1985); indeed, the author of the *Elstad* opinion (and three other Justices of the Supreme Court) thought that such an approach had been condoned by that decision. See *Missouri v. Seibert*, 542 U.S. 600, 627–29 (2004) (O'Connor, J., dissenting). In any event, this practice is likely to come to a halt in light of the conclusion of a majority of the Court in *Seibert* that deliberate use of two-stage questioning with warnings given only after an incriminating statement is made will lead to suppression. See *id.* at 614 (plurality opinion); *id.* at 620–22 (Kennedy, J., concurring in the judgment). See also Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 545–47 (2002).

¹¹⁴ See Leo, *supra* note 90, at 282–84. The other leading study in recent years of *Miranda*'s implementation reached a similar conclusion. See Cassell & Hayman, *supra* note 59, at 888–94, 920. Although the interrogators in the Leo study knew they were being observed, Leo convincingly explains why that ultimately did not skew the data. See Leo, *supra* note 90, at 270–72. Barry Feld's recent study of juvenile interrogations also found no evidence of coercion. See Feld, *supra* note 108, at 70–90. Professor Leo's work is full of anecdotes describing what he regards as police overreaching, although the anecdotes are unaccompanied by any statistics establishing that these practices occur with frequency. See, e.g., Leo & White, *supra* note 45, at 431–50; Ofshe & Leo, *supra* note 34, at 1001–14.

¹¹⁵ See Thomas, *supra* note 113, at 1962, 1980–95.

But put all this aside. Even crediting Professor Stuntz's fears, *Miranda* is not properly labeled a failure. *Miranda* states only a single objective—to achieve compliance with the Fifth Amendment by ensuring that custodial interrogations occur only upon a valid waiver of the Fifth Amendment right to be free from compelled self-incrimination.¹¹⁶ No other objective is properly open to a court under the Fifth Amendment, which forbids, as we have seen, only compelled confessions, and not improvident ones. Nothing in Professor Stuntz's account explains why *Miranda* fails on this score. As I demonstrate above, *Miranda* produces valid waivers under long-settled conceptions of waiver. The waivers may often be foolish, but they are made with full awareness of the rights foregone.

There is, accordingly, no case to be made against *Miranda* on its own terms. At best, Professor Stuntz's critique supports an argument that there is some sort of police abuse during post-warning interrogation that requires additional regulation, but such an argument is not based on the inherent compulsion in custodial interrogation. Demanding better post-waiver regulation of interrogation under the Due Process Clause is easier said than done. Consider videotaping interrogations, perhaps the most common recommendation offered by the *Miranda*-is-a-failure camp.¹¹⁷ There is little doctrinal support for constitutionally mandated videotaping; the Court has held that the Due Process Clause does not require that the prosecution create or preserve evidence merely because it is potentially exculpatory.¹¹⁸ As the Court has written, it is "unwilling[] to . . . impos[e] on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance" absent a showing that "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant."¹¹⁹ Thus, at least when a law enforcement agency's standard policy involves no taping of interrogation, there is little doctrinal basis for a constitutional attack.

Perhaps doctrinal innovation would be warranted if videotaping yielded clear benefits, but it is unclear what videotaping is expected to accomplish. We have seen that there is little empirical evidence that noncompliance with *Miranda* or coercion during interrogation is common.¹²⁰ There is also little evidence that

¹¹⁶ See 384 U.S. at 467, 478–79.

¹¹⁷ See *supra* note 32.

¹¹⁸ See *Arizona v. Youngblood*, 488 U.S. 51, 56–59 (1988); *California v. Trombetta*, 467 U.S. 479, 485–90 (1984).

¹¹⁹ *Youngblood*, 488 U.S. at 58.

¹²⁰ See *supra* text accompanying note 113.

credibility disputes are common in litigation about custodial interrogation; George Thomas's review of custodial interrogation cases available on Westlaw disclosed that only four percent turned on the credibility of the participants.¹²¹ Thus, there is little reason to believe that videotaping is likely to improve *Miranda* compliance or enhance the reliability of factfinding—there is simply not much empirical evidence that either is a significant problem.¹²² Nor is videotaping likely to deter abuse even if it is infrequent—a truly sadistic officer will indulge himself in a location without cameras, and would be prepared to lie about what he has done after the fact.

Thus, we cannot expect videotaping to curb what are already deemed abuses under current law, which, in any event, have not been shown to be common. Moreover, in the absence of substantive regulation of interrogation techniques, it is unclear how videotaping is expected to lead to more effective regulation of interrogation. In *Frazier v. Cupp*,¹²³ for example, the interrogation was taped,¹²⁴ and yet that did not stop the police from deceiving the suspect by falsely claiming that his accomplice had confessed.¹²⁵ Thus, while a common claim of the *Miranda*-is-a-failure camp is that police deception during interrogation should be curbed,¹²⁶ videotaping will not lead to that objective. Given the political pressure to apprehend lawbreakers, the police can be expected to employ every lawful means for obtaining confessions, and therefore videotaping will not likely deter tactics that the courts condone.¹²⁷ One may dislike the kind of tactics recom-

¹²¹ See Thomas, *supra* note 113, at 1982–83.

¹²² An additional argument made in support of videotaping is that it will improve assessments of the voluntariness of confessions because it will enable the trier of fact to determine whether the suspect volunteered critical facts about the crime that were not publicly known or whether those facts were in fact supplied by interrogators. Leo, et al., *supra* note 31, at 511. But again, absent a rule forbidding the police from utilizing such facts during interrogation, it is unclear that evidence of the use of such tactics will have much of an effect. In violent crimes, for example, I would sometimes confront a suspect with particularly grisly aspects of the physical evidence in an effort to shake the suspect and suggest that laboratory analysis would ultimately link him to the crime. In my experience, juries are frequently sympathetic to this type of explanation for what might initially seem an overly aggressive interrogation tactic.

¹²³ 394 U.S. 731 (1969).

¹²⁴ *Id.* at 737.

¹²⁵ *Id.* at 737–39. Similarly, although Professor Feld advocates videotaping interrogations, the videotapes that he observed did not prevent what he regarded as improper, if subtle, efforts to influence juveniles to waive their rights similar to those observed by Professor Leo. See Feld, *supra* note 108, at 28, 90–99. The same was true of Professor Leo's study, in which he was actually present during interrogation, or observed videotaped interrogations, and nevertheless observed a variety of tactics that he viewed as unduly coercive. See Leo, *supra* note 90, at 269–72, 292–303.

¹²⁶ See *supra* note 35.

¹²⁷ Although videotaping advocates do not make the point, perhaps they believe that police will engage in self-regulation if they are concerned that juries will react adversely

mended by the manuals that encourage a suspect to believe that cooperation is in his interest, but absent substantive reform limiting the kinds of appeals that interrogators may make—before or after soliciting waivers—videotaping alone will not change interrogators' behavior.

The same problem infects proposals to require judges to undertake some sort of stricter review of the reliability and voluntariness of confessions.¹²⁸ The advocates of this approach frequently invoke the Central Park Jogger case to support their proposals for independent judicial review of the reliability of confessions.¹²⁹ In that case, three of the five defendants were arrested near the scene of a brutal assault and rape shortly after it occurred, at a time at which roving bands of youths had committed multiple assaults in the park; five suspects then confessed to participating in the assault while denying personal involvement in the rape; each confession provided details about the involvement of the other defendants; and three of the confessions were videotaped in the presence of the suspects' parents.¹³⁰ Nevertheless, the confessions were false; DNA evidence, tested years later, identified as the rapist another individual not linked to any of the defendants.¹³¹

The Central Park Jogger case is an uncertain poster child for more muscular judicial review of confessions. To be sure, there were inconsistencies in the Central Park Jogger confessions as each offender accused others of playing a principal role,¹³² but in cases involving joint action this is commonplace; in their confessions, offenders frequently endeavor to minimize their own role.¹³³ Indeed, the advocates of these reforms make no claim that confessions accompanied by these kinds of inconsistencies are usually unreliable; and they make no effort as well to identify

to what they perceive to be overly aggressive interrogation techniques. No empirical evidence has yet surfaced of such an effect, however, in jurisdictions that perform videotaping. As a prosecutor, I would have advised investigators to continue to utilize all lawful interrogation techniques during videotaped confessions, while seeking appropriate instructions informing the jury that the police used only lawful interrogation techniques during the videotaped session. It is therefore unclear at best that in such circumstances videotaping would have any predictable and significant regulatory bite, especially given the reality that juries are likely to approve of the use of such tactics when they are told they are lawful means to solve serious crimes.

¹²⁸ See *supra* note 34.

¹²⁹ Davies, *supra* note 34, at 230–52; Leo, et al., *supra* note 31, at 479–87.

¹³⁰ See TIMOTHY SULLIVAN, UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS 23–47, 84–85 (1992); Davies, *supra* note 34, at 215–16; Leo et al., *supra* note 31, at 479–82.

¹³¹ See Davies, *supra* note 34, at 220–22; Leo et al., *supra* note 31, at 482–84.

¹³² See Davies, *supra* note 34, at 244; Leo et al., *supra* note 31, at 536–37.

¹³³ See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 138–39 (1999); *Lee v. Illinois*, 476 U.S. 530, 544–45 (1986).

anything approximating an error rate for confessions of this type. In the Central Park Jogger case, for example, given that three defendants had been arrested near the scene of the crime, and that all five had been placed there by other witnesses, perhaps only with the benefit of hindsight can one confidently say that a judge should have deemed the confessions insufficiently reliable to be put before a jury.

Thus, the proposals for more searching reliability review come with all the hazards of regulation by anecdote; it is unclear whether the Central Park Jogger case reflects a systemic problem or is a bizarre outlier—perhaps borne of the fact that the defendants may well have participated in other assaults in the park that night and therefore were willing to admit a role in an assault without understanding their vicarious liability for the rape itself. For her part, one of the principal advocates of searching judicial scrutiny of confessions, Sharon Davies, does not propose a *per se* rule that interlocking but inconsistent confessions of persons found near the scene of a crime are never admissible absent some additional corroboration; she instead proposes a non-exclusive list of at least ten factors.¹³⁴ Ten-factor tests are unlikely, however, to produce predictable outcomes. Professor Davies makes little effort to defend her ten-factor test as an effective means of regulation in itself; instead she speculates that judges will do a better job than juries because their training and experience gives them greater expertise in evaluating the reliability of confessions.¹³⁵ She identifies no empirical evidence to support this claim, however, and with reason. For more than four decades, the Due Process Clause has been understood to require judges to make an independent finding of voluntariness before permitting a confession to be presented to a jury.¹³⁶ If judicial training and experience enabled judges to identify confessions that are the result of undue police pressure, then we should have expected that judges would have learned long ago how to smoke out confessions that were the likely result of police pressure under the rubric of voluntariness. After all, the requirement that judges make an independent finding of voluntariness permits as searching a review as is necessary to assure the court that a confession has not been induced by police over-

¹³⁴ See Davies, *supra* note 34, at 242–43. Professor Stuntz, for his part, is unable to identify any set of criteria to govern judicial review of interrogation techniques. See Stuntz, *supra* note 30, at 995–98. Professor Kamisar has similarly argued that custodial interrogation ought to take place in the presence of a judicial officer with the power to regulate the process, but is similarly unable to specify the criteria that should govern such regulation. See KAMISAR, *supra* note 34.

¹³⁵ See Davies, *supra* note 34, at 250–52.

¹³⁶ See *Jackson v. Denno*, 378 U.S. 368, 387 (1964).

reaching or an overborne will.¹³⁷ The fact that judges seem not to have developed what Professor Davies regards as reliable methods for screening out police-induced false confessions suggests that judicial expertise is not likely to solve the problem with which she is concerned.

Professor Leo, in addition to advocating mandatory videotaping if feasible (although the Central Park Jogger case would seem to argue against the efficacy of videotaping), would require a court to weigh three factors: whether the confession contains nonpublic information that can be independently verified; whether the confession led the authorities to discover new evidence; and whether the suspect's confession is consistent with the objective evidence.¹³⁸ Thus, like Professor Davies, Professor Leo advocates a discretionary test, rather than per se rules, again with good reason. As the late Welsh White observed, it makes little sense to exclude all confessions that are not corroborated by nonpublic information—that approach would make admissibility turn on frequently fortuitous circumstances that determine whether there is nonpublic information about the circumstances underlying a particular crime that can be used to independently corroborate a confession.¹³⁹ Indeed, Professor White may have been understating the problem. In my experience, it was difficult to get even highly motivated cooperating defendants to remember the details of crimes they had committed. Given the level at which most offenders operate, my guess is that Professor Leo is asking for an unrealistic degree of corroboration—certainly he provides no empirical evidence that the level of corroboration that he would require is usually present in truthful confessions. In any event, his balancing test, preserving as it does the ample discretion that inheres in all balancing tests, of-

¹³⁷ While the voluntariness test, as framed by the Court, requires an inquiry into police overreaching rather than reliability per se, see *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), the voluntariness test is broad enough to reach an unwarranted effort by the police to induce a suspect willing only to admit to a relatively minor crime to link himself to a far more serious one. As the Court has put it: "the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Miller v. Fenton*, 474 U.S. 104, 116 (1985).

¹³⁸ See Leo et al., *supra* note 31, at 531. George Thomas has advanced proposal along somewhat the same lines to exclude confessions that are a product of interrogation techniques that involve both high pressure and large incentives to confess. See George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEXAS TECH. L. REV. 1293, 1298–1317 (2007). This proposal, like that of Professor Leo, seems to involve at least as much judicial discretion as Professor Davies' approach, and it is far from clear that its actual operation would differ in any meaningful respect from the traditional voluntariness inquiry.

¹³⁹ See Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2024–28 (1998).

fers little guarantee that judicial screening of confessions will improve. The traditional voluntariness test requires judges to consider all of the factors identified by Professor Leo when assessing the admissibility of a confession, and yet by his own account, it has failed to weed out coerced confessions.

Thus, it is far from apparent that reliability review would be more effective than the voluntariness review that predominated prior to *Miranda*, and which most commentators have condemned as having failed to produce consistent and effective regulation.¹⁴⁰ It is equally unclear that the judiciary could speak with sufficient uniformity on interrogation tactics to constitute a reliable regulator. Given the malleability of the voluntariness/reliability tests, it is unclear that a more muscular form of judicial review of confessions would be consistent or principled.¹⁴¹

¹⁴⁰ See, e.g., MARK BERGER, *TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION* 104–12 (1980); KAMISAR, *A Dissent*, *supra* note 51, at 69–76; WHITE, *supra* note 30, at 39–48; Godsey, *supra* note 35, at 468–71; Ogletree, *supra* note 33, at 1833–35; Penney, *supra* note 65, at 337–62; Schulhofer, *supra* note 91, at 869–72; Seidman, *supra* note 30, at 727–36; Weisselberg, *supra* note 16, at 113–16. Even Professor Stuntz, another important advocate of greater judicial regulation of confessions, has acknowledged, “once one assumes that *some* pressure is acceptable, it is very hard to define how much pressure is too much.” Stuntz, *supra* note 30, at 980. Professor Godsey attempts to solve this problem by arguing that interrogators should be forbidden to threaten to impose what would be objectively characterized as a penalty on a suspect during interrogation to punish silence or encourage a confession, while acknowledging that a threat to seek the suspect’s conviction or an offer of leniency if the suspect cooperates should not be viewed as a penalty. See Godsey, *supra* note 35, at 515–38. It is unclear that this proposal is any different than existing law; indeed, Professor Godsey makes no effort to demonstrate that courts currently admit confessions obtained through what he regards as improper penalties. There is reason to be skeptical on this point. See, e.g., *Lynumn v. Illinois*, 372 U.S. 528 (1963) (inducing confession by threats that defendant would lose custody of her children); *Spano v. New York*, 360 U.S. 315 (1959) (inducing confession by threat that suspect’s friend would lose his job if suspect failed to cooperate). See also Paul Marcus, *It’s Not Just about Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 619–21 (2006) (reviewing cases). Moreover, as we will see below, the empirical work performed to date has not disclosed the use of such punitive tactics as a significant cause of false confessions. In any event, Professor Godsey’s concession that a confession made in the hope of leniency does not invalidate a resulting confession confirms the propriety of the most commonly used interrogation techniques.

¹⁴¹ For example, despite supposed judicial expertise in sentencing, the empirical evidence on pre-guidelines sentencing demonstrated the existence of substantial inter-judge sentencing disparities that were, among other things, the impetus for state and federal sentencing guidelines. See, e.g., *Blakeley v. Washington*, 542 U.S. 296, 315–20 (2004) (O’Connor, J., dissenting); *id.* at 332 (Breyer, J., dissenting); Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 395 (1991); Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272–74 (1977); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 311–12 (2001); Ilene H. Nagel, *Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895–97 (1990); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227–28 (1993). There is little reason not to expect similar disparities in judicial attitudes toward interro-

To be sure, judicial regulation would have relatively predictable regulatory consequences if it were based upon clear rules. The best example of such an approach comes from those who advocate the abolition of custodial interrogation by the police.¹⁴² The proponents of this approach argue that valid waivers cannot be given by suspects who are subject to the pressures of custodial interrogation.¹⁴³ The advocates of abolition of custodial interrogation, however, make little effort to explain how their position can be squared with longstanding principles of waiver. As we have seen, the settled rule is that a suspect can validly waive constitutional rights when he thinks it is in his interest to do so despite the pressures created by a pending investigation or prosecution, and regardless of whether the suspect has correctly assessed his own interests.¹⁴⁴ Of course, one could simply announce that as a prophylactic matter, the *Miranda* right to counsel cannot be waived during custodial interrogation, but such a rule would be quite a radical innovation in the law of waiver.¹⁴⁵

gation techniques under a regime of searching but ad hoc judicial review.

¹⁴² See *supra* note 36 and accompanying text.

¹⁴³ Irene and Yale Rosenberg, for example, argue that even a counseled waiver is necessarily infected by the pressures of custodial interrogation. See Rosenberg & Rosenberg, *supra* note 36, at 107–14. Professor Kamisar argues that the required warnings ought to be given by or in the presence of a judicial officer. See KAMISAR, *supra* note 34.

¹⁴⁴ See *supra* text accompanying notes 74–102. To be fair, Charles Ogletree has made an attempt along these lines. Writing before the Supreme Court established that the Sixth Amendment right to counsel can be waived extrajudicially in *Patterson v. Illinois*, 487 U.S. 285, 292–93 (1988), he acknowledged that the right to counsel can be validly waived before a judicial officer, but argued that “[a] suspect does not have the same degree of protection in the stationhouse when the warnings are given by a police officer intent on interrogating the suspect . . .” Ogletree, *supra* note 33, at 1844 n.97. We have seen, however, that the test for waiver asks only if the defendant knows he has a right to counsel and intentionally surrenders it; waiver law has never asked whether the defendant knows enough about the value of counsel to correctly assess his own interests. See, e.g., *Iowa v. Tovar*, 541 U.S. 77, 87–92 (2004). And, as we have also seen, the *Miranda* warnings ensure that the suspect knows that he has a right to have counsel present during questioning. Thus, the structure of waiver law seems far more consistent with *Patterson* than with Professor Ogletree’s position, and the propriety of extrajudicial waivers of the Fifth Amendment right to counsel recognized in *Miranda* should follow *a fortiori* from *Patterson*.

¹⁴⁵ An additional objection can be made to the proposal that is sometimes advanced that would conjoin judicially supervised interrogation, whether in counsel’s presence or not, with a warning that the suspect’s refusal to answer questions could be used as evidence of his guilt at trial. See, e.g., AMAR, *supra* note 49, at 70–88; KAMISAR, *supra* note 34, at 84, 93–94; Alschuler, *supra* note 51, at 2667–72; see also Russell D. Covey, *Interrogation Warrants*, 26 CARDOZO L. REV. 1867, 1904–09, 1926–32 (2005) (advocating for compulsory police interrogation authorized by a warrant). These proposals, however, do not properly accommodate the text of the Fifth Amendment. A guilty defendant subject to such a procedure, for example, has no choice but to incriminate himself, either by confessing, providing an exculpatory account that could later be disproved and therefore used as an incriminating false statement of exculpation (as in *Bram*), or remaining silent, which would itself be treated as evidence of guilt. It appears that compulsory pretrial examination of an accused was common in most states at the time of the framing, but there is little evidence of any prevalent legal understanding that squared this practice with the text

Perhaps doctrinal innovation would be appropriate based on a sufficient showing that the current approach has led to widespread abuse. Abuse, however, cannot be defined as evidence that police succeed in obtaining waivers in a substantial majority of cases. As we have seen, nothing in the Fifth Amendment forbids a waiver of the right to be free from compelled self-incrimination. A showing that current waiver law failed to prevent what must be compelled or involuntary confessions, however, might well justify doctrinal reform. Such a case for innovation, however, is necessarily an empirical one, and only a few of the *Miranda* critics attempt to make it.¹⁴⁶

One *Miranda* critic who did take up this cudgel was Professor White. Based on a review of confessions in cases in which the suspect was ultimately exonerated, he argued for a prohibition on techniques that have produced significant numbers of false confessions: lengthy interrogations, interrogation of vulnerable suspects such as minors or the mentally disabled, and interrogations involving threats, deception or promises.¹⁴⁷ Similarly, Professor Leo has used empirical evidence of false confessions to support his proposal that confessions must be corroborated by independent evidence to guard against what he regards as an unacceptable risk of a false confession.¹⁴⁸ This approach, like a flat ban on

of the Fifth Amendment. See Moglen, *supra* note 52, at 1123–29. In any event, the practices of the states at the time of the framing are of little relevance since the Fifth Amendment was not made applicable to the states until *Malloy v. Hogan*, 378 U.S. 1 (1964). Rather than basing his argument on an originalist understanding of the Fifth Amendment, Professor Alschuler asserts that “[a] suspect’s answers to orderly questioning in a safeguarded courtroom environment should not be regarded as the product of compulsion,” Alschuler, *supra* note 51, at 2670, but it is difficult to take this argument seriously. Under such a system, a suspect would be compelled to attend the judicial interrogation under threat of sanction. That is compulsion no less than is requiring a suspect to take an oath under threat of contempt. As we have seen, the threat of criminal sanctions if a suspect does not submit to interrogation is the proper place to draw the line between persuasion and compulsion. And while this objection is particularly acute for suspects who are in fact guilty, the text of the Fifth Amendment does not limit its protections to the innocent.

¹⁴⁶ This is not to say that the critics have been completely unable to find empirical evidence of interrogation techniques inconsistent with *Miranda*. For example, there is anecdotal evidence that police sometimes tell suspects that the only way they can learn about the charges against them or obtain some form of leniency is to waive their *Miranda* rights. Leo & White, *supra* note 45, at 440. This evidence shows a misdescription of the suspect’s rights and the consequences of invoking them given a suspect’s right to notice of charges and his ability to engage in plea bargaining even after asserting his *Miranda* rights. Accordingly, under traditional waiver principles, these tactics will fail to produce valid waivers because they mislead the suspect about the nature of his rights and the consequences of invoking them. Indeed, under current law, confessions obtained through misrepresentations of this type are usually suppressed. Marcus, *supra* note 140, at 615–18.

¹⁴⁷ WHITE, *supra* note 30, at 196–215. See also, e.g., Alschuler, *supra* note 32, at 971–74 (false statements about the evidence against the suspect); Gohara, *supra* note 35, at 834–40 (deception); Young, *supra* note 35, at 456–75 (same).

¹⁴⁸ Leo et al., *supra* note 31, at 512–19, 525–35.

custodial interrogation, is unquestionably prophylactic. Professor White, for example, never argued that lengthy interrogations, interrogation of vulnerable suspects, or interrogations involving threats and deception always produce involuntary or unreliable confessions; instead, his claim was that the risk of an involuntary, unreliable, or otherwise suspect confession is so high in such circumstances that confessions obtained through these tactics should be barred from evidence by the Due Process Clause.¹⁴⁹ Similarly, although the Leo proposal is vague about the doctrinal basis for its approach, it, too, is rooted in concerns about the supposed prevalence of unreliable confessions, and appears to be premised on the Due Process Clause.¹⁵⁰

The Due Process Clause is indeed the best doctrinal support for these proposals. Suspects who have waived their *Miranda* rights have already made a decision to subject themselves to compelled self-incrimination by agreeing to answer the questions of their captors, and in any event, the advocates of these reforms do not claim that the confessions that they would exclude necessarily involve compulsion within the meaning of the Fifth Amendment.¹⁵¹ To be sure, *Bram* supplies at least some support for using the Fifth Amendment to regulate threats or promises; in *Bram*, the Court wrote that "a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."¹⁵² This passage, however, did not consider whether an admissible confession might result if a confession is preceded by a knowing and intelligent waiver of Fifth

149 WHITE, *supra* note 30, at 196–215; White, *supra* note 139, at 2042–58.

150 See Leo et al., *supra* note 31, at 493–522; Ofshe & Leo, *supra* note 34, at 1115–22.

151 For present purposes, I put aside the question whether some suspects, because of their age or mental condition, should be deemed incapable of validly waiving their *Miranda* rights. There will undoubtedly be circumstances in which youth or mental disability might prevent an individual from supplying a valid waiver, but there will also be many circumstances in which minors or those under a mental disability will be able to make a deliberate and voluntary choice to waive their *Miranda* rights, which is all that standard waiver doctrine requires. See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 169–70 (1986) (holding that voluntariness of a waiver "has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word"). It is worth noting, however, that one recent study concluded that the ability of juveniles older than fifteen to understand their *Miranda* rights while under interrogation was on par with that of adults. Feld, *supra* note 108, at 90–92. The author warned, however, that juveniles may be more vulnerable to police influence. *Id.* at 98–100. Another recent study provides far greater reason to doubt that mentally retarded subjects are capable of giving valid waivers. See Morgan Cloud et al., *Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002).

152 *Bram v. United States*, 168 U.S. 532, 542–43 (1897) (quoting SIR WM. OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (Horace Smith & A.P. Perceval Keep eds., 6th ed. 1896)). See also Hirsch, *supra* note 35, at 54–59.

Amendment rights. Moreover, the Court has more recently stated that “this passage [in] *Bram* . . . does not state the standard for determining the voluntariness of a confession.”¹⁵³ The Court was correct; as we have seen, under settled principles of waiver, the fact that a suspect is facing the threat of enhanced sanctions if he asserts his constitutional rights does not invalidate a waiver of those rights, as long as the suspect understands his rights and elects to surrender them in the hope of some reciprocal advantage.¹⁵⁴

Thus, we are left with the Due Process Clause as the basis for additional judicial regulation of interrogation. Assessing the case for due process regulation, however, involves a necessarily empirical inquiry. Suppose, for example, that the type of threat that is condoned by the plea bargaining cases—the threat to take the suspect to trial on the most serious possible charges and then seek the harshest possible sentence—was likely to produce only accurate confessions because only guilty suspects were likely to yield to such a threat.¹⁵⁵ Or suppose that the type of deception condoned by *Frazier v. Cupp*—false claims that the authorities have highly incriminating evidence against the suspect—was also likely to produce reliable confessions because only the guilty were likely to yield to such claims.¹⁵⁶ As it happens, there is some empirical evidence that pressure or deception is useful to obtaining confessions, and is more likely to produce truthful than false confessions.¹⁵⁷ It is surely difficult to construct an argu-

¹⁵³ *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991).

¹⁵⁴ See *supra* text accompanying notes 74–102.

¹⁵⁵ The defenders of plea bargaining often take essentially this view of the plea bargaining process, which, we have seen, also involves threats of punishment as a means to garner waivers of constitutional rights. See generally, e.g., Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599 (2005); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

¹⁵⁶ Some courts have condoned such deception because they believe that suspects who are confident of their innocence will not be influenced by this form of deception. See, e.g., *State v. Kelekolio*, 849 P.2d 58, 71–74 (Haw. 1993); *Sheriff, Washoe County v. Bessey*, 914 P.2d 618 (Nev. 1996).

¹⁵⁷ See Christopher Slobogin, *Lying and Confessing*, 39 TEXAS TECH. L. REV. 1275, 1280–84 (2007). One particularly striking study involved interrogation of participants about whether they had improperly received assistance during a decision making exercise, utilizing for some participants a interrogation tactic involving an offer of leniency if they confessed and, for others, the use of tactics designed to minimize the seriousness of the offense. The study indicated that these pressure tactics, at least when used separately, increased the rate of true confessions far more than the rate of false confessions

Condition	True Confessions	False Confessions
No Tactic	46%	6%
Deal	72%	14%
Minimization	81%	18%
Minimization + Deal	87%	43%

ment that due process forbids interrogation techniques that are likely to produce accurate confessions by suspects who have knowingly and intelligently agreed to submit to interrogation despite an awareness of their *Miranda* rights—indeed, the advocates of additional due process regulation do not make such an argument.¹⁵⁸ To be sure, some commentators are troubled by any form of official deception,¹⁵⁹ but adopting that view would mark a radical change in our constitutional tradition which, for example, has long tolerated police undercover work despite the necessary deceit that it usually entails.¹⁶⁰ Moreover, it is a respectable moral position to permit official deceit in the interest of a greater social good, such as the detection or prevention of crime, at least when there is not an unreasonable likelihood of convicting the innocent and when those who employ these tactics are subject to political accountability.¹⁶¹ Thus, for the most part, the advocates of additional due process regulation of interrogation tactics stake their position on an empirical claim that these tactics endanger the innocent.¹⁶²

The problem with the empirical case for greater due process regulation, however, is that we have no idea what rate of false confessions is produced by the tactics that the critics have tar-

Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 484 Table 1 (2006). Still, data assembled under experimental conditions should be viewed with caution. See *supra* note 90.

¹⁵⁸ I put aside confessions obtained by false promises of leniency or other benefits. Although the Supreme Court has never squarely decided whether a confession induced by a promise of leniency must be suppressed if the promise is not honored, it has held that a guilty plea cannot stand when induced by an unfulfilled promise. See *Santobello v. New York*, 404 U.S. 257, 261–63 (1971). It would seem to follow that a promise that induces a confession must be honored. See *Welsh S. White, Confessions Induced by Broken Government Promises*, 43 DUKE L.J. 947 (1994). For a review of the pertinent case law, which makes inadmissibility turn on whether the defendant confessed in reliance on an unfulfilled promise, see Marcus, *supra* note 140, at 621–24. To be sure, a skillful interrogator will be able to raise a suspect's hopes for leniency without making a promise—I did just that on many occasions.

¹⁵⁹ See, e.g., Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817 (1997); Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3 (1995); Young, *supra* note 35, at 468–71. Deborah Young, without citing empirical evidence to support her supposition, adds a utilitarian claim by arguing that police deceit is counterproductive because it will produce distrust that will ultimately reduce civilian cooperation with the authorities. See *id.* at 457–60. Those who claim that the law enforcement community does not understand where its own interests lie should bear the burden of adducing some empirical evidence to that effect.

¹⁶⁰ See, e.g., *United States v. White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966); *On Lee v. United States*, 343 U.S. 747 (1952); *Andrews v. United States*, 162 U.S. 420 (1896); *Grimm v. United States*, 156 U.S. 604 (1895).

¹⁶¹ For an argument along these lines, see Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997).

¹⁶² See, e.g., WHITE, *supra* note 30, at 196–215; Alschuler, *supra* note 32, at 967–78; Gohara, *supra* note 35, at 816–34.

geted. For example, there is no data that provides even a rough guess about how likely the tactics that Professor White has identified produce false confessions, much less wrongful convictions,¹⁶³ as Professor White ultimately acknowledged.¹⁶⁴ Similarly, Professor Leo's approach, forbidding what are thought to be inadequately corroborated confessions, makes no effort to identify an error rate for such confessions.¹⁶⁵ It may be that a good many confessions with no more corroboration than was present in the Central Park Jogger case, for example, are entirely accurate. Nor have the advocates of the Leo approach explained why judges are more likely than juries to be able to identify confessions that are likely to be false. No empirical evidence supports such a claim, and, as we have seen, the judicial track record under the current voluntariness test provides little cause for optimism.

Maybe even more important, we do not even know if the tactics identified by the critics produce *disproportionate* numbers of false confessions. Perhaps they do not. When I engaged in interrogation as a prosecutor, for example, I usually engaged in some degree of puffing about the strength of the case against the suspect—something that might well be branded deception. I also regularly engaged in what could be characterized as threats—at least the kind of threat to seek the maximum punishment generally condoned by the plea bargaining cases.¹⁶⁶ And, in every multiple confession case that I handled, the suspects initially contradicted each other, placing greater culpability on each other.

Thus, it would not surprise me if the vast majority of custodial interrogations involve the features condemned by critics. If so, the fact that a study of false confessions will frequently disclose the use of the interrogation tactics identified by Professor White, or what Professor Leo would regard as insufficiently corroborated confessions, provides no basis to conclude that these

¹⁶³ See, e.g., Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 503–38 (1998); Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1188–97 (2001).

¹⁶⁴ See White, *supra* note 30, at 1224–29. Instead, Professor White argued that the data suggests that about one-tenth of wrongful convictions involve false confessions in potentially capital cases, while admitting that the percentage of confession-induced wrongful convictions is likely lower in non-capital cases. See *id.* at 1228–29. This tells us next to nothing about the rate at which the interrogation tactics of which he complains induce wrongful confessions, and even less about how many truthful confessions would be lost under the reforms that he advocates.

¹⁶⁵ See Leo et al., *supra* note 31, at 512–20.

¹⁶⁶ To be fair, I should acknowledge that as I gained experience, I tended to place these threats into a type of “I’d really like to help you if you’ll let me” context, not because I had particular scruples about threats, but because I found that a congenial ambience made for more effective interrogation.

features increase the likelihood that a confession is false. At best, it is probably reasonable to presume that more aggressive interrogation techniques will produce a higher rate of confessions than more passive approaches, but it is entirely unclear that the rate of false confessions will also increase through more aggressive techniques.¹⁶⁷

Although the critics make no effort to identify an error rate for the confessions that they would exclude from evidence, perhaps their surveys of false confession cases justifies an assumption that there is some nontrivial error rate associated with the interrogation tactics that they target for elimination. But “[t]here is always in litigation a margin of error”¹⁶⁸ I never prosecuted an individual about whose guilt I had a reasonable doubt, but if it surfaced today that some of the convictions I obtained were inaccurate, I would not be shocked. Even under a reasonable-doubt standard, factfinding is necessarily a probabilistic business, and most kinds of proof inject a risk of error. For example, the available empirical evidence demonstrates a risk of error in the use of eyewitness testimony,¹⁶⁹ accomplice testimony,¹⁷⁰ and even fingerprint evidence.¹⁷¹

In fact, false confessions may not be the leading cause of erroneous convictions. Surveys of documented exonerations consistently find that eyewitness testimony is the leading cause of false convictions.¹⁷² It would seem to follow (once any need to identify

167 To be sure, one can build an anecdotal case that interrogators sometimes persuade a suspect that his position is so hopeless that he has no realistic choice but to confess, see, e.g., Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents At Risk?*, 60 AM. PSYCHOLOGIST 215, 220–22 (2005); Ofshe & Leo, *supra* note 34, at 1004–114, but this says nothing about the rate at which the very same tactics induce a guilty suspect to provide an accurate confession.

168 *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

169 See, e.g., BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 10–13 (1995); Gross et al., *supra* note 31, at 542–44; Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581 (2000).

170 See, e.g., Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107 (2006).

171 See, e.g., Simon A. Cole, *More than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985 (2005); Simon A. Cole, *The Prevalence and Potential Causes of Wrongful Conviction by Fingerprint Evidence*, 37 GOLDEN GATE U. L. REV. 39 (2006).

172 See, e.g., Gross et al., *supra* note 31, at 542–46; Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, in *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 1, 10–11 (Michael Tonry ed., 2005); Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 253–56 (2006). This estimate should be viewed with caution, however, since documented exonerations are not likely to be a random sample of all wrongful convictions, but instead are heavily skewed toward sex crimes and other types of offenses in which DNA or other conclusive physical evidence can establish factual innocence, or serious crimes subject to intensive investigation. See, e.g., Gross, et al., *supra* note 31, at 529–40.

an actual error rate has been jettisoned) that if due process mandates regulation of interrogation practices because of the risk of error, due process must compel restrictions on the use of eyewitness testimony, and other types of evidence or investigative tactics that produce what one could plausibly surmise to be an unacceptable error rate.¹⁷³ Moreover, even if courts could somehow divine error rates, how are they to decide what constitutes an unacceptable risk of error? Three percent? Ten percent? We are not told, but presumably the critics would require restrictions on investigative tactics at something well below fifty percent. That would mean that far more reliable evidence of guilt would be excluded than would false evidence of guilt. And what about the large numbers of guilty offenders who will go unpunished if courts brand as impermissible investigative tactics that are far more likely to produce accurate than false convictions but that nevertheless produce error rates that are thought to be unacceptable? The *Miranda-is-a-failure* scholarship evinces no particular concern about this problem, although surely there is reason to believe that conviction rates will be reduced if eyewitness identifications, accomplice testimony, aggressive interrogation techniques, or other tactics thought to produce unacceptable error rates are sharply circumscribed, if not prohibited altogether.¹⁷⁴

All of this should suggest that due process regulation of interrogation and other investigative techniques based on a presumed risk of error is deeply problematic. Nor is there any ready answer to the argument that “due process,” in this context, requires something more than deference to the political process.¹⁷⁵

¹⁷³ Due process already requires the exclusion of eyewitness identifications that are thought to be the product of unduly suggestive identification procedures absent sufficient indicia of reliability. *Manson v. Brathwaite*, 432 U.S. 98, 109–14 (1977). But since this rule appears not to have prevented some significant number of false convictions, the logic of the due process position would seem to be that it must be supplemented by some additional prophylactic safeguards.

¹⁷⁴ The risk that reforms will go wrong is far from hypothetical. Although a large majority of experts in the field of identification testimony have relied on laboratory data to urge that witnesses view potential offenders sequentially rather than in simultaneous lineups in procedures administered by a “blind” official who does not know who has been identified as a suspect by investigators, see Dawn McQuiston-Surrett, Roy S. Malpass & Colin G. Tredoux, *Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory*, 12 *PSYCHOL. PUB. POL’Y & L.* 137, 137–38 (2006), the limited empirical data gathered in the field to date shows that the rate at which the suspect is identified goes down while the rate at which an innocent “filler” is identified goes up. See *id.* at 161–62. Thus, it appears that this technique may increase the risk that an innocent suspect will be identified.

¹⁷⁵ When it comes to what are considered “legislative” rules applied to large numbers of cases, the legislative process is ordinarily thought to supply all the process that is constitutionally “due.” See, e.g., *Atkins v. Parker*, 472 U.S. 115, 129–30 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432–33 (1982); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

It is hard to be unsympathetic to the problem of false convictions, but for that very reason, it is far from clear that the political process will fail to respond to the problem, at least when reliable data becomes available demonstrating how the error rate in the criminal process can be efficaciously reduced without unacceptable limitations on the ability to convict the guilty.

Due process is not unconcerned with the risk of error in the criminal justice system. Due process is understood to require the prosecution to prove a criminal defendant's guilt beyond reasonable doubt for just this reason.¹⁷⁶ The advocates of due process regulation of interrogation (and other investigative) techniques, however, seek additional protection, based on evidence that these techniques produce some nontrivial (although as yet unascertained) error rate. As a doctrinal matter, the absence of any historical support for prophylactic due process regulation of interrogation techniques based on a presumed risk of error might itself doom the case for new regulation.¹⁷⁷ Even putting that problem aside, however, no one could tenably read the Due Process Clause as a prohibition of error in the criminal justice system. In any system administered by humans, there will be error. Surely "due process" accommodates that much reality.

CONCLUSION

The advocates of due process prohibition of interrogation techniques thought to pose unacceptable risks of error are what Henry Monaghan once called constitutional "perfectionists."¹⁷⁸ Although he applied the label to the 1970s-vintage movement among legal scholars to read the Constitution as mandating whatever they believed to be a more just system of governance,¹⁷⁹ the same phenomenon is today perhaps even more prevalent among scholars of constitutional criminal procedure. Led by Professor Stuntz, they read the Constitution to command whatever

¹⁷⁶ See, e.g., *Cage v. Louisiana*, 498 U.S. 39, 39–40 (1990) (per curiam); *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *Addington v. Texas*, 441 U.S. 418, 423–24 (1979); *In re Winship*, 397 U.S. 358, 370–72 (1970) (Harlan, J., concurring).

¹⁷⁷ See *Medina v. California*, 505 U.S. 437, 442–46 (1992). See generally Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretative Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001). To be fair, there is at least a bit of precedent for ahistorical due process regulation in order to reduce the risk of error in the criminal process. The Court departed from history when, in *Brady v. Maryland*, 373 U.S. 83 (1963), it held that prosecutors must disclose exculpatory information to the defense, and subsequently broadened that duty to require prosecutors to identify and disclose exculpatory information in the hands of the police and other investigators, see *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), even though historically prosecutors had never been placed under any type of duty of disclosure. Michael Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 865–67, 893–99 (1968); see generally JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 283–343 (2003).

¹⁷⁸ Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 358 (1981).

¹⁷⁹ See *id.* at 355–60.

they believe to be the optimal system of convicting the guilty and protecting the innocent.¹⁸⁰

The Constitution's objectives, however, are more modest. Our Constitution does not contain a "no-conviction-of-the-innocent" clause, presumably not because anyone wants to convict the innocent, but because such an objective is unattainable. Perhaps the empirical evidence may one day be available that will enable us to reduce the risk of error in the criminal process without placing unacceptable constraints on our ability to convict the guilty. That day, however, has not yet arrived. And, although scholars can occupy the ivory towers of constitutional perfectionism with impunity, those in the trenches of law enforcement are expected to deal with the grimmest of daily realities. In that world, perfectionism is beyond reach. Getting a valid *Miranda* waiver ought to be good enough.

¹⁸⁰ Professor Stuntz's criticism of *Miranda*, for example, is that it fails to achieve what he regards as distributive justice by maximizing the number of suspects who submit to interrogation while minimizing what he regards as abusive questioning. See Stuntz, *supra* note 30, at 992–98. It is far from clear how this objective comports with the text of the Fifth Amendment, but that does not seem to be the point of the exercise.

Reliability Lost, False Confessions Discovered

Mark A. Godsey*

INTRODUCTION

The advent of post-conviction DNA testing in the past twenty years has spawned an “Innocence Revolution,” in which hundreds of Americans imprisoned or on death row for serious crimes like murder and rape have been conclusively proven innocent and released.¹ DNA testing gives our criminal justice system something like a crystal ball—it allows us to look back in time with absolute clarity to determine how and where things went wrong in ways we never could before.

It was not uncommon in earlier decades to find judicial opinions espousing the view that wrongful convictions simply do not occur in America. Now, however, we know better. From studying the cases of wrongful convictions, we now know that eyewitness identification is not nearly as reliable as once believed.² We also know that hundreds of innocent people have been convicted through the use of “junk science,” such as bite mark analysis or microscopic hair comparison, which DNA testing has proven to be wildly inaccurate.³

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1 Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

2 Arnold Loewy, *Systemic Changes That Could Reduce the Conviction of the Innocent* 4 (UNC Legal Studies Research Paper No. 927223, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927223; Gross, *supra* note 1, at 542. See also Innocence Project—Eyewitness Misidentification, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>.

3 Loewy, *supra* note 2, at 7. See also Innocence Project—Unreliable and Limited Science, <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php>.

Most importantly for my purposes here, we now know that suspects will confess all too often to crimes that they did not commit, leading to wrongful convictions.⁴ Of all the things that DNA has taught us about our criminal justice system, this phenomenon is perhaps the hardest to accept. The idea that a suspect would falsely confess to a crime that he did not commit seems counterintuitive and nonsensical. Psychiatrists and social scientists are examining the reasons why false confessions occur, and we have a long way to go before we will have a complete answer. At any rate, DNA testing has proven that false confessions by innocent people occur more often than most would have ever imagined.

For centuries, constitutional confession law in the United States has been concerned with the reliability and accuracy of confessions. Prior to admitting the confession into evidence, a court in this country had to examine whether the confession at issue was accurate and trustworthy. In the 1986 case of *Colorado v. Connelly*,⁵ however, the United States Supreme Court suddenly subverted reliability as a factor when considering the admissibility of a confession. Then, ironically, shortly after *Connelly* was decided, DNA testing started to reveal why we *should* be very concerned about the reliability of confessions after all. Indeed, within a decade of the *Connelly* decision, the false confession problem in this country had been laid bare.

In this essay, I attempt to shed light on this legal irony. Part I briefly traces the role of the reliability factor in constitutional confession law from its origins through today. Part II briefly explores our recent discovery of the false confession problem through DNA exonerations. In the Conclusion, I offer some thoughts on how this problem should be resolved.

I. THE RELIABILITY FACTOR: A HISTORICAL EXAMINATION

Interestingly, courts in the eighteenth and nineteenth centuries were much more aware of and concerned with the problem of unreliable confessions than their modern counterparts. Anyone today who is concerned about innocent people being convicted by the use of false confessions would be envious of the protective doctrines in place during confession law's infancy. Indeed, prior to the ratification of the Bill of Rights, the common law in England was fast developing a rule of evidence that was highly suspicious of confessions. The rule made it quite easy for a defen-

⁴ Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 484–85.

⁵ 479 U.S. 157 (1986).

dant to have his confession thrown out if the interrogator made any sort of promise or threat of the type quite common in modern interrogations.⁶ The reason for this delicacy was the fear of false confessions—that any sort of inducement might cause an innocent person to utter an untruth.⁷ As the seminal 1783 case of *The King v. Warickshall*⁸ noted:

Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled [sic] to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, . . . but a confession forced from mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected.⁹

In *Warickshall* and the American cases that followed its lead in the nineteenth century, even slight pressures—such as those which would be considered the norm in modern interrogation rooms—were deemed impermissible.¹⁰ Many of these cases involved hints of leniency by the interrogators. In the 1845 American case of *State v. Bostick*,¹¹ for example, a promise by the interrogator—that the suspect would receive leniency and would be “sent home” if she confessed—rendered the resulting confession inadmissible. The court stated:

[W]here promises of favor or threats are used, the great danger is, that the confession, whether verbal or written, may be untrue; proceeding, not from a sense of guilt, but from the influence of hope or fear. In such cases, the confession is rejected. Therefore, a confession obtained by temporal inducement, by threat, or by a promise of hope or favor, having some reference to the party's escape from the charge, held out by a person in authority, is inadmissible.¹²

In 1897, the Court in *Bram v. United States*¹³ incorporated this common law rule of evidence, presently called the “voluntariness rule,” into constitutional confession law by making it the test for admissibility under the Fifth Amendment's Self-Incrimination Clause.¹⁴ *Bram* further illustrates the highly suspicious attitude of courts toward confessions during this era. In *Bram*, the defendant confessed after the interrogator made a

⁶ Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 481–85 (2005).

⁷ *Id.*

⁸ 168 Eng. Rep. 234 (1783).

⁹ *Id.* at 234–35.

¹⁰ Godsey, *supra* note 6, at 482–88.

¹¹ 4 Del. (4 Harr.) 563 (1845).

¹² *Id.* at 565.

¹³ 168 U.S. 532 (1897).

¹⁴ Godsey, *supra* note 6, at 474–88.

mild and subtle suggestion of leniency.¹⁵ The Court focused on the following statement by the interrogating detective: "If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders."¹⁶ The Court explained:

[H]ow could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Thus viewed, the weight to be removed by speaking naturally imported a suggestion of some benefit as to the crime and its punishment arising from making a statement.

[The detective], in substance, therefore, called upon the prisoner to disclose his accomplice, and might well have been understood as holding out an encouragement that by so doing he might at least obtain a mitigation of the punishment for the crime which otherwise would assuredly follow.¹⁷

Acknowledging that the inducement offered by the detective was slight, the Court noted, "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."¹⁸

Flashing forward to the mid-twentieth century, one finds reliability as an important, though not quite integral, factor in determining the admissibility of confessions.¹⁹ The fifty-year period that is marked by *Brown v. Mississippi*²⁰ in 1936 at the front end, and *Colorado v. Connelly*²¹ in 1986 at the back end, saw the reliability factor thrive at times before its final demise in *Connelly*.

Indeed, in the 1936 *Brown* decision, the reliability factor that originated in the common law voluntariness cases was still going strong. In throwing out the confessions of several African-American defendants who had confessed after being tortured by a sheriff and local mob in Mississippi, the Court focused on the unreliability of confessions obtained in such a manner.²² The court held that convicting the defendants solely on such unreliable evidence violated due process as it amounted to a "mere pretense of a trial."²³

In the middle part of the twentieth century, reliability re-

¹⁵ *Bram*, 168 U.S. at 562.

¹⁶ *Id.* at 539.

¹⁷ *Id.* at 564-65.

¹⁸ *Id.* at 543.

¹⁹ Godsey, *supra* note 6, at 488-99.

²⁰ 297 U.S. 278 (1936).

²¹ 479 U.S. 157 (1986).

²² *Brown*, 297 U.S. at 281-82, 286.

²³ *Id.* at 286.

mained an important factor in confession admissibility, but it was no longer the sole driving force. The reliability of a confession was merely one of many factors that a court considered when deciding whether to admit or reject a confession under the governing due process voluntariness test.²⁴ Nevertheless, during this era, courts could exclude a confession under due process based solely on the ground that it was unreliable.²⁵

In 1986, however, the Court handed down its decision in *Colorado v. Connelly*.²⁶ In that case, a mentally ill man had walked up to a police officer in Denver and confessed to a murder.²⁷ A state-employed psychiatrist testified that the defendant had confessed while suffering from psychotic delusions in which God told him to confess or commit suicide. (The state apparently did not contest the issue of mental illness). Made under such circumstances, the confession was quite unreliable. Indeed, the police were unable to corroborate that there had been an unsolved murder during the month and year in which the defendant claimed he had committed his crime.

Despite such concerns about the confession's reliability, the Court found no constitutional barriers to its admission into evidence.²⁸ Turning 200 years of confession law on its head, the Court stated: "A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, and not by the Due Process Clause of the Fourteenth Amendment."²⁹

With this language, the Court greatly undermined the role of reliability in the equation of confession admissibility. It may be possible to limit this case on the grounds that, because the officer in question did nothing to induce Connelly's confession, there was no state action. Nevertheless, *Connelly* made clear for the first time that unreliability is not a stand-alone basis on which a court can exclude a confession on constitutional grounds.³⁰

²⁴ See Leo, *supra* note 4, at 493-96; Godsey, *supra* note 6, at 488-91.

²⁵ See Leo, *supra* note 4, at 493-94. *But see id.* at 495-96 ("The due process voluntariness test continued to evolve in the 1950s and 1960s as the Supreme Court began to recognize that an entirely false or unreliable confession could, logically, be considered voluntary and thus admissible into evidence against a criminal defendant.")

²⁶ 479 U.S. 157 (1986).

²⁷ *Id.* at 160-61.

²⁸ *Id.* at 167.

²⁹ *Id.* (internal citation omitted).

³⁰ Leo, *supra* note 4, at 499 ("With *Connelly*, the Court abandoned the reliability rationale upon which that doctrine originally had been premised."). In holding that there was no "state action" in the case, because the officer did nothing to induce Connelly's confession, the Court ignored the admission into evidence of the confession as a possible basis for state action. *Connelly*, 479 U.S. at 165-67. The admission into evidence of a false confession had been the predicate "state action" in *Brown v. Mississippi*. See 297 U.S. at 286-87.

In sum, the period from *Warickshall* in 1783 through *Bram* in 1897 reflects the high-water mark in the criminal justice system's concern for false confessions. Through the middle part of the twentieth century, reliability remained a chief concern. In 1985, the Court subverted this long-standing policy, holding that a confession's unreliability could not be the sole reason for excluding a confession under the Constitution.

II. THE RECENT DISCOVERY OF THE FALSE CONFESSION PROBLEM

After *Connelly* was decided in 1986, Barry Scheck and his network of Innocence Projects across the country began using DNA testing to exonerate scores of inmates convicted of serious crimes.³¹ To date, more than 300 individuals have been exonerated in this Innocence Revolution.³² Because DNA was either not left at the scene by the perpetrator, not collected by the police, or not properly preserved by the authorities in the vast majority of cases, the number of exonerations to date represents a small fraction of the number of innocent people wrongfully convicted.

The DNA exonerations to date have revealed something particularly remarkable for those who study confessions. In 25% of the cases of wrongful conviction, the innocent person falsely confessed.³³ Before DNA, there were few avenues to verify a false confession. Simply put, the inmate would claim that he had confessed falsely, but most people, including in many cases his lawyer, would not believe him. Now, scores of case studies involving actual false confessions exist, and they raise troubling questions.

The problem of false confessions has become so pervasive that it frequently appears in the mainstream media. It has been covered by nearly every television show dealing with criminal justice. *O, The Oprah Magazine* (of all sources), recently explored this phenomenon in a glossy full-color feature.³⁴

While perhaps the most famous case of false confessions is the Central Park jogger case,³⁵ pop fiction writer John Grisham's recent work and first piece of non-fiction, *The Innocent Man*, may do the most to bring public awareness to this phenomenon. In a riveting fifteen-page section in the middle of the book, Grisham puts the reader in the shoes of the suspect during a five-hour in-

³¹ See generally BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

³² Gross, *supra* note 1, at 524.

³³ Leo, *supra* note 4, at 484.

³⁴ Melba Newsome, *True Crimes, False Confessions*, O, THE OPRAH MAG., Apr. 2006, at 235.

³⁵ For a detailed discussion of the Central Park Jogger Case, see generally Leo, *supra* note 4.

terrogation.³⁶ He describes the pressures, emotions and thoughts that lead to a false confession. In the end, the suspect, Tommy Ward, who was later sent to death row on the basis of his false confession, decides to “play along” with the police and confess for two reasons: First, he is exhausted and worn down by the relentless questioning and pressure of the tag-team interrogation.³⁷ Second, he has an undying belief in the criminal justice system.³⁸ He believes that no innocent person could be convicted in this country. He naively believes that if he tells a story, the questioning will end and the truth will quickly be discovered.³⁹ Ward rationalizes: “Tomorrow, or the next day, the cops would realize that the story did not check out. They would talk to Karl, and he would tell the truth. They would find Odell Titsworth, and he would laugh at them. Play along. Good police work will find the truth.”⁴⁰ The perceived low risk that the false confession would stand the test of time, coupled with the overwhelming desire to say anything to end the barrage of intense questioning and pressure, gave way and resulted in a false confession. While I cannot do justice to Grisham’s work in this short essay, anyone who struggles to understand how a rational and sane person could falsely confess to a murder should read the true story of *The Innocent Man*.

It may take years for social scientists and psychiatrists to fully understand why and how often false confessions occur. In the meantime, University of San Francisco Law Professor Richard Leo and others have produced a rich series of scholarly articles examining the root causes of this problem.⁴¹ For now, however, we know that false confessions are a problem, we know that many innocent people have been convicted as a result of false confessions, and we know that, because of *Colorado v. Connelly*, courts have no constitutional grounds on which to deal with this problem.

CONCLUSION

Many have offered ways to deal with the problem of false confessions. Videotaping interrogations is an obvious improvement, as it allows a judge and jury to accurately see what went

³⁶ JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND JUSTICE IN A SMALL TOWN* 85–100 (2006).

³⁷ *Id.* at 91, 93.

³⁸ *Id.* at 93.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ For citations to the empirical studies on false confessions, see Leo, *supra* note 4, at 512–20.

on in the interrogation room.⁴² Several of the documented false confessions were videotaped, and watching a replay of the interrogation allows one to see why the suspect falsely confessed in a way that could never be understood without such documentation. Richard Leo and others have suggested a corroboration rule and new reliability test based on a multitude of factors.⁴³

I endorse all of these approaches. My point in this essay, however, is less ambitious than attempting to solve the problem. I seek merely to bring to light a sad irony in the development of our confession law. The Supreme Court killed off the "reliability policy" as a factor in constitutional confession law in 1986, and then, suddenly, the problem of unreliable confessions surfaced with a vengeance. Today we have empirical proof that false confessions occur more often than we have ever imagined, yet our courts are substantially less concerned with the problem than they were 200 years ago.

I have previously written that the Self-Incrimination Clause should not be concerned with reliability; I stand by that statement today.⁴⁴ The Court in *Connelly* erred, however, when it held that the Due Process Clause is not concerned with the admission of unreliable confessions. The *Connelly* Court offered no legal basis for this holding, and ignored or distorted history to reach its conclusion. Indeed, confession law and the Due Process Clause have been steeped in concerns about reliability for more than 200 years, and rightfully so. No case is better than *Brown v. Mississippi* for illustrating how due process is offended by the introduction of a false or perjured confession that results in a "pretense of a trial."

As we move forward into the next century of confession law, it is my hope that we learn from our recent discovery of the false confession problem, recognize our mistake in *Connelly*, and heed the lessons of courts from a bygone era.

⁴² See Leo, *supra* note 4, at 530. See also generally Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003) (discussing the need for taping police interrogations and outlining three constitutional grounds which would mandate taping as a routine practice).

⁴³ Leo, *supra* note 4, at 520–39.

⁴⁴ Godsey, *supra* note 6, at 474–99.

***Miranda* Warnings, Torture, the Right to Counsel and the War on Terror**

*M. Katherine B. Darmer**

INTRODUCTION

Forty years after the *Miranda*¹ decision, the crimes that rivet the nation are different than those that consumed the public in 1966. September 11 is in many ways a dividing line.² Before September 11, we believed torture was unthinkable; now we do not. Before September 11, we debated whether *Miranda* made sense from the perspective of law enforcement; now, the notion that terror suspects would be given *Miranda* warnings seems almost quaint. It is plain that the Bush Administration is treating the vast majority of terror suspects far outside the realm of ordinary law enforcement, where the protections of the Fourth, Fifth and Sixth Amendments are uncertain at best.

The *Miranda* decision was, in many ways, very much the product of its time. Decided in the same era as *Brown v. Board of Education*,³ it was arguably motivated, in large part, by a desire to achieve greater equality in the criminal justice system, and to provide greater access to justice to the most disadvantaged members of society.⁴ *Miranda* was a controversial decision

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1 *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring the provision of warnings to a suspect in advance of custodial interrogation).

2 See M. Katherine B. Darmer, *Introduction to CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST-9/11 WORLD* 11, 11 (M. Katherine B. Darmer, Robert M. Baird & Stuart E. Rosenbaum eds., 2004).

3 347 U.S. 483 (1954). For a provocative and thorough discussion of *Miranda* in the context of the norms that influenced both that case and *Brown*, see Scott W. Howe, *The Troubling Influence in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359 (2001).

4 See Howe, *supra* note 3, at 393.

The Warren Court's enthusiasm for prescriptive equality greatly influenced the holdings that form the basis of modern interrogation and confessions doctrine. The Court constructed this doctrine under the Sixth Amendment right to counsel and the Fifth Amendment privilege against compelled self-incrimination. Under these clauses, the Justices concluded that the poor and

when it was decided,⁵ and it remained controversial during the subsequent eras of the Burger and Rehnquist Courts. Indeed, those Courts chipped away at *Miranda* until the decision became a mere remnant of its former self.⁶ To the extent that the *Miranda* Court meant to fundamentally change the nature of police interrogation and significantly alter the dynamics of the stationhouse, that grand vision “soared only on the pages of the majority opinion, and foundered in the workaday world of competing considerations, such as crime control.”⁷ For example, in *New York v. Quarles*,⁸ the Court held that a police officer did not violate the Fifth Amendment by asking an unwarned suspect simply about the location of a gun. The Court held that “concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*.”⁹

I have argued previously that the “public safety” doctrine should be expanded in the terrorism context,¹⁰ as terrorism cases present a much more compelling need for addressing public safety than does the discovery of a gun in a supermarket. I have also advocated that courts should adopt a “foreign interrogation” exception to *Miranda* in the terrorism context.¹¹ This article picks up on those themes and argues even more broadly for exceptions to *Miranda* in the terrorism context. This position is

ignorant should be made the equal of the rich and well-informed in their dealings with police interrogators. The Justices also concluded that the uncharged suspect who had not yet been to court should be treated as equal to the accused against whom adversary judicial proceedings had commenced. These notions of equality were crucial to the evolution of modern doctrine regulating interrogation and confessions practice.

Id. See also *id.* at 398 (“The forces that moved five Justices to endorse the *Miranda* opinion cannot be understood without an appreciation of the influence of the equality notion on the Court.”).

⁵ See *id.* at 398 (“*Miranda* became the most controversial of all of the Warren Court’s criminal-procedure decisions.”); see also M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J. L. & PUB. POL’Y 319, 339–40 (2003) (noting that *Miranda* was decided by a 5–4 margin with strong dissenting opinions, and that both commentators and politicians denounced the opinion).

⁶ See M.K.B. Darmer, *Lessons from the Lindh Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 264–68 (2002).

⁷ *Id.* at 264; see also Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understanding*, 90 MINN. L. REV. 781, 803 (2006) (addressing in particular the right to counsel warnings aspect of *Miranda*, “None of the coercion-dispelling benefits that the *Miranda* Court imagined have come to fruition in the rough-and-tumble world of the stationhouse interrogation room”).

⁸ 467 U.S. 649 (1984). For a fuller discussion of *Quarles* and its placement within the Court’s “prophylaxis” line of cases, see Darmer, *supra* note 6, at 264, 266–68.

⁹ 467 U.S. at 653.

¹⁰ See Darmer, *supra* note 6, at 271–87 (discussing applicability of the *Quarles* rule to terrorism cases and specifically advocating an extension of the public safety exception to the so-called “*Edwards* rule,” which bars police from asking any additional questions once a suspect has invoked the right to counsel).

¹¹ Darmer, *supra* note 5, at 348 (“I would go even further . . . by carving out a ‘foreign interrogation’ exception to *Miranda* . . .”).

anchored in the view that *Miranda* is, in fact, a “prophylactic rule” which “sweeps more broadly than the Fifth Amendment itself.”¹² Following this view, exceptions to the *Miranda* rules are permitted.

While *Miranda* may impose tolerable limits on ordinary law enforcement efforts, those same limits may be intolerable for a society facing very real threats of terrorism. As one panelist argued during this Symposium, the Bush Administration, ironically, might ultimately be thought of as a “great friend” of *Miranda* precisely because it has chosen not to proceed against the majority of terrorism suspects in conventional criminal courts.¹³ In brief, that theory suggests that because it would be intolerable to abide by constraints such as *Miranda* in fighting the War on Terror, there is a grave risk that *Miranda* and other criminal procedure rights would simply be jettisoned along the way in conventional criminal courts, thereby having an impact far beyond the terrorism cases.

While the theory that protections in the realm of ordinary law enforcement are best preserved by keeping the terrorism cases outside of that realm, there are grave risks to a “shadow system” operating wholly outside of the ordinary criminal law enforcement structure. The U.S. government has declared a number of individuals to be “enemy combatants,” and is holding them on that basis without access to the rights normally attendant to the criminal justice system. Many of those individuals are being held at Guantanamo Bay, Cuba. This article advocates for according fuller protections to those suspects, while recognizing that the full panoply of rights accorded to criminal defendants in cases like *Miranda* are not appropriately applied to such individuals.

Part I of the article takes up the question whether the *Miranda* warnings are “really required” by the Constitution, and, if not, what the implications of that are for the War on Terror, contrasting *Miranda* rights with more fundamental rights, such as the right to be free from torture.

Part II then addresses the fact that while *Miranda* serves to over-regulate confessions in important respects, it also fails to fully vindicate core concerns of the Fifth Amendment. *Miranda* presumes that all custodial interrogation involves compulsion,

¹² *Withrow v. Williams*, 507 U.S. 680, 702 (1993) (O'Connor, J., concurring in part) (quoting *Oregon v. Elstad*, 470 U.S. 298, 306 (1985)).

¹³ See Joan Larsen, Visiting Professor of Law, Univ. of Mich. Law Sch., Remarks at the Chapman Law Review Symposium: *Miranda* at 40: Applications in a Post-Enron, Post-9/11 World (Jan. 26, 2007), available at http://www.chapman.edu/LawReview/symposium2007_webcast.asp (follow “Click here for Panel #1” hyperlink).

and regulates custodial interrogation by requiring that warnings be given before a statement can be elicited at trial. If a statement is ultimately compelled, however, based on abusive interrogation techniques, the Court analyzes the problem under the Due Process Clause, which has a narrower scope in some respects than does the Self-Incrimination Clause. For example, the Due Process Clause has not been interpreted to limit the conduct of foreign agents. Thus, if a foreign agent were to use torture to extract a confession, that confession could potentially be admissible at a trial in the United States. In my view this is a violation of core Fifth Amendment concerns.

In Part III, the article then turns to the "right to counsel" aspect of *Miranda*, arguing that it is beyond the scope of the Fifth Amendment and should be eliminated.

Part IV then turns to the Sixth Amendment right to counsel during adversarial proceedings and argues that that right is so fundamental to basic fairness that it should be recognized, even with respect to terrorism cases and enemy combatants. Finally, this article addresses the fact that proceedings at Guantanamo Bay currently permit coerced statements to be introduced into evidence, and argues that those provisions substantially undermine the fairness of those proceedings.

I. ARE THE *MIRANDA* WARNINGS REALLY REQUIRED?

The *Miranda* Court held that "compulsion" is "inherent in custodial surroundings"¹⁴ and further held that, without protection against that compulsion, "no statement obtained from the defendant can truly be the product of his free choice."¹⁵ Thus, unless other equally effective protective measures are employed, a suspect in custody must be given the following warnings: "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."¹⁶ If such warnings are not given, any statement made by the defendant is inadmissible in a later criminal trial.¹⁷

Much has already been said on the subject of whether the *Miranda* warnings are "really required" by the Constitution or whether, instead, the *Miranda* Court's warnings requirement represented a "prophylactic rule" designed to ensure protection of

¹⁴ *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

¹⁵ *Id.*

¹⁶ *Id.* at 444.

¹⁷ *Id.*

the Fifth Amendment.¹⁸ Justice Rehnquist explicitly described the *Miranda* warnings as prophylactic thirty-three years ago in *Michigan v. Tucker*,¹⁹ which involved the admissibility of the testimony of a witness who had been identified in unwarned statements. The Court consistently repeated that characterization of *Miranda*²⁰ until *Dickerson v. United States*, when the Court held, anomalously, that *Miranda* was a “constitutional decision” despite “language in some of our opinions” to the contrary.²¹ The line of cases describing *Miranda* as prophylactic, according to the Court, illustrated simply that “no constitutional rule is immutable.”²² Following *Dickerson*, the Court continued to describe *Miranda* as “prophylactic.”²³ Indeed, in *United States v. Patane*, a plurality of the Court specifically noted that “nothing in *Dickerson*, including its characterization of *Miranda* as announcing a constitutional rule, changes any of these observations,” including those regarding the prophylactic nature of *Miranda*,²⁴ a proposition with which the majority of the Court agreed.²⁵

In this Symposium, however, my colleague Larry Rosenthal provocatively argues—contrary to the views taken by the Court and most commentators—that *Miranda* is not prophylactic at all.²⁶ Rather, Professor Rosenthal argues that *Miranda* properly concluded that custodial interrogation inherently involves Fifth Amendment compulsion. Thus, he continues, “*Miranda* is not prophylactic—its warnings are required only when a suspect is

18 See Evan H. Caminker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 1 (2001) (“*Miranda* kicked off an energetic debate over the legitimacy of the Court’s creation of so-called prophylactic rules . . .”); see also Lawrence Rosenthal, *Against Orthodoxy: Miranda Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 581 nn.16–17 (2007) (collecting conflicting authority). The broader question of the legitimacy of prophylactic rules is beyond the scope of this article.

19 417 U.S. 433, 446 (1974). For a more complete discussion of *Tucker*, see Darmer, *supra* note 6, at 265.

20 See, e.g., *New York v. Quarles*, 467 U.S. 649, 653 (1984) (“[T]his case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*.”); *Withrow v. Williams*, 507 U.S. 680, 690–91 (1993).

21 *Dickerson v. United States*, 530 U.S. 428, 438 (2000). For a fuller discussion of *Dickerson* and why I believe its reasons are anomalous in light of the Court’s prior jurisprudence, see Darmer, *supra* note 6, at 268–71. The Michigan Law Review devoted a symposium to the *Dickerson* decision shortly after it was decided, in which a number of prominent scholars criticized the opinion. See Symposium, *Miranda after Dickerson: The Future of Confession Law*, 99 MICH. L. REV. 879 (2001).

22 *Dickerson*, 530 U.S. at 441.

23 See, e.g., *United States v. Patane*, 124 S. Ct. 2620 (2004).

24 *Id.* at 2628 (plurality opinion) (citation omitted).

25 *Id.* (plurality opinion) (noting the “prophylactic nature of *Miranda*”). The plurality opinion was written by Justice Thomas, and joined by Chief Justice Rehnquist and Justice Scalia. See also *id.* at 2631 (Kennedy, J., concurring in the judgment), where Justice Kennedy, joined by Justice O’Connor, agreed with the plurality that *Dickerson* “did not undermine” precedents noting *Miranda* as prophylactic.

26 See Rosenthal, *supra* note 18, at 585.

compelled to incriminate himself, and they ensure that incriminating statements are received in evidence only when a suspect has validly waived the right to be free from compelled self-incrimination.”²⁷

While Professor Rosenthal musters powerful arguments for his position, ultimately I believe he overstates the compulsion *inherent* in custodial interrogation, as the *Miranda* Court itself overstated that inherent compulsion. The dictionary defines “compel” as “[t]o constrain[:] force,”²⁸ but most modern custodial interrogation involves efforts to persuade rather than the use of force. As Symposium participant Mark Godsey has persuasively established, “the Framers adopted the self-incrimination clause to ban certain penalties, such as physical punishments . . .”²⁹ In the pre-*Miranda* case *Brown v. Mississippi*, decided under the Due Process Clause, the Court reached unanimity in condemning the use of brute force to obtain a confession.³⁰ *Miranda*, on the other hand, fractured the Court, in part because of the somewhat novel proposition that more-or-less routine custodial interrogation, without warnings, was unconstitutional, even absent earmarks of abuse.

Indeed, even the *Miranda* majority asserted somewhat gingerly that there is compulsion inherent in custodial interrogation. While the Court did state unequivocally that “[u]nless adequate protective devices are employed to dispel the *compulsion inherent* in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice,”³¹ elsewhere the Court used less bold language. Describing defendant Ernesto Miranda’s circumstances, for example, the majority noted that the “*potentiality* for compulsion is forcefully appar-

²⁷ *Id.* at 575.

²⁸ WEBSTER’S II NEW RIVERSIDE DICTIONARY (1984); see also Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 492 (2005) (“‘Compel’ has been defined as ‘to drive or urge forcefully’ and ‘to cause to do or occur by overwhelming pressure.’” (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 253 (11th ed. 2003))).

²⁹ Godsey, *supra* note 28, at 505. The clause was also intended to ban “deprivations of liberty, and divine retribution via the oath *ex officio*, used by ecclesiastical tribunals.” *Id.*; see also *id.* at 479–81 (collecting historical support). Professor Rosenthal focuses on the use of compelled oaths enforced by threat of criminal contempt as being an underlying concern of the privilege. Rosenthal, *supra* note 18, at 589–90. While the history underlying the Fifth Amendment is complicated and somewhat opaque, see generally LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968), the prevention of torture was one of its important features. As Levy says, “That it was a ban on torture and a security for the criminally accused were the most important of its functions, as had been the case historically, but these were not the whole of its functions.” *Id.* at 430.

³⁰ 297 U.S. 278 (1936). For a particularly compelling discussion of the case, see Morgan Cloud, *Torture and Truth*, 74 TEX. L. REV. 1211 (1996).

³¹ *Miranda v. Arizona*, 384 U.S. 436, 458 (1966) (emphasis added).

ent . . . ”³² The description of custodial interrogation as “potentially” compulsive is, it seems to me, more intellectually honest than describing it as inherently, or inevitably, compulsive. The latter description ignores the real differences among interrogators, and among suspects. While it is certainly true that interrogators are generally motivated to get answers from suspects, some are much more dogged and effective than others. Similarly, some suspects are virtually immune to tactics of persuasion. Some suspects simply do not talk, even when subjected to skillful and prolonged interrogation. Surely the fact that not all suspects talk proves that custodial interrogation does not necessarily involve compulsion. If it did, then every suspect would confess.

Professor Rosenthal argues that the *Miranda* decision is well-grounded in the nineteenth-century Supreme Court decision of *Bram v. United States*.³³ In *Bram*, the Court, applying the Fifth Amendment Self-Incrimination Clause for the first time to a confession in a federal case, held that a confession was compelled when the suspect had been stripped of his clothing, and a detective told the suspect that another person had witnessed him commit a murder and implied that the suspect could help himself by talking.³⁴ The Court held that such circumstances “perturb[] the mind and engender[] confusion of thought,”³⁵ interpreting the detective’s statements as a “promise of leniency” that resulted in a violation of the Self-Incrimination Clause.³⁶ As I have previously argued, “[i]f taken seriously, the language of *Bram* suggests that the Fifth Amendment places extraordinary limits on the scope of permissible interrogations.”³⁷ *Bram* itself has been the subject of criticism,³⁸ but even if one accepts both the relative

³² *Id.* at 457; see also *id.* at 461 (“An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak.”). This language raises the question of whether an individual who is (1) intimately familiar with the surroundings of a police station (such as a police officer who is himself a suspect), (2) questioned by a single officer in a friendly tone, or (3) not subjected to “techniques of persuasion” but simply asked a single question in a straightforward way, has really been subjected to “compulsion.”

³³ 168 U.S. 532 (1897). For Professor Rosenthal’s discussion of the *Bram* case, see Rosenthal, *supra* note 18, at 586–92, 601–02, 612. For a further discussion of the case, see Darmer, *supra* note 5, at 325–28.

³⁴ See 168 U.S. at 562–64.

³⁵ *Id.* at 564.

³⁶ Steven D. Clymer, *Are the Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 480 (2002).

³⁷ Darmer, *supra* note 5, at 326.

³⁸ See, e.g., *id.* at 327; Rosenthal, *supra* note 18, at 588 n.51 (citing others). For an extended criticism of *Bram*, see Godsey, *supra* note 28, at 477–88 (arguing that the Court “erred simply by choosing voluntariness as the touchstone for confession admissibility under the self-incrimination clause” and “conflat[ed] the common law voluntariness doctrine with the self-incrimination clause.”). See also Clymer, *supra* note 36, at 480 & n.140. Entering into the historical debate about *Bram* is beyond the scope of this article.

breadth of *Bram* and its reliance on the Fifth Amendment Self-Incrimination Clause as being correct, as Professor Rosenthal does, *Miranda* took *Bram* a significant step further by determining that *all* custodial interrogation involves compulsion—even interrogation that does not involve the relatively slight pressure at issue in *Bram*.

As Professor Steven D. Clymer has put it, “[h]ere, the *Miranda* Court broke new ground. In *Bram*, an implied promise of leniency had contributed to the compulsion. In contrast, the *Miranda* Court concluded from its assessment of police interrogation manuals” that compulsion is inherent in custodial interrogation “even absent any physical violence, threats, or promises.”³⁹ That is a significant innovation.⁴⁰

As Justice Harlan noted in dissent, the newly-designed *Miranda* rules appeared designed instead to eliminate any “pressures” on a suspect and to “discourage any confession at all.”⁴¹ While the *Miranda* opinion actually consolidated four different cases,⁴² Justice Harlan focused on the facts of Ernesto Miranda’s case itself, which were representative.⁴³ In that case, Miranda made both an oral and written confession, having been subjected to interrogation for less than two hours, and without being subjected to “force, threats or promises.”⁴⁴ The confessions, Justice Harlan noted, “are now held inadmissible under the Court’s new rules. One is entitled to feel astonished that the Constitution can be read to produce this result.”⁴⁵ Miranda confessed “during brief, daytime questioning conducted by two officers and un-

³⁹ Clymer, *supra* note 36, at 481–82 (citations omitted); *see also* *Miranda v. Arizona*, 384 U.S. 436, 528 (1966) (White, J., dissenting) (arguing that the *Bram* case itself rejected the notion that custodial interrogation was itself inherently suspect). “The question in *Bram* was whether a confession, obtained during custodial interrogation, had been compelled, and if such interrogation was to be deemed inherently vulnerable the Court’s inquiry could have ended there.” *Id.*

⁴⁰ *Cf.* Godsey, *supra* note 28, at 499–501 (noting that the Court shifted gears from a due process analysis to the Self-Incrimination Clause, recognizing that “the correct test for confession admissibility in the Bill of Rights is compulsion,” but defining compulsion “very broadly”). “The *Miranda* decision represented a monumental departure from the past, in several important respects.” *Id.* at 499.

⁴¹ 384 U.S. at 505 (Harlan, J., dissenting).

⁴² The Court consolidated the cases of *Miranda v. Arizona*, *Vignera v. New York*, *Westover v. United States*, and *California v. Stewart*. 384 U.S. at 436 (majority opinion).

⁴³ *See id.* at 518 (Harlan, J., dissenting) (“[I]t may make the analysis more graphic to consider the actual facts of one of the four cases reversed by the Court. *Miranda v. Arizona* serves best, being neither the hardest nor easiest of the four under the Court’s standards.”).

⁴⁴ *Id.* at 518; *see also id.* at 491–93 (majority opinion) (discussing the facts of Ernesto Miranda’s case, which describes the length of interrogation and makes no references to the use of force, threats, or promises); *id.* at 457 (discussing the facts of the *Miranda* and *Stewart* cases, noting that “the records do not evince overt physical coercion or patent psychological plays.”).

⁴⁵ *Id.* at 518 (Harlan, J., dissenting).

marked by any of the traditional indicia of coercion."⁴⁶ Previously, by contrast, the Court had suppressed confessions under the Due Process Clause⁴⁷ on a case-by-case approach by taking into account such specific circumstances as "threats or imminent danger, physical deprivations . . . , repeated or extended interrogation, limits on access to counsel or friends, length and illegality of detention under state law, and individual weakness or incapacities."⁴⁸

Similarly, Justice White pointed out that, until the *Miranda* decision, it had never been suggested that custodial interrogation "was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will."⁴⁹ Famously, Justice White noted that under the *Miranda* rule, if the police ask a defendant "a single question such as 'Do you have anything to say?' or 'Did you kill your wife?' his response, if there is one, has somehow been compelled"⁵⁰ Quoting this language in his article, Professor Rosenthal points out that "[m]ost commentators seem to find this point unanswerable."⁵¹ Professor Rosenthal, however, does not. Rather, he argues that compulsion does exist because the questioner has a badge and a gun and holds the suspect's liberty in his hands. Even if there is just "a bit" of compulsion as in Justice White's hypothetical, there is compulsion.⁵²

Professor Rosenthal acknowledges, as he must, that not all suspects will succumb to this compulsion; some will have the "fortitude" to resist it.⁵³ In that case, "there has been no Fifth Amendment violation because the suspect has not been compelled to become a witness against himself."⁵⁴ When a suspect does respond, however, that response is compelled, a fortiori, "by virtue of the compulsive power of custody and the inherent threat that it will continue unless the jailer is somehow satisfied."⁵⁵

⁴⁶ *Id.* at 518-19.

⁴⁷ The vast majority of the Court's prior cases arose under the Due Process Clause, because most of those cases came up through the state courts before the Fifth Amendment Self-Incrimination Clause had been held to apply to the states. For an extended discussion of the due process cases, see Catherine Hancock, *Due Process before Miranda*, 70 TUL. L. REV. 2195 (1996). The Supreme Court ultimately held that the Fifth Amendment applied to the states via the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), which set the stage for *Miranda*.

⁴⁸ *Miranda*, 384 U.S. at 508 (citations omitted).

⁴⁹ *Id.* at 535 (White, J., dissenting).

⁵⁰ *Id.* at 533.

⁵¹ Rosenthal, *supra* note 18, at 591.

⁵² *Id.* at 580-82.

⁵³ *Id.* at 581.

⁵⁴ *Id.*

⁵⁵ *Id.*

Surely this overstates the case; however, the *Miranda* Court itself overstated the case. Imagine, for example, a prison inmate who has been well-integrated into the complex social fabric of his prison. Suddenly, he finds himself released on parole, with no job, no friends and no family on "the outside." Seeking a return to the world he knew, he commits a flagrant crime in the presence of a uniformed officer. The officer arrests the parolee, placing him in handcuffs.⁵⁶ The officer does not read any *Miranda* warnings but instead simply turns to his arrestee and asks, "Why did you do that?" If the man responds, "I did that because I want to go back to prison," surely that response was not compelled within either the meaning of the Fifth Amendment or under any commonsense understanding of the term. Yet *Miranda* posits that such a statement has been compelled, and Professor Rosenthal, presumably, would agree.

In later cases, the Court backed off this absolutist position, drawing a distinction between those cases in which a suspect has been "really compelled" (i.e., through the use of brute force) and those cases which represent simply a technical non-compliance with *Miranda*. The *Quarles* decision is emblematic of this dichotomy. In that case, in which a suspect ran into a grocery store and ditched his gun, prompting the police to ask about its whereabouts, the Court emphasized that there was no evidence that the defendant's response regarding the gun's location was "actually compelled."⁵⁷ Because the statement was not "actually compelled," but was compelled only in the sense that it would have been presumed compelled under *Miranda*, the Court held that "concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."⁵⁸ If, by contrast, the officer on the scene had thrown *Quarles* to the ground and beaten him until he told police where the gun was, his answer would have been deemed compelled or,

⁵⁶ In this regard, the case differs in an important way from *Colorado v. Connelly*, in which the Court found no constitutional violation when the lower court admitted a confession that the defendant made after walking in voluntarily to a police station. 479 U.S. 157 (1986). The Court found that "the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" *Id.* at 170 (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)). While arguably the defendant parolee in my hypothetical is quite similar to *Connelly*, in that both were self-motivated to confess, *Miranda* would draw a distinction between the two because, in my case, the defendant was technically in custody and subject to interrogation, meaning that he should have been given warnings under *Miranda*. While mine might be an extreme example, surely there are numerous examples of defendants in custody who are motivated to confess and are not really *compelled* to do so simply by virtue of being in custody and being asked questions.

⁵⁷ *New York v. Quarles*, 467 U.S. 649, 652, 654 (1984). For further discussion of the case, see Darmer, *supra* note 6, at 266-68.

⁵⁸ *Quarles*, 467 U.S. at 653.

more likely, involuntary under the auspices of the Due Process Clause. Because it was not “really compelled” however, the Court carved out an exception to the *Miranda* rules.

The dissent pointed out the doctrinal incoherence endemic to this approach, noting that the majority had failed to “deal with the constitutional presumption established” in *Miranda*.⁵⁹ In the dissent’s view, the police really did nothing wrong, but the Court did, by failing to accord full weight to *Miranda*’s presumption of compulsion. As long as the police act consistently with the dictates of due process, “[i]f a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights.”⁶⁰ However, any answers given to such unadvised statements are inadmissible, because they are presumptively compelled.⁶¹ Justice O’Connor made a similar point in her concurring opinion: “When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial.”⁶²

While adherence to the underlying rationale of *Miranda* may indeed have required exclusion of Quarles’s statement, it is my position that the Fifth Amendment does not, in fact, require the exclusion. In the interest of preventing compelled confessions, *Miranda* over-regulates in the confessions context. This over-regulation may be tolerable in the majority of cases, but it is intolerable where imminent danger to the public safety is at stake. Understood as a prophylactic rule, *Miranda* is certainly vulnerable to criticism, including that the original *Miranda* Court did not describe it that way, and that the later understanding of *Miranda* as “prophylaxis” is inconsistent with its original rationale. However, a prophylactic *Miranda* is more politically palatable and stable than one that recognizes no exception. Moreover, a jurisprudence that allows “unwarned” statements but excludes “really compelled” ones is more consistent with core concerns of the Fifth Amendment. In its post-*Miranda* jurisprudence, the Court essentially created, de facto, a two-tiered system. In cases where confessions are “really compelled,” those confessions cannot be used for any purpose.⁶³ In those cases where the confes-

⁵⁹ *Id.* at 684 (Marshall, J., dissenting).

⁶⁰ *Id.* at 686.

⁶¹ *See id.*

⁶² *Id.* at 664 (O’Connor, J., concurring in part). O’Connor dissented from that part of the Court’s holding that found that the statements did not need to be suppressed. She agreed with the Court that the physical fruit of the statement—the gun itself—need not be suppressed. *Id.* at 665.

⁶³ Joseph D. Grano, *Miranda’s Constitutional Difficulties: A Reply to Professor*

sion is compelled only in the sense that it is presumed compelled under *Miranda*, then the warnings may be dispensed with (as in the public safety cases), or, if required but not given, can result in statements that can be used to impeach the defendant if he testifies,⁶⁴ or in the admission of the fruits of the statement (such as the physical evidence mentioned by a suspect in an uncoerced statement that nevertheless violated the dictates of *Miranda*).⁶⁵

Rejecting the notion of *Miranda* as a prophylactic rule has serious implications for the terrorism cases. If un-Mirandized statements are deemed compelled, then they cannot be used for any purpose. As Professor Clymer argues, “the privilege flatly prohibits the use of compelled statements in criminal cases, no matter how badly or for what purpose the government may need the information that the compelled statement imparts.”⁶⁶ Using the example of the threatened use of the contempt sanction in order to force testimony, he points out that a prosecutor choosing to invoke that sanction in order to learn details regarding a bombing plot could do so “only at the cost of exclusion of any resulting statement in a criminal prosecution of the suspected terrorist.”⁶⁷ Similarly, he suggests, the cost of obtaining the information from Quarles about his gun in the grocery store should have been exclusion of the evidence. In Clymer’s view, the public safety exception is simply “impossible to reconcile” with the Fifth Amendment privilege.⁶⁸

But it is only impossible to reconcile with the Fifth Amendment privilege as interpreted by *Miranda*, which I have argued is overly broad and over-regulates confessions. That overly broad interpretation was subscribed to by only a bare majority of the *Miranda* Court and has been narrowed, appropriately, by subsequent decisions. Because this narrower conception is, in fact, justified, the public safety exception should be broadly applied in the terrorism cases.⁶⁹ If such an exception were broadly applied, agents would be free to question terrorism suspects without giving *Miranda* warnings. Agents would bear the risk that the suspect was not in fact a potential terrorism suspect, and if questions yielded information only about unrelated conventional

Schulhofer, 55 U. CHI. L. REV. 174, 177 (1988).

⁶⁴ *Harris v. New York*, 401 U.S. 222 (1971).

⁶⁵ *United States v. Patane*, 124 S. Ct. 2620, 2627–28 (2004) (plurality opinion).

⁶⁶ Clymer, *supra* note 36, at 549.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Cf. United States v. Padilla*, No. 04-60001-CR-COOKE, 2006 WL 3678567 (S.D. Fla. Nov. 17, 2006) (finding that *Miranda* did not apply in the questioning of terrorism suspect Padilla at O’Hare airport, on the theory that the interrogation was not “custodial” when applying looser standards for questioning at the border).

crimes, the information would have to be suppressed.

Such an exception does not mean that terrorism suspects are left without constitutional protections. Unfortunately, however, as set forth below, the Court's modern jurisprudence suggests a narrower scope of protection than that suggested by the Constitution for "truly compelled" statements.

II. *MIRANDA* AND "REALLY COMPELLED" STATEMENTS

Under the Court's prior jurisprudence, the Due Process Clause provides primary protection against the use of torture or brute force, because due process is required before the deprivation of "life, liberty, or property."⁷⁰ Thus, that phrase has been interpreted to prevent the *infliction* of brutality,⁷¹ at least by agents within the jurisdiction of the United States,⁷² whereas the Self-Incrimination Clause of the Fifth Amendment protects only against the introduction of compelled statements at trial.⁷³ On the one hand, I have argued that the Court's interpretation of the Fifth Amendment in *Miranda* leads to an "over-regulation" of confessions law; but on the other hand, the Court's exclusive reliance on the Due Process Clause in deciding whether a confession is involuntary under-regulates "truly compelled" statements.⁷⁴

Professor Godsey has persuasively established in his prior work the fact that the Supreme Court, over time, has "unmoored" the *Miranda* warnings from their original justification (Fifth Amendment compulsion) and now uses them as a first step in determining whether a confession is "voluntary" under a due process analysis.⁷⁵ As Professor Godsey puts it,

[T]he Court, in the last four decades, has slowly moved away from *Miranda's* original compulsion theory as the underlying justification for the warnings. Instead of requiring the warnings to dispel inherent coercion as described in the *Miranda* decision, the Court now uses the warnings as a prophylactic rule to make easier the task of determining the "voluntariness" of a confession in the due process sense of that term.⁷⁶

⁷⁰ U.S. CONST. amends. V, XIV.

⁷¹ See *New York v. Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting) (noting that the Due Process Clause places limits on police behavior); cf. *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding that a conviction obtained in reliance on a confession extracted by torture violated due process). For a compelling discussion of the *Brown* case, see Cloud, *supra* note 30.

⁷² Cf. Darmer, *supra* note 5, at 366 (suggesting that the Due Process Clause does not constrain the acts of foreign agents).

⁷³ *Chavez v. Martinez*, 538 U.S. 760 (2003).

⁷⁴ See Darmer, *supra* note 5, at 357–372 (discussing the limits of the due process standard).

⁷⁵ Godsey, *supra* note 7, at 793–816.

⁷⁶ *Id.* at 810 (citing Mark A. Godsey, *Miranda's Final Frontier—The International*

Under the modern approach to the due process voluntariness test, however, the Court has narrowed its focus in asking whether a confession is “involuntary,” as compared to the due process inquiry that was in place before *Miranda*.⁷⁷ In *Colorado v. Connelly*,⁷⁸ the Court rejected a claim that a confession was involuntary when made by a mentally deluded individual who walked into a police station and confessed. The fact that the confession may have been utterly unreliable did not lead to exclusion, despite the fact that reliability had historically been a factor in assessing the voluntariness of a confession.⁷⁹ In *Connelly*, the Court focused strictly on the question whether police overreaching had resulted in the confession: “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause”⁸⁰

Specifically, the *Connelly* Court rejected the notion that the trial court’s admission into evidence of the defendant’s potentially unreliable statement was tantamount to the type of state action sufficient to implicate the Due Process Clause. Rather, in order to establish a due process violation, the defendant had to establish an “essential link between coercive activity of the State” and the defendant’s actual confession.⁸¹ In that case, because the state had contributed in no way whatever to the defendant’s underlying confession, the Court found no due process violation.

I have argued previously that *Connelly* has serious implications for the terrorism cases. *Connelly* suggests that where there is no “bad act” by U.S. agents, there would be no basis under the Court’s current jurisprudence to exclude a confession obtained through force by foreign agents:

Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad, 51 DUKE L.J. 1703, 1734–52 (2002); Godsey, *supra* note 28, at 505–15; Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 863–67 (2003) [hereinafter Godsey, *New Frontier*].

⁷⁷ See Darmer, *supra* note 5, at 357–59 (describing the de facto dilution of the due process voluntariness test, and providing possible explanations for the weakened standard).

⁷⁸ 479 U.S. 157 (1986).

⁷⁹ See Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2009–14 (1998); see also JOSEPH D. GRANO, CONFESIONS, TRUTH, AND THE LAW 65 (1993) (describing concerns with both reliability and offensive police practices); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM J. CRIM. L. 309, 313 (1998) (describing three concerns that underlie the historic due process voluntariness test, including the unreliability of certain confessions). A further discussion of *Connelly* and reliability can be found in this Symposium issue. Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAP. L. REV. 611 (2007).

⁸⁰ *Connelly*, 479 U.S. at 167.

⁸¹ *Id.* at 165.

If the due process clauses prevent the admission into evidence of only those confessions caused by deterrable police misconduct, then no conditions or pressure entirely independent of such conduct would render a confession "involuntary" for purposes of the Constitution. This is true even if pressure were imposed, externally, by foreign agents . . . , rather than by internal psychological conditions, such as those present in *Connelly*. In the Ninth Circuit case of *United States v. Wolf*, for example, the court suggested that *Connelly* "cast into serious doubt" the "continuing vitality" of an earlier Ninth Circuit case holding that an involuntary confession obtained by Mexican police would be inadmissible in an American court. This is because, after *Connelly*, with its emphasis on wrongful, deterrable state action, there is necessarily no due process violation in the absence of wrongful conduct by a state actor that U.S. courts can hope to control.⁸²

An overly robust application of the *Miranda* rules in the terrorism context could lead American agents to have a "perverse incentive" to turn terrorism suspects over to rogue foreign agents, unconstrained by limits on such tactics as torture.⁸³ Because the Due Process Clause has been interpreted to prevent only bad acts committed by agents within the jurisdiction of American courts, moreover, the Due Process Clause would not forbid the introduction into evidence of forcibly extracted confessions obtained overseas. The Fifth Amendment itself, however, should prevent the introduction of such "truly compelled" statements into evidence at any trial, but the Court thus far has dealt with claims that a confession was "truly compelled" by applying a weakened version of the historic due process voluntariness test rather than the privilege against self-incrimination.⁸⁴ As Godsey has argued, "[F]rom textual and doctrinal standpoints, the privilege seems the more appropriate provision with which to regulate confessions, as it speaks directly to the issue of compulsory self-incrimination, while the Due Process Clauses are silent on the matter."⁸⁵ In its modern jurisprudence, however, the Court has unfortunately relegated the Self-Incrimination Clause to the foundation for its resolution of *Miranda* claims.⁸⁶

⁸² Darmer, *supra* note 5, at 365 (citations omitted). The Court has likewise held that aliens are not entitled to Fourth Amendment protections for seizures occurring outside the United States, or Fifth Amendment protections for statements never admitted at trial. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

⁸³ Darmer, *supra* note 5, at 354.

⁸⁴ *Id.* at 360.

⁸⁵ Godsey, *New Frontier*, *supra* note 76, at 863; see also Godsey, *supra* note 28, at 499–515 (making a sustained argument that *Miranda* properly moored confessions law in the Self-Incrimination Clause, but that post-*Miranda* jurisprudence made an improvident return to the due process voluntariness test while retaining the *Miranda* warnings).

⁸⁶ Darmer, *supra* note 5, at 354; cf. Godsey, *supra* note 28, at 508 (describing *Miranda* warnings as simply a "first-step litmus test" for determining whether a confession is voluntary in the due process sense of the term).

Thus, *Miranda* not only over-regulates in harmful ways, but ultimately under-regulates in an even more damaging way. Surely, whatever else it does, the Self-Incrimination Clause should prevent the introduction into trial of a statement obtained by torture. But with the Court's alternative focus on warnings and waiver under *Miranda*, this core concern of the Fifth Amendment has not been vindicated.

It is now plain that the risk that terrorist suspects will be turned over to rogue foreign agents is not just theoretical but real. American agents have participated in turning over suspects for torture pursuant to the practice known as "extraordinary rendition."⁸⁷ To be sure, the reasons for this practice are complex, and it is not just the constraints posed by *Miranda* that have contributed to it; in fact, *Miranda* may have played no role whatsoever, particularly if the suspects who have been subjected to extraordinary rendition would not have been part of the conventional criminal court system in this country.⁸⁸ Moreover, it could be argued that if American agents participated actively in turning a suspect over to agents knowing that torture would be employed, the American agents' participation would be significant enough to constitute "state action," triggering the Due Process Clause—at least if an American citizen were involved. However, foreign citizens would almost certainly receive no protection under a due process analysis.⁸⁹ And, presumably, a statement coerced by foreign agents could then be introduced into a conventional criminal trial of a terrorism suspect in the United States. This is inconsistent with the plain language of the Fifth Amendment, which provides that "No person . . . shall be compelled in any criminal case to be a witness against himself."⁹⁰ Any statement produced by torture, brute force or coercion should be inadmissible by virtue of the Fifth Amendment, regardless of any way around its inadmissibility under a due process analysis.⁹¹ It is unfortunate that the Court's focus on waivers under *Miranda* has moved the emphasis away from other more troubling aspects

⁸⁷ See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, HARV. HUM. RTS. J. 123 (2006).

⁸⁸ See generally *infra* Part IV. Indeed, it may be that Fourth Amendment limits on investigations in the United States may play a more critical role in the decision to resort to this practice. There may be situations, for example, where the Government has a basis to believe that someone is involved in terrorism, but does not have "probable cause" to conduct searches that could help establish the case or to make an arrest in a conventional criminal case. I am grateful to Larry Rosenthal for making this point.

⁸⁹ See Godsey, *New Frontier*, *supra* note 76, at 895–96 (noting the particular vulnerability of non-citizens after *Connelly*).

⁹⁰ U.S. CONST. amend. V.

⁹¹ See Godsey, *supra* note 28, at 505 (noting that the Fifth Amendment was designed by the Framers to ban physical abuse, among other things).

of interrogation.

III. *MIRANDA'S* RIGHT TO COUNSEL APPROACH

Miranda's provision of a "right to counsel" may be its most acutely problematic feature.⁹² While the Sixth Amendment provides the right to counsel at criminal trials,⁹³ *Miranda* held for the first time that suspects should be told that they also have the right to have counsel present during any custodial interrogation.⁹⁴ In practice, if a suspect invokes his right to counsel, counsel is almost never provided to assist him during the interrogation. Instead, the interrogation is simply terminated.⁹⁵

Professor Rosenthal defends the right to counsel aspect, arguing that "if one rigorously applies the rule that indulges every reasonable presumption against waiver, it is quite defensible to conclude that suspects cannot be expected to make knowing and intelligent decisions if they are unaware of the availability of expert legal advice."⁹⁶ Taking a somewhat unorthodox approach, Professor Rosenthal's focus on *Miranda's* waiver structure leads him to conclude that by waiving his *Miranda* rights, the suspect is actually agreeing to be subject to *compulsion*, not just agreeing to be subject to questioning.⁹⁷ Presumably, because he is aware of the right to seek expert legal advice before making that determination, the waiver is valid.

Under the more orthodox view of *Miranda*, however, the warnings do not serve as a vehicle for a subject to waive his right to be subject to compulsion, but instead the warnings are designed to *dispel* the compulsion inherent in the custodial interrogation environment. Indeed, the *Miranda* Court itself noted that the warnings are a "prerequisite in *overcoming* the inherent pressures of the interrogation atmosphere."⁹⁸ Under this view, because the warnings have "already dispelled" the compulsion inherent in custodial interrogation, a suspect who waives his rights and agrees to submit to questioning is not agreeing to submit to compulsion per se, but rather just to submit to ques-

⁹² See Rosenthal, *supra* note 18, at 597 (describing the right to counsel as "perhaps the most debatable of the *Miranda* rights").

⁹³ U.S. CONST. amend. VI.

⁹⁴ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

⁹⁵ Godsey, *supra* note 7, at 797-98. For a discussion of the fact that invoking the right to counsel leads to greater protections for the suspect than invoking the right to remain silent, see Darmer, *supra* note 6, at 260-63.

⁹⁶ Rosenthal, *supra* note 18, at 597.

⁹⁷ *Id.* at 587 ("[W]hile *Miranda* does not eliminate the compulsion inherent in custodial interrogation, it instead produces a valid waiver of the right to be free from that compulsion."); see also *id.* at 575 (noting that a suspect can "validly waive[] his right to be free from compelled self-incrimination").

⁹⁸ *Miranda*, 384 U.S. at 468 (emphasis added).

tioning now purged of the taint of compulsion. As the Court noted in a unanimous decision authored by Justice Marshall, "We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."⁹⁹

I have already argued that the Court's *Miranda* jurisprudence has been inadequate in terms of protecting against real compulsion, and doubtless the mere recitation of warnings and a suspect's waiver are not enough to dispel compulsion. But to the extent that *Miranda* both over-regulates and under-regulates, the right to counsel has particular earmarks of both. The warning over-regulates insofar as it encourages a suspect *not* to talk, and instead to seek legal advice, even in circumstances where submitting to unwarned interrogation would not violate the Constitution. It under-regulates because a suspect may hear the right, waive it, and still end up subject to compelling pressures.

In the terrorism context, advising a suspect that he has the right to counsel is an intolerable limit on the need to gather information. The Fifth Amendment surely limits what the government can do to obtain a confession, but just as surely it does not impose an affirmative obligation on the government to provide a lawyer to a suspect during interrogation as *Miranda* sought to do. That requirement is tantamount to asking the government to "thwart its own investigations,"¹⁰⁰ as it is well-recognized that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."¹⁰¹ Despite the fact that post-*Miranda* practice has been simply to shut down interrogation after the invocation of the right to counsel, rather than to provide counsel immediately, the fact that the Court later elevated the right-to-counsel strand to provide greater protections for a suspect who invokes this right rather than the right to silence¹⁰² makes *Miranda's* right to counsel strand particularly pernicious.

Even if suspects should be advised of their right to remain silent—a right which is at least *related* to the Fifth Amendment—the right to counsel during interrogation is wholly foreign to the text of the Self-Incrimination Clause and should not form a part

⁹⁹ *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984).

¹⁰⁰ Darmer, *supra* note 6, at 258–59.

¹⁰¹ *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).

¹⁰² Darmer, *supra* note 6, at 261.

of the Court's Fifth Amendment jurisprudence. This aspect of *Miranda's* prophylactic rules should be changed, not just in the terrorism context, but in all cases.

IV. DENIAL OF SIGNIFICANT RIGHTS TO GUANTANAMO BAY DETAINEES: COERCED STATEMENTS AND LIMITS ON THE RIGHT TO COUNSEL

While the *Miranda* "right to counsel" is controversial, the right to appointed trial counsel established by a unanimous Supreme Court in *Gideon v. Wainwright*¹⁰³ has been far less so. Among other things, *Gideon* is much more closely tethered to the text of the Sixth Amendment than is *Miranda* to the Fifth. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."¹⁰⁴ Thus, in terrorism cases that proceed in conventional courts, such as the cases involving John Walker Lindh and Zacarias Moussaoui, the defendants are plainly entitled to counsel.¹⁰⁵

When the Government operates outside the conventional criminal court system, however, the Sixth Amendment arguably does not apply. The Sixth Amendment provides for counsel in "criminal prosecutions," not in Combatant Status Review Tribunals ("CSRTs") such as those that have been established for determining "enemy combatant" status,¹⁰⁶ or in Military Commission proceedings.¹⁰⁷ Constitutional right to counsel aside, the question whether counsel should be provided to Guantanamo Bay detainees—for example, as a matter of legislative grace or even through the efforts of committed volunteer lawyers—has not received government support.¹⁰⁸ Indeed, a high-level member of the Bush Administration recently made headlines by representing that it was "unpatriotic" for counsel to step in to represent "enemies" and even suggesting that other clients of corporate law

¹⁰³ 372 U.S. 335 (1963).

¹⁰⁴ U.S. CONST. amend. VI.

¹⁰⁵ See Darmer, *supra* note 6, at 243 (noting that Lindh "had a small army of privately retained defense counsel advising him when he entered his guilty plea"); cf. Michael C. Dorf, Column, *Why the Military Commissions Act is No Moderate Compromise*, FINDLAW.COM, Oct. 11, 2006, <http://writ.lp.findlaw.com/dorf/20061011.html> (pointing out that, historically, terrorism suspects such as those charged in the 1993 World Trade Center bombing and Moussaoui were charged in conventional courts, and advocating for greater use of the conventional courts).

¹⁰⁶ See Gary Williams, *Indefinite Detention and Extraordinary Rendition: Recent Court Decisions Throw into Doubt the Executive's Claims for Extraordinary Authority over Enemy Combatants*, L.A. LAWYER, Sept. 2006, at 44, 49; see also *infra* notes 112–18 and accompanying text.

¹⁰⁷ Williams, *supra* note 106, at 49.

¹⁰⁸ See, e.g., Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L. POLY & ETHICS J. 127, 146–47 (2006).

firms should pressure the firms to stop providing pro bono assistance to such individuals.¹⁰⁹

A complicated issue arises when determining the scope of rights constitutionally required to be provided to detainees at Guantanamo Bay—particularly those who are non-citizens. Initially, the Government took the position, in essence, that those detainees had no right to challenge their detention pursuant to writs of habeas corpus. The Supreme Court rejected that position in *Rasul v. Bush*,¹¹⁰ holding that statutory habeas rights extended to the Guantanamo Bay detainees based upon the district court's jurisdiction over those who had custody of the detainees.¹¹¹

Following the Court's decision in *Rasul* and the related case of *Hamdi v. Rumsfeld*,¹¹² involving the rights of a so-called citizen "enemy combatant," the U.S. Government established CSRTs to determine whether or not those held at Guantanamo were properly classified as enemy combatants.¹¹³ Classification of an individual as an "enemy combatant" has important implications, including the potential for long-term detention without formal charge.¹¹⁴

The CSRTs were deeply flawed from the perspective of providing meaningful hearings to the detainees, as documented in a paper prepared by Mark Denbeaux and his team of student researchers.¹¹⁵ Among many other significant limitations was the fact that the detainees had no right to counsel. As Denbeaux documented:

The CSRT procedures recommended that the Government have an attorney present at the hearing; the same procedures deny the detainees any right to a lawyer.

Instead of a lawyer, the detainee was assigned a "personal representative"—whose role, both in theory and practice, was minimal.

¹⁰⁹ See Laurie L. Levenson, *Calibrating Ethics in Criminal Law*, L.A. DAILY J., Feb. 2, 2007, at 6 (noting that it was "particularly appalling" that a high-level official would suggest that it was "unpatriotic to represent detainees and those designated as 'enemies' of the state").

¹¹⁰ 124 S. Ct. 2686 (2004).

¹¹¹ See *id.* at 2698–99.

¹¹² 124 S. Ct. 2633 (2004).

¹¹³ Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667, 670 n.15 (2006). Blocher's comment provides a helpful analysis of whether the CSRTs properly denied prisoner-of-war status to the detainees for purposes of applying the Geneva Convention.

¹¹⁴ See *Hamdi*, 124 S. Ct. at 2636 ("The Government contends that Hamdi is an 'enemy combatant,' and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.").

¹¹⁵ MARK DENBEAUX, ET AL., NO-HEARING HEARINGS: CSRT: THE MODERN HABEAS CORPUS? (2006), available at http://law.shu.edu/news/guantanamo_reports.htm.

....

At the end of the hearing, the personal representative failed to exercise his right to comment on the decision in 98% of the cases

....

In the 52% of the cases where the personal representative did make substantive comments, those comments sometimes advocated for the Government.¹¹⁶

In light of the other significant shortfalls of the CSRTs, including the fact that the CSRTs permitted hearsay from anonymous sources¹¹⁷ and evidence obtained through torture,¹¹⁸ the fact that there was no right to counsel takes on even more significant ramifications. While an attorney could point to the serious limits of such evidence, the detainee himself or his personal representative would be far less equipped to do so.

Based on recent legislation, it is now plain that Congress intended to strip detainees held as enemy combatants of their right to seek judicial review of those determinations pursuant to writs of habeas corpus.¹¹⁹ In addition, while the Military Commissions Act of 2006 ("MCA") contemplates that some enemy combatants will be provided with trial-like proceedings before Military Commissions, those proceedings provide vastly more limited protections than do either ordinary criminal trials or traditional military courts martial.¹²⁰ Of specific importance to this article, the MCA, while purporting to ban the use of statements obtained by "torture," does contemplate the use of statements obtained from detainees where the amount of "coercion" used is the subject of

¹¹⁶ See *id.* at 3 (paragraph numbering omitted); see also *id.* at 14–18 (documenting further the limits on the assistance provided by "personal representatives").

¹¹⁷ See, e.g., *id.* at 34.

¹¹⁸ See *Boumediene v. Bush*, Nos. 05-5062 to 05-5064, 05-5095 to 05-5116, 2007 WL 506581 (D.C. Cir. Feb. 20, 2007).

Additionally, and more significant still, continued detention may be justified by a CSRT on the basis of evidence resulting from torture. Testimony procured by coercion is notoriously unreliable and unspeakably inhumane. . . . The DTA [Detainee Treatment Act ("DTA")] implicitly endorses holding detainees on the basis of such evidence by including an anti-torture provision that applies only to future CSRTs. DTA § 1005(b)(2), 119 Stat. at 2741. Even for these future proceedings, however, the Secretary of Defense is required only to develop procedures to assess whether evidence obtained by torture is probative, not to require its exclusion. *Id.* § 1005(b)(1), 119 Stat. at 2741.

Id. at *19 (Rogers, J., dissenting) (first citation omitted).

¹¹⁹ See *id.* at *9 (finding the court to be without jurisdiction) (citing the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2740 (2005)).

¹²⁰ See, e.g., Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2608 (2006) (to be codified at 10 U.S.C. § 949a) (permitting evidence generally not admissible in a criminal trial to be used).

dispute.¹²¹

Thus, statements can be introduced if obtained by coercive means falling short of “torture,” a term which the Administration has defined narrowly in other contexts.¹²² Being adjudged guilty under the MCA of certain crimes can lead to the ultimate penalty of death.¹²³

Moreover, the MCA does not guarantee military commission proceedings for all detainees. This means that individuals deemed “enemy combatants” under the severely truncated CSRT proceedings can potentially be held indefinitely.¹²⁴ Ultimately, the United States may be executing, imprisoning and holding indefinitely vast numbers of detainees based upon procedures that are strikingly different and less protective than those accorded to criminal defendants.

Finally and perhaps most significantly, the MCA sought to strip federal courts of jurisdiction to hear claims¹²⁵ under the statutory provision for habeas corpus, 28 U.S.C. § 2241. In *Boumediene v. Bush*, a split panel of the District of Columbia Court of Appeals upheld the provisions of the MCA, finding that Congress had plainly intended to strip the courts of jurisdiction under the habeas corpus statute and that no constitutional right to habeas corpus could be claimed by aliens lying outside the territorial jurisdiction of the United States.¹²⁶

In deciding *Rasul*, the Supreme Court held earlier that aliens held at Guantanamo Bay had a statutory right to habeas corpus.¹²⁷ Now that Congress has amended the statute expressly to remove the courts’ jurisdiction to hear aliens’ claims under the statute, the Court will have to determine whether Congress violated the Suspension Clause. That Clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹²⁸

121 *Id.*, 120 Stat. at 2607 (to be codified at 10 U.S.C. § 948r). For a further discussion of this point, see Linda M. Keller, *Alternatives to Miranda: Preventing Coerced Confessions via the Convention Against Torture*, 10 CHAP. L. REV. 743, 749 (2007).

122 See Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to the Honorable Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020801.pdf>.

123 See § 3, 120 Stat. at 2616 (to be codified at 10 U.S.C. § 949m).

124 See *id.*, 120 Stat. at 2603 (to be codified at 10 U.S.C. § 948d) (“Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title.”).

125 *Id.* § 7(a), 120 Stat. at 2635–36 (amending 28 U.S.C. § 2241 (2000)).

126 *Boumediene v. Bush*, Nos. 05-5062 to 05-5064, 05-5095 to 05-5116, 2007 WL 506581, at *3, *6 (D.C. Cir. Feb. 20, 2007).

127 *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004).

128 U.S. CONST. art. I, § 9, cl. 2.

Whether the War on Terror, now in its seventh year, constitutes a “Rebellion or Invasion” is dubious. While the Executive Branch has relied on wartime precedent for the notion that battlefield detainees are not entitled to constitutional protections, the Guantanamo Bay detainees are in a different position than those captured and held on the battlefield. Perhaps more significantly, given our control over the facilities at Guantanamo Bay, the length of time we have been holding detainees, and the conditions in which the world knows they have been held, the detaining authorities are in a different position than battlefield commanders who must make rapid decisions in the heat of battle and who are necessarily diverted by the daily constraints of war.

Analyzing the scope of the constitutional protections available to Guantanamo Bay detainees is beyond the scope of this article.¹²⁹ But we must recognize that the “shadow system” we are engaged in is deeply problematic. We are using coerced confessions and we are holding prisoners indefinitely who have had none of the protections of an adversarial system to challenge their status as “enemy combatants.” This is inconsistent with the spirit of the rights provided by our Constitution, even if there is an argument that executive authority in wartime is broad enough to justify this system. We should be deeply concerned about a system that has generated much global criticism. If we lose moral authority, we lose the power to persuade on the world stage. As my colleague Donald J. Kochan has recently noted, persuasion is an important “‘soft power’ weapon that has a place in the plan in the war on terror.”¹³⁰ The utility of that power, however, “is directly proportional to a nation’s credibility to make claims that there is quality in the intellectual and ideological commodities it has to offer.”¹³¹

CONCLUSION

Forty years after *Miranda*, we must recognize that *Miranda* is an imperfect solution to the problem of coerced confessions. Particularly in the context of terrorism cases, we do not have the luxury of according its prophylactic protections, especially when

¹²⁹ For a recent article that analyzes the constitutionality of the jurisdiction-stripping provisions of the MCA, see Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. (forthcoming 2007), available at <http://ssrn.com/abstract=935368>.

¹³⁰ See Donald J. Kochan, *The Soft Power and Persuasion of Translations in the War on Terror: Words and Wisdom in the Transformation of Legal Systems*, 110 W. VA. L. REV. (forthcoming 2008) (manuscript at 2, available at <http://ssrn.com/abstract=977547>); see also *id.* (manuscript at 10) (“Soft power is the means of leveraging popularity, power, prestige, prosperity, envy, enlightenment and experience to affect foreign nationals and foreign policy.”).

¹³¹ *Id.*

not tethered to the Constitution. On the other hand, we must recognize that the right against self-incrimination is absolute, and that truly compelled statements should form no part of our criminal justice system. Outside of the criminal justice system, in the context of military detentions, the applicability of constitutional protections is far less certain. But we have learned much in the criminal justice system about the dangers and unfairness of coerced confessions and the vital role played by counsel. Any system that does not provide such core protections should be viewed with skepticism.

An Essay on *Miranda's* Fortieth Birthday

Paul Shechtman*

*Miranda v. Arizona*¹ has now reached its fortieth birthday, and it has grown in stature with age. After *Dickerson v. United States*,² *Miranda* is clearly a "constitutional decision." Forty years later, however, basic questions about *Miranda's* effect remain hotly debated: Does *Miranda* frustrate effective law enforcement by shielding the guilty from custodial interrogations? Does it protect the innocent from false confessions and wrongful convictions? Should its warnings be modified to better serve their intended purpose? If not, what other measures should be considered if one believes, as I do, that police interrogation requires additional regulation? This essay, which grows out of my presentation at the Chapman Law Review *Miranda* symposium, addresses those questions.

I.

As others have observed, there is a paucity of useful empirical analysis of *Miranda's* effect on police interrogation.³ In the immediate aftermath of the decision, there was a flurry of research, but most scholars agree that the studies are flawed.⁴ Principal among the shortcomings was a failure to appreciate that the police would adapt to *Miranda* with time. As a result, the early studies do not provide a reliable basis for drawing long-term conclusions.

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1 384 U.S. 436 (1966).

2 530 U.S. 428 (2000).

3 See, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1058 (1998) ("In what has aptly been described as an 'empirical desert,' we have little knowledge about what police interrogation looked like shortly after *Miranda*, much less what it looks like today." (citing H. RICHARD UVILLER, *TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE* 198 (1988)); George C. Thomas III, *Is Miranda a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996).

4 See, e.g., Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 631-52 (1996); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 506-41 (1996).

Since those early years, there have been only two studies of note, both published in 1996: one by Professor Leo conducted in the Bay Area⁵ and the other by Professor (now Judge) Cassell and his student, Bret Hayman, conducted in Salt Lake County.⁶ Those studies are notable because in each, approximately 80% of arrestees who received *Miranda* warnings elected to waive their rights and face questioning.⁷ And in each, less than 5% of those who initially waived later reconsidered and invoked.⁸ Two studies is a small sample from which to generalize, but it is all we have; hence, those numbers—80% waive, and few subsequently invoke—are treated as revealed truths in the *Miranda* literature.

If those numbers are accurate, the first obvious question is, why do so many arrestees agree to talk? The principal reason, no doubt, is that arrestees want to talk: the innocent want to explain their innocence, and the guilty want to minimize their culpability. (Often, an arrestee does not appreciate the extent to which he has incriminated himself, as when he admits to a robbery but denies pulling the trigger, only to be charged with felony murder.) Many arrestees are loath to remain silent lest the police draw an adverse inference against them. Some waive their rights in order to learn what the police know about the crime. They recognize that the police are unlikely to talk to them unless they talk to the police.⁹

Another reason that so relatively few arrestees invoke is that the *Miranda* warnings are ineffectual. In part that is because the police have learned to give the warnings in a way that masks their import. They have learned to “waltz around *Miranda*,” to use the words of a detective whom Professor Leo interviewed.¹⁰ A revealing example is the recent decision in *Hairston v. United States*,¹¹ in which the defendant, an 18-year-old, was arrested for a gang-related murder. The arrest occurred at approximately 10:00 p.m., and the lead detective gave the arresting officer express instructions not to administer *Miranda* warnings. Instead, the defendant was placed in an interview room and left there alone for more than an hour. When the lead detective finally en-

5 Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

6 Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996).

7 Leo, *supra* note 5, at 276; Cassell & Hayman, *supra* note 6, at 859–60.

8 Leo, *supra* note 5, at 275; Cassell & Hayman, *supra* note 6, at 860.

9 For insight into the diverse factors that motivate arrestees to talk, see Anemona Hartocollis, *Remain Silent? Some in Custody Spell it All Out*, N.Y. TIMES, Jan. 5, 2007.

10 Leo, *supra* note 4, at 665; see also Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 431–47 (1999).

11 *Hairston v. United States*, 905 A.2d 765 (D.C. Cir. 2006).

tered the room, he launched into a lengthy speech. He announced that he knew the defendant was involved in the crime, named others who supposedly also participated, and informed the defendant that another gang member had already confessed. All the while, the detective admonished the defendant to "listen and not talk."¹²

When the defendant first spoke, it was to express his disbelief that his fellow gang member was cooperating. The detective countered by showing the defendant a videotape of the other gang member talking to the police. The videotape was played for one minute with the volume off so that the defendant could only guess at what his confederate was saying. It was at that point, almost an hour into the session, that the detective asked the defendant if he wanted to tell "his side of the story." When the defendant answered "yes," the detective administered the *Miranda* warnings. Three hours later, he had elicited a confession to the crime.¹³ That the detective's stratagem was found to comport with *Miranda*, which it was, speaks volumes about our willingness to tolerate "waltzing."

The answer to the second obvious question—why do so few arrestees who initially waive subsequently invoke?—can be found in a brilliant article by Professor Stuntz, who calls such persons "conditional talkers."¹⁴ As Professor Stuntz observes, conditional talkers are optimistic that they can talk their way out of trouble, seemingly ignorant of the fact that talking to the police is a perilous course, fearful of angering the police by initially invoking, courageous enough to say "stop" in mid-stream, and sophisticated enough to realize that if they say "stop," the police will presumably accede to their request. That so few people share that mix of traits—in Professor Stuntz's words, "ignorant and knowledgeable, fearful and courageous, irrationally optimistic and unusually sophisticated"—should not be surprising.¹⁵

One other fact helps explain why there are so few conditional talkers. Increased police professionalism, to which *Miranda* has contributed, has meant that interrogation tactics are less abusive, so that the need to say "stop" is less pressing. A little-noted aspect of the Leo and Cassell-Hayman studies is the brevity of the observed interrogations: 92% of the interrogations Leo observed lasted two hours or less and all but one of the interrogations that Cassell and Hayman studied lasted one hour or less.¹⁶

¹² *Id.* at 770–71.

¹³ *Id.* at 772.

¹⁴ William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975, 983 (2001).

¹⁵ *Id.* at 986–87.

¹⁶ Leo, *supra* note 5, at 279; Cassell & Hayman, *supra* note 6, at 892.

An arrestee is less likely to invoke mid-stream when the stream is so short.

II.

The goal of confession law should be to regulate the interrogation process so as to maximize the number of arrestees who talk and to minimize abusive interrogations. To borrow Justice Harlan's words, "[P]eaceful interrogation is not one of the dark moments of the law."¹⁷ Indeed, if the available data is correct, more than 50% of all interrogations yield incriminating evidence.¹⁸ For me, what drove the point home was an assignment as a consultant to the District Attorney's Office in pre-Katrina New Orleans, where the police had all but stopped questioning arrestees, even in homicide cases. The result was homicide prosecutions that relied exclusively on the testimony of eyewitnesses and accomplices. Not surprisingly, intimidation of witnesses was rampant, and acquittals were common. One can debate whether confessions are good for the soul, but they are plainly good for the prosecution.

How does *Miranda* fare when judged against the goal of maximizing non-abusive interrogations? I will focus here on *Miranda*'s costs. One cost is that some guilty defendants who might otherwise talk invoke their right to silence. Estimating their number is a parlous task. If 20% of arrestees invoke their *Miranda* rights and 50% of interrogations are successful, incriminating statements would be lost in 10% of cases. That number, however, is high because some of those who invoke would remain silent even if *Miranda* were overruled. (Among those who invoke are a disproportionate number of recidivists who apparently have learned that silence is golden.)¹⁹ Professor Schulhofer may well be close to the mark when he estimates that *Miranda* prevents the police from obtaining incriminating statements in approximately 5% of cases.²⁰ That is a small percentage, but it is a significant number in the aggregate (there were 603,503 arrests in 2005 for violent crimes²¹), so that *Miranda*'s cost in lost evidence should not be lightly dismissed.

17 *Miranda v. Arizona*, 384 U.S. 436, 517 (1966) (Harlan, J., dissenting).

18 Leo, *supra* note 5, at 280–81 (noting that older studies had success rates of approximately 50%, and suggesting success in as high as two-thirds of interrogations); see generally George C. Thomas III, *Plain Talk about the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933 (1996).

19 Leo, *supra* note 5, at 286–87.

20 Schulhofer, *supra* note 4, at 545–46.

21 U.S. DEPT OF JUSTICE FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S. 2005 tbl.29 (2006), http://www.fbi.gov/ucr/05cius/data/table_29.html (classifying murder, forcible rape, robbery, and aggravated assault as violent crimes).

Miranda imposes other costs on the criminal justice system as well. We lose some voluntary confessions because of technical non-compliance with *Miranda*, but the number seems small.²² What bears emphasis is that any exclusion of reliable evidence on a perceived "technicality" breeds disrespect for the law. Take, for example, the recent case of *United States v. Street*, in which the defendant was a police officer with twenty-two years on the job who moonlighted as a bank robber.²³ His voluntary confession was suppressed because he was given only two of the four warnings.²⁴ Bright line rules must be enforced, but no one should be pleased with the result in *Street*, which flouts common sense.

Another cost of *Miranda* is a proliferation of hearings. Even if the prosecution "wins," the criminal justice system loses when scarce resources are devoted to pre-trial proceedings. The sad reality is that the adjudicative process has become so costly that we plea bargain virtually all criminal cases.²⁵ Trials have all but vanished. *Miranda* contributes to that reality, which its admirers too often forget.

Miranda's greatest cost, however, may be that it has stifled further effort to regulate police interrogation. *Miranda* warnings, it seems, share a common feature with the warnings on the boxes of commercial products. Just as those warnings have shielded manufacturers from liability, *Miranda* warnings have shielded police interrogations from closer scrutiny. If the warnings are given, courts are less likely to look "inside the box" to see whether the police have employed dubious tactics. As the Supreme Court itself has observed, "The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry. But as we said in *Berkemer v. McCarty*, '[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."²⁶

What we know is that *Miranda* has not eliminated false confessions. Professors Drizin and Leo have documented 125 proven

²² See George C. Thomas III, *Stories about Miranda*, 102 MICH. L. REV. 1959, 1976 (2004) (describing studies which show that "police have adjusted to the rule that they must warn suspects before beginning custodial interrogation").

²³ *United States v. Street*, 472 F.3d 1298, 1302 (11th Cir. 2006).

²⁴ *Id.* at 1304, 1312-14.

²⁵ Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137 (2005) ("[P]lea bargains resolve ninety-five percent of adjudicated cases."); see also the classic article by John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

²⁶ *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984)) (alteration in original) (citation omitted).

cases of false confessions since *Miranda* was announced.²⁷ DNA exonerations have given prominence to the issue. If we believe 125 false confessions is an unacceptable number, as we must, then reforms that go beyond *Miranda* are required.

III.

Three reforms commend themselves.

1. Videotaping. A fundamental flaw of *Miranda* is that it does nothing to eliminate the swearing contest between the police and the arrestee that plagued courts in the pre-*Miranda* years. It is still commonplace for a judge (or jury) to be faced with strikingly different accounts of what occurred behind closed doors. In recent years, numerous jurisdictions have mandated videotaping to varying extents,²⁸ and efforts should be made to study the effect. Does videotaping reduce the number of custodial interrogations? Do the police circumvent the rules by conducting more pre-custody interviews? Does videotaping spawn litigation about what happened before the camera was turned on? One recent study reports promising results.²⁹ Surely any reform that both Professor Leo and Judge Cassell support (given their otherwise divergent views) deserves our careful consideration.

2. Expert testimony. Juries, we now know, are not skilled at recognizing false confessions. In the 35 false confession cases in the Drizin-Leo study that went to trial before a jury, the jury acquitted in 7 and convicted in 28.³⁰ That percentage reflects the fact that most jurors believe that an innocent person would not confess to a crime. Expert testimony can help dispel that canard. The leading case is *United States v. Hall*,³¹ in which the court

²⁷ Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

²⁸ See Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 528–29 (identifying jurisdictions that have required electronic recording); Cathy Young, *Miranda Morass*, REASON, Apr. 2000, at 54, 56 (“[A]t least 2,400 police and sheriffs’ departments nationwide (about 15 percent of the total) audiotape or videotape . . . interrogations . . .”).

²⁹ See THOMAS P. SULLIVAN, NORTHWESTERN SCH. OF LAW, CTR. FOR WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 6, 24–26 (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf>.

³⁰ Drizin & Leo, *supra* note 27, at 953. Fourteen of 125 false confessors pleaded guilty and two were convicted by a judge; the other seventy-four were never charged or the charges were dropped pre-trial.

³¹ *United States v. Hall (Hall I)*, 93 F.3d 1337 (7th Cir. 1996) (remanding for a *Daubert* hearing); *United States v. Hall (Hall II)*, 974 F. Supp. 1198 (C.D. Ill. 1997) (admitting expert testimony on remand); *United States v. Hall (Hall III)*, 165 F.3d 1095 (7th Cir. 1999) (affirming convictions); see generally Nadia Soree, Comment, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testi-*

found that such testimony would be helpful to the jury and that it passed muster under *Daubert*. (The expert was allowed to testify that there are false confessions and to the factors that seem to produce them, but *not* that the defendant's confession was false.)³² It bears note that Hall was convicted despite the expert's testimony—an outcome which should allay the fears of some prosecutors that expert testimony about false confession is a recipe for false acquittals.

3. Length Restrictions. One of the lessons from *Miranda* literature is that protracted interrogations can yield false confessions. In 84% of the cases in the Drizin-Leo study for which the length of interrogation could be determined, questioning lasted more than six hours. Several interrogations lasted more than a day.³³ A rule limiting questioning to four hours with the ability to seek additional time from a judge in exceptional circumstances would seem desirable.³⁴ I would not require the police to advise arrestees of the four-hour rule: what matters is not that arrestees know the limit but that there be one.³⁵

IV.

There have been proposals to strengthen the *Miranda* warnings to address the false confession problem. One proposal calls for adding the admonition that a suspect's silence cannot be used against him.³⁶ For me, the proposal misses the mark. An added warning might have the unwanted effect of increasing the number of arrestees who invoke. And it is unlikely to prevent false confessions from occurring. As noted above, false confessions are often the product of lengthy interrogations, and those who confess falsely are often young or mentally defective.³⁷ A refined warning would do precious little to prevent them from talking.

Miranda is now forty years old, and, after *Dickerson*, its fifti-

mony, 32 AM. J. CRIM. L. 191 (2005).

³² *Hall II*, 974 F. Supp. at 1205.

³³ Drizin & Leo, *supra* note 27, at 948–49.

³⁴ Notably, a leading manual on police interrogation indicates that four hours is generally sufficient to obtain a confession. Welsh S. White, *False Confessions and the Constitutional Safeguards against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 145 (1997) (citing FRED E. INBAU, ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 310 (3d ed. 1986)).

³⁵ Compare *id.* at 144 (arguing that “interrogators should be required at the outset to inform a suspect as to the maximum permissible length of the questioning”).

³⁶ Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 813 (2006).

³⁷ Drizin & Leo, *supra* note 27, at 948–49; Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 308 (2006) (“By contrast, prolonged interrogation—especially in conjunction with youthfulness, mental retardation, or other psychological vulnerabilities—is strongly associated with eliciting false confessions.”).

eth birthday (and well beyond) seems assured. It is now a fixture on the criminal justice landscape. That said, we should not look to *Miranda* as a solution to the false confession problem. Video-taping, expert testimony, and length restrictions should be promoted in upcoming years. Their effect should be examined at the next Chapman *Miranda* symposium, say in 2017.

The Right to Remain Silent in Light of the War on Terror

Ronald J. Rychlak*

"The law will not suffer a prisoner to be made the deluded instrument of his own conviction."

Watts v. Indiana, 338 U.S. 49, 54 (1949) (quoting 2 William Hawkins, A Treatise of the Pleas of the Crown ch. 46 § 34 (8th ed. 1824)).

"[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . . Admissions of guilt resulting from valid Miranda waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'"

McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)).

INTRODUCTION

The familiar words of the *Miranda* warning are known by almost all Americans who have watched television at any time since the U.S. Supreme Court's 1966 decision in *Miranda v. Arizona*.¹ The precise rules have evolved over the years, but most people know that they have the right to remain silent and the right to have an attorney appointed if they cannot afford one. There can be difficult issues of proof in court, but litigants, attorneys, and judges fundamentally know how *Miranda* works.² That is not to say, however, that *Miranda* is uncontroversial. Few areas of law provoke more consistent debate than interrogation and confessions,³ and *Miranda*'s exclusion of incriminating

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¹ 384 U.S. 436 (1966).

² If a suspect is interrogated while in custody, the officer has to inform the suspect of his or her rights to remain silent and to have an attorney present for questioning, and the suspect must waive those rights or statements made by the suspect will be inadmissible at trial. *Id.* at 444–45.

³ WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 291 (2d ed. Hornbook Series 1992).

statements in some criminal cases has only added to the controversy. Moreover, the events of September 11, 2001 and the subsequent War on Terror have renewed interest in the issue of interrogation and confessions. The stakes have gotten higher.⁴

The dilemma most often presented is the “ticking bomb” scenario. This is the situation in which the authorities want to interrogate a suspect who is in custody regarding his knowledge about a ticking bomb or a planned terrorist attack.⁵ Is this suspect entitled not to incriminate himself? What about the right to have an attorney present, or the right to remain silent? The responses to these questions might seem obvious to many people: an emphatic “no and no.”⁶ In reality, of course, the more likely scenario is one in which several suspects are in custody, and one or more of them *may* have knowledge relevant to a planned terrorist attack but many others will have no such knowledge. What rights are to be accorded the suspects in that situation?

To properly address this issue, one must resolve several preliminary questions, including: Do standard criminal procedure laws apply? Where are the suspects being held (inside or outside of the United States)? What is their citizenship status? How urgent is the supposed threat? How reliable is the information known by the authorities? Can torture ever be justified, and how is it defined? What about psychological pressure? What is the consequence of violating the rights of the detainee/prisoner? What international obligations apply?⁷ Many of these questions

4 “[C]laims of violations of human-rights law or the Constitution must be evaluated in the context of the realities created by Sept. 11.” John C. Yoo, *Perspectives on the Rules of War: Sept. 11 Has Changed the Rules*, S.F. CHRON., June 15, 2004, at B9. See also M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL’Y 319 (2003) (proposing a “foreign interrogation” exception to *Miranda*).

5 See George J. Terwillinger III, “Domestic Unlawful Combatants”: A Proposal to Adjudicate Constitutional Detentions, ENGAGE, Oct. 2006, at 55, 55 (setting forth a similar scenario).

6 JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR 152 (2006) (“The Fifth Amendment’s right to remain silent . . . applies only in the criminal justice system.”). Yoo details the problems of providing similar rights to terrorist suspects. *Id.* at 152–53. But see *United States v. Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000) (holding that FBI agents sent to Afghanistan to interrogate captured members of the al Qaeda network had to abide by constitutional limitations). The Court stated, “The Supreme Court cases on point suggest that the Fourth Amendment applies to United States citizens abroad. . . . Thus, this Court finds that even though the searches at issue in this case occurred in Kenya, El-Hage can bring a Fourth Amendment challenge.” *Id.* at 270–71.

7 See James A. Deeken, Note, *A New Miranda for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of Printz v. United States*, 31 VAND. J. TRANSNAT’L L. 997 (1998). In early 2007, German prosecutors indicted several CIA agents for allegedly capturing a German citizen, taking him to a third country, and subjecting him to harsh interrogation. Mark Landler, *German Court Challenges C.I.A. over Abduction*, N.Y. TIMES, Feb. 1, 2007,

go beyond the scope of this article, but as this Symposium reveals, the rights of terrorist suspects and the potential applicability of *Miranda* are much more than hypothetical questions. Governmental sources, academic commentators, and the media have all recently devoted a great deal of attention to these subjects.⁸ As the United States continues to fight the War on Terror and seek out terrorist activity located outside of this nation, interrogations of non-American citizens by American officials will undoubtedly increase both in number and importance.

Certainly an American citizen arrested within the United States would have the right not to incriminate himself. Presumably a foreign national arrested outside of the United States would not be fully protected.⁹ Other scenarios present more difficult issues.¹⁰ American courts, therefore, have to determine whether the Fifth Amendment's privilege against self-incrimination applies to non-American citizens, and whether an American police or military agent conducting an investigation abroad must provide some type of warnings before conducting an interrogation.¹¹ The initial question would seem to be whether terrorist suspects are even entitled to the right protected by *Miranda*—the right not to incriminate themselves.

I. DEVELOPMENT OF THE LAW OF SELF-INCRIMINATION

The problems with permitting suspects to testify against

at A1.

⁸ See Mark A. Godsey, *Miranda's Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal For a New Miranda Exception Abroad*, 51 DUKE L.J. 1703 (2002); Robert L. Bartley, *A 'Miranda' Warning for Saddam? Democrats Try to Discredit America's Victory*, OPINIONJOURNAL.COM, July 14, 2003, <http://www.opinionjournal.com/forms/printThis.html?id=110003743>; Andrew C. McCarthy, *McCain & Miranda: "Cruel, Inhuman and Degrading" May Prove More Dangerous than Meets the Eye*, NAT'L REV. ONLINE, Dec. 15, 2005, <http://www.nationalreview.com> (follow "Search" hyperlink; then follow "National Review Online" hyperlink; then search "more dangerous than meets the eye").

⁹ See *United States v. Bowman*, 260 U.S. 94, 98 (1922) ("[T]he same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents."). *But see Bin Laden*, 126 F. Supp. 2d at 270 ("The Government seems to concede the general applicability of the Fourth Amendment to American citizens abroad . . .").

¹⁰ When Congress focuses a statute on extraterritorial conduct or provides an explicit extraterritorial provision in the statute, it is clear that there is a basis for prosecuting extraterritorial activities. See generally Ellen S. Podgor, *"Defensive Territoriality": A New Paradigm for the Prosecution of Extraterritorial Business Crimes*, 31 GA. J. INT'L & COMP. L. 1 (2002).

¹¹ Complicating these questions is the fact that the laws of many foreign nations do not provide suspects with the full range of rights embodied in *Miranda*, such as the right to remain silent or the right to speak to an attorney. Thus, informing a foreign national of these rights might actually mislead the suspect, at least as to any prosecution that might take place in that nation. Godsey, *supra* note 8, at 1708.

themselves (which often leads to suspects being forced to testify against themselves) have long been recognized. As early as 866, Pope St. Nicholas I wrote:

If a [putative] thief or bandit is apprehended and denies the charges against him, you tell me your custom is for a judge to beat him with blows to the head and tear the sides of his body with other sharp iron goads until he confesses the truth. Such a procedure is totally unacceptable under both divine and human law . . . , since a confession should be spontaneous, not forced. It should be proffered voluntarily, not violently extorted. After all, if it should happen that even after inflicting all these torments, you still fail to wrest from the sufferer any self-incrimination regarding the crime of which he is accused, will you not then at least blush for shame and acknowledge how impious is your judicial procedure? Likewise, suppose an accused man is unable to endure such torments and so confesses to a crime he never committed. Upon whom, pray tell, will now devolve the full brunt of responsibility for such an enormity, if not upon him who coerced the accused into confessing such lies about himself?¹²

One way to avoid these problems is to provide suspects with the right to remain silent. For at least 400 years, Great Britain has extended the privilege against self-incrimination to criminal suspects,¹³ and scholars have been debating the merits of that privilege all along.¹⁴

Police and prosecuting authorities consider confessions to be not only persuasive (and in some cases conclusive) of guilt, but also absolutely necessary for the smooth functioning of the criminal legal system. Suspects, however, do not typically confess to civil authorities to cleanse their souls. As one author put it, "by any standards of human discourse, a criminal confession can never truly be called voluntary. With rare exception, a confession is compelled, provoked and manipulated from a suspect by a

¹² Brian W. Harrison, *The Church and Torture*, THIS ROCK, Dec. 2006, at 23, 25 (quoting Pope Nicholas I, *Ad Consulta Vestra* ch. 86 (Nov. 13, 866)) (first alteration in original). Nicholas went on to suggest a different approach based on scripture (*Hebrews* 6:16), which involved making the person swear innocence on the Holy Gospel and accepting his word at that point. Pope Nicholas I, *Ad Consulta Vestra* ch. 86 (Nov. 13, 866). available at <http://www.fordham.edu/halsall/basis/866nicholas-bulgar.html>.

¹³ See GLANVILLE WILLIAMS, *THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL* 42–43 (2d ed. 1958) (describing the 1568 Court of Common Pleas' release of a defendant imprisoned for not answering the judge's questions).

¹⁴ See, e.g., *id.* at 48–58 (summarizing criticism of the privilege by Jeremy Bentham, among others); 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE* 229–41 (Fred B. Rothman & Co. 1995) (1827) (criticizing the exclusion of self-incriminating evidence because the innocent would want to speak, and therefore the privilege would only protect the guilty); Ian Dennis, *Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-Incrimination*, 54 *CAMBRIDGE L.J.* 342, 342–53 (1995) (concluding that the system should apply the privilege in limited contexts and not view it as a human right); David Dolinko, *Is There a Rationale for the Privilege against Self-Incrimination?*, 33 *UCLA L. REV.* 1063, 1064 (1986) (describing the privilege as a historical relic).

detective who has been trained in a genuinely deceitful art.”¹⁵ Investigators throughout history have resorted to tactics, some of them unsavory, to encourage statements from suspects.¹⁶ The *Miranda* rules are designed to regulate police interrogations by requiring them to inform suspects of their legal rights and by suppressing statements that are taken in violation of those rights.

In the days of the Star Chamber, procedures such as the rack and other instruments of torture were used to obtain confessions. Concern over the harsh tactics to compel statements from prisoners gradually resulted in the development of the right to remain silent.¹⁷ In fact, because of the force that was being used to compel confessions, Great Britain eventually prohibited all parties, including criminal defendants, from testifying as witnesses at their trials.¹⁸

A complete ban on all testimony from parties was eventually recognized as an obstacle in the pursuit of truth, and the prohibition was lifted.¹⁹ Criminal defendants were permitted to testify, but they also had the right not to testify.²⁰ Judges, however, could comment on a defendant’s failure to testify.²¹

Following English common law, early American courts permitted the introduction of confessions without restriction, even if law enforcement officials abridged the rights of those being inter-

¹⁵ DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 199 (1991).

¹⁶ In *The Proof of Guilt*, Glanville Williams describes procedures such as the rack and other instruments of torture used to obtain confessions “in the bad old days” of the Star Chamber. WILLIAMS, *supra* note 13, at 38–41.

¹⁷ See WILLIAMS, *supra* note 13 (describing the development of the privilege over hundreds of years). Some historians date the beginning of the concept of a privilege to 1637, with *John Lilburn*, a Star Chamber case. See *Miranda v. Arizona*, 384 U.S. 436, 459 (1966) (identifying *Lilburn* as a critical historical event in the development of the privilege). Parliament abolished the Star Chamber after this trial. See *id.* (noting the Star Chamber’s fall following the *Lilburn* trial). Other scholars trace the privilege even further back in time. See MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE 244 n.2 (Edward W. Cleary ed., 2d ed. 1972) (noting the view that the privilege dates back to canon law); *Miranda*, 384 U.S. at 458–59 n.27 (noting that some commentators find analogous principles in the Bible).

¹⁸ Scott Rowley, *The Competency of Witnesses*, 24 IOWA L. REV. 482, 485–90 (1939). See also WILLIAMS, *supra* note 13, at 43 (describing procedures regarding the defendant as a witness in the 1700s).

¹⁹ The House of Commons passed the Criminal Evidence Act of 1898. See WILLIAMS, *supra* note 13, at 45–48 (noting that the Criminal Evidence Act of 1898 was developed to counteract unmerited acquittals resulting from defendants not testifying); see also Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36 (Eng.) (changing rules regarding the competency of witnesses).

²⁰ See Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36, § 1(a) (Eng.) (stating that a charged person “shall be a competent witness,” but “shall [only] be called . . . upon his own application”).

²¹ See WILLIAMS, *supra* note 13, at 59–61. In addition, once a defendant elected to testify, the Act compelled him to answer incriminating questions. *Id.*

rogated.²² The key issue was whether the confession was *reliable*.²³ Too often, forcibly extracted confessions were given by the suspects solely to stop the interrogation.²⁴ This focus on reliability dominated American confession law well into the twentieth century.²⁵

In the 1944 case *Ashcraft v. Tennessee*, the Supreme Court discussed aggressive interrogation methods known as the “third degree.”²⁶ These techniques were designed to force confessions without brutal force, but with tactics such as powerful lights, persistent questioning over numerous hours, and deprivation of sleep.²⁷ The Court held that where the manner of interrogation was “inherently coercive,” the confession would be inadmissible regardless of reliability.²⁸ Importantly, if impermissible methods were used, a confession would be inadmissible regardless of the impact that the methods had on that particular defendant.²⁹

The problem with the “voluntariness test” was that virtually all confessions are “involuntary” to some extent. As one author put it, “[B]y any standards of human discourse, a criminal confession can never truly be called voluntary. With rare exception, a confession is compelled, provoked and manipulated from a suspect by a detective who has been trained in a genuinely deceitful

²² LAFAYE & ISRAEL, *supra* note 3, at 294.

²³ See *id.* (“[T]he question was put in terms of whether the defendant’s confession had been induced by a promise of benefit or threat of harm, while on other occasions the inquiry was more directly put in terms of whether the circumstances under which the defendant had spoken impaired the reliability of the confession.”).

²⁴ The actual number of false confessions is unknown and probably unknowable. It is certainly subject to debate. Compare Paul G. Cassell, *The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J. L. & PUB. POL’Y 523, 529 (1999) (stating that “false confessions occur quite infrequently”), with Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 430 (1998) (arguing that false confessions are much more common).

²⁵ Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 494; see also Joseph D. Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979). Military commissions still look to see whether information is relevant and reliable in order to decide issues of admissibility. YOO, *supra* note 6, at 218–19.

²⁶ 322 U.S. 143, 150–52 (1944).

²⁷ *Id.* at 150 & n.6. The Court found Ashcraft’s confession involuntary, compelled, and thus inadmissible. *Id.* at 153. This conclusion was based on the officers’ continual relay-style interrogation over a period of thirty-six hours without rest. *Id.*

²⁸ *Id.* at 154. See also *Watts v. Indiana*, 338 U.S. 49, 50 n.2 (1949) (citing *Lisenba v. California*, 314 U.S. 219, 236–37 (1941)) (noting that if circumstances indicate that the confession was not given by the free will of the defendant, it will not be deemed voluntary and therefore will be inadmissible, even though the statements may be reliable).

²⁹ *Ashcraft*, 322 U.S. at 160. The Court has noted, however, that the characteristics of a particular defendant might subject him or her to particular peril. See *Colorado v. Connelly*, 479 U.S. 157, 165 (1986) (“[M]ental condition is surely relevant to an individual’s susceptibility to police coercion.”).

art.”³⁰ Critics also argued that the voluntariness test permitted too much pressure to be applied on suspects, as it only prohibited prosecutors from using evidence obtained by “interrogation methods that would exert so much pressure that the suspect would admit to facts regardless of whether she believed in the truth of the facts admitted.”³¹ Nevertheless, the voluntariness rule survives even today,³² though it is often overshadowed by *Miranda*.

In the late 1950s, the Supreme Court put in place the so-called *McNabb-Mallory* rule.³³ Based on a federal statute³⁴ and the Federal Rules of Criminal Procedure,³⁵ this rule held that a criminal defendant had to be arraigned “without unnecessary delay” and that any confession obtained during such a delay could be excluded from evidence in any subsequent prosecution.³⁶ This rule was never constitutionally required, and it was eventually supplanted by *Miranda*.³⁷

In the 1960s, the Warren Court dramatically reshaped the way society dealt with criminals and criminal suspects. Prior to that time, protections afforded defendants in state criminal proceedings (where most criminal cases are tried) were often quite limited. The Bill of Rights applied only to the federal govern-

³⁰ SIMON, *supra* note 15, at 199. On the other hand, recent studies suggest that about 20% of the confessions obtained by the police would have been made even if there had been no interrogation. Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions while Respecting Suspects' Dignity*, 41 VAL. U. L. REV. 1, 56 (2006).

³¹ Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2012 (1998).

³² In *Colorado v. Connelly*, 479 U.S. 157 (1986), a man “heard voices” that commanded him to do things. One of those things was to make a confession. *Id.* at 161. Lower courts, based on testimony from psychologists, concluded that this was not voluntary and therefore was inadmissible. *Id.* at 161–62. The Supreme Court reversed, holding that before a confession could be deemed involuntary, there must be “coercive police activity.” Since there was none here, it was not involuntary. *Id.* at 167.

³³ See *McNabb v. United States*, 318 U.S. 332, 341–42, 345 (1943); *Mallory v. United States*, 354 U.S. 449, 453 (1957).

³⁴ 18 U.S.C. § 595 (1940) (“It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial . . .”).

³⁵ FED. R. CRIM. P. 5(a).

³⁶ See *McNabb*, 318 U.S. at 341–42, 345; *Mallory*, 354 U.S. at 451, 453. See also *United States v. Alvarez-Sanchez*, 511 U.S. 350, 354 (1994) (“The so-called McNabb-Mallory rule . . . generally rendered inadmissible confessions made during periods of detention that violated the prompt presentment requirement of Rule 5(a) of the Federal Rules of Criminal Procedure. Rule 5(a) provides that a person arrested for a federal offense shall be taken ‘without unnecessary delay’ before the nearest federal magistrate, or before a state or local judicial officer authorized to set bail for federal offenses under 18 U.S.C. § 3041, for a first appearance, or presentment.”) (internal citations omitted).

³⁷ The *Miranda* opinion noted both the history of the “third degree” and the danger of false confessions. It described the modern interrogation process as “psychologically rather than physically oriented.” *Miranda v. United States*, 384 U.S. 436, 445–48 (1966).

ment, and the Fourteenth Amendment, which did apply to the states, gave criminal defendants only those fundamental rights deemed "implicit in the concept of ordered liberty."³⁸ In the 1960s, the Supreme Court began to read the Fourteenth Amendment in a new manner. Instead of looking for fundamental rights implicit in the concept of ordered liberty, it moved to "selective incorporation" of provisions contained in the Bill of Rights.³⁹ By moving to this approach, the Supreme Court led a revolution in American criminal procedure and provided all of the following rights to state criminal defendants: the freedom from unreasonable searches and seizures and the exclusionary rule;⁴⁰ the prohibition against cruel and unusual punishment;⁴¹ the right to assistance of counsel in felony cases;⁴² the privilege against self-incrimination;⁴³ the right to confront opposing witnesses;⁴⁴ the right to a speedy trial;⁴⁵ the right to compel defense witnesses to appear at trial;⁴⁶ the right to a jury trial;⁴⁷ and protection against double jeopardy.⁴⁸ In 1972, the death penalty was declared unconstitutional as it was then applied,⁴⁹ and in 1973, states were prohibited from outlawing abortions in the early stages of pregnancy.⁵⁰

Regarding interrogations and confessions, the Supreme Court first adopted a rule based upon the Sixth Amendment.⁵¹ *Massiah v. United States* prohibited the police from "deliberately eliciting" statements from an individual after the initiation of judicial proceedings (indictment, information, arraignment, or preliminary hearing) without an attorney being present.⁵² The following month, in *Escobedo v. Illinois*, the Court created the "focus" test, enforcing the right to counsel at the point when an investigation focuses on the accused with the purpose of eliciting

³⁸ *Palko v. Connecticut*, 302 U.S. 319, 324–28 (1937).

³⁹ The selective incorporation doctrine was established by Justice Reed in *Adamson v. California*, 332 U.S. 46, 51–54 (1947).

⁴⁰ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

⁴¹ *Robinson v. California*, 370 U.S. 660, 667 (1962).

⁴² *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

⁴³ *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

⁴⁴ *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

⁴⁵ *Klopfer v. North Carolina*, 386 U.S. 213, 222–23 (1967).

⁴⁶ *Washington v. Texas*, 388 U.S. 14, 23 (1967).

⁴⁷ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

⁴⁸ *Benton v. Maryland*, 395 U.S. 784, 787 (1969).

⁴⁹ *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

⁵⁰ *Roe v. Wade*, 410 U.S. 113, 164 (1973). See also Ronald J. Rychlak, *Abortion, Thinking Americans, and Judicial Politics*, 14 LIFE AND LEARNING 77, 85–86 (2004).

⁵¹ Until 1964, the Court held that the Fifth Amendment did not apply to the states. See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

⁵² 377 U.S. 201, 206 (1964). This test remains valid even after *Miranda*. See, e.g., *Fellers v. United States*, 540 U.S. 519, 523–24 (2004).

a confession.⁵³ The next year, the Court switched to a Fifth Amendment analysis and set forth the now-familiar *Miranda* rules.

II. *MIRANDA V. ARIZONA*

The Fifth Amendment protects an individual from being “compelled in any criminal case to be a witness against himself.”⁵⁴ In the 1966 case *Miranda v. Arizona*,⁵⁵ the Court held that certain procedural rights had to be afforded to suspects in a custodial interrogation context in order to safeguard Fifth Amendment rights.⁵⁶ The Court examined the facts of four different cases collectively and developed not one holding but what some call “a complex series of holdings.”⁵⁷ A confession by a suspect in a custodial setting, even though voluntarily made, would be inadmissible unless, preceding the confession, the suspect was given four warnings: (1) that he had the right to remain silent, (2) that any statement could be used against him, (3) that he had the right to have an attorney present at any questioning, and (4) that he had the right to have an attorney appointed if the suspect was without funds. While the Court pointed out that these rights could be waived, such a waiver would be examined to ensure it was made both “knowingly and intelligently.”⁵⁸ Confusion alone does not make the decision to waive the right to remain silent invalid. In *Connecticut v. Barrett*, the defendant refused to make a written statement, but agreed to “talk.”⁵⁹ He later argued that

⁵³ 378 U.S. 478, 492 (1964).

⁵⁴ U.S. CONST. amend. V. Before *Miranda*, “compulsion” to testify meant legal compulsion so that the witness faced the potential of perjury or contempt. Reliance on Fifth Amendment application to informal compulsion rejected much precedent but was not contrary to constitutional interpretation. Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 437–38 (1987).

⁵⁵ 384 U.S. 436 (1966).

⁵⁶ *Id.* at 467. The Court researched police manuals as a source of current police practices and concluded that even without violence or police brutality, “custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.” *Id.* at 455.

⁵⁷ Schulhofer, *supra* note 54, at 436. Schulhofer divides the holding into three parts: (1) that informal pressure to speak can equal compulsion under the Fifth Amendment, (2) that compulsion exists in any custodial interrogation, and (3) that warnings are necessary to “dispel the compelling pressure of custodial interrogation.” *Id.* He finds the most controversial part of the holding to be the third step, but he believes that the central part of the decision lies within the other parts of the holding. *Id.*

⁵⁸ *Miranda*, 384 U.S. at 479. The Court later weakened these rights by allowing pre-warning statements to be used for impeachment purposes only, not as substantive evidence. See *Oregon v. Hass*, 420 U.S. 714, 722 (1975). Some view *Miranda* as a compromise between the “totality of the circumstances” analysis and a complete annihilation of confessions, as it combined the impact of both the custody and the interrogation on the suspect to determine coercion. Yale Kamisar, *Miranda: The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1077 (1984) (reviewing LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* (1983)).

⁵⁹ 479 U.S. 523, 525 (1987).

this showed that he was confused about the consequences. The Court, however, held that the oral statement was admissible.⁶⁰ Likewise, in *Colorado v. Spring*, the defendant agreed to talk about one crime.⁶¹ In the course of the interrogation, the questioning shifted to another crime and he made incriminating statements. The defendant said that he did not know what he was waiving, but the Court held that these statements were admissible.⁶²

The *Miranda* Court did not claim to have discovered something new in the Constitution that had been overlooked for 180 years. Nor did the *Miranda* Court state that these warnings were constitutionally required.⁶³ Rather, Chief Justice Earl Warren wrote that the warnings were "safeguards" of the Fifth Amendment privilege against self-incrimination.⁶⁴ To ensure that an accused person is not coerced into incriminating himself, he "must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."⁶⁵ The Court immediately added that the suggested words were not intended to be a "constitutional straitjacket," and encouraged Congress and states to be creative about other ways to protect the rights of suspects.⁶⁶ The Court did, however, demand that any other methods be at least as effective as the *Miranda* warnings.⁶⁷

The exact constitutional status of the *Miranda* warnings became a matter of dispute. In *Michigan v. Tucker*, Justice Rehnquist wrote that the *Miranda* warnings "were not themselves rights protected by the Constitution . . ." ⁶⁸ In *Oregon v. Elstad*, Justice O'Connor explained that "errors . . . made by law enforcement officers in administering the prophylactic *Miranda* procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself."⁶⁹

⁶⁰ *Id.* at 530.

⁶¹ 479 U.S. 564, 566-68 (1987).

⁶² *Id.* at 577.

⁶³ *Miranda*, 384 U.S. at 467.

⁶⁴ *Id.* at 444.

⁶⁵ *Id.* at 467.

⁶⁶ *Id.* But see *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (finding 18 U.S.C. § 3501 to be unconstitutional).

⁶⁷ *Miranda*, 384 U.S. at 467. Of course, *Miranda's* effectiveness is subject to serious debate. See *infra* note 86 and accompanying text. For an interesting proposal to expand the *Miranda* warnings to include, among other things, a reminder of the benefits of a truthful statement, even if it is incriminating, see Milhizer, *supra* note 30, at 99-100. "True and heartfelt confessions of guilt can likewise be greatly beneficial to the common good." *Id.* at 5.

⁶⁸ *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). Rather, the Court noted that the warnings were "measures to insure that the right against compulsory self-incrimination was protected." *Id.* at 444.

⁶⁹ 470 U.S. 298, 309 (1985). The Court held that "fruit" of a non-coercive *Miranda* violation, at least when the fruit is a subsequent confession, need not be suppressed. *Id.* at

On the other hand, according to *Miranda*, both federal and state law enforcement officials had to give the warnings.⁷⁰ Since the Supreme Court did not have the power to create rules of evidence for the states unless that power came from constitutional interpretation, many argued that the Court must have found the warnings to be required by the Constitution. This issue would not be resolved until 2000.⁷¹

III. THE CONGRESSIONAL REACTION TO *MIRANDA*

Within two years of the *Miranda* decision, Congress tried to change things back. It seemed clear that *Miranda* was intended to discourage suspects from confessing to the police,⁷² and it was likely that this would have an adverse impact on criminal prosecutions and ultimately on the crime rate. So, taking heed of Justice John Harlan's dissenting opinion that the "social costs of crime are too great to call the new rules [enunciated in *Miranda*] anything but a hazardous experimentation,"⁷³ Congress enacted 18 U.S.C. § 3501, which stated, "In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given."⁷⁴ Section 3501 was passed

304.

⁷⁰ See 384 U.S. at 498–99.

⁷¹ *Dickerson*, 530 U.S. at 442.

⁷² Milhizer, *supra* note 30, at 21 ("The only plausible explanation for the Court's hyperbolic advice is that it wanted the *Miranda* warnings to discourage suspects from confessing to police.")

⁷³ *Miranda*, 384 U.S. at 517 (Harlan, J., dissenting).

⁷⁴ 18 U.S.C. § 3501 (2000).

§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

as part of the Omnibus Crime Control Act of 1968 and required only that a confession be offered voluntarily in order for it to be used in court, thereby bypassing *Miranda*-related legal and evidentiary requirements.

Congress left no doubt that the purpose of § 3501 was to reverse *Miranda*. The statute provided that, while the trial court is deciding whether a confession is voluntary, it should take into account all circumstances surrounding the confession (including whether *Miranda*-type warnings were given).⁷⁵ The absence of such warnings, however, would not preclude admissibility of an otherwise voluntary confession.⁷⁶

Even though the Supreme Court frequently noted that the *Miranda* warnings were not required by the Constitution, that they were merely "prophylactic" protections of the Fifth Amendment guarantee against compulsory self-incrimination,⁷⁷ for thirty years the Attorneys General refused to enforce § 3501, believing that it was unconstitutional.⁷⁸ Then, in February of 1999,

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Id.

⁷⁵ *Id.* § 3501(b)(3).

⁷⁶ *Id.* § 3501(b)(5).

⁷⁷ See Darmer, *supra* note 4, at 344.

⁷⁸ In a concurring opinion in *Davis v. United States*, Justice Scalia wondered why, "with limited exceptions [§ 3501] has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago." 512 U.S. 452, 463-64 (1994) (Scalia, J., concurring). He indicated that while he reserved judgment, it "seems" that the act's voluntariness consideration, not *Miranda*, is

a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit ruled in *United States v. Dickerson* that the *Miranda* warning no longer governed the admissibility of confessions in federal court.⁷⁹

Dickerson involved a bank robber from Maryland who confessed to his part in several heists.⁸⁰ A lower court suppressed the confession on the grounds that it had been given before he was read his *Miranda* rights.⁸¹ The Fourth Circuit, however, reversed the decision and ruled that § 3501 was the governing authority, despite the fact that the government did not base its argument on this law.⁸² The case then went to the U.S. Supreme Court.

In its 2000 decision in *Dickerson v. United States*, the Court broke with the past and elevated *Miranda* to constitutional status.⁸³ Section 3501 was found to be insufficient to protect the Fifth Amendment right not to incriminate oneself.⁸⁴ *Miranda* rights would now be considered part and parcel of the Fifth Amendment. Thus, according to the *Dickerson* Court, the failure to Mirandize a suspect was inherently coercive—no matter how well the suspect may have been treated, no matter how much his physical comfort had been respected, and no matter how well he may already have known his rights.⁸⁵

IV. THE IMPACT OF *MIRANDA* ON CRIME

Many scholars have attempted to obtain empirical evidence regarding confessions and the impact of *Miranda*, but as pointed out by other panelists at this Symposium, the difficulty of gathering and evaluating the evidence has led to inconclusive results.⁸⁶

the legal standard for the admissibility of confessions. *Id.* at 464. The refusal of prosecutors to argue for the application of § 3501 means that courts might be wasting their time looking at a “host of ‘*Miranda*’ issues that might be entirely irrelevant under federal law.” *Id.* at 465. Further, Justice Scalia said that he would “no longer be open to the argument that [the Supreme Court] should continue to ignore the commands of § 3501 simply because the Executive declines to insist that we observe them.” *Id.* at 464. He said he looked forward to a time “when a case that comes [under § 3501] is next presented to [the Supreme Court].” *Id.* at 464.

⁷⁹ *United States v. Dickerson*, 166 F.3d 667, 692 (4th Cir. 1999).

⁸⁰ *Id.* at 671.

⁸¹ *Id.*

⁸² *Id.* at 695.

⁸³ *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

⁸⁴ *Id.* at 442.

⁸⁵ *See id.* at 444; McCarthy, *supra* note 8 (“Failing to provide *Miranda* rights is sure to be found by many federal judges to be a form of lawless coercive interrogation that fits within [the] . . . prohibition against *cruel, unusual, and inhumane* treatment. This is especially so given that judges frequently resort to legislative history in construing vague, confusing, inexact statutory terms. Anyone reading the Congressional Record here will find that the whole purpose . . . was to make coercive interrogation illegal.”).

⁸⁶ LAFAYE & ISRAEL, *supra* note 3, at 291. *See also* Paul G. Cassell, *Miranda’s “Neg-*

Some commentators argue that its costs, in terms of lost convictions, are too great to justify the limited benefits *Miranda* supplies.⁸⁷ It has been suggested that thousands of violent criminals escape justice each year as a direct result of *Miranda*.⁸⁸ As one noted critic of *Miranda* has argued:

Evidence of *Miranda*'s harmful effects is mounting. For example, along with various co-authors, I have developed empirical evidence of *Miranda*'s substantial harm to law enforcement. In my most recent articles, I have analyzed the precipitous drop in crime clearance rates that followed immediately on the heels of *Miranda* and concluded that *Miranda* severely hampered police effectiveness.⁸⁹

Other commentators argue that the cost of *Miranda* is minimal and the significant benefits include protection of the innocent.⁹⁰ Still others have even suggested that the warnings themselves, used properly, are actually helpful in obtaining statements from suspects.⁹¹

ligible" *Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POLY 327 (1997). As one British court noted, the right not to testify elicits "strong but unfocused" feelings. *Regina v. Director of Serious Fraud Office, Ex parte Smith*, [1993] A.C. 1, 30-34 (H.L.) (appeal taken from Q.B.) (U.K.) (discussing the right to silence and different immunities encompassed by this term).

⁸⁷ See Dennis, *supra* note 14, at 342-53 (concluding that the criminal justice system should apply the privilege in limited contexts and not view it as a human right); David Dolinko, *Is there a Rationale for the Privilege against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1064 (1986) (describing the privilege as a historical relic). Philosopher Jeremy Bentham, one of the earliest critics of the privilege, thought that the innocent would want to speak, and therefore the privilege would only protect the guilty. See BENTHAM, *supra* note 14, at 238; see also Dennis, *supra* at 342 n.2 (citing Bentham's views regarding the privilege against self-incrimination); WILLIAMS, *supra* note 13, at 48-54 (summarizing Bentham's treatise on privilege).

⁸⁸ Cassell & Fowles, *Handcuffing The Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1126 (1998). See also Milhizer, *supra* note 30, at 53 (noting that *Miranda* was based on the "Reid Model" of psychological interrogation, which has since become "widely disfavored within the psychological community").

⁸⁹ Cassell, *supra* note 24, at 531 (citations omitted).

[T]he innocent are at risk not only from false confessions, but also from "lost" confessions—that is, confessions that police fail to obtain from guilty criminals that might help innocent persons who would otherwise come under suspicion for committing a crime[or become a victim of the criminals who did not confess].

....

... [T]here is good reason to believe that the Supreme Court's decision in *Miranda* has exacerbated the risks to the innocent. The *Miranda* decision has reduced the number of truthful confessions, while at the same time doing nothing about, and probably even worsening, the false confession problem by diverting the focus of courts away from the substantive truth of confessions to procedural issues about how they were obtained.

Id. at 525-527 (citation omitted).

⁹⁰ See SUSAN M. EASTON, *THE RIGHT TO SILENCE* 60-62 (1991) (arguing that the innocent are protected by the right to silence); Dennis, *supra* note 14, at 348 (describing protection of the innocent against wrongful conviction as a justification for the privilege).

⁹¹ See SIMON, *supra* note 15, at 199.

Even if *Miranda* can be used by interrogators to help obtain statements from some suspects (and there is every reason to believe that the police try to exploit any remaining “loopholes”),⁹² the rules are certainly designed to dissuade suspects from making uninformed statements. If the rules are serving their intended purpose, they make life harder for interrogators and prosecutors. Logically, then, they would have the same impact on those trying to gain information to assist with the War on Terror.

Miranda is essentially an exclusionary rule.⁹³ Statements taken in violation of it cannot be used against the defendant in a subsequent prosecution, but if the suspect who was interrogated is not prosecuted, the exclusionary aspect of *Miranda* has no application. Moreover, there are many exceptions that negate *Miranda*'s effect in specific cases.⁹⁴ There is also a certain lack of logic in a rule that assumes that any statement taken without warnings must have been coerced, but does not presume that waivers of the right to remain silent or to have an attorney have been coerced.⁹⁵ As Justice Douglas stated in a pre-*Miranda* case, the “trial of the issue of coercion is seldom helpful,” with police officers “usually testify[ing] one way, the accused another.”⁹⁶ *Miranda* does little to change this problem. It just creates a fact question, and the prosecution has the burden of proof to show that the suspect understood his or her rights before waiving

⁹² See *Missouri v. Seibert*, 124 S. Ct. 2601 (2004) (plurality opinion).

⁹³ Traditionally, it has been said that there is no violation until the statement is used at trial. See *Darmer*, *supra* note 4, at 345–46 (quoting *United States v. Bin Laden*, 132 F. Supp. 2d 168, 181–82 (S.D.N.Y. 2001)). In *Chavez v. Martinez*, 538 U.S. 760 (2003), however, the Court ruled that whether the suspect's substantive due process rights had been violated and an action could proceed against the interrogator had to be addressed on remand, even though the statement was not used at trial. *Id.* at 772 (“Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.”).

⁹⁴ See, e.g., *Harris v. New York*, 401 U.S. 222 (1971) (holding that un-Mirandized confessions may still be used for impeachment purposes); *Bowen v. State*, 607 So. 2d 1159 (Miss. 1992) (noting that when a defendant is entitled to *Miranda* warnings and does not receive them, any voluntary statement made by him may be used for impeachment purposes); *New York v. Quarles*, 467 U.S. 649 (1984) (establishing an exception to *Miranda* for questioning prompted by concern for public safety).

⁹⁵ As pointed out by Justice White, “if the defendant may not answer without a warning a question such as ‘Where were you last night?’ without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?” *Miranda v. Arizona*, 384 U.S. 436, 536 (1966) (White, J., dissenting).

⁹⁶ *Crooker v. California*, 357 U.S. 433, 443–44 (1958) (Douglas, J., dissenting). He went on to note that the nature of the process gives defendants “little chance to prove coercion” at trial.

them.

Some commentators even believe that the police have learned to work with (or around) the *Miranda* rules so well that they have become nothing more than minor inconveniences or perhaps even tools that the authorities can exploit in an interrogation.⁹⁷ Certainly there are some officers who would lie, deny-

⁹⁷ Consider the following passage:

The detective offers a cigarette, not your brand, and begins an uninterrupted monologue that wanders back and forth for a half hour more, eventually coming to rest in a familiar place: "*You have the absolute right to remain silent.*"

Of course you do. You're a criminal. Criminals always have the right to remain silent. At least once in your miserable life, you spent an hour in front of a television set, listening to this book-'em-Danno routine. You think Joe Friday was lying to you? . . . Get it straight: A police detective, a man who gets paid government money to put you in prison, is explaining your absolute right to shut up before you say something stupid.

"Anything you say or write may be used against you in a court of law."

. . . You're now being told that talking to a police detective in an interrogation room can only hurt you. If it could help you, they would probably be pretty quick to say that, wouldn't they? They'd stand up and say you have the right not to worry because what you say or write in this godforsaken cubicle is gonna be used to your benefit in a court of law. No, your best bet is to shut up. Shut up now.

"You have the right to talk with a lawyer at any time—before any questioning, before answering any questions, or during any questions."

Talk about helpful. Now the man who wants to arrest you for violating the peace and dignity of the state is saying you can talk to a trained professional, an attorney who has read the relevant portions of the Maryland Annotated Code or can at least get his hands on some Cliffs Notes. And let's face it, pal, you just carved up a drunk in a Dundalk Avenue bar, but that don't make you a neurosurgeon. Take whatever help you can get.

"If you want a lawyer and cannot afford to hire one, you will not be asked any questions, and the court will be requested to appoint a lawyer for you."

Translation: You're a derelict. No charge for derelicts.

At this point, if all lobes are working, you ought to have seen enough of this Double Jeopardy category to know that it ain't where you want to be. How about a little something from Criminal Lawyers and Their Clients for \$50, Alex?

Whoa, punk, not so fast.

"Before we get started, lemme just get through the paperwork," says the detective, who now produces an Explanation of Rights sheet, BPD Form 69, and passes it across the table.

"EXPLANATION OF RIGHTS," declares the top line in bold block letters. The detective asks you to fill in your name, address, age, and education, then the date and time. That much accomplished, he asks you to read the next section. It begins, "YOU ARE HEREBY ADVISED THAT:"

Read number one, the detective says. Do you understand number one?

"You have the absolute right to remain silent."

Yeah, you understand. We did this already.

"Then write your initials next to number one. Now read number two."

And so forth, until you have initialed each component of the *Miranda*

ing any brutal or coercive conduct that resulted in a statement from the suspect.⁹⁸ Those same officers, however, are likely to testify falsely that they gave appropriate *Miranda* warnings. They may also technically comply with *Miranda* while still putting the suspect through a very traumatic experience.⁹⁹

Whatever the effectiveness of *Miranda*, the release of a common criminal may deny justice, but it usually poses a minimal threat to society. Terrorism changes that equation. For that reason, one must ask whether a criminal procedure rule such as *Miranda*, or—more broadly—the right not to be coerced into self-incrimination, should even apply in terrorism cases.

V. IS PROTECTION FROM SELF-INCRIMINATION PROPER IN THE TERRORISM CONTEXT?

In the context of domestic criminal cases, the *Miranda* warnings operate to protect suspects' rights and to make interrogators' and prosecutors' jobs more difficult. The question is whether the same concerns that justify the right not to incriminate oneself in domestic criminal cases are applicable when it comes to the investigation of international terrorism. The two primary concerns are: false testimony brought during interrogation (reliability) and the related issue of brutal tactics being used by police authorities in order to elicit incriminating statements (torture).

A. Reliability

If suspects are forced to speak, investigators might get bad information.¹⁰⁰ Consider the case of *Brown v. Mississippi*, in

warning. That done, the detective tells you to write your signature on the next line, the one just below the sentence that says, "I HAVE READ THE ABOVE EXPLANATION OF MY RIGHTS AND FULLY UNDERSTAND IT."

You sign your name and the monologue resumes.

SIMON, *supra* note 15, at 193–94. "As a result, the same law enforcement community that once regarded the 1966 *Miranda* decision as a death blow to criminal investigation has now come to see the explanation of rights as a routine part of the process—simply a piece of station house furniture, if not a civilizing influence on police work itself." *Id.* at 199.

⁹⁸ "Put bluntly, an officer inclined to take a swing at a suspect surely would not hesitate to ignore the *Miranda* protections yet then insist on the witness stand that he had given the prescribed warnings." Darmer, *supra* note 4, at 341.

⁹⁹ For example, in *Miller v. Fenton*, 796 F.2d 598, 600 (3d Cir. 1986), a very skillful interrogator, fully compliant with *Miranda*, verbally dominated a suspect to the point that, after confessing, he collapsed in a catatonic state. The court included the transcript of the interrogation in an appendix. See *id.* at app.

¹⁰⁰ See, e.g., PHILLIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 109–11 (2003); Sanford Levinson, "Precommitment" and "Postcommitment": *The Ban on Torture in the Wake of September 11*, 81 *TEX. L. REV.* 2013, 2028–29 (2003); Leo & Ofshe, *supra* note 24; Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, *N.Y. TIMES*, Mar. 30, 1998, at A1; Thomas H. Maugh II, *Glendale Case Raises Issue of Reliability of Confessions*, *L.A. TIMES*, Apr. 2, 1998, at A1.

which the defendant's conviction was based solely on a confession induced by beatings.¹⁰¹ He had been hanged twice by the local deputy and other men—the marks on his neck were still visible at trial—then whipped. When he would not confess, he was released only to be picked up two days later, whipped again, and told that the whippings would continue until he confessed and agreed to every detail that the deputy suggested. The defendant's story, in fact, changed several times to fit the facts as they were explained to him. The confession was admitted at trial, and the jury convicted and sentenced him to death.¹⁰² The U.S. Supreme Court held that this violated the Fourteenth Amendment.¹⁰³ In fact, it called the Mississippi Supreme Court decision upholding the conviction a denial of due process in and of itself.

As illustrated in the *Brown* case, and totally aside from the related concern for the just treatment of citizens, unrestrained interrogation may lead to bad information. That would serve neither the purpose of justice in a criminal context, nor would it serve governmental forces fighting terror. Moreover, false confessions and bad information are not elicited only when physical abuse is involved. Mental duress can also lead to false confessions.¹⁰⁴ The right not to incriminate oneself helps protect against this concern.

False confessions that have been obtained in criminal cases often have been driven by animus based on factors such as race, politics, the desire of police authorities to "close" a case, or other personal interests. Such factors *could* impact a terror-related interrogation, but the risk is significantly lower, due in part to the different goal. In regular criminal investigations, the goal for the officer is to make an arrest and get the suspect off the street. The evidence will be tested, if ever, at some uncertain date in the future, when someone else (the prosecutor) will try to obtain a conviction and close the case. In that circumstance, the statement is valuable to the arresting officer regardless of whether it is accurate.

Interrogators in the terrorism context are seeking information, not trying to get a conviction, and time is far more likely to be of the essence. They know that a statement, much less a false

¹⁰¹ *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹⁰² *Id.* at 279.

¹⁰³ *Id.* at 287.

¹⁰⁴ See Human Rights Watch, *U.S.: CIA Whitewashing Torture: Statements by Goss Contradict U.S. Law and Practice*, PEACE JOURNALISM, Nov. 2005, <http://peacejournalism.com/ReadArticle.asp?ArticleID=6948>. An American citizen taken into Czech custody on charges of espionage while working as bureau chief for the *Associated Press* in Prague signed a false confession after being interrogated for six days. He had been kept awake for over forty-two straight hours.

statement, will not close their case. Interrogation may, however, help them thwart a serious threat to peace. Importantly, interrogators seem to think that pressure—physical or non-physical—is more beneficial than not.¹⁰⁵ They are in the best position to evaluate the risk of bad information from aggressive interrogation. They know the risks of false statements, and yet—in every society—they continually return to forceful methods of interrogation.¹⁰⁶ Those who are outside of that community are not close enough to the matter to successfully prove that the risk of false statements is sufficiently serious so as to justify providing terrorist suspects with the right not to incriminate themselves.¹⁰⁷ Accordingly, and without intending in any way to condone overly-aggressive interrogation, much less torture, this “potentially bad information” argument is an insufficient justification for the right not to incriminate oneself, at least in a terrorist-related situation. It certainly does not justify applying the *Miranda* rule in this context.

¹⁰⁵ Levinson, *supra* note 100, at 2029–31.

¹⁰⁶ *Id.* See also *infra* notes 112–126 and accompanying text.

¹⁰⁷ In fact, scholars have been debating the empirical evidence ever since *Miranda* was announced. See, e.g., Cassell, *supra* note 24, at 527–29.

B. Morality and Torture

A related argument in support of the privilege against self-incrimination is that without it, interrogators might be tempted to coerce suspects into making statements, and they could slide into overly-aggressive interrogation or even torture.¹⁰⁸ At times, of course, they would have an innocent person in custody. This is an ancient concern. St. Augustine wrote of it in the fifth century:

[The accused] is tortured to discover whether he is guilty, so that, though innocent, he suffers most undoubted punishment for crime that is still doubtful; not because it is proved that he committed it, but because it is not ascertained that he did not commit it. Thus the ignorance of the judge frequently involves an innocent person in suffering. [T]he result of this lamentable ignorance is that this very person, whom he tortured that he might not condemn him if innocent, is condemned to death both tortured and innocent. For if he has chosen . . . to quit this life rather than endure any longer such tortures, he declares that he has committed the crime which in fact he has not

¹⁰⁸ For an analysis of slippery slope arguments and how they function, see Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

In the Eighteenth Century, Saint Alphonsus Liguori in his *Theologia Moralis*, considered three questions:

(a) Under what conditions can a judge proceed to have an accused person tortured . . . ? Answer: the judge may only “descend to torture” as a last resort, i.e., when full proof cannot be obtained by non-violent means; next, there must already be “semi-complete proof” (*semiplenam probationem*) of the accused’s guilt arising from other evidence; and finally, certain classes of persons are to be exempt from torture, either because of their frailty or their great value to society: “men of great dignity[,]” knights of equestrian orders, royal officials, soldiers, doctors [probably in the general sense of learned men] and their children, pre-pubescent children, senile old folks, pregnant women, and those who are still weak after childbirth.

(b) To what extent may the accused be tortured . . . ? Answer: the more convincing the already-existing evidence for his guilt, the more severely he may be tortured, but—taking into account the varying estimated endurance-levels [sic] of different individuals—never so severely that “it is morally impossible for him to endure” the pain. If that level of cruelty is in fact reached, “the confession thus extorted will be involuntary and so must be considered legally null and void[,]” even if the accused, for fear of further torment, subsequently ratifies his confession outside the torture chamber in the presence of the judge.

(c) Whether one who has already been tortured may be tortured again . . . ? Answer: not if he refuses to confess during the first torture session (unless new independent evidence against him subsequently comes to light). In that case he must be set free. But if he confesses under torture, and then retracts that confession before the judge, he may be tortured again—and even a third time if the same thing happens after the second torture session. But if he confesses under torture a third time, and yet again subsequently retracts in the presence of the judge, he must be released. For the judge then must presume that his three confessions were all forced and involuntary—and therefore invalid.

Brian W. Harrison, *Torture and Corporal Punishment as a Problem in Catholic Theology*, LIVING TRADITION, Sept. 2005, at pt. II A11, <http://www.rtforum.org/lt/lt119.html> (citing *Theologia Moralis* 4:3:3 nos. 202–04) (third alteration in original) (formatting altered).

committed [and] has been condemned and put to death . . .¹⁰⁹

Overly-aggressive interrogation may be a particularly serious threat in the terrorism context.¹¹⁰

When it comes to criminal investigations, many authorities have concluded that the harsh practices associated with “the third degree” are less effective in obtaining truthful statements than psychologically-oriented techniques designed to reduce the suspect’s resistance in the typical criminal investigation.¹¹¹ In terror-related situations, however, the evidence suggests that the less aggressive interrogation tactics tend not to be as successful.¹¹² Military interrogators are certainly using tactics that are far more aggressive than would be acceptable in common criminal cases. Indeed, the events of September 11 have caused serious scholars to debate the previously unthinkable prospect of legalized torture.¹¹³

¹⁰⁹ ST. AUGUSTINE, *THE CITY OF GOD* 19:6 (Marcus Dods trans., Random House, Inc. 1950) (426).

¹¹⁰ Of course, the first issue is to reach a consensus on the meaning of “torture.” The practice lacks a clear definition in international agreements and in American law. As Richard Posner, U.S. Circuit Judge for the Seventh Circuit and Senior Lecturer at the University of Chicago Law School, has noted, “Almost all official interrogation is coercive, yet not all coercive interrogation would be called ‘torture’ by any competent user of the English language, so that what is involved in using the word is picking out the point along a continuum at which the observer’s queasiness turns to revulsion.” Richard A. Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION* 291, 291 (Sanford Levinson ed., 2004). In other words, there is a continuum of pressure that can be used during interrogation ranging from an uncomfortable chair and warm lights to extreme physical abuse (and perhaps even worse). Posner has written, “only the most doctrinaire civil libertarians (not that there aren’t plenty of them) deny [that] if the stakes are high enough, torture is permissible.” Richard A. Posner, *The Best Offense*, *NEW REPUBLIC*, Sept. 2, 2002, at 28, 30 (reviewing ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002)). Moreover, Posner has written that “[n]o one who doubts that this is the case should be in a position of responsibility.” *Id.*

¹¹¹ See Leo & Ofshe, *supra* note 24, at 434 n.10 (“Interrogators may have become more effective at obtaining confession statements than they were in the prior era of *third degree* interrogation.”).

¹¹² YOO, *supra* note 6, at 189.

¹¹³ See, e.g., *TORTURE: A COLLECTION*, *supra* note 110; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *COLUM. L. REV.* 1681 (2005); Anthony Lewis, *Making Torture Legal*, *N.Y. REV. BOOKS*, July 15, 2004, at 4; *Dershowitz: Torture Could Be Justified*, *CNN.COM/LAW CENTER*, Mar. 4, 2003, <http://edition.cnn.com/2003/LAW/03/03/cnna.Dershowitz/> (discussing the possibility with Harvard Law Professor Alan Dershowitz). Dershowitz has proposed “torture warrants” in cases of “ticking time bomb terrorists.” ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 141 (2002). See also Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, *L.A. TIMES*, Nov. 8, 2001, at B19; Alan M. Dershowitz, *Want to Torture? Get a Warrant*, *S.F. CHRON.*, Jan. 22, 2002, at A19. Dershowitz would restrict warrants to only the most egregious cases. See, e.g., Alan M. Dershowitz, Letter to the Editor, *Torture Warrants*, *S.F. CHRON.*, Jan. 28, 2002, at B4 (“My personal hope is that no torture warrant would ever be issued, because the criteria for obtaining one would be so limited and rigorous.”).

It is worth noting that the United States is not the only nation to reconsider its interrogation regulations in light of modern terrorism. In Israel, for instance, "interrogators used third-degree practices on alleged Palestinian terrorists, some of whom died in custody. The Supreme Court of Israel recently outlawed these practices, but left open the possibility that torture could be justified in 'ticking bomb' situations."¹¹⁴

Similarly, in the early 1970s, "the British and Irish governments . . . found it necessary to reduce the strength of the privilege against self-incrimination in the name of fighting terrorism."¹¹⁵ They "introduced security measures that . . . , inter alia, allow[ed] courts to draw inferences from a defendant's refusal to answer questions regarding his membership in a terrorist group."¹¹⁶ They "justified laws allowing courts to draw adverse inferences from an accused's silence and other derogations of the right to silence by pointing out the sophistication of the IRA and other para-military groups in their ability to resist questioning"¹¹⁷

One reason why the right to refuse to testify is so important is because if defendants can be forced to testify, they will—at least sometimes—be intimidated into making false confessions. The concern over the use of torture to obtain confessions is well-embedded in American history. The 1788 debate in the Virginia Convention on the ratification of the Constitution contains this interesting discussion on the topic:

Patrick Henry: . . .

. . . .

But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.

¹¹⁴ John Parry & Welsh White, *Interrogating a Suspected Terrorist*, JURIST LEGAL INTELLIGENCE (2001), <http://jurist.law.pitt.edu/terrorism/terrorismparry.htm>.

¹¹⁵ Stacey Carrara Friends, Note, *An Effective Way to Deal with Terrorism? Britain and Ireland Restrict the Right to Silence*, 23 SUFFOLK TRANSNAT'L L. REV. 227, 249 (1999).

¹¹⁶ *Id.* at 227 (citing *Home News: Commons Special Debate*, IRISH TIMES, Sept. 3, 1998). "In December 1998, however, Parliament changed the law slightly in light of the European Court of Human Rights ruling" *Id.* at 227 n.2 (citing Steve Doughty, *Judges Retreat over Right to Silence*, THE DAILY MAIL, Dec. 2, 1998, at 2). "Courts may now only draw inferences from the silence of an accused person that occurs in the presence of the accused's lawyer." *Id.*

¹¹⁷ *Id.* at 250.

Mr. NICHOLAS: . . . But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. . . . If we had no security against torture but our declaration of rights, we might be tortured to-morrow; for it has been repeatedly infringed and disregarded.

Mr. GEORGE MASON replied that the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.

Mr. NICHOLAS acknowledged the bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extorting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity.¹¹⁸

This concern about torture applied to both criminal activity and warfare. During the Revolutionary War, General George Washington and leaders of the Continental Congress considered the just treatment of enemy combatants to be an important strategic concern.¹¹⁹ As Robert F. Kennedy, Jr. has noted, the American concern for just treatment of prisoners “was all the more extraordinary because these courtesies were not reciprocated by King George’s armies. Indeed, the British conducted a deliberate campaign of atrocities against American soldiers and civilians. . . . Captured Americans were tortured, starved and cruelly maltreated aboard prison ships.”¹²⁰ Kennedy went on to note:

President Lincoln instituted the first formal code of conduct for the humane treatment of prisoners of war in 1863. Lincoln’s order forbade any form of torture or cruelty, and it became the model for the 1929 Geneva Convention. Dwight Eisenhower made a point to guarantee exemplary treatment to German POWs in World War II, and Gen. Douglas McArthur ordered application of the Geneva Convention during the Korean War, even though the U.S. was not yet a signatory. In the Vietnam War, the United States extended the convention’s protection to Viet Cong prisoners even though the law did not technically require it.¹²¹

¹¹⁸ 5 THE FOUNDERS’ CONSTITUTION 377 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹¹⁹ Robert F. Kennedy Jr., *America’s Anti-Torture Tradition*, L.A. TIMES, Dec. 17, 2005, at B21.

¹²⁰ *Id.*

¹²¹ *Id.*

Despite the concern about extorting confessions, governmental authorities used some very aggressive tactics in trying to obtain confessions well into the twentieth century.

In 1929, for instance, the Correctional Association of New York

researched the court records and found “strong grounds for suspecting that severe practices are employed to obtain information from those who come into the hands of the police.” Among the abusive methods in use throughout the United States at that time were solitary confinement, whipping by rubber hose, forcing a suspect to look at a deceased victim in the morgue, placing a skeleton in a suspect’s cell, and handcuffing the suspect to a chair for thirty-seven hours.¹²²

The Association lamented the fact that while “some States have passed statutes against [the third degree] there seem to have been practically no convictions under them.” The Association also observed that “there is no practical redress for the individual . . . though the officers are civilly liable to the injured party for mistreating him, this remedy is in practice of no avail.”¹²³

At a very fundamental level, the concern over interrogation slipping into torture is a moral decision, not a pragmatic one.¹²⁴ American history and American values condemn torture of prisoners. It does not follow, however, that moral concerns would justify the same rules in a terror-related scenario that apply in common criminal law cases. In the terror context, when time is likely to be of the essence and many lives may hang in the balance, some form of aggressive interrogation, beyond what is acceptable when considering common criminals, may be justifiable, if not necessary. The threat is greater, the risk is higher, and the time element may be significantly different.¹²⁵

¹²² Ilan K. Reich, *A CITIZEN CRUSADE FOR PRISON REFORM: THE HISTORY OF THE CORRECTIONAL ASSOCIATION OF NEW YORK* 45 (1994) (quoting PRISON ASS’N OF N.Y., NINETY-NINTH ANNUAL REPORT 23 (1943)).

¹²³ *Id.* at 46 (quoting PRISON ASS’N OF N.Y., ONE HUNDRED THIRD ANNUAL REPORT 40 (1947)) (alterations in original).

¹²⁴ There are those who argue that the law should not impose moral values. Without delving into that argument in other contexts, it is certainly legitimate for a society to decide that authorities who are acting on behalf of the public should behave in a moral manner. Cf. Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 UCLA L. REV. 599, 609–10 (2000) (discussing whether there should be a moral obligation placed on the civil government to help the disabled); Rychlak, *supra* note 50, at 94–97 (advocating for the pro-life community to vote into the Senate those with similar moral stances on abortion in order to change current abortion law and ultimately change the composition of the Supreme Court).

¹²⁵ See generally David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 GEO. MASON L. REV. 135 (2004).

At the same time, few, if any, citizens want to give interrogators full discretion to do whatever they wish.¹²⁶ Elimination of all rules and the threat of sanctions for the interrogators would open the possibility of widespread abuse. Waterboarding has already been publicly defended.¹²⁷ What about beatings, amputations, or inflicting pain on members of the suspect's family? As Richard John Neuhaus has stated:

How do we address these questions of what in fact is happening in circumstances in which conscientious Christians seek moral guidance, and how can we do this without falling into the pits of relativism, proportionalism, consequentialism, and related errors? In the ticking bomb instance, does the duty to protect thousands of innocents override the duty not to torture?¹²⁸

Therefore, it is incumbent on modern lawmakers to find a way to control interrogations and see that they do not turn into torture sessions while permitting interrogators to extract critical information.¹²⁹

¹²⁶ Amnesty International's webpage states: "The America We Believe In Does Not Torture People." Amnesty International USA, *The America We Believe In Leads the World on Human Rights*, <http://believe.amnestyusa.org/site/c.igLQIUOCKtF/b.2070843/k.BDE5/Home.htm> (last visited Mar. 10, 2007). That view is certainly shared by many Americans who do not agree with other aspects of the Amnesty International agenda. Most religious groups also condemn torture. See, e.g., Adelle M. Banks, *Religious and Civil-Rights Coalition Asks Bush to Condemn Use of Torture*, PRESBYTERIAN NEWS SERVICE, Nov. 10, 2005, <http://www.pcusa.org/pcnews/2005/05609.htm>.

¹²⁷ See Demetri Sevastopulo, *Cheney Endorses Simulating Drowning*, MSNBC, Oct. 26, 2006, <http://www.msnbc.msn.com/id/15433467/>. See also Harrison, *supra* note 12, at 24 (stating that waterboarding "causes a brief, panic-inducing sensation of being about to drown but no pain or injury"). On September 20, 2006, television host Bill O'Reilly had Brian Ross of ABC News on his show. Deborah, *Bill O'Reilly Endorses Waterboarding As Safe and Reliable*, NEWS HOUNDS, Sept. 20, 2006, http://www.newshounds.us/2006/09/20/bill_oreilly_endorses_waterboarding_as_safe_and_reliable.php. Ross stated that "14 detainees with very important information about future terror plots broke down and talked after [being subject to] waterboarding." *Id.* He reported that "the toughest suspect broke down in [two and a half] minutes," but most detainees "only lasted for 30 seconds." *Id.* Ross "admitted that it probably could kill someone," but the main thing about waterboarding is that it makes the subject feel like he is drowning because it triggers "an uncontrollable gag reflex." *Id.*

¹²⁸ Richard John Neuhaus, *The Public Square: Secularization Doesn't Just Happen*, FIRST THINGS, Mar. 2005, at 58, 62, available at http://www.firstthings.com/article.php3?id_article=164.

¹²⁹ There are at least four different reasons why an interrogator might resort to torture: (1) for the illegal enjoyment of the person inflicting the torture; (2) to extract a confession of criminal activity; (3) to punish an enemy or wrongdoer; or (4) to obtain information so as to prevent greater harm (the "ticking bomb" scenario). See Harrison, *supra* note 12, at 26. The concerns that relate to criminal law rules primarily address the first three reasons. The torture scenario most often invoked when discussing terrorism, however, is the fourth reason. See *id.* at 26-27. That is why the typical criminal law analysis does not perfectly fit in the ticking bomb scenario. The moral equation is different. According to Father Brian Harrison, a professor at the Pontifical University of Puerto Rico, the Catholic Church has condemned the first three reasons for inflicting torture, but—perhaps tellingly—has not expressly condemned torture in the fourth situation. *Id.*

In light of these moral concerns, not to mention the international conventions, stripping all regulation from interrogation is simply not a viable alternative. If the controls were completely lifted, it is easy to imagine interrogators going too far. Therefore, some controls must apply in these situations.¹³⁰

VI. APPROPRIATE CONTROLS ON TERROR-RELATED INTERROGATIONS

Recognizing that there is reason to place restrictions on interrogation, even in the terrorism scenario, the next question becomes whether *Miranda*-style protections should be given to the suspects. The answer here must be "no." *Miranda* is not a good way to regulate terror interrogations. As Justice O'Connor explained in a 1993 case, "Because *Miranda* 'sweeps more broadly than the Fifth Amendment itself,' it excludes some confessions even though the Constitution would not."¹³¹ Perhaps that is why one Congressman said: "There's not a single member of this Congress that believes that *Miranda* warnings should be given to terrorists . . ." ¹³²

Whatever the cost may be in the criminal context, terrorism shifts the balance of this equation. The risk of a single criminal going free is relatively small. Large terror-related organizations are a different matter. "[T]he harm any individual ordinary criminal can inflict, if wrongly freed, is limited. The potential harm an al Qaeda operative can inflict is potentially enormous."¹³³ Criminal laws have long been written so as to recognize the additional danger associated with joint or group activity,

¹³⁰ *The Catechism of the Catholic Church* provides:

Torture which uses physical or moral violence to extract confessions, punish the guilty, frighten opponents, or satisfy hatred is contrary to respect for the person and for human dignity. Except when performed for strictly therapeutic medical reasons, directly intended *amputations, mutilations, and sterilizations* performed on innocent persons are against the moral law.

CATECHISM OF THE CATHOLIC CHURCH ¶ 2297 (1994). The *Catechism* goes on to state:

In times past, cruel practices were commonly used by legitimate governments to maintain law and order . . . In recent times it has become evident that these cruel practices were neither necessary for public order, nor in conformity with the legitimate rights of the human person. On the contrary, these practices led to ones even more degrading. It is necessary to work for their abolition. We must pray for the victims and their tormentors.

Id. at ¶ 2298.

¹³¹ *Withrow v. Williams*, 507 U.S. 680, 702 (1993) (O'Connor, J., concurring in part and dissenting in part) (quoting *Oregon v. Elstad*, 470 U.S. 298, 306 (1985)).

¹³² *Rep. Hunter Sides with Bush Administration on Military Tribunals*, FOXNEWS.COM, July 12, 2006, <http://www.foxnews.com/story/0,2933,203126,00.html> (quoting Rep. G.K. Butterfield).

¹³³ YOO, *supra* note 6, at 201.

and the danger presented by international terror organizations must similarly be recognized by the law.

In a criminal investigation, if police questioning is prompted by an immediate concern for public safety, the Supreme Court has held that the officers may question the suspect without first providing *Miranda* warnings.¹³⁴ Moreover, the suspect's answers to these questions may be used not only to avert the immediate threat but also as evidence in a subsequent criminal prosecution against the suspect.¹³⁵ This does not mean, of course, that any and all tactics are legitimate when an officer is motivated by public safety concerns.¹³⁶ Limits still have to be set to protect suspects from overly aggressive interrogation. For today's purposes, however, the key is that *Miranda* is not the way to protect those suspects.

In the terrorist situation, it would seem that *every* interrogation—at least every one that is hypothesized when discussing the ticking bomb scenario—can be said to be prompted by a concern for the public safety. This does not mean that every tactic can be justified in the terror-related scenario. If aggressive interrogations take place, there will be mistakes in determining who is a legitimate suspect, and there will be times when techniques used to obtain information will not be justified. In those cases, governmental officials should face an inquiry and be able to defend their actions. Should they be unable to justify their actions, they would be subject to possible punishment.¹³⁷ If police are allowed to use otherwise impermissible interrogation tactics when lives are at stake, how far should they be permitted to go?¹³⁸

134 *New York v. Quarles*, 467 U.S. 649 (1984); *see also* Darmer, *supra* note 4, at 342–43.

135 *Quarles*, 467 U.S. at 659–60.

136 *Id.* at 656, 658 (stating that when officers ask questions, they need to be “reasonably prompted by a concern for the public safety”) (emphasis added). A coerced, involuntary statement, for instance, would not be admissible under this *Miranda* exception. *Oregon v. Elstad*, 470 U.S. 298, 317 (1985).

137 Two issues that require further development include: (1) where responsibility should be attached, and (2) whether low-ranking officials who are ordered to carry out aggressive interrogations should be able to invoke the “Nuremberg defense” of superior orders. Henry T. King, Jr., *The Legacy of Nuremberg*, 34 CASE W. RES. J. INT’L L. 335, 340 (2002); Frank Lawrence, Note, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397, 413 (1989) (“[I was only] following superior orders . . .”).

138 The answer to this question could have the long-term consequence of adversely impacting the treatment of U.S. citizens who are held in other nations. As such, this is a problem that calls for resolution. The rules of procedure and evidence for the International Criminal Court (ICC) provide for the protection of certain self-incriminating testimony. *See* Preparatory Comm’n for the Int’l Criminal Court, *Report of the Preparatory Commission for the International Criminal Court* add. 1, pt. I, ch. 4 R. 74(3), U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000). Perhaps more importantly, the ICC may have jurisdiction over those who commit torture in certain circumstances. *See* Neil A. Lewis, *Military’s Opposition to Harsh Interrogation is Outlined*, N.Y. TIMES, July 28, 2005, at A21; John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the In-*

After-the-fact judicial or quasi-judicial investigations give governmental authorities flexibility to deal with interrogation problems that are impossible to foresee but likely to develop. This approach strikes a balance between the two competing needs (information to combat terrorism and just treatment of all detainees) and succeeds where *Miranda* fails because it holds interrogators responsible if they "cross the line" but does not stop the flow of information. This approach is not perfect; it will not stop all overly-abusive tactics. The same, of course, can be said of *Miranda* and almost every other device ever used to protect against abusive interrogation.

Unlike *Miranda*, this approach requires that the analysis and evaluation of the interrogation occur after the interrogation has taken place.¹³⁹ In the terrorism/ticking bomb scenario, this approach is reasonable due to the immediate nature of the threat because the issues are complex, and various factors are likely to shift from one case to the next. It is not possible to develop in advance a one-size-fits-all template to determine what level of pressure can or should be applied to a given suspect and a particular threat.¹⁴⁰ With after-the-fact hearings, however, various principles and limitations designed to protect detainees from overly-abusive tactics (and to let government authorities know what is permissible) can and should be established. It can be assumed that they will evolve over the years.

CONCLUSION

Protection from forced self-incrimination is an important value in our criminal law system, and *Miranda* is one way to enforce that right. Due to the increased threat and time pressures, the analysis shifts in the terrorism/ticking bomb scenario. There are still reasons to provide some level of protection against forced self-incrimination to terrorist suspects, primarily to prevent interrogators from becoming overly abusive. The justifiable level of pressure to be applied in any given terror-related case, however, cannot be decided with certainty in advance. Too many factors have to be taken into consideration.¹⁴¹ While there must be limi-

ternational Criminal Court, 79 NOTRE DAME L. REV. 55 (2003).

¹³⁹ "Judges are good at focusing on what has happened in the past. Whether an attack might occur in the future, its magnitude, and how to stop it is beyond their usual expertise." YOO, *supra* note 6, at 201. When it comes to terrorism, the same might be said of legislators and regulators.

¹⁴⁰ See Darmer, *supra* note 4, at 371 ("Beyond limiting the use of physical force to extract confessions, it is difficult to establish rules, in advance, on the permissible range of tactics when seeking confessions.")

¹⁴¹ The most extreme forms of torture (e.g. life-threatening, permanent injury, harm to third parties) might well be prohibited in advance. In other cases, numerous factors

tations, *Miranda* is not the appropriate way to enforce those limitations in the terrorism scenario. Rather, there must be after-the-fact judicial or quasi-judicial investigations that can look at all the facts and evaluate the actions of the interrogating authorities.

In the War on Terror, part of the battle is to thwart the enemy, part of it is to protect innocent citizens, and part of it is to maintain moral standards. The United States will have to make many decisions in future years, and those goals will sometimes compete with each other. We should remember that military and quasi-military actions are fundamentally different from criminal investigation. Accordingly, we cannot simply take criminal law doctrines and expect them to work in these new situations. At the same time, we have to maintain a basic level of morality in how we carry out governmental activities, and that may require the development of new standards and procedures. It may be difficult to do this, but it is necessary if we are to defeat terrorism without compromising our integrity.

How the War on Terror May Affect Domestic Interrogations: The 24 Effect

Sam Kamin*

INTRODUCTION

For the first time since *Miranda* was decided nearly forty years ago,¹ interrogation techniques have been at the forefront of the American consciousness. The War on Terror has forced Americans to grapple with the definition of torture, whether torture is ever an appropriate interrogation technique, whether it is an effective interrogation technique, and so on. Unlike many past discussions of interrogation techniques, the current torture debate has not been limited to law enforcement and the legal academy; discussions of torture and “hard treatment” have been front page news, have permeated popular culture, and have forced the American people to examine their preconceptions of the appropriateness of coercion in obtaining information from suspects.

I call the omnipresence of depictions and discussions of torture in popular culture the “24 Effect.”² We see torture depicted in fiction,³ on the news,⁴ and on the internet.⁵ My concern is not

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¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² The effect is, of course, named after the Fox television show *24*. The show and its effect are described in Part III, *infra*.

³ *24* is the most obvious example, but clearly far from the only one. See, e.g., David Edelstein, *Now Playing at Your Local Multiplex: Torture Porn*, N.Y. MAG., Feb. 6, 2006, at 63.

⁴ The Fox News Channel ran a three-part report on “waterboarding,” an interrogation technique known to have been used by American forces interrogating terror suspects overseas. A Fox reporter agreed to undergo the procedure at the hands of private soldiers dressed in black hoods. He concluded that while it would be impossible to describe the procedure as anything other than torture, it was certainly “effective.” See Steve Harrigan, *Waterboarding: Historically Controversial*, FOXNEWS.COM, Nov. 7, 2006, <http://www.foxnews.com/story/0,2933,227357,00.html>.

⁵ The now-infamous photographs of the torture and degradation of prisoners at the Abu Ghraib prison in Iraq are available from numerous sources and in more excruciating detail on the internet than they ever were in the mainstream American press. One of the

that the 24 Effect will necessarily cause torture to spill over from the War on Terror into local police departments' interrogation rooms.⁶ I do not believe that the causal relationship is nearly that direct.⁷ Rather, my concern is that once the public has become inured to torture by its repeated factual and fictional representations—even its disturbing representations—the public will increasingly discount the effect of non-physical coercive interrogation techniques on criminal defendants and will become more receptive to the use of those non-torturous techniques in run-of-the-mill criminal cases.

The ultimate result of the 24 Effect, therefore, will likely be a shifting of the baseline for permissible treatment of criminal defendants; because psychological coercion, trickery, false promises and threats have a lesser visceral impact than the physical

milder examples can be found on the Salon.com website along with an extensive exposition of the history of abuse in Abu Ghraib. See Joan Walsh, *The Abu Ghraib Files*, SALON.COM, Oct.–Dec. 2003, http://www.salon.com/news/abu_ghraib/2006/03/14/introduction/index.html.

⁶ Of course, it is not always easy to distinguish “crime” from the “War on Terror.” Take, for example, the case of Jose Padilla. He was arrested at O’Hare airport in Chicago in May of 2002 and held in a Navy brig in South Carolina for several years, allegedly suspected of plotting to explode a dirty bomb in the United States. Just before his habeas petition was due to be heard by the Supreme Court, Padilla was transferred to a civilian prison and is currently awaiting greatly reduced charges in the Southern District of Florida. Linda Greenhouse, *Justices Decline Terrorism Case of a U.S. Citizen*, N.Y. TIMES, Apr. 4, 2006, at A1; Errin Haines, *Appeals Court Weighs Padilla Charge*, FOXNEWS.COM, Jan. 10, 2007, <http://www.foxnews.com/wires/2007Jan10/0,4670,PadillaTerrorCharges,00.html>; see also Padilla v. Hanft, 126 S. Ct. 1649 (2006). For a fuller discussion of the interaction between civilian criminal prosecutions and the War on Terror, see M. Katherine B. Darmer, *Miranda Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 619 (2007); Joan L. Larsen, Visiting Professor of Law, Univ. of Mich. Law Sch., Remarks at the Chapman Law Review Symposium: *Miranda* at 40: Applications in a Post-Enron, Post-9/11 World (Jan. 26, 2007), available at http://www.chapman.edu/LawReview/symposium2007_webcast.asp (follow “Click here for Panel #1” hyperlink).

⁷ There is some evidence, however, that what appears on television has a direct effect on interrogation techniques in the field. For example, an Army official recently met with writers and producers of the Fox Television show *24* in order to try to convince them that their show had a deleterious effect on interrogations in the military.

[The army officials] had come to voice their concern that the show’s central political premise—that the letter of American law must be sacrificed for the country’s security—was having a toxic effect. In their view, the show promoted unethical and illegal behavior and had adversely affected the training and performance of real American soldiers. “I’d like them to stop,” [one officer] said of the show’s producers. “They should do a show where torture backfires.”

....

... The third expert at the meeting was Tony Lagouranis, a former Army interrogator in the war in Iraq. He told the show’s staff that DVDs of shows such as “24” circulate widely among soldiers stationed in Iraq. Lagouranis said to me, “People watch the shows, and then walk into the interrogation booths and do the same things they’ve just seen.”

Jane Mayer, *Whatever It Takes: Torture on “24”*, NEW YORKER, Feb. 19 & 26, 2007, at 66, 72, 77.

torture to which we are all becoming accustomed, courts as well as the public at large are likely to become more accepting of these techniques. This is particularly distressing given the fact that non-torturous but coercive interrogation techniques are highly correlated with unreliable confessions and with wrongful convictions.⁸ Thus, in addition to the dignitary harms that befall criminal defendants and the rest of society whenever statements are coerced from criminal defendants, the bottom-line result of the 24 Effect will be more convictions of the innocent and, by logical extension, more guilty criminals going unpunished.

In this Article, I briefly trace the history of police interrogation and its legal regulation in the United States, from the founding-era understanding that a defendant's silence was entitled to great respect, to the modern practice of *Miranda* warnings and voluntariness inquiries. I then turn to the portrayal of torture in contemporary media, arguing that whatever the motivation may be for the production of these images, their effect will be to desensitize Americans to the effects of torture. Returning then to interrogation, I argue that this desensitizing effect of omnipresent torture will make Americans more accepting of coercive but nonviolent interrogation techniques. I show that, given the close connection between coercive interrogation techniques and wrongful convictions, we should be very concerned about this development, regardless of our thoughts about the continuing wisdom and relevance of the *Miranda* decision.

I. HISTORY—THE EVOLUTION OF INTERROGATION TECHNIQUES AND THEIR REGULATION IN THE UNITED STATES

Not much is known about interrogation techniques prior to the turn of the last century.⁹ Because the individual guarantees of the Fifth Amendment and the rest of the Bill of Rights had not yet been incorporated into the Due Process Clause of the Four-

⁸ See Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 *FORDHAM URB. L.J.* 791 (2006); TIMOTHY SULLIVAN, *UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS* 23–47, 84–85 (1992).

⁹ It is known that compulsory questioning of witnesses was a favorite technique of the Star Chamber, and that the Fifth Amendment adopted the then-common practice in the colonies of prohibiting the compulsory questioning of suspects at trial. See, e.g., Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 *MICH. L. REV.* 2625, 2649 (1996); 4 *NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT [WICKERSHAM COMMISSION], REPORT ON PROSECUTION* 25–26 (1931). A number of commentators have argued that the right was meant to be limited to questioning in the courtroom. See, e.g., Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 *MICH. L. REV.* 1, 2 (1930). For a discussion of early understandings of the Fifth Amendment, see generally Alschuler, *supra*.

teenth Amendment,¹⁰ there was relatively little litigation of interrogation cases until the late nineteenth century.¹¹ In one of the first such cases, the 1897 case of *Bram v. United States*,¹² the Supreme Court held that any official inducements or threats whatsoever were sufficient to render a confession invalid.¹³ Borrowing from centuries of English common law, the *Bram* Court determined that the use of threats or promises to induce a defendant to confess violated the defendant's rights under the Fifth Amendment.¹⁴

The facts of *Bram* are illustrative. *Bram* was suspected of murder. Another suspect, Brown, had been interviewed prior to *Bram's* interrogation. The examining officer admitted in court that he had said the following to *Bram*:

"Now, look here, *Bram*, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But," I said, "some of us here think you could not have done all that crime alone. If you had an accom-

10 See *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968) (cataloguing the incorporation of various rights into the Due Process Clause of the Fourteenth Amendment).

11 Alan G. Gless, *Self-Incrimination Privilege Development [sic] in the Nineteenth-Century Federal Courts: Questions of Procedure, Privilege, Production, Immunity and Compulsion*, 45 AM. J. LEGAL HIST. 391 (2001).

The United States Supreme Court did not decide a self-incrimination issue in a federal criminal case during the first ninety years after the ratification of the Fifth Amendment. The reason was simple. The Court almost completely lacked any appellate jurisdiction over federal criminal cases for most of the first ninety years.

Id. at 393.

12 168 U.S. 532 (1897).

13 *Id.* at 565. It is also fairly clear that the Court did not entirely mean what it said in *Bram*. As Professor Marcus has argued:

The greatest reach of this notion would be to take it literally so that any degree of inducement would be sufficient to invalidate an otherwise permissible statement by the defendant. Not surprisingly, very few courts have ever followed such an interpretation. Instead, the modern view of the statement is that threats and promises are to be taken seriously but that these are rarely determinative on their own.

Paul Marcus, *It's Not Just about Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 606 (2006).

14 A number of critics have lambasted *Bram* as a misreading of both the Fifth Amendment and the English cases on which the Court purported to base its decision. See, e.g., Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465 (2005).

Rather than examine the text, the Court simply borrowed the voluntariness test from a line of early English and American common law cases and used it in place of the compulsion paradigm textually delineated within the self-incrimination clause. While these early cases stand for the proposition that confessions must be voluntary in order to be admissible, they are historically unrelated to the self-incrimination clause and the interrogation practices the self-incrimination clause was intended to ban.

Id. at 478 (citations omitted); Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 777 n.101 ("As a matter of history the *Bram* Court was probably wrong." (citations omitted)).

plice, you should say so, and not have the blame of this horrible crime on your own shoulders.”¹⁵

The court invalidated the confession on the basis of these statements by the officer.¹⁶ Needless to say, such comments would hardly raise an eyebrow today. The police officers in *Bram* encouraged Bram to confess, but certainly did nothing that would render his confession involuntary under the standard currently applied by our courts.¹⁷

It is fairly clear that, although the *Bram* Court was extremely protective of the rights of suspects, interrogation practices in the United States did not necessarily follow suit. In particular, with regard to minority or unpopular defendants, it is clear that police practices during this time were anything but protective of the rights and dignity of suspects.¹⁸ In the 1930s, the Wickersham Commission Report on police practices both exposed and decried the widespread physical abuse of criminal suspects at the hands of interrogators throughout this country.

To obtain confessions or admissions the officers (usually detectives) proceed to “work” the prisoner. “Work” is the term used to signify any form of what is commonly called the third degree, and may consist in nothing more than a severe cross-examination. Perhaps in most cases it is no more than that, but the prisoner knows that he is wholly at the mercy of his inquisitor and that the severe cross-examination may at any moment shift to a severe beating. This knowledge itself undoubtedly induces speedy confessions in many instances and makes unnecessary a resort to force. If the prisoner refuses to answer, he may be returned to his cell with notice that there he will stay till ready to “come clean.” The cell may be especially chosen for the purpose—cold, dark, without bed or chair. The sweat box is a small cell completely dark and arranged to be heated till the prisoner, unable to endure the temperature, will promise to answer as desired. Or refusal to answer may be overcome by whipping, by beating, with rubber hose, clubs, or fists, or by kicking, or by threats, or promises.

Powerful lights turned full on the prisoner’s face, or switched on and off, have been found effective. The electric chair is another device to extort confessions.

The most commonly used method is persistent questioning, con-

¹⁵ *Bram*, 168 U.S. at 539.

¹⁶ *Id.* at 564–65.

¹⁷ For a discussion of current confession law, see *infra* Part II.

¹⁸ There is a strong overlap between the Court’s criminal procedure cases and its cases protecting racial minorities. See, e.g., Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305–06 (1982) (“Although the Court had never treated them as race cases, there can be little doubt that the decisions in *Moore v. Dempsey*, *Powell v. Alabama*, and *Brown v. Mississippi* made new criminal procedure law in part because the notorious facts of each case exemplified the national scandal of racist southern justice.” (citations omitted)).

tinuing hour after hour, sometimes by relays of officers. It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired.¹⁹

The Wickersham Commission did not merely describe the third degree, it decried it; the Commission noted that torture was a sign of laziness and a lack of initiative on the part of law enforcement. Only a police officer without faith in his own wits and intelligence, the Commission argued, would resort to brute force in order to obtain a confession.²⁰

The kind of brutality discussed by the Wickersham Commission led to a national revulsion²¹ and was unequivocally rejected by the Supreme Court shortly thereafter. In *Brown v. Mississippi*,²² the Supreme Court was confronted with a case in which a Mississippi sheriff's deputy admitted quite freely to brutalizing a black defendant in very much the same way described by the Wickersham Commission.

[T]he two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.

.. It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, "Not too

¹⁹ 11 WICKERSHAM COMMISSION, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 47 (1931).

²⁰ The Commission decried these tactics as laziness in the extreme. A former district attorney of New York County said: "It would enhance the ability of the police force if the practice was stamped out. It is a short cut and makes the police lazy and unenterprising." Another former New York prosecutor stated that it impaired police efficiency; if the police "could not get their results by brawn, they were helpless."

Id. at 188.

²¹ See, e.g., Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 313-14 (2003). "Third degree" brutality by police officials, however, was judged constitutionally anathema by the Supreme Court in the aftermath of the exposure and condemnation of the practice by such authorities as the American Bar Association and the Wickersham Commission Report in the early 1930s. That official rejection was reinforced by the revulsion against torture as characteristic of America's totalitarian enemies.

Id. (citations omitted).

²² 297 U.S. 278 (1936).

much for a negro; not as much as I would have done if it were left to me." Two others who had participated in these whippings were introduced and admitted it—not a single witness was introduced who denied it. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding.²³

The Court acknowledged that while the states are generally free to organize their criminal justice systems however they wish, such freedom comes with clear boundaries.

Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process.²⁴

Clearly, the Court argued, the abuse of criminal defendants in order to obtain a confession fell beyond the permissible range of options available to the states.

Although it would be naïve to think that the Court's decision in *Brown* single-handedly caused the cessation of the third degree,²⁵ the available empirical evidence certainly indicates that by the time *Miranda* was decided some thirty years later, the third degree *as an interrogation technique* had virtually disappeared from contemporary police practice.²⁶ While prisoners and defendants were no doubt still being abused at the hands of police after the Supreme Court prohibited such practices, *Brown* and its progeny had made clear that using physical violence to extract information was worse than useless in terms of criminal prosecution.²⁷ If police wished merely to harm or intimidate those under their custody, they could continue to do so subject only to civil and criminal actions against them; if they wished to prosecute those abused defendants in court using information ob-

²³ *Id.* at 284–85 (quoting *Brown v. State*, 161 So. 465, 470–71 (Mo. 1935) (Griffith, J., dissenting)).

²⁴ *Id.* at 285–86. Of course, the Supreme Court would later conclude that a state may *not* do away with trial by jury. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

²⁵ As Richard Leo argues, the professionalization of police departments throughout the nation also played an important part in the disappearance of the third degree. Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 47–52 (1992).

²⁶ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, at 446–48 (1966) (noting that, although instances of the third degree clearly continued to exist, “we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented”).

²⁷ See, e.g., Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, in TORTURE: A COLLECTION 105 (Sanford Levinson ed., 2004) (discussing the legal admissibility of torture-induced confessions).

tained through the third degree, however, *Bram* and its progeny made clear that they would be unable to do so.²⁸

Police departments reacted to the loss of the third degree by developing a number of interrogation techniques designed to achieve the third degree's goals. When *Miranda* was decided in 1966, requiring the now-familiar warnings in all instances of custodial interrogation, the Court made extensive reference to the coercive but non-violent interrogation techniques catalogued and perfected by Inbau and Reid in their police interrogation materials and in wide use throughout the country.²⁹

Although the *Miranda* Court was extremely critical of these interrogation techniques, it chose not to invalidate them wholesale, but rather to interpose the four warnings³⁰ between the accused and that coercion. As commentators have criticized for nearly forty years, once a defendant has been made aware of and voluntarily waived his rights, the inherently coercive techniques that the Court criticized in *Miranda* may continue to be used so long as they do not render the defendant's confession "involuntary."³¹

²⁸ See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

²⁹ See, e.g., *Miranda*, 384 U.S. at 450 ("The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim, or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty." (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 34-43, 87, 43-55 (1962))); see also *id.* at 451 ("Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable." (quoting CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956))).

³⁰ The police must warn a suspect: 1) that he has the right to remain silent, 2) that anything he says may be used against him, 3) that he has the right to an attorney, and 4) that if he cannot afford an attorney one will be appointed to represent him. *Id.* at 444.

³¹ See, e.g., Mark Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1020 (1988).

[W]aiver . . . appeared to be the Achilles' heel of the *Miranda* decision. The Supreme Court emphasized the conditions and inherent evils of custodial interrogation in concluding that the process was inherently coercive. As a result, the voluntariness test could not be relied upon to regulate confession admissibility. However, the question remained whether these same factors would undercut the legitimacy of *Miranda* waivers. The more astute custodial suspects

It is important to remember that the Court did not replace the voluntariness test that had preceded *Miranda* with a test that looked merely at whether or not the *Miranda* warnings were administered.³² Rather, the Court created an additional layer of protection *on top of* the voluntariness inquiry: A confession obtained in violation of *Miranda* is irrebuttably presumed to be involuntary.³³ However, a confession obtained after the *Miranda* warnings have been read to a defendant is admissible only so long as both the waiver of *Miranda* rights and the subsequent confession itself were voluntarily obtained.³⁴

II. INTERROGATIONS AND CONFESSIONS TODAY

There has been much scholarly discussion in recent years regarding the effect that the *Miranda* warnings have had on the number of confessions obtained from criminal suspects. Some have argued that the warnings have led to the rejection of a number of otherwise voluntary confessions and to the loss of many convictions.³⁵ Others have argued with equal force that, while confessions may have been lost immediately following the *Miranda* decision, police departments have effectively adapted to the new rules, developing techniques that are at least as efficient at obtaining confessions from resistant defendants as the coercive techniques used before *Miranda*. Just as police departments adapted to the loss of the third degree following *Brown*, they have adapted to the warnings that the *Miranda* dissenters worried would be the death of confessions in criminal investigation.³⁶

Regardless of whether the number of confessions since

would now be able to assert their rights, but the remainder might well succumb to the environment and waive their rights due to "inherent coercion" just as pre-*Miranda* suspects had succumbed and answered police questions.

Id.

³² Congress attempted to undo this decision in 1968 with its passage of § 3501, which stated that voluntariness was the only standard for determining the admissibility of confessions. See 18 U.S.C. § 3501 (2000).

³³ *Miranda*, 384 U.S. at 476 ("The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant.").

³⁴ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 444 (2000) ("The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry."); Marcus, *supra* note 13, at 638 ("The test today for voluntariness remains what it has been for more than half a century: Judges 'look at the totality of the circumstances of the case in determining whether the confession was voluntary.'" (quoting *State v. Barden*, 572 S.E.2d 108, 124 (N.C. 2002))).

³⁵ See, e.g., Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996).

³⁶ See, e.g., Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996); Stephen Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996).

Miranda has gone up or down, nearly everyone seems to agree that contemporary courts place enormous weight on whether *Miranda* warnings were given, essentially endorsing as voluntary any statement that is made following the warnings and the voluntary waiver of the rights contained therein.³⁷ For much the same reason that the Federal Bureau of Investigation gave a precursor to the *Miranda* warnings long before they were required to do so, many prosecutors and members of law enforcement opposed the argument in *Dickerson* to return to the pre-*Miranda* status quo. The warnings have so immunized the police conduct that follows that, as one of the participants in this Symposium succinctly put it, "If the [Supreme] Court had not imposed the warnings on the police, they would eventually have discovered their value and given them anyway."³⁸

³⁷ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry. But as we said in *Berkemer v. McCarty*, "[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."

Id. (citation omitted) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984)).

³⁸ Steven B. Duke, *Does Miranda Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 566 (2007). In fact, as the Supreme Court noted in *Miranda*, the Federal Bureau of Investigations was giving warnings akin to those mandated in *Miranda* prior to the Court's mandate. *Miranda*, 384 U.S. at 483. As proof that courts are not taking seriously the requirement of judging the totality of the circumstances in cases in which a defendant was properly Mirandized, consider the following from a recent article by Professor Marcus:

This Article has considered thousands of opinions on confessions from the past two decades. One necessarily comes away with a feeling of being unclean and tainted by government activities that are not honorable even given the environment needed for interrogations. Many judges allow confessions into evidence in cases in which police interrogators lied and threatened defendants or played on the mental, emotional, or physical weaknesses of suspects. While judges write that they do not condone such conduct and find such practices repugnant, reprehensible, or deplorable, some of those same judges have upheld the admission of such confessions that result from those practices after applying the totality of circumstances test.

Marcus, *supra* note 13, at 643 (citations omitted). See also Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1021-22 (2001).

[F]or the most part, *Miranda* has helped, not hurt, law enforcement. As argued above, *Miranda* has helped law enforcement by de facto displacing the case-by-case voluntariness standard as the primary test of a confession's admissibility, in effect shifting courts' analysis from the voluntariness of a confession to the voluntariness of a *Miranda* waiver. By creating the opportunity for police to read suspects their constitutional rights and by allowing police to obtain a signed waiver form that signifies consensual and non-coercive interrogation, *Miranda* has helped the police shield themselves from evidentiary challenges, rendering admissible otherwise questionable and/or involuntary confessions.

Id. (citations omitted).

III. DEPICTIONS OF INTERROGATION AND TORTURE IN THE PUBLIC CONSCIOUSNESS

It is against this legal and historical background that the current public discussions and depictions of torture and hard treatment appear. At least since the start of the War on Terror in 2001, discussions and depictions of torture have been front-page news in the United States. Leaked photographs of mistreated prisoners at the Abu Ghraib prison in Iraq made prime-time news,³⁹ Congress and the executive branch have debated the appropriate role of torture in American foreign policy,⁴⁰ and furor arose over the so-called "torture memo," in which now-Attorney General Alberto Gonzalez argued that the Geneva Convention's prohibitions on torture do not apply to terror suspects.⁴¹ The legal academy was drawn into the popular debate on terror, led in no small part by University of California, Berkeley law professor John Yoo, who was a deputy to Gonzalez at the time the torture memo was written,⁴² and who has written extensively on how international agreements on the treatment of prisoners do not apply to the war against Al-Qaeda and the Taliban.⁴³

At the same time that this discussion of actual American pol-

³⁹ Charlotte Sector, *More Abu Ghraib Prison Abuse Photos Leaked: Australian TV Sidesteps Efforts by the U.S. Government to Squash Release*, ABC NEWS, Feb. 15, 2006, <http://abcnews.go.com/International/story?id=1621440>.

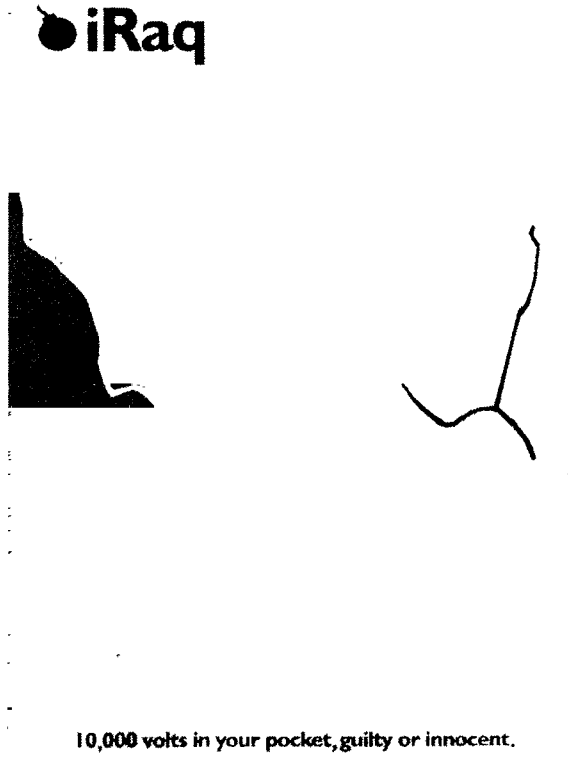
⁴⁰ For example, on December 14, 2005, the House of Representatives passed the Department of Defense Appropriations Act, H.R. 2863, 109th Cong. (2005), a bill regulating interrogation by U.S. military officials. The bill, already passed by the Senate, received the grudging support of the White House; it was signed into law by President Bush on December 30, 2005. See Josh White, *President Relents, Backs Torture Ban: McCain Proposal Had Veto-Proof Support*, WASH. POST, Dec. 16, 2005, at A1; Press Release, The White House, President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

⁴¹ Memorandum from Alberto R. Gonzales to President George W. Bush (Jan. 25, 2002), available at http://msnbc.com/modules/newweek/pdf/gonzales_memo.pdf. In the memo, Gonzalez defends the need to dispense with the Geneva Conventions on the grounds that "[t]he nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians." *Id.* at 2.

⁴² Boalt Hall School of Law, Professor John Yoo, <http://www.law.berkeley.edu/faculty/yooj/> (last visited Mar. 30, 2007).

⁴³ While not discussing his role in the production of the torture memo, Professor Yoo defends much of its contents in John Yoo, *Behind the "Torture Memos"*, SAN JOSE MERCURY NEWS (N. Cal. Edition), Jan. 2, 2005, at 1P. Yoo is hardly the only legal academic, however, who has weighed in on the torture debate. See, e.g., TORTURE: A COLLECTION, *supra* note 27; Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19 (arguing that nonlethal torture techniques "such as sterile needles, being inserted beneath the nails to cause excruciating pain" should be permitted if law enforcement demonstrates to a magistrate the "absolute need to obtain immediate information in order to save lives coupled with probable cause that the suspect had such information and is unwilling to reveal it").

icy was making headlines, the media began bombarding us with fictional depictions of torture. In movies,⁴⁴ on television,⁴⁵ even in the streets (see image, below), depictions of torture are everywhere in our popular culture.



MILTON GLASER & MIRKO ILIĆ, *THE DESIGN OF DISSENT 66* (2005). Such images have become the subject of a variety of parodies or social commentaries.

In 2006, David Edelstein of *New York Magazine* coined the phrase “torture porn” to describe a new slate of horror movies aimed at teenagers, linking the rise of “torture porn” to contem-

⁴⁴ The PG-13 James Bond film *Casino Royale* had a scene of graphic genital torture. *CASINO ROYALE* (MGM 2006). The Oscar-winning film *The Last King of Scotland* explicitly depicts a man being hung from meat hooks piercing his chest. *THE LAST KING OF SCOTLAND* (DNA Films 2006). In *Hostel*, vivisections of unsuspecting tourists are par for the course. *HOSTEL* (Hostel LLC 2005).

⁴⁵ See, e.g., *24: Day 6: 11:00 AM–12:00 PM* (FOX television broadcast Jan. 29, 2007). *24* is the most obvious example, but others come to mind. For example, a recurring theme on ABC’s *Lost* is the toll that becoming a torturer during war has had on one of the characters. Although the character is clearly haunted by what he has done, his skills come in handy more than once. *Lost: One of Them* (ABC television broadcast Feb. 15, 2006); *Lost: Enter 77* (ABC television broadcast Mar. 7, 2007).

porary events:

Post-9/11, we've engaged in a national debate about the morality of torture, fueled by horrifying pictures of manifestly decent men and women (some of them, anyway) enacting brutal scenarios of domination at Abu Ghraib. And a large segment of the population evidently has no problem with this. Our righteousness is buoyed by propaganda like the TV series *24*, which devoted an entire season to justifying torture in the name of an imminent threat: a nuclear missile en route to a major city. Who do you want defending America? Kiefer Sutherland or terrorist-employed civil-liberties lawyers?⁴⁶

Edelstein argues that in the wake of pictures and discussion of actual torture on the front page of the newspaper, torture has become far more acceptable in fiction: "Explicit scenes of torture and mutilation were once confined to the old 42nd Street . . . whereas now they have terrific production values and a place of honor in your local multiplex."⁴⁷ In other words, events have taken torture mainstream.⁴⁸

As Edelstein's article makes clear, when it comes to depictions of torture in the post-9/11 universe, the Fox show *24* stands above all others.⁴⁹ Centered on the Los Angeles office of the fictional Counter-Terrorism Unit ("CTU"), *24* is primarily the story of a single agent, Jack Bauer, portrayed by Kiefer Sutherland.⁵⁰

⁴⁶ Edelstein, *supra* note 3, at 64.

⁴⁷ *Id.*

⁴⁸ See John Hayes, *Tolerance for Torture: TV and Movies Up the Ante on Graphic Torture Scenes and Audiences Keep Coming Back for More*, PITTSBURGH POST-GAZETTE, Jan. 19, 2007, at C-1.

The American security agent is strapped to a chair beside a table covered with knives and assorted medical tools. A sadistic Middle Eastern terrorist whispers gentle insults into his ear as he roughly twists the blade—and the agent screams in agony.

It's not a midnight screening of a campy 1960s Russ Meyer splatter classic, or even an R-rated teen slasher film. It's the sixth-season premiere of the Fox TV hit "24."

. . . .

It's curious that America's taste for more fictional media torture is happening at a time when real-life torture is a daily ordeal in Iraq, and the nation is debating America's use of coercive interrogation methods and splitting hairs over the definition of "torture."

Id.

⁴⁹ The Parents Television Council, a non-partisan organization that monitors the content of prime-time television shows, has singled out *24* for the darkness of its content:

The PTC review found that Fox's "24" showed 67 scenes of torture in the first five seasons. Upon review of prime time broadcast programming from 1995 to 2001, there were 110 scenes of torture. From 2002 to 2005, the number increased to 624 scenes of torture.

Press Release, Parents Television Council, PTC Calls for More Network Responsibility over Violent Content: PTC Reveals New Research on Torture Scenes (Feb. 14, 2007), available at <http://www.parentstv.org/PTC/publications/release/2007/0214.asp>.

⁵⁰ Parents Television Council, *Twenty Four*—Parents Television Council Family TV

Jack and CTU battle repeated terrorist attacks on American soil, relying on improbably sophisticated surveillance technology,⁵¹ flawless intuition,⁵² and, quite often, torture.⁵³

The sixth season of the show has been no exception. In the first three weeks the show was on the air, spanning six episodes, Jack is released from a Chinese prison, bearing the physical and emotional scars of nearly two years of what was likely nearly constant torture.⁵⁴ He is released only to be handed over to a Middle-Eastern terrorist who has promised to cease his attacks against American civilians in exchange for the right to torture Jack who, it turns out, had tortured the terrorist's brother years before.⁵⁵ Jack escapes his sadistic captor and, within hours, is interrogating his own brother.⁵⁶ Rightly intuiting that his interrogation subject has not told him the complete truth, Jack ties him to a chair and holds a plastic bag over his head, cutting off his breathing until he gives up the truth about nuclear devices loose on American soil.⁵⁷

Here is what we have learned about torture from *24*, not just this season, but throughout its run. First, torture works. The imposition of torture on a suspect invariably and almost instantaneously forces the suspect to speak and to speak truthfully

Guide Show Page, <http://www.parentstv.org/ptc/shows/main.asp?shwid=1538> (last visited Mar. 30, 2007); FOX Television Broadcast Company, *24*, <http://www.fox.com/24/> (last visited Mar. 30, 2007).

⁵¹ See, e.g., *24: Day 4: 10:00 AM–11:00 AM* (FOX television broadcast Jan. 10, 2005); *24: Day 6: 1:00 PM–2:00 PM* (FOX television broadcast Feb. 12, 2007) (using real-time satellite feeds to track moving suspects and vehicles). The technical savvy of CTU stands in marked contrast to the technological backwardness of actual U.S. counter-terrorism officials. See, e.g., Dan Eggen, *FBI Pushed Ahead with Troubled Software*, WASH. POST, June 6, 2005, at A1 (describing the FBI's failed attempt to develop a computerized case management system which ended up costing taxpayers \$170 million); Noah Shachtman, *The Federal Bureau of Luddites: Why There Are Still FBI Agents Who Don't Have E-mail Addresses*, SLATE, Apr. 6, 2006, <http://www.slate.com/id/2139274/> (describing the FBI's inability to provide email addresses to all of its relevant employees). See also Timothy P. Carney, *I am Jack Bauer: What 24 Means for Homeland Security*, NAT'L REV. ONLINE, June 26, 2006, <http://search.nationalreview.com> (enter "I Am Jack Bauer" (including quotation marks) in "Search Terms" field and click "Search").

⁵² See, for example, *24: 12:00 AM–1:00 AM* (FOX television broadcast Nov. 6, 2001), where Jack blackmails George Mason upon speculation that he stole money from the government; *24: Day 2: 12:00 PM–1:00 PM* (FOX television broadcast Nov. 26, 2002), where Jack deduces that Mason is suffering from radiation sickness; and *24: Day 6: 10:00 AM–11:00 AM* (FOX television broadcast Jan. 22, 2007), when Jack decides his brother is lying about his level of knowledge based solely on his brother's mannerisms.

⁵³ See *infra* note 58 and accompanying text.

⁵⁴ *24: Day 6: 6:00 AM–7:00 AM* (FOX television broadcast Jan. 14, 2007).

⁵⁵ *Id.*

⁵⁶ *Id.*; *24: Day 6: 7:00 AM–8:00 AM* (FOX television broadcast Jan. 14, 2007); *24: Day 6: 10:00 AM–11:00 AM*, *supra* note 52; *24: Day 6: 11:00 AM–12:00 PM*, *supra* note 45.

⁵⁷ *24: Day 6: 10:00 AM–11:00 AM*, *supra* note 52; *24: Day 6: 11:00 AM–12:00 PM*, *supra* note 45; *24: Day 6: 12:00 PM–1:00 PM* (FOX television broadcast Feb. 5, 2007).

about what she knows.⁵⁸ Jack Bauer can tell when a suspect is lying or withholding important evidence and his application of torture can make the suspect speak and make him speak truthfully.⁵⁹ On a recent episode of the show, Jack uses a high-tech lie-detector to augment his impeccable intuition regarding whether or not a suspect is telling all he knows.⁶⁰ Although lie-detectors in the real world are so unreliable that their results are almost never admissible at trial, on television they are infalli-

⁵⁸ See, for example, *24: 10:00 AM–11:00 AM* (FOX television broadcast Feb. 12, 2002), where Jack slams a man's head into a partition, tapes him up, and threatens to torture him if the man does not take Jack to where his wife and daughter are being held hostage, which he does; *24: Day 2: 9:00 PM–10:00 PM* (FOX television broadcast Feb. 25, 2003), where Jack shoots a woman suspected of having information about a bomb in the arm and then refuses to give her pain medication until she divulges the information about the location of a bomb, which again, she does; *24: Day 3: 8:00 AM–9:00 AM* (FOX television broadcast Apr. 27, 2004), where Jack threatens to torture the daughter of a man who is about to release a deadly virus in San Francisco in order to find out his location; *24: Day 4: 12:00 AM–1:00 AM* (FOX television broadcast Apr. 18, 2005), where Jack breaks a suspect's fingers, one by one, to get him to release the whereabouts of another suspected terrorist; *24: Day 5: 9:00 PM–10:00 PM* (FOX television broadcast Mar. 27, 2006), when the "torture tools" are brought out and Jack's love interest is given a drug to induce her to talk, and Jack threatens to kill another woman in order to get her to admit that she, not Jack's love interest, is the real culprit; *24: Day 6: 5:00 PM–6:00 PM* (FOX television broadcast Mar. 5, 2007), when Jack uses a cigar cutter to cut off the tip of a suspect's pinky, and the suspect then states that a terrorist is in the Mojave Desert preparing to launch aerial drones to deliver nuclear warheads. There is, of course, a wealth of information, all of which indicates that torture is an incredibly ineffective interrogation technique. See, e.g., Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 261–62 (2004); DARIUS REJALI, *TORTURE AND DEMOCRACY* (forthcoming 2007) ("Advocates of torture often assume that torture works in this sense better than other methods of investigation and all that is left is the moral justification. But if torture does not work, if it cannot be administered professionally, scientifically, and productively, if it offers no temporal advantage in the case of "a ticking time bomb," then the whole argument is pointless. Can torture be used to intimidate prisoners? Yes. Can it force false confessions [sic] yes? Can it produce true information better than other policing techniques? No. . . . The available empirical evidence on this is conclusive.").

⁵⁹ The only exception to this rule, it seems, is Bauer himself:

Virtually the sole exception to this rule is Jack Bauer. The current season begins with Bauer being released from a Chinese prison, after two years of ceaseless torture; his back is scarred and his hands are burnt, but a Communist official who transfers Bauer to U.S. custody says that he "never broke his silence."

Mayer, *supra* note 7, at 69. See also *24: Day 2: 2:00 AM–3:00 AM* (FOX television broadcast Apr. 15, 2003) (showing Jack bound and gagged, his abdomen is cut several times with a scalpel dipped in ammonia, and the open wounds are burnt; he is then tasered twice and then CPR and epinephrine must be administered to revive him; Jack reveals nothing); *24: Day 2: 3:00 AM–4:00 AM* (FOX television broadcast Apr. 22, 2003) (showing Jack's chest being shocked with a defibrillator, after which he is given a dose of medication to paralyze his diaphragm, preventing him from breathing; Jack still reveals nothing). *But see 24: Day 2: 7:00 PM–8:00 PM* (FOX television broadcast Feb. 11, 2003) (showing that after Jack's interrogation of a suspected terrorist fails, Jack stages the killing of the terrorist's son and makes the terrorist watch the "murder" on tape, and the terrorist still refuses to talk); *24: Day 5: 6:00 PM–7:00 PM* (FOX television broadcast Mar. 6, 2006) (showing Jack giving a man large doses of a pain-inducing drug to convince him to reveal information, but the man refuses to succumb).

⁶⁰ *24: Day 6: 12:00 PM–1:00 PM*, *supra* note 57.

ble.⁶¹

Second, torture is used only on the guilty and only when it is imminently necessary to obtain information. In much the same way that Inbau and Reid counseled that coercive interrogation techniques should only be used when there is a high probability of the suspect's guilt,⁶² so Jack and his colleagues resort to torture only when it is clear that nothing else will get the job done.⁶³

Third, Jack Bauer does not seem to enjoy employing torture.⁶⁴ While others on the show—Islamic terrorists, the Chinese—either use torture gratuitously or seem to derive a sadistic thrill from its use, Jack resorts to it only when it is necessary and only when he is convinced that it will produce the results he needs. If the “ticking time-bomb” scenario is the best argument for torture—Alan Dershowitz argues that a warrant for torture should be issued if necessary to prevent imminent harm⁶⁵—then *24* makes that argument each week. Given how successful torture is at obtaining the truth, and given how high the stakes are on *24*, it is hard to see how anyone could be *against* torture.⁶⁶

⁶¹ See, e.g., Todd R. Samelman, Note, *Junk Science in Federal Courts: Judicial Understanding of Scientific Principles: Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), 6 J. TECH. L. & POL'Y 263, 264 (2001) (“Over the seventy-year use of the Frye standard, only the admissibility of lie detector tests received negative treatment . . .”).

⁶² *Miranda v. Arizona*, 384 U.S. 436, 451 (1966) (“In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable.” (quoting CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956))).

⁶³ See, for example, *24: Day 6: 10:00 AM–11:00 AM*, *supra* note 52, where Jack suffocates his brother with a plastic bag to gain information; *24: Day 6: 12:00 AM–1:00 PM* (FOX television broadcast Feb. 5, 2007), where Jack, in desperation, has his brother injected with a painful serum to force him to speak; *24: Day 6: 5:00 PM–6:00 PM*, *supra* note 58, where Jack uses a cigar cutter to cut off the tip of a suspect's pinky and threatens to shoot him in order to prevent nuclear warheads from launching; *24: Day 2: 9:00 PM–10:00 PM*, *supra* note 58, where Jack shoots the only available terrorist with knowledge of a bomb's location and refuses to give her pain killers until she gives information; see also *24: Day 5: 6:00 PM–7:00 PM*, *supra* note 59; *24: Day 4: 5:00 PM–6:00 PM* (FOX television broadcast Feb. 28, 2005). But see *id.*, where Jack tortures Paul Raines with an electric wire in the mistaken belief that he is associated with terrorists; Paul quickly forgives Jack, eventually taking a bullet that was meant for him.

⁶⁴ See, e.g., *24: Day 6, 7:00 AM–8:00 AM*, *supra* note 56; *24: Day 6, 12:00 PM–1:00 PM*, *supra* note 57. As one expert has put it, Jack seems surprisingly unchanged by the things he has done over the years. See, e.g., Mayer, *supra* note 6, at 72 (“Joe Navarro, one of the F.B.I.'s top experts in questioning techniques . . . told me, ‘Only a psychopath can torture and be unaffected. You don't want people like that in your organization. They are untrustworthy, and tend to have grotesque other problems.’”).

⁶⁵ Dershowitz, *supra* note 43.

⁶⁶ In fact, the popularity of the show has been taken by some on the right as an endorsement of the use of torture in the War on Terror. For example, on the Fox News Channel, conservative commentator Laura Ingraham described the popularity of the show *24* as being “as close to a national referendum” on the use of “tough tactics” in the War on Terror as we are likely to see. *The O'Reilly Factor* (Fox News Channel broadcast Sept. 13,

IV. THE 24 EFFECT

As I stated above, my concern is not necessarily that torture will return to the interrogation rooms of the United States.⁶⁷ While police professionalization and judicial oversight may not have entirely eliminated the abuse of suspects in our country, these processes have largely removed the third degree from the repertoire of techniques available to officers interested in obtaining a conviction. Furthermore, given the lack of scrutiny that courts generally give to Mirandized confessions,⁶⁸ police officers working today rarely need to resort to physical abuse in order to obtain confessions.

What concerns me about the current torture debate in the United States is the desensitizing effect that depictions of torture can have. Compared with torture, coercive but non-violent interrogation techniques—the litany of techniques expressly disapproved of by the *Miranda* court—pale by comparison. Isolating a suspect from his support network, diminishing the seriousness of his crime, feigning sympathy for his plight, using promises of leniency or threats of increased punishment to obtain a confession—these techniques simply do not resonate with the American public the way physical brutality does.⁶⁹ As a result, I fear that the public as well as the courts may become even more accepting of these practices than they already are.

Why would this increased acceptance of coercive but non-

2006).

⁶⁷ Not everyone is so sanguine about the lines between torture in the military and torture at home. For example, in an article in *Slate* magazine, Darius Rejali argues that the connection has been made before:

[T]his corruption will not be limited to the military. Two-track interrogation systems have similar corrupting influences in domestic policing, particularly as former interrogators and MPs seek jobs as police officers after being decommissioned. The military tortures in the Franco-Algerian War soon seeped into French policing in the 1960s. And in the United States, this kind of slippage has happened twice: initially, as the water tortures of the Spanish-American War began appearing in police stations in the 1920s, and again as electrical techniques used during the Vietnam War appeared in Chicago policing in the 1970s. These torturers-turned-policemen-turned-torturers were especially attracted to techniques that were clean, and there is every reason to believe that the clean techniques now approved in the Iraq war will, sooner or later, appear in a neighborhood near you.

Darius Rejali, *Containing Torture: How Torture Begets Even More Torture*, *SLATE*, Oct. 27, 2006, <http://www.slate.com/id/2152268/>.

⁶⁸ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (“[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.” (alteration in original) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984))).

⁶⁹ See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 910 (2004).

torturous interrogation be so problematic? It is important to remember that the techniques currently in use by police departments were extensively catalogued and explicitly critiqued by the *Miranda* court. On its way to mandating the now-familiar warnings, the Court described these psychologically coercive techniques as being “equally destructive of human dignity” as the third degree.⁷⁰ Even if we do not find this appeal to human dignity compelling,⁷¹ there is great reason to be concerned about coercion in the interrogation room.

Principally, for my purposes, it is important to remember that the coercive interrogation techniques catalogued but ultimately upheld in *Miranda* are likely to produce false confessions. The social science literature on interrogation makes two things very clear: One, false confessions are a leading cause of wrongful convictions, and two, they are most often attributable to coercive interrogation techniques. As Leo, Drizin, Neufeld, Hall, and Vatner recently wrote:

The primary cause of false confession is the interrogator’s use of psychologically coercive interrogation techniques such as implicit or explicit promises of leniency in exchange for confession and threats of differential punishment in the absence of confession. Other coercive techniques include lengthy or incommunicado interrogation; depriving essential necessities such as food, sleep, water, or access to bathroom facilities; refusing to honor a suspect’s request to terminate interrogation; and inducing extreme exhaustion and fatigue. Some researchers have argued that additional situational risk factors that may cause innocent people to confess falsely include physical custody and isolation, confrontation, and minimization techniques.⁷²

If this parade of horrors sounds familiar, it should. The interrogation techniques that Leo and his co-authors identify with false confessions match up with surprising consistency to the

⁷⁰ *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (“It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.”).

⁷¹ See, e.g., *id.* at 539 (White, J., dissenting).

The most basic function of any government is to provide for the security of the individual and of his property. These ends of society are served by the criminal laws which for the most part are aimed at prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.

Id. (citations omitted).

⁷² Richard A. Leo, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 517.

techniques described by the *Miranda* Court as common interrogation techniques in the post-*Brown* world.⁷³

The danger of a false confession that is induced by coercive techniques is compounded by the apparently innocuous nature of these techniques. The risk of false confessions leading to wrongful conviction would be greatly minimized if it were broadly understood that coercive interrogation techniques can induce even an innocent person to confess. Sadly, however, quite the opposite appears to be the case. As Drizin and Leo write:

[I]n the era of psychological interrogation, the phenomenon of false confession has become counter-intuitive. Because police interrogation is beyond the common knowledge of individuals who have neither experienced it firsthand as a criminal suspect nor performed it as a trained police officer—i.e., the vast majority of the American public—most people are ignorant of the psychologically manipulative methods and strategies of police interrogators. Most people do not appear to know that interrogation-induced false confessions even exist, let alone that police detectives are sent to specialized training schools to learn the techniques of interrogation or how and why they are designed to manipulate the perceptions, reasoning, and decision-making of a custodial suspect and thus lead to the decision to confess. Like many criminal justice officials, most people appear to believe in what one of the authors has labeled “the myth of psychological interrogation”: that an innocent person will not falsely confess to a serious crime unless he is physically tortured or mentally ill.⁷⁴

In other words, the impact of psychological interrogation is compounded by its stealth character. Because the defendant does not appear in the courtroom with bruises and welts, it is easier for the judge to find that his confession was voluntarily given.

As we become more accustomed to bruised and beaten bodies in Iraq, on television dramas, and in the movies, the gap between what we know is possible and what happens in the run-of-the-mill criminal case will inevitably become wider. My fear is that as we become more aware of the possibility and reality of horrific violence being perpetrated against detainees, anything less than that will come to seem tame by comparison. This will lead courts to monitor Mirandized interrogations even less than they do now, will likely produce more coerced confessions, and will ultimately result in more false confessions and wrongful convictions. This should be troubling regardless of one’s views about the wisdom or legitimacy of *Miranda*.

⁷³ *Miranda*, 384 U.S. at 446–47.

⁷⁴ Drizin & Leo, *supra* note 69, at 910.

CONCLUSION

The fortieth anniversary of the *Miranda* decision provides us with an opportunity to re-examine our recent past and to consider the future of interrogation in this country. From *Bram* to *Brown* to *Miranda*, courts have consistently, though not uniformly,⁷⁵ increased their supervision of what happens in the stationhouse. In response, law enforcement officials have adapted to these changing rules and have found ways to continue to question suspects and obtain information within the dictates of the law.

My concern is that torture will change this balance. Because torture lowers our baseline assumptions about the fair treatment of detainees, I worry that it will negatively impact the judicial oversight of interrogation in a way that will be very difficult to undo.

⁷⁵ The direction of the law is rarely uniform in any field. There have been decisions, both before *Miranda* and after, that have had the effect of contracting rather than expanding the rights of those undergoing interrogation. See, e.g., *Harris v. New York*, 401 U.S. 222 (1971) (holding that a statement obtained in violation of *Miranda*, but not of the Fifth Amendment itself, could be used for impeachment purposes); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (holding that a suspect subject to questioning during a traffic stop is not in custody for *Miranda* purposes); *Moran v. Burbine*, 475 U.S. 412 (1986) (approving a *Miranda* waiver in a case where counsel had been retained by family members and had been expressly told by police officers that the suspect would not be interrogated that night); *Illinois v. Perkins*, 496 U.S. 292 (1990) (holding that *Miranda* warnings need not be given when the officer who questions the suspect is undercover). This list is by no means exhaustive.

Law and Disorder: The High Court's Hasty Decision in *Miranda* Leaves a Tangled Mess

Jeremy M. Miller*

INTRODUCTION

This is an essay borne of almost three decades of studying the infamous 1966 U.S. Supreme Court decision, *Miranda v. Arizona*.¹ This is, paradoxically, both the easiest and most difficult task. It is easy because, although *Miranda* was a 100-plus page opinion, there have been at least 1000 articles tailored to most every sentence in that opinion. Fairly it can be queried, "What does this professor have to add?"

Miranda was judicial fiat: at its worst, it was *ultra vires*, it was a usurpation of the legislative function, it was illogical, it was—being complimentary—the second try at handling a social problem. It was verbose, it confused the Sixth Amendment right to counsel² with the Fifth Amendment self-incrimination clause,³ it was filled with dicta that was inexorably eroded from its birth to the present. It changed the long-held belief that the self-incrimination right attached at trial or trial-like proceedings, not in the street. But, at its best, it was idealistic, it attempted to maximize the truth-finding function of trial, it maximized individual dignity and liberty, and it gave law professors a meaningful chance to pontificate and earn tenure. Additionally, it relied on the intrinsic equitable powers of the High Court to fashion appropriate remedies.

Admittedly, the Anglo-American process of common law de-

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¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (emphasis added)).

³ U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . .").

velopment includes the notion that in a judge's role of interpreting the law, he or she, by necessity, *creates* law. Law is not automatically self-effectuating. Yet it is expected that a judge will attempt to follow the original intent of the framers of that law; this is so-called "originalism."⁴ However, not only do evolving notions of decency⁵ mandate judicial balancing and change, but radical population changes, technological advances, and social evolution indicate that strict construction of "originalism" is unworkable—except as a first principle. As a first principle, it checks unbridled judicial caprice. As the only principle, it "freezes" law into a cruel irrelevance.

The High Court should (and still could) correct this self-inflicted wound. It is indisputable that all American courts, including the U.S. Supreme Court, have the power to fashion equitable remedies. But equitable remedies, essentially amounting to unbridled judicial discretion, are a dangerous last resort.

The Framers were not plagued by crime, nor did they have a massive police force. They were aware that uncorroborated confessions were unreliable, and thus the corpus delicti rule⁶ was, and still is, part of our common law. The rule precludes convicting an individual based solely on his or her own uncorroborated confession.⁷

The High Court should have, and did, mandate that the self-incrimination clause should apply prior to trial, at the time of arrest. Prior to *Miranda*, pre-trial confessions or admissions had to be "voluntary."⁸ Otherwise, under traditional evidence law, the prejudicial effect would outweigh the probative value. Additionally, involuntariness was interpreted to violate the due process requirements of both the Fifth and the Fourteenth Amendments.⁹ Accordingly, to effectuate this mandate the Court should

⁴ Originalism is defined as "[t]he theory that the U.S. Constitution should be interpreted according to the intent of those who drafted and adopted it." BLACK'S LAW DICTIONARY 1126 (7th ed. 1999).

⁵ Decency is defined as "[t]he state of being proper, as in speech or dress; the quality of being seemly." *Id.* at 413.

⁶ The corpus delicti rule is "[t]he doctrine that prohibits a prosecutor from proving the corpus delicti based solely on a defendant's extrajudicial statements." *Id.* at 346.

⁷ *Id.*

⁸ *See, e.g., Morales v. New York*, 396 U.S. 102 (1969).

After considering the full record, we do not disturb the determination of the trial court, affirmed by the New York appellate courts, that Morales' confessions were voluntarily given. The trial occurred prior to *Miranda v. Arizona*, and the totality of the circumstances surrounding the confessions shows that the confessions were voluntary, not coerced.

Id. at 104 (citation omitted).

⁹ *See, e.g., Withrow v. Williams*, 507 U.S. 680, 693–94 (1993) (holding that in considering a criminal defendant's claim under the Due Process Clause of the Fourteenth Amendment and whether the defendant's conviction improperly rested on an involuntary

have, and did, require that the arrestee be affirmatively told of this due process right.¹⁰

Then the High Court began an embarrassing set of stumbles. Correctly, it held that the Sixth Amendment right to counsel applied after formal charging in *Massiah*.¹¹ But it stumbled badly in *Escobedo* in holding that the “target” of a criminal investigation must be told of his or her right to counsel whether or not that person is arrested or formally charged.¹² Although *Escobedo* has never been overruled, it has been limited to its facts.¹³

Instead of holding that the Sixth Amendment right to counsel attaches when the suspect is placed in jail or even arrested, which using their parlance, is certainly a “critical stage”¹⁴ in a potential defendant’s criminal—or not—future, the Court created a non-existent aspect of the Fifth Amendment Self-Incrimination Clause. That is, when an individual is under arrest, he or she must affirmatively be told not only of his or her right to remain silent, but also of the right to counsel.¹⁵ The rule proved as im-

confession, courts must look to the totality of circumstances to determine whether a confession was voluntary, including (1) the crucial element of police coercion; (2) the length, location, and continuity of the interrogation; (3) the defendant’s maturity, education, physical condition, and mental health; and (4) the failure of the police to advise the defendant of his or her rights to remain silent and to have counsel present during custodial interrogation).

¹⁰ See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (“[T]he privilege [against self-incrimination] is fulfilled only when the person is guaranteed the right ‘to remain silent unless he chooses to speak in the unfettered exercise of his own will.’” (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964))).

¹¹ *Massiah v. United States*, 377 U.S. 201, 205 (1964).

¹² *Escobedo v. Illinois*, 378 U.S. 478, 485–86 (1964).

[A] Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.

Id. at 484–85 (quoting *Massiah v. United States*, 377 U.S. 201, 204 (1964)) (internal quotation marks omitted).

¹³ See *United States v. Muzychka*, 725 F.2d 1061, 1066 (3d Cir. 1984).

¹⁴ See, e.g., *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (recognizing a long-standing rule that the Sixth Amendment right to counsel attaches not only at trial, but also at earlier, “critical” stages).

¹⁵ *Miranda*, 384 U.S. at 467–469.

[I]n apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.

...

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court.

Id.

practicable as it was ridiculous, and has been riddled with exceptions.¹⁶

The rule should have been that the arrestee be told of his or her right to silence, and that upon jailing, the arrestee be offered counsel, thus moving the Sixth Amendment right to counsel to the pre-trial arena. For the purists, an alternate logical rule would have been a strong presumption of voluntariness if the "rights" were given verbally, and a presumption of involuntariness if they were not given verbally.

Instead, we have volumes of "jigsaw puzzle" law and an encyclopedia of exceptions to *Miranda*. We also have the High Court's grudging acceptance of a rule that it admits is not truly constitutional. It did this recently in *Dickerson*, which tackled the issue of *Miranda* as a constitutional principle and decided whether the U.S. Congress could "overrule" it.¹⁷

A brief examination of the historical background of the Fifth Amendment Self-Incrimination Clause will be helpful for interpretation. Even in colonial times an inquisitorial, torture-laden,

[T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

....

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given.

Id. at 470.

¹⁶ See, e.g., *New York v. Quarles*, 467 U.S. 649, 655-58 (1984) (establishing a "public safety" exception to the requirement that *Miranda* warnings be given before questioning: for example, if the defendant is in possession of information regarding the location of an unattended gun in a supermarket, or there are other similar exigent circumstances which require protection of the public, the defendant may be questioned without warning and his responses, though incriminating, will be admissible in evidence); *Rhode Island v. Innis*, 446 U.S. 291, 300-03 (1980) (holding that a spontaneous statement made by a defendant while in custody, even though the defendant has not been given *Miranda* warnings or invoked the right to counsel, is admissible in evidence as long as the statement was not given in response to police questioning or other conduct by the police likely to produce an incriminating response); *Harris v. New York*, 401 U.S. 222, 226 (1971) (holding that a confession obtained in violation of the *Miranda* standards may nonetheless be used for purposes of impeaching the defendant's testimony: that is, if the defendant takes the stand at trial and the prosecution wishes to introduce his or her confession as a prior inconsistent statement to attack his or her credibility, the *Miranda* holding will not prohibit this); *Colorado v. Connelly*, 479 U.S. 157, 165-67 (1986) (holding that *Miranda's* requirement for "voluntariness" means only that the suspect reasonably appears to understand what he or she is doing, and is not being coerced into signing the waiver, regardless of whether the suspect may actually have been insane at the time).

¹⁷ See *Dickerson v. United States*, 530 U.S. 428, 432 (2000) ("We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress.").

trial-by-ordeal method was not uncommon.¹⁸ Likewise there was hostility to the “*ex officio*” oath. The *ex officio* oath was a badge of infamy on an often exemplary common law. It required that the defendant place his or her hand on a Bible and promise to truthfully answer questions asked of him or her. After this point, incriminating answers were sought and were punishable.¹⁹ Further, there was no right to refuse to answer.²⁰ Perjury, at least in capital cases, was punishable by death.²¹ Sir Edward Coke, the famous Elizabethan English lawyer and judge, placed his career on the line to have the *ex officio* oath ousted from the common law. Coke’s persistence cost him his job, as King James removed Coke from office in 1616.²² The *Lilburne* trial and tragedy, also in the 1600s in England, did much to cement the right against self-incrimination into the common law.²³ There, the rebel writer Lilburne was publicly tortured and tried. He dramatically emphasized the injustice of the *ex officio* oath, and his eloquence and popular support did much to bring the safeguards now embodied in the Self-Incrimination Clause into the English system.²⁴

Another source of the privilege against self-incrimination was the 1689 *Scottish Claim of Rights*.²⁵ It should be noted, however, that the right was not in the *Magna Carta*.²⁶ The right crossed the Atlantic when James Madison, the principal author of the Fifth Amendment, purposefully used broad drafting so as to make the right itself broad.²⁷

Finally, in *Malloy v. Hogan* in 1964, the privilege against self-incrimination was made applicable to the states via the Fourteenth Amendment Due Process Clause.²⁸

18 LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 346–47 (Ivan R. Dee 1999) (1968).

19 *Id.* at 46–47, 274.

20 *Id.* at 132–34.

21 See *Furman v. Georgia*, 408 U.S. 238, 335 (1972) (Marshall, J., concurring).

22 See Leonard W. Levy, *The Origins of the Fifth Amendment and its Critics*, 19 CARDOZO L. REV. 821, 823 (1997); see also LEVY, *supra* note 18, at 254.

23 See Sara A. Leahy, Note, *United States v. Balsys: Foreign Prosecution and the Applicability of the Fifth Amendment Privilege Against Self-Incrimination*, 48 DEPAUL L. REV. 987, 991 n.29 (1999). See also LEVY, *supra* note 18, at 282.

24 LEVY, *supra* note 18, at 271–82.

25 See R. Carter Pittman, *Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 764 (1935) (“The only constitutional document that recognized [the privilege against self-incrimination] in any form before 1776 is the Scotch Claim of Rights of 1689 . . .”).

26 *Id.*

27 Cf. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 712–13 (1985).

28 See *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

MIRANDA AND POLICE INTERROGATION PRIOR TO
FORMAL CHARGING

A. The Voluntariness Standard

Prior to the landmark decision of *Miranda v. Arizona* regarding pre-indictment interrogation and confession, the due process requirement of general "voluntariness" controlled.²⁹ The test for voluntariness is whether the suspect's will was overborne.³⁰ For example, in 1936 in *Brown v. Mississippi*,³¹ a confession that resulted from obvious torture was overturned.

Similarly, the Court has held that psychological coercion is sufficient to void the admissibility of certain confessions. In *Leyra v. Denno*, the bringing in of a psychiatrist, purportedly to help the defendant with a sinus problem but in fact to gain a confession, was held to violate constitutional requirements for due process.³² Lengthy interrogations and interrogations of the "weak" indicate involuntariness under the Due Process Clause.

Although the due process voluntariness standard has been overshadowed by *Miranda*, it is still relevant if *Miranda* is inapplicable, such as when the suspect is not in custody or is not formally charged. That is, all statements in order to be used against the accused must be voluntary, under the totality of the circumstances.³³

B. *Miranda*—Custodial Interrogation

In the 1960s, the Warren Court realized the potential detrimental effect that a confession or other incriminating statement could have on the accused's case. The introduction of a confession usually signals guilt to the jury. Moreover, the High Court was not pleased with the state courts' guarding of defendants' rights. It therefore strengthened the self-incrimination protection. In early attempts to strengthen the accused's position when faced with police interrogation, the Court applied the Sixth Amendment right to counsel. The 1964 cases of *Massiah*³⁴ and *Escobedo*³⁵ explain this principle. However, and perhaps illogically, the Court later attacked the problem by applying the Fifth Amendment Self-Incrimination Clause—provided there was custody (meaning arrest).

29 *Miranda v. Arizona*, 384 U.S. 436, 464, 467 (1966).

30 *Watts v. Indiana*, 388 U.S. 49, 53 (1949).

31 *Brown v. Mississippi*, 297 U.S. 278, 281–82, 285–87 (1936).

32 *Leyra v. Denno*, 347 U.S. 556, 559–60 (1954).

33 *Dickerson v. United States*, 530 U.S. 428, 434 (2000).

34 *Massiah v. United States*, 377 U.S. 201, 205–06 (1964).

35 *Escobedo v. Illinois*, 378 U.S. 478, 484–85 (1964).

*Miranda v. Arizona*³⁶ was a set of four cases considered together. It metamorphosed the prior law. Instead of a case-by-case approach, examining voluntariness under the totality of the circumstances, the Court, in effect, created a new confession code. That is, prior to interrogation, suspects in custody must be warned that they have the right to remain silent, that anything they say can be used against them in court, that they have a right to counsel (*not* based on the Sixth Amendment), and that if they cannot afford counsel one will be appointed for them.³⁷ Furthermore, even if the suspect waives his or her rights after being given these warnings, the prosecution must show that the waiver was knowingly and intelligently given.³⁸

Later Supreme Court opinions have limited *Miranda*.³⁹ The following discussion is a systematic approach to analyzing a *Miranda* problem, and proof that the opinion has been so severely eroded as to warrant overruling or modification.

1. Was There Custody?

For *Miranda* to attach, there must be custody. One is in custody when, by a show of police authority, he or she is actually restrained or submits to this show of authority.⁴⁰ An interview with government agents, standing by itself, does not require giving *Miranda* warnings, and thus suppression of subsequent admissions is not proper. Moreover, an interview at the police station is not *per se* custodial.⁴¹

³⁶ 384 U.S. 436, 456-57 (1966).

³⁷ *Id.* at 444.

³⁸ *Id.*

³⁹ See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (holding that pre-custodial traffic stops do not require giving *Miranda* warnings prior to questioning); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (holding that *Miranda* warnings were procedural safeguards of the right against compelled self-incrimination and not themselves protected by the Constitution); *New York v. Quarles*, 467 U.S. 649, 654 (1984) (holding that *Miranda* warnings are prophylactic measures providing "practical reinforcement" for the Fifth Amendment right against compelled self-incrimination and not themselves rights protected by the Constitution).

⁴⁰ *Miranda*, 384 U.S. at 444 ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.")

⁴¹ *Id.* at 478.

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred

The case law is clear: Either an arrest or a de facto arrest is custodial, thus requiring that *Miranda* warnings be given prior to interrogation.⁴² A related question is whether a mere "Terry stop" also requires that a suspect be given *Miranda* warnings prior to questioning. In *Berkemer v. McCarty*, the Supreme Court ruled that stops, although they are Fourth Amendment "seizures," do not require the giving of *Miranda* warnings prior to questioning because a stop is both briefer in duration than an arrest and a lesser restraint on freedom.⁴³ It therefore held that custody is to be judged on the objective indicia of arrest—the officer's belief or intent is irrelevant.⁴⁴ It should be noted in passing that custody for habeas corpus can be satisfied more easily. The author is troubled by this reasoning. If an arrest mandates *Miranda* warnings, a stop, which is almost as intimidating, should also.

2. Was There Interrogation?

Miranda warnings are not required unless there is interrogation (as well as custody). It therefore becomes of great importance to understand what interrogation is. *Rhode Island v. Innis* defined interrogation under *Miranda* as either express questioning or behavior that the police should know is "reasonably likely to elicit an incriminating response."⁴⁵ The first part of the definition is obvious: Interrogation occurs when there is express questioning. The second part covers the less obvious situation where, for instance, the police use trickery to gain a response. Under the *Innis* test, responses gained via police trickery are insulated from suppression provided that the suspect did not give the objective appearance of being weak.⁴⁶ It must be emphasized that this is a solely objective test. Police bad faith is irrelevant.⁴⁷ Thus "playing on" guilt is acceptable—provided that there are not objective indicia of psychological weakness on the part of the suspect. Only when the suspect is young, emotionally frazzled (e.g., in tears) or physically impaired will police trickery amount to in-

by the Fifth Amendment and their admissibility is not affected by our holding today.

Id. With this holding, incidentally, the Court fully abandoned the old *Escobedo* "target of investigation" test for requiring warnings.

⁴² *Id.* at 467–68.

⁴³ *Berkemer*, 468 U.S. at 440.

⁴⁴ *Stansbury v. California*, 511 U.S. 318, 323 (1994).

⁴⁵ *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *id.* at 298 ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (quoting *Miranda*, 384 U.S. at 444) (emphasis omitted)).

⁴⁶ *Id.* at 302 n.8.

⁴⁷ *Id.* at 301.

terrogation.⁴⁸

Innis was arrested on charges of murder and robbery.⁴⁹ He invoked his *Miranda* rights. For that reason, police were precluded from interrogating him. On the way to the police station, after his arrest, two officers conversed to *each other* regarding the missing rifle and the danger the rifle posed to the disabled children at the nearby school.⁵⁰ Innis volunteered to lead them to the gun, and the gun was discovered just where Innis indicated. Leading the officers to the gun was incriminating and at least partially testimonial.

The Court held that the officers' behavior did not amount to interrogation.⁵¹ It reasoned that there was obviously no direct questioning, and the police had no knowledge of the suggestibility of this suspect;⁵² therefore there was no interrogation.

3. Were the Warnings Given and Was There a Waiver of *Miranda* Rights?

Obviously, *Miranda* warnings must be given when there is custodial interrogation. Moreover, it is equally clear that there must be a waiver of those rights for a suspect's statements to be admissible against him in the prosecution's case in chief.

The waiver must be voluntary, knowing and intelligent. However, in writing, this test appears far more difficult to meet than in practice. The voluntary aspect does not focus on the "free will" of the suspect. Rather, as set out in *Connelly*, it focuses merely on police overreaching.⁵³ Thus, a person's confession, after literally hearing voices commanding him to confess to a murder, is deemed legally "voluntary," provided the police did not manipulate his weakness. Similarly, equivocation will likely be deemed to be a waiver.⁵⁴

48 George E. Dix, *Federal Constitutional Confessional Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 293-94 (1988); Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far*, 99 MICH. L. REV. 1168, 1173-74 (2001).

49 *Innis*, 446 U.S. at 295.

50 *Id.* at 294-95.

51 *Id.* at 302.

Turning to the facts of the present case, we conclude that the respondent was not 'interrogated' within the meaning of *Miranda*. It is undisputed that the first prong of the definition of 'interrogation' was not satisfied, for the conversation between Patrolmen Gleckman and McKenna included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited.

Id.

52 *Id.* This test should not be confused with the subjective Sixth Amendment test.

53 *Colorado v. Connelly*, 479 U.S. 157, 170 (1986).

54 *Davis v. United States*, 512 U.S. 452, 459 (1994).

It follows that the “knowing and intelligent” aspect is also relatively easy to meet. In the context of the *Miranda* prophylactic rule, a waiver is “knowing and intelligent” if the suspect is old enough to understand the warnings and is able to understand English.⁵⁵

The above analysis focuses on the initial waiver of *Miranda* rights. However, if the suspect invokes *some or all* of the *Miranda* safeguards, the analysis becomes more complex.

If the suspect invokes only the *Miranda* right to silence, e.g., by saying something like, “I don’t want to talk,” then the police are permitted to resume interrogation after a reasonable period of time.⁵⁶ However, if the suspect invokes *all* of his or her *Miranda* rights by saying something like, “I want a lawyer,” then interrogation must completely cease for this crime *and all crimes, period*.⁵⁷ The reason for this is that the request for a lawyer is tantamount to stating, “I am helpless.”

In this latter situation, where the *Miranda* right to counsel is invoked, only if the suspect initiates further discussion and if the *Miranda* rights are fully waived will suspects’ statements be admissible at criminal trial. The police are not permitted to re-open interrogation after invocation of the *Miranda* right to counsel.⁵⁸

4. Is there an Exception to *Miranda*?

Like the exclusionary rule of the Fourth Amendment, *Miranda* is a “prophylactic rule.”⁵⁹ Via its inherent equitable powers, the U.S. Supreme Court created the rule to prevent the perceived harm of police overreaching and misconduct. Thus, since the High Court has not deemed *Miranda* to be a mandate of the Constitution, it has allowed exceptions to the rule. Although this approach is arguably unprincipled (since if it is not a necessary part of the Constitution, the Supreme Court truly has less of a claim to jurisdiction), the approach does characterize the present law. Thus there have arisen many exceptions to *Miranda*.

⁵⁵ G. Michael Deacon, *Interrogation and Police Practices—Custodial Interrogations—Waiver and Assertion of Miranda Rights*, 81 GEO. L.J., 991, 1000–02 (1993).

⁵⁶ *Michigan v. Mosley*, 423 U.S. 96, 106–07 (1975).

⁵⁷ *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (holding that once a defendant has asserted the *Miranda* right to counsel, officers may not question the defendant until a lawyer is made available to the defendant or until the “[defendant] himself initiates further communication, exchanges, or conversations” with an officer).

⁵⁸ *Id.* at 484–85.

⁵⁹ *Stone v. Powell*, 428 U.S. 465, 479 (1975) (noting that the exclusionary rule is a prophylactic device to deter Fourth Amendment violations); *United States v. Patane*, 542 U.S. 628, 636 (2004) (noting that *Miranda* is a prophylactic rule).

C. Derivative Evidence

Together, *Michigan v. Tucker*⁶⁰ and *Oregon v. Elstad*⁶¹ indicate that unlike suppression in the Fourth Amendment context, derivative evidence of a *Miranda* violation is not to be suppressed absent police bad faith.⁶² Thus, voluntary admissions given during custodial interrogation without *Miranda* warnings do not taint voluntary admissions after *Miranda* warnings have been given—even though such admissions merely repeat the un-Mirandized statements—unless there was police bad faith.⁶³ Similarly, a live witness discovered as a result of admissions made in violation of *Miranda* can testify.⁶⁴ Because there is no derivative evidence suppression requirement under *Miranda*, it follows that there is no need to explain the attenuation, independent source and inevitable discovery doctrines.

D. Form

In *California v. Prysock*⁶⁵ and *Duckworth v. Eagan*,⁶⁶ the warnings were given in a slightly different manner. In the latter case, for example, the suspect was told that no lawyer would be furnished unless and until the suspect were required to go to court—but if a lawyer was desired, questioning would cease.⁶⁷ This is, of course, quite out of sync with the latter two prongs of *Miranda*. Nevertheless, it was held to be acceptable.⁶⁸ In *Colorado v. Spring*, the Court held that the warnings need not in-

60 417 U.S. 433, 444 (1974) (noting that the prophylactic *Miranda* warnings are “not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected”).

61 470 U.S. 298 (1985).

62 *Id.* at 306–08.

63 *See id.* at 309.

64 *Id.* at 308.

65 453 U.S. 355 (1981). In *Prysock*, the defendant was a minor who confessed only after his parents met him at the police station and presumably pressured him to do so.

66 *Duckworth v. Eagan*, 492 U.S. 195 (1989). In *Duckworth*.

Respondent confessed to stabbing a woman nine times after she refused to have sexual relations with him, and he was convicted of attempted murder. Before confessing, respondent was given warnings by the police, which included the advice that a lawyer would be appointed ‘if and when you go to court.’ The United States Court of Appeals for the Seventh Circuit held that such advice did not comply with the requirements of *Miranda v. Arizona*.

Id. at 197 (citation omitted). However, the Supreme Court disagreed, holding that the “if and when you go to court” language did not suggest that “only those accused who can afford an attorney have the right to have one present before answering any questions.” and it did not “impl[y] that if the accused does not ‘go to court,’ [i.e.,] the government does not file charges, the accused is not entitled to [counsel] at all.” *Id.* at 203 (quoting *Eagan v. Duckworth*, 843 F.2d 1554, 1557 (7th Cir. 1988)). Thus the *Miranda* warnings with this additional language were held to be sufficient.

67 *Id.* at 198.

68 *Id.* at 203.

clude information as to what crime is being investigated.⁶⁹

E. Vicarious Assertion

Moran v. Burbine indicated that *Miranda* rights are the *personal rights* of the suspect, and cannot be vicariously asserted by the suspect's attorney.⁷⁰ In *this case*, the suspect's sister, without the suspect's knowledge, retained counsel for the suspect. The attorney phoned the police station and the police lied to her, saying that they would not interrogate her client. The Court held that this questionable police behavior did not require dismissal.⁷¹

F. Probation

It could be argued that probation is custodial, and that there is interrogation when a probation interview is mandatory. However, the Court has held that *Miranda* warnings are not required for probation interviews.⁷² Although the Court reasoned that such interviews are not custodial, this can be logically categorized as another exception to *Miranda*.

G. Emergency/Public Safety

Miranda warnings need not be given when police ask questions reasonably prompted by a concern for the public safety; suppression is only mandated if the statements were *actually coerced*.⁷³ The test is objective. If there is an imminent exigency, *Miranda* may be dispensed with. As is usually the case, the offi-

⁶⁹ *Colorado v. Spring*, 479 U.S. 564, 577 (1987) (holding that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege").

⁷⁰ *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986) (stating that there is an "elemental and established proposition that the privilege against compulsory self-incrimination is, by hypothesis, a personal one that can only be invoked by the individual whose testimony is being compelled").

⁷¹ *Id.* at 432-34 ("We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation . . . [However, w]e hold only that, on these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States.").

⁷² *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984).

⁷³ *New York v. Quarles*, 467 U.S. 649, 655-56 (1984).

[T]here is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and the availability of that exception does not depend upon the motivation of the individual officers involved. In a kaleidoscopic situation . . . where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the [public safety exception] should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer.

cers' *actual* intent is irrelevant.⁷⁴

H. Impeachment

Voluntary statements taken in violation of *Miranda* can be used to impeach a defendant who takes the stand.⁷⁵ Interestingly, the original *Miranda* opinion, in dictum, indicated that the defendant's statements could not be used against him *at all*.⁷⁶ At any rate, this exception does not extend to impeaching defense witnesses with the defendant's statements.⁷⁷

I. Terry Stops

In *Terry v. Ohio*, the Court held that a stop is a seizure of the person, and thus technically is custodial.⁷⁸ Nevertheless, as indicated in *Berkemer v. McCarty*, *Miranda* warnings need not be given when there is a stop, and voluntary responses should not be suppressed.⁷⁹ The difficult issue here is in distinguishing a stop from an informal (de facto) arrest. In the latter situation, *Miranda* warnings are required.

J. Interrogation by a Private Party

Similar to Fourth Amendment rights, *Miranda* warnings are required in custodial interrogation only if a police officer or other government agent is performing the interrogation.⁸⁰ They are not mandated for custodial interrogation conducted by private parties.

74 *Atwater v. City of Lago Vista*, 532 U.S. 318, 363 (2001).

75 *Oregon v. Hass*, 420 U.S. 714, 722 (1975).

76 *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.

Id.

77 *James v. Illinois*, 493 U.S. 307, 308–09 (1990).

78 *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (“[W]hen the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”).

79 468 U.S. 420, 440 (1984).

80 *Miranda*, 384 U.S. at 461 (“We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak.”).

K. Police Trickery

Although the *Miranda* Court was offended by police trickery (e.g., reverse line-up, false accusation or “Mutt & Jeff” (good cop-bad cop) techniques), later Supreme Courts have usually ignored such conduct. In *Michigan v. Mosley*, for example, the Supreme Court held that a false accusation by the police was irrelevant.⁸¹ A similar situation occurred in *Frazier v. Cupp*.⁸² Further, although the Supreme Court disagreed, *Innis* likely also indicates the presence of police trickery.⁸³ Again, it seems that police trickery is acceptable so long as it is not highly egregious.⁸⁴ This analysis may also explain *Moran v. Burbine*, where the police trickery was aimed at the suspect’s attorney.⁸⁵

L. Routine Booking

A suspect’s incriminating statements during routine booking can be used against him, even if the suspect has invoked his *Miranda* rights beforehand. Thus, for example, a slurred response after a request for the suspect’s address is admissible to show that the suspect was intoxicated.⁸⁶

M. Plainclothes Interrogation

Surprisingly, the Supreme Court has held that a suspect in jail who has invoked his *Miranda* rights can be interrogated by a police officer or agent, provided that this person appears *not* to be a police agent. The Court reasoned that the purpose behind *Miranda* was the desire to reduce the intimidation of “official interrogation.”⁸⁷

N. What is “Interrogation?”

The test for whether there was interrogation is not the same

⁸¹ 423 U.S. 96, 104–05, 107 (1975).

⁸² 394 U.S. 731, 735 (1969) (holding that the prosecutor’s inclusion of a summary of testimony in his opening statement, which he expected to receive from a person who had been indicted with the accused and had pleaded guilty, but who later asserted his privilege against self-incrimination when called as a witness by the prosecutor, did not deprive the defendant of his right of confrontation because the court instructed the jury that those statements were not to be regarded as evidence, and that was sufficient to protect the defendant’s constitutional rights).

⁸³ *Rhode Island v. Innis*, 446 U.S. 291, 294–95 (1980).

⁸⁴ The double questioning, once before giving the *Miranda* warnings and once immediately after, was found to violate *Miranda* because it was so egregious. See *Missouri v. Seibert*, 124 S. Ct. 2601, 2613 (2004).

⁸⁵ 475 U.S. 412, 417 (1986) (holding that the police did not act so egregiously as to deprive the defendant of due process when the officers lied to suspect’s counsel, saying that the suspect would *not* be questioned when he, in fact, was).

⁸⁶ *Pennsylvania v. Muniz*, 496 U.S. 582, 590 (1990).

⁸⁷ See, e.g., *Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

under the Sixth Amendment as it is under the Fifth Amendment. The Sixth Amendment test queries whether the police “deliberately elicited” an incriminating response.⁸⁸ That is, the focus is on police bad faith. Weakness of the suspect is not required. This is an easier test for the defendant. Under this test, not only is direct questioning precluded (absent a defendant-initiated waiver), but police trickery is also precluded.⁸⁹ Once the accused invokes the Sixth Amendment right to counsel, there can be no waiver of the right unless the defendant initiates further discussion with the police or prosecution.

However, the Sixth Amendment interrogation protection, unlike *Miranda* rights, is only applicable to the crime for which the defendant is formally charged.⁹⁰ Thus, if the defendant is questioned on *unrelated crimes*, the only protections are the Fifth Amendment voluntariness test and *Miranda*—even if he or she has already been indicted for the other crimes.⁹¹

Yet despite all of the above convoluted rules, rationales and exceptions, the High Court held in *Dickerson* that *Miranda*, now long a part of our law, though not mandated by the Constitution, is constitutional law!⁹²

CONCLUSION

What lessons can be learned from the above analysis? Go slowly. Judges should not create law unless there has been ample time to debate the underlying principles of the Constitution. And, if the High Court erred, as it certainly did in *Miranda*, it

⁸⁸ *Massiah v. United States*, 377 U.S. 201, 206 (1964).

⁸⁹ See generally *Brewer v. Williams*, 430 U.S. 387 (1977) (holding that a defendant's right to counsel is violated if the defendant has invoked his right to counsel and police officers use deceptive means to entice the defendant to talk).

⁹⁰ *Moran v. Burbine*, 475 U.S. 412, 431 (1986).

⁹¹ *Arizona v. Roberson*, 486 U.S. 675 (1988) (reaffirming the bright-line rule established in *Edwards*: a suspect who has “expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication” (quoting *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981))). However, in *Roberson*, three days elapsed between the unsatisfied request for counsel and the separate-offense interrogation. *Id.* at 686. Under such circumstances, the Court found there to be a serious risk that the mere repetition of the warnings would not overcome the presumption of coercion created by prolonged police custody. *Id.* Furthermore, the fact that it may be in an uncounseled suspect's interest to know about, and to give a statement concerning, the separate offense does not compel an exception to *Edwards*, since the suspect, having requested counsel, can determine how to deal with the separate investigations with counsel's advice, and since the police are free to inform the suspect of the facts of the second investigation, as long as they do not interrogate him, and he is free to initiate further communication. *Id.* at 687. See also *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (noting that the *Edwards* rule is “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights”).

⁹² *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

should bite the bullet, overrule the case, and create law that is principled and that makes a modicum of sense. To wit, the Sixth Amendment right to counsel should attach at jailing, and giving *Miranda* warnings should set up a rebuttable presumption of voluntariness, and no more.

The McNulty Memo—Continuing the Disappointment

*Keith Paul Bishop**

In late December 2006, Deputy Attorney General Paul McNulty announced the publication of a revised set of guidelines for federal criminal prosecutions of business organizations.¹ In issuing these guidelines, the Deputy Attorney General was not breaking new ground. Rather, he was simply adjusting the previously announced policies of his predecessors. Yet, these new guidelines, set forth in what is known as the “McNulty Memorandum,” have been widely criticized. To understand why, it is necessary to put the McNulty Memorandum in historical context with its antecedents. It is only by understanding Department of Justice policy for the last seven years that one can know why the publication of the McNulty Memorandum has been viewed with such disappointment.

The story of the McNulty Memorandum begins in June 1999 when Deputy Attorney General Eric Holder issued a memorandum addressed to all Component Heads and U.S. Attorneys.² The ostensible purpose for the memorandum was to provide guidance to prosecutors in making the decision whether to charge a corporation in a particular case. According to the memorandum, guidance was necessary because “[m]ore and more often, federal prosecutors are faced with criminal conduct committed by or on behalf of corporations.”³ On its face the memorandum was thus nothing more than bureaucratic guidance. As such, it could

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¹ Memorandum from Paul McNulty, Deputy Attorney General to Heads of Dep’t Components and U.S. Attorneys (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf [hereinafter McNulty Memorandum].

² Memorandum from Deputy Attorney General to All Component Heads and U.S. Attorneys (June 16, 1999), *available at* <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> [hereinafter Holder Memorandum]. In the parlance of the U.S. Justice Department, a “Component head means the official who directs the administration and operations of each Office, Board, Division, and Bureau, i.e., the principal organizational units of the Department of Justice.” U.S. Dep’t of Justice, Human Resources Dictionary (Sept. 23, 2004), <http://www.usdoj.gov/jmd/ps/appendix1.htm>.

³ Holder Memorandum, *supra* note 2.

have been expected to attract little attention outside the walls of the Justice Department. The memorandum, which soon earned the eponym the "Holder Memorandum," proved to be the father of a series of highly controversial memoranda issued by Mr. Holder's successors.

What has made the Holder Memorandum and its progeny so controversial? The core of the Holder Memorandum was its enumeration of factors that federal prosecutors should consider in determining whether to bring criminal charges against a corporation.⁴ In this regard, the idea of charging corporations, while unknown at common law,⁵ was not a new idea. Indeed, over ninety years ago the U.S. Supreme Court had found "no valid objection in law, and every reason in public policy" to hold corporations criminally liable.⁶ Moreover, the Supreme Court found that the government's ability to regulate business transactions would be vitiated if corporations could not be criminally regulated because of "the old and exploded doctrine that a corporation cannot commit a crime."⁷ Given that the notion of criminal prosecutions of corporations was well settled by 1999, it might have been expected that the idea of providing guidance to federal prosecutors in making the decision to charge corporations was both appropriate and reasonable. As it turned out, it was not the idea of prosecuting corporations or even the idea of providing guidance on the decision to prosecute that was controversial; it was the content of the guidance itself.

The Holder Memorandum enumerated eight factors that prosecutors should consider in deciding whether to charge a corporation.⁸ One of these factors—the corporation's willingness to

⁴ *Id.* at II.

⁵ WILLIAM BLACKSTONE, 1 COMMENTARIES *464 ("A corporation cannot commit treason, or felony, or other crime, in [its] corporate capacity: though [its] members may, in their distinct individual capacities." (citation omitted)).

⁶ *N.Y. Cent. R.R. v. United States*, 212 U.S. 481, 495 (1909).

⁷ *Id.* at 496.

⁸ The eight factors were:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges;
5. The existence and adequacy of the corporation's compliance program;
6. The corporation's remedial actions, including any efforts to implement

cooperate—became the principal lightning rod for criticism of the Holder Memorandum and its progeny.⁹ The concept of cooperation was not so controversial in and of itself. Rather, it was the Holder Memorandum's express reference to the corporation's waiver of the attorney-client and work product protections as an element of cooperation that proved to be the problem.¹⁰ The Holder Memorandum made it clear that a waiver of the attorney-client protections extended to internal investigations as well as specific communications with counsel by individuals within the corporation.¹¹

Deputy Attorney General Holder advanced two justifications for including a waiver of attorney-client protections as an element of cooperation.¹² Neither justification is assailable if only the interests of the prosecutor are considered. However, both fail to take into account countervailing interests. Thus, the Holder Memorandum was in this respect unbalanced.

First, Deputy Attorney General Holder noted that “[s]uch waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.”¹³ From a prose-

an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

7. Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and

8. The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.

Holder Memorandum, *supra* note 2, at II (citations omitted).

9 See, e.g., American College of Trial Lawyers, Report, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307 (2003); Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111 (2003).

10 The Federal Rules of Evidence do not enumerate specific evidentiary privileges. Under Rule 501, privileges are “governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience” except as otherwise provided by the Constitution, federal statute, or rules adopted by the Supreme Court pursuant to statutory authority. FED. R. EVID. 501. The attorney-client privilege protects from disclosure communications by a client that are made in confidence for the purpose of seeking legal advice from a legal advisor. *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). The work product doctrine is separate and distinct from the attorney-client privilege. The work product doctrine protects documents and materials prepared by an attorney in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 509–10 (1947). In this article, the attorney-client privilege and the work product doctrine are referred to collectively as the “attorney-client protections.”

11 Holder Memorandum, *supra* note 2, at VI.

12 *Id.*

13 *Id.* The U.S. Attorneys' Manual defines a “target” as “a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” U.S. Attorneys' Manual § 9-11.151, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/11mcrim.htm (last visited Mar. 29, 2007). A “subject” of an investigation is defined

cutor's perspective, using corporations to interrogate individuals makes good sense. Individuals, unlike corporations, have the benefit of the constitutional right against self-incrimination.¹⁴ Moreover, it is likely that individuals will become aware of their Fifth Amendment right. The fact that law enforcement is asking questions may in many cases be sufficient to cause an individual to call his or her lawyer. If the individual is subpoenaed to testify before a grand jury as a target, it is the Justice Department's policy to send a "target letter" warning the individual that he "may refuse to answer any question if a truthful answer to the question would tend to incriminate you."¹⁵ Even if not advised by counsel, the fact that questioning is being performed by law enforcement is likely to alert an individual to the potential ramifications of the interrogation. Once apprised of their Fifth Amendment right, individuals are unlikely to waive that right without at least attempting to get something in exchange.

On the other hand, individuals may view internal corporate investigations as having less serious consequences than investigations conducted by federal prosecutors.¹⁶ Given the private nature of the inquiry, they may fail to consult with legal counsel and may believe that the Fifth Amendment right against self-incrimination is inapplicable. Moreover, employees may believe, with some real justification, that failure to cooperate in their employer's internal review will lead to the loss of their jobs. For example, Smithfield Foods, Inc., has adopted a corporate code of business conduct that provides in part:

Full cooperation with internal investigations is a condition of each employee's employment with Smithfield. Any effort by an employee to hinder an investigation with false or misleading information, or by refusing to provide information that he or she has, will be addressed with disciplinary action up to and including termination of employment.¹⁷

as "a person whose conduct is within the scope of the grand jury's investigation." *Id.* A witness is simply someone who may have relevant information. Generally, a target faces a higher risk of prosecution than a subject or witness, but a subject or witness may become a target and eventually a criminal defendant.

¹⁴ U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . ."). See, e.g., *Bellis v. United States*, 417 U.S. 85, 90 (1974) ("[N]o artificial organization may utilize the personal privilege against compulsory self-incrimination . . ."); *United States v. White*, 322 U.S. 694, 699 (1944) ("Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation.").

¹⁵ U.S. Attorneys' Manual, *supra* note 13, § 9-11.151.

¹⁶ "Employees often are unaware of the potential personal consequences of cooperating with lawyers hired by their employers." *United States v. Stein*, 463 F. Supp. 2d 459, 462 (S.D.N.Y. 2006).

¹⁷ Smithfield Foods, Corporate Governance: Business Conduct, at Part V, http://www.smithfieldfoods.com/Governance/BusinessConduct/PartV_Training.asp (last visited Mar. 29, 2007).

For all of these reasons, persons conducting internal corporate investigations can expect to face fewer obstacles than federal prosecutors when questioning employees. Recognizing this reality, the Holder Memorandum dangles the carrot of leniency before corporations in order to encourage them to do the questioning for the prosecution. Prosecutors can then use the information gathered in these “internal” investigations to charge individuals with crimes.¹⁸ The Holder Memorandum’s justification for seeking waivers therefore simply articulates a pragmatic approach to making an end-run around the Fifth Amendment.¹⁹

Second, Deputy Attorney General Holder justified seeking waivers of the attorney-client protections on the basis that waivers are “often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.”²⁰ From the perspective of a prosecutor, this justification is also plausible. However, it ignores other countervailing policies and values that have long justified the application of the attorney-client protections.

It should be remembered that the Holder Memorandum predates the headline-grabbing collapses of Adelphia, Enron, and WorldCom.²¹ It also predates the Sarbanes-Oxley Act and Presi-

¹⁸ That federal prosecutors use the information gathered by counsel in the course of internal investigations in charging individual defendants is indisputable. In 2006, for example, the government filed a criminal complaint against George Reyes, the former Chief Executive Officer of Brocade Communications, and Stephenie Jensen, its Vice President of Human Resources, for securities fraud in connection with alleged backdating of stock options. The U.S. Attorney’s criminal complaint cited interviews of the defendants conducted by Brocade’s audit committee. The complaint includes such allegations as “[w]hen interviewed by the attorneys representing Brocade’s Audit Committee at the end of 2004, JENSEN stated . . .” and “[w]hen interviewed by the attorneys representing Brocade’s Audit Committee in early 2005, REYES admitted . . .” Affidavit in Support of Complaint by FBI Special Agent Joseph Schadler, *United States v. Reyes*, 239 F.R.D. 591 (N.D. Cal. 2006), available at <http://www.usdoj.gov/usao/can/press/2006/ReyesJensencCRIMINALComplaint.PDF>. In response to a survey of federal prosecutors concerning requests or demands for waiver of privileges from organizational defendants, the U.S. Attorney’s office for the Southern District of New York stated that “the purpose in seeking such waivers is to obtain evidence, which we believe may assist us in prosecuting appropriate individuals or entities.” REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES 99 (2003), available at http://www.uscc.gov/corp/advgrprpt/AG_Final.pdf [hereinafter AD HOC REPORT].

¹⁹ This approach is constitutionally suspect.

This Court finds that the government, both through the Thompson Memorandum and the actions of the USAO [U.S. Attorney’s Office], quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights. There is a clear nexus between the government ‘and the *specific* conduct of which’ the Moving Defendants complain.

Stein, 440 F. Supp. 2d at 337 (quoting *Desiderio v. Nat’l Ass’n of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (1999)).

²⁰ Holder Memorandum, *supra* note 2, at VI.

²¹ Adelphia Communications, Enron Corp., and WorldCom, Inc. filed voluntary peti-

dent Bush's establishment in 2002 of a Corporate Fraud Task Force.²² Thus, the Holder Memorandum constituted the principal guidance for U.S. Attorneys during a period of heightened public awareness of criminal prosecutions of corporations and their executives.²³

In January 2003, Deputy Attorney General Larry D. Thompson updated the Holder Memorandum by issuing what soon became known as the "Thompson Memorandum."²⁴ Although the Thompson Memorandum largely copied the Holder Memorandum, the Thompson Memorandum did contain at least one key difference (at least in the minds of its interpreters): The Thompson Memorandum was viewed as binding upon prosecutors, whereas the Holder Memorandum was viewed as simply advisory.²⁵ For example, the Thompson Memorandum added the injunction that "prosecutors and investigators in every matter involving business crimes *must* assess the merits of seeking the conviction of the business entity itself."²⁶ In contrast, the Holder Memorandum spoke of providing "guidance as to what factors should generally inform a prosecutor."²⁷ Despite the Thompson Memorandum's apparent binding nature, it retained the Holder Memorandum's statement that waiver of the attorney-client protections is not an "absolute requirement" of cooperation.²⁸

The Thompson Memorandum's continuing inclusion of waiver of the attorney-client protections as an element of coop-

tions seeking relief under Chapter 11 of the Bankruptcy Code. *In re Adelpia Business Solutions, Inc.*, 280 B.R. 63 (Bankr. S.D.N.Y. 2002); *In re Enron Corp.*, No. 01-16034 (AJG), 2001 Bankr. LEXIS 1563 (Bankr. S.D.N.Y. 2001); *In re Worldcom, Inc.*, No. 02-13533 (AJG), at 2 (Bankr. S.D.N.Y. 2007), http://www.nysb.uscourts.gov/opinions/ajg/54767_18686_opinion.pdf.

²² Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); Exec. Order No. 13,271, 3 C.F.R. 245 (2003).

²³ In fact, prosecutorial efforts largely focused on individuals, with a few notable exceptions, such as the criminal conviction of Arthur Andersen LLP, which had been Enron Corporation's public auditor. Ultimately, the U.S. Supreme Court overturned that conviction. *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129 (2005).

²⁴ Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf [hereinafter Thompson Memorandum].

²⁵ *United States v. Stein*, 435 F. Supp. 2d 330, 338 (2006) ("Unlike its predecessor [the Holder Memorandum], however, the Thompson Memorandum is binding on all federal prosecutors."); Carmen Couden, Note, *The Thompson Memorandum: A Revised Solution or Just a Problem?*, 30 J. CORP. L. 405, 416 (2005) ("[I]t is more appropriate for corporations to consider the provisions set forth in the Thompson Memorandum as government 'rules' rather than discretionary 'guidelines' and prepare for an investigation accordingly.").

²⁶ Thompson Memorandum, *supra* note 24, para. 1 (emphasis added).

²⁷ Holder Memorandum, *supra* note 2.

²⁸ *Id.* While this statement makes it clear that a waiver is not always required, the phraseology of the memorandum suggests that a decision to not to seek a waiver was to be the exception rather than the rule.

eration was consistent with policies adopted by other federal agencies in the wake of the Holder Memorandum. For example, in October 2001, the U.S. Securities and Exchange Commission issued a Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and SEC Statement on the Relationship of Cooperation to Agency Enforcement (the “21(a) Report”).²⁹ The report announced the settlement of a cease-and-desist proceeding against the former corporate controller of a subsidiary of Seaboard Corporation.³⁰ The SEC, however, took no action against Seaboard itself. The SEC cited Seaboard’s cooperation, including Seaboard’s decision not to invoke the attorney-client privilege, as the basis for not pursuing the corporation.³¹

Nonetheless, the private bar’s reaction to the Thompson Memorandum was decidedly negative. In November 2003, the Corporations Committee of the Business Law Section of the California State Bar issued a public commentary decrying the pressure on clients to waive the attorney-client and work product protections.³² The public commentary cited the Thompson Memorandum as one example of this type of pressure. The following year, American Bar Association President Robert Gray, Jr. established a Presidential Task Force to advocate for the attorney-client privilege (the “Task Force”).³³ The Task Force’s work resulted in the American Bar Association’s House of Delegates’ adopting resolutions in August 2005 opposing the routine practice by government officials of requesting waivers of the attorney-client and work product protections:

RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice; and

²⁹ Report of Investigation, Exchange Act Release No. 34-44969, 76 SEC Docket 220 (Oct. 23, 2001).

³⁰ *Id.*

³¹ *Id.* at 220–21.

³² CORPORATIONS COMM. BUS. LAW SECTION, THE STATE BAR OF CAL., AT EVERY PERIL: NEW PRESSURES ON THE ATTORNEY-CLIENT RELATIONSHIP 1 (2003), available at http://calbar.ca.gov/calbar/pdfs/sections/buslaw/corporations/2003-11-18_public-commentary.pdf.

³³ AM. BAR ASSOC., TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, REPORT TO THE HOUSE OF DELEGATES 3 (2006), available at <http://www.acca.com/public/attyclientpriv/abahodreportemployee.pdf>.

FURTHER RESOLVED, that the American Bar Association opposes policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections.

FURTHER RESOLVED, that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.³⁴

In apparent reaction to this criticism, Acting Deputy Attorney General Robert McCallum issued a memorandum in October 2005 (the "McCallum Memorandum").³⁵ The McCallum Memorandum did not revise the Thompson Memorandum. Rather the McCallum Memorandum imposed two new limitations on prosecutors seeking waivers of the attorney-client protections. First, the McCallum Memorandum established supervisory review as a pre-condition to any request for a waiver.³⁶ Second, each U.S. Attorney's Office was directed to institute a written waiver review policy governing such requests.³⁷ The McCallum Memorandum did not require that these policies be made publicly available. Further, the McCallum Memorandum specifically disclaimed any requirement of consistency among the various U.S. Attorney's Offices around the country.³⁸ Thus, corporations continued to be in a position in which they could only guess as to prosecutorial expectations.³⁹ From the perspective of the bar, moreover, the McCallum Memorandum did little to reduce pressure to waive the attorney-client protections.

In late 2006, both the Senate and the House of Representatives held hearings on the attorney-client privilege and the Thompson Memorandum.⁴⁰ In connection with this hearing, a coalition of business and bar associations submitted a report of a survey of in-house and outside counsel.⁴¹ The report unequivocally

³⁴ *Id.*

³⁵ Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Dep't Components and U.S. Attorneys (Oct. 21, 2005), available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 130 (2006) (statement of Edwin Meese III, Ronald Reagan Distinguished Fellow in Pub. Policy and Chairman, Ctr. for Legal and Judicial Studies, The Heritage Found.).

⁴⁰ *Id.*; *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2006).

⁴¹ THE COAL. TO PRES. THE ATTORNEY-CLIENT PRIVILEGE, SUBMISSION TO THE U.S. SENATE JUDICIARY COMMITTEE REGARDING HEARINGS ON COERCED WAIVER OF THE

cally cites the Holder, Thompson, and McCallum Memoranda as the reasons for waiver demands. The coalition also reported that nearly 75% of the respondents agreed with the statement that a “culture of waiver” has evolved.⁴²

Three months later, on December 8, 2006, Senator Arlen Specter introduced the “Attorney-Client Privilege Protection Act of 2006” which, among other things, would prohibit federal prosecutors from conditioning a civil or criminal charging decision on an assertion of the attorney-client and work product protections.⁴³ Perhaps like King Belshazzar, seeing the handwriting on the wall, the Department of Justice replaced the Thompson Memorandum less than a week after the introduction of Senator Specter’s bill.⁴⁴ This new memorandum was penned by Deputy Attorney General Paul McNulty and, like its predecessors, it shares the name of its author.⁴⁵

If the intent of the McNulty Memorandum was to quiet criticism of Department of Justice policies regarding waiver of the attorney-client protections, the memorandum has been a failure. The private bar has been highly critical of the McNulty Memorandum. For example, American Bar Association President Karen Mathis stated that “[t]he Justice Department’s new corporate charging guidelines for federal prosecutors fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations.”⁴⁶

Disappointment with the McNulty Memorandum in part stems from the decisive and less nuanced action taken last year by the U.S. Sentencing Commission.⁴⁷ A little over a year after

ATTORNEY-CLIENT PRIVILEGE: THE NEGATIVE IMPACT FOR CLIENTS, CORPORATE COMPLIANCE, AND THE AMERICAN LEGAL SYSTEM (Sept. 12, 2006), available at <http://www.acca.com/public/attyclientpriv/coalitionsenjudtestimony.pdf> [hereinafter COALITION SUBMISSION]. The coalition consists of the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, the Financial Services Roundtable, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, and the U.S. Chamber of Commerce. *Id.* at 1.

⁴² *Id.* at 11–12.

⁴³ S. 30, 109th Cong. (2006).

⁴⁴ *Daniel* 5:5–6 (King James) (“In the same hour came forth fingers of a man’s hand, and wrote over against the candlestick upon the plaister of the wall of the king’s palace: and the king saw the part of the hand that wrote. Then the king’s countenance was changed, and his thoughts troubled him . . .”).

⁴⁵ McNulty Memorandum, *supra* note 1.

⁴⁶ Press Release, Karen J. Mathis, President, Am. Bar Assoc., Statement Regarding Revisions to the Justice Department’s Thompson Memorandum (Dec. 12, 2006), available at <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59>.

⁴⁷ Congress created the Sentencing Commission as part of the Comprehensive Crime Control Act of 1984, § 217(a), 28 U.S.C. § 991 (2000). The duties of the Sentencing Commission include promulgating and distributing guidelines for use of a sentencing court in

the publication of the Thompson Memorandum, the Sentencing Commission had amended its sentencing guidelines to include the following commentary in relation to corporate cooperation: “[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”⁴⁸ In making this change, the Sentencing Commission was influenced by the Thompson Memorandum and the practices of the Department of Justice.⁴⁹ Despite the fact that the Sentencing Commission pronounced its expectation that “waivers will be required on a limited basis,”⁵⁰ many viewed the change as placing greater pressures on corporations to provide waivers to prosecutors. As a result, an informal coalition was formed to address the issue.⁵¹ In May 2005, the American Bar Association wrote to the Sentencing Commission urging that it “address and remedy the Commentary on an expedited basis.”⁵² A year later, the Sentencing Commission removed the offending footnote.⁵³

If the intent of the McNulty Memorandum was to forestall further legislative efforts to limit prosecutorial decisions based upon assertion or waiver of the attorney-client protections, the memorandum has also failed in that regard. In January 2007, Senator Specter introduced a new bill, S. 186, the Attorney-Client Privilege Protection Act of 2007.⁵⁴ In general, this bill would prohibit an agent or attorney of the United States in any federal investigation or criminal or civil enforcement matter from, among other things, “demand[ing], request[ing], or condition[ing] treatment on the disclosure by an organization, or person affiliated with that organization, of any communication pro-

determining the sentence to be imposed in a criminal case. § 994(a).

⁴⁸ Sentencing Guidelines for United States Courts, 69 Fed. Reg. 28,994, 29,021 (May 19, 2004).

⁴⁹ See *id.* at 29024.

⁵⁰ See *id.* at 29021.

⁵¹ AM. BAR ASSOC. TASK FORCE ON THE ATTORNEY-CLIENT PRIVILEGE, REPORT (2005), available at <http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf>. In addition to the ABA Task Force, the coalition consisted of the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, Frontiers of Freedom, the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Washington Legal Foundation. *Id.* at 16 n.75.

⁵² Letter from Robert D. Evans to The Honorable Ricardo H. Hinojosa, Chairman, U.S. Sentencing Comm. (May 17, 2005), available at http://www.abanet.org/poladv/letters/crimlaw/050517letter_sentencing.pdf.

⁵³ Sentencing Guidelines for United States Courts, 71 Fed. Reg. 28062, 28073 (May 15, 2006).

⁵⁴ Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007), available at <http://www.acc.com/public/attyclientpriv/thompsonmemoleg.pdf>.

tected by the attorney-client privilege or any attorney work product.”⁵⁵ This bill would also prohibit “condition[ing] a civil or criminal charging decision relating to an organization, or person affiliated with that organization, on . . . any valid assertion of the attorney-client [protections].”⁵⁶

The McNulty Memorandum borrows heavily from its antecedents. Yet, it does break some new ground. Rather than stating that a waiver is not an “absolute” requirement, the McNulty Memorandum limits requests for waiver of the attorney-client protections to only those circumstances in which “there is a legitimate need” for privileged information.⁵⁷ Moreover, the McNulty Memorandum makes it clear that a “legitimate need” is not established by the fact that it may be “desirable or convenient” for prosecutors to obtain the information.⁵⁸ According to the McNulty Memorandum, whether a “legitimate need” exists depends upon:

- (1) the likelihood and degree to which the privileged information will benefit the government’s investigation;
- (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
- (3) the completeness of the voluntary disclosure already provided; and
- (4) the collateral consequences to a corporation of a waiver.⁵⁹

While these criteria appear to be far more specific than the Holder and Thompson Memoranda, the reality may be far different. As an initial matter, the requirement that there be a “legitimate need” sets the bar at the lowest possible level. The first criterion is really no criterion at all—the government should not be seeking information unless the information would benefit its investigation. To forbid prosecutors from seeking information that does not benefit their investigations proscribes very little indeed. The second criterion is equally hollow. If the prosecutor can timely and completely obtain the information elsewhere, there is little gained (and little given) by a waiver of the privilege. Presumably, prosecutors seek waivers because they cannot obtain the information easily by other means. This was, in fact, one of the principal justifications for seeking waivers in the Holder Memorandum.⁶⁰ The third criterion underscores the continuing self-interested pragmatism of the Department of Justice’s

⁵⁵ *Id.* § 3(b)(1).

⁵⁶ *Id.* § 3(b)(2).

⁵⁷ McNulty Memorandum, *supra* note 1, at 8.

⁵⁸ *Id.* at 8–9.

⁵⁹ *Id.* at 9.

⁶⁰ Holder Memorandum, *supra* note 2, at VI.

approach to waivers. In effect, the Department is saying that our need for information legitimizes our need for waivers. The final criterion is also problematic. From a societal standpoint, the benefits of the attorney-client protections are undermined whenever they are waived. One of the principal reasons for protecting communications between a client and the attorney is to encourage full and candid communications.⁶¹ If employees know that the government will pressure their employers to turn over the results of communications with corporate counsel, they are more likely to limit their disclosures to counsel.⁶² Ultimately, corporations will be less able to self-police, remediate and prevent legal violations.

The McNulty Memorandum also divides attorney-client protected information into two categories. Prosecutors are authorized to seek so-called "Category I" material with the "written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division."⁶³ The request must specify the "legitimate need" for the information and identify the scope of the waiver sought. The McNulty Memorandum does not explain the extent of consultation required or whether the U.S. Attorney's decision to seek a waiver can be overruled by the Assistant Attorney General. For example, will it be sufficient for a prosecutor to establish a legitimate need by simply reciting why the information will help the investigation, or must the prosecutor provide a balanced analysis of the criteria identified in the McNulty Memorandum? In introducing S. 186, Senator Specter noted these points and observed that "it is difficult to see how the McNulty memo provides better safeguards for Category 1 information than the interim-McCallum memo . . . which mandated a U.S. Attorney-level 'written waiver review process' for all attorney-client privilege waiver requests."⁶⁴

Category I information is characterized as "purely factual information" that may or may not be privileged relating to the underlying misconduct.⁶⁵ Under the McNulty Memorandum, examples of Category I information include but are not limited to: (i) key documents; (ii) witness statements; (iii) purely factual interview memoranda regarding the underlying misconduct; (iv) or-

61 *United States v. BDO Seidman*, 337 F.3d 802, 810 (7th Cir. 2003).

62 AD HOC REPORT, *supra* note 18, at 102 ("The possibility that the government may require a waiver, and the fear of both the criminal and civil consequences of such a waiver, create strong disincentives for organizations to conduct thorough internal investigations, as well as for employees to cooperate in such investigations." (citations omitted)).

63 McNulty Memorandum, *supra* note 1, at 9.

64 153 CONG. REC. S182 (daily ed. Jan. 4, 2007) (statement of Sen. Specter).

65 McNulty Memorandum, *supra* note 1, at 9.

ganizational charts created by company counsel; (v) factual chronologies; (vi) factual summaries; or (vii) reports containing investigative facts reported to counsel.⁶⁶ Of course, the line between fact and opinion can often be indistinct at best. For example, a report purporting to contain investigative facts reported to counsel may implicitly reflect an attorney's interpretation or opinions about the facts reported.

The McNulty Memorandum clearly authorizes prosecutors to consider a corporation's response to a waiver of Category I information in determining whether the corporation has cooperated in the government's investigation.⁶⁷ Thus, the McNulty Memorandum leaves intact the carrot (and implicit stick) of cooperation that had its genesis in the Holder Memorandum.

If the Category I information provides an incomplete basis to conduct a thorough investigation, the McNulty Memorandum authorizes prosecutors to request a waiver of so-called Category II information.⁶⁸ The McNulty Memorandum cautions that waivers "should only be sought in rare circumstances."⁶⁹ Category II "information includes legal advice given to the corporation before, during, and after the underlying misconduct occurred."⁷⁰ Thus, Category II information can include attorney-client protected information developed in the course of an internal investigation as well as legal advice given after conclusion of the investigation. The McNulty Memorandum cites as examples of Category II information the following:

- (i) Attorney notes, memoranda containing mental impressions and conclusions;
- (ii) legal determinations as a result of an internal investigation; or
- (iii) legal advice given to the corporation.⁷¹

Category II information does not include "legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon an advice-of-counsel defense."⁷² Nor does it include "legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege."⁷³ In either case, the McNulty Memorandum allows prosecutors to follow the procedures for seeking waivers that are applicable to Category I in-

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 10.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

formation.

Before requesting Category II information, a prosecutor must request authorization from the Deputy Attorney General.⁷⁴ Again, any request must set forth the legitimate need and the scope of the waiver sought. "If the request is authorized, the [U.S.] Attorney must communicate the request in writing to the corporation."⁷⁵

If the corporation declines to provide Category II information, prosecutors may not consider a negative response to a request for Category II information in deciding whether to prosecute the corporation.⁷⁶ However, prosecutors "may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation."⁷⁷ Seemingly, therefore, the McNulty Memorandum has removed the "stick" for refusals to provide Category II information while maintaining the "carrot." In practice, however, corporations may simply not see it this way. A benefit denied is likely to be perceived in much the same way as a punishment.

The McNulty Memorandum's bifurcation of information was likely founded upon distinctions made by some courts with respect to attorney work product.⁷⁸ Under this analysis, the "presumption in favor of nondisclosure is shifted with respect to fact work product."⁷⁹ Opinion work-product, on the other hand, is afforded a higher (in some cases, absolute) level of protection.⁸⁰ Even though these distinctions have been made for purposes of the work product doctrine, they have no application to the attorney-client privilege. Yet, the McNulty Memorandum inexplicably conflates these two protections without providing any rationale for doing so.

The McNulty Memorandum appears to strengthen the attorney-client privilege by requiring written authorization before seeking waivers of either Category I or Category II information. In practice, however, prosecutors can easily sidestep these procedures. For example, a prosecutor might still mention the benefits of waiving the privilege while not directly requesting a waiver.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See, e.g., *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986) ("Some courts interpreting [*Hickman v. Taylor*, 329 U.S. 495 (1947).] have defined two types of work product.")

⁷⁹ *Id.*

⁸⁰ See, e.g., *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973).

Indeed, there have been anecdotal reports of such “subtle” requests even before the McNulty Memorandum was issued.⁸¹

In conclusion, the McNulty Memorandum has disappointed many because it is consistent with its history. Throughout the saga of the Holder/Thompson/McCallum memoranda, the Department of Justice has steadfastly retained the ability to seek, and credit as cooperation, waivers of attorney-client protections. The McNulty Memorandum does not break with this tradition. It sets a very low bar for requests for waivers, and while it purports to impose additional procedural protections, prosecutors can easily circumvent these protections.

⁸¹ COALITION SUBMISSION, *supra* note 41, at 10 (“Other prosecutors cited in our surveys employ other ‘subtle’ tactics such as tossing a copy of the Thompson Memo on the table with the privilege waiver section highlighted and making a statement such as ‘you’d like to qualify for the benefits of cooperation in this investigation, correct?’”).

Alternatives to *Miranda*: Preventing Coerced Confessions via the Convention Against Torture

Linda M. Keller*

INTRODUCTION

This article discusses an international law alternative to *Miranda*'s preventive measures concerning coerced confessions. Others have explored *Miranda*'s effectiveness, or lack thereof, in preventing compelled confessions. This article addresses another avenue for protection from coercion during interrogation: international treaty law. It focuses on "War on Terror" detainees in U.S. custody as an example of interrogation subjects unlikely to be given the protection of *Miranda*. This article draws on the example of the hostile use of truth serum to illustrate the difficulties in defining the term "torture" in the context of preventive interrogation.¹ Although there is general agreement that outright torture should be prohibited in most if not all circumstances, the meaning of the term "torture" is unsettled. The internationally accepted definition of torture does not clearly set out which tactics are prohibited. The line between aggressive interrogation techniques and torture is difficult to discern, particularly when dealing with psychological pressure rather than physical coercion. The *Miranda* Court recognized the psychological coercion

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¹ For a more in-depth discussion of this issue, see Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT'L L. REV. 521 (2005). In this article, I trace the history of the definition of torture from the drafting of the Convention Against Torture through the Bush Administration's infamous torture memos. In order to explore the understanding of mental torture, I evaluate the use and threatened use of truth serum as either torture or cruel, inhuman, or degrading treatment. Here, I focus on the definition of torture in light of the apparent consensus that torture is unacceptable even in the War on Terror, but that the meaning of the term "torture" is unclear. See, e.g., M.K.B. Darmer, Professor of Law, Chapman University School of Law, Remarks at the Chapman Law Review Symposium: *Miranda* at 40: Applications in a Post-Enron, Post-9/11 World (Jan. 26, 2007), available at http://www.chapman.edu/LawReview/symposium2007_webcast.asp (follow "Click here for Panel #1" hyperlink).

inherent in custodial interrogation and established prophylactic rules for its prevention.² Where *Miranda* does not apply, the international treaty on torture might serve a similar purpose.

Part I of this article briefly summarizes the reasons for *Miranda*'s ineffectiveness or inapplicability to War on Terror detainees. Part II outlines the accusations of torture brought by detainees and the U.S. government's position regarding coercive interrogation. This part also highlights some of the key domestic laws prohibiting torture and their shortcomings. Part III explains the definition of torture under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")³ as modified by the United States via its ratification with reservations. This part reveals a significant lacuna in the treaty by analyzing whether the use or threatened use of truth serum on War on Terror detainees would constitute torture. Although the threatened use of truth serum violates CAT's definition of torture as modified by the United States, the actual use of truth serum does not. This paradoxical conclusion should not stand.

I. *MIRANDA* AND WAR ON TERROR DETAINEES

In *Miranda*, the Supreme Court faced "questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime."⁴ The Court was worried about the "incommunicado police-dominated atmosphere" of interrogation and "the evils it can bring."⁵ In particular, the Court voiced concerns regarding physical brutality and psychological coercion.⁶ Similarly, the so-called Global War on Terror being waged by the U.S. government raises concerns about the limits on interrogation methods when questioning detainees suspected of having knowledge that would help prevent a terrorist attack. In the wake of 9/11, "the gloves came off."⁷ The challenge is determining where to draw the line between aggressive questioning and unacceptable tactics in the War on Terror.

In *Miranda*, the Court required "procedural safeguards" to ensure the privilege against self-incrimination, in the form of

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

³ G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) [hereinafter CAT].

⁴ *Miranda*, 384 U.S. at 439.

⁵ *Id.* at 456.

⁶ *Id.* at 446-49.

⁷ See John Barry, Michael Hirsh & Michael Isikoff, *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 29, available at <http://www.msnbc.msn.com/id/4989422/> (quoting the congressional testimony of Cofer Black, the onetime director of the CIA's counterterrorism unit).

four warnings that are familiar to most Americans: that the suspect has the right to remain silent; that any statements made after waiver of this right can be used as evidence against him; that he has the right to an attorney; and that this attorney would be appointed if he cannot afford to retain one.⁸ These warnings are not aimed merely at preventing the admission of coerced statements into evidence at trial; they are also intended to prevent coercion in the first place. The Court determined that the *Miranda* warnings would serve as assurance that coercion would be eradicated.⁹ Such coercion could take the form of physical beatings but, in modern interrogation, more often consists of psychological coercion.¹⁰ While recognizing society's need for interrogation, the Court held that the measures were necessary to protect the privilege while not unduly burdening law enforcement.¹¹

The *Miranda* warnings, however, might not apply to War on Terror detainees for several reasons.¹² *Miranda* typically does not apply abroad, particularly to non-citizens.¹³ Even if *Miranda* were to apply, it would be of limited effectiveness. *Miranda* would not be violated until the confession is introduced at trial,¹⁴ offering little protection for War on Terror detainees that the government has no intention of prosecuting in criminal court. Moreover, the public safety exception to *Miranda* would likely apply to preventive interrogation; i.e., under *New York v. Quarles*, the failure to give *Miranda* warnings would be excused

⁸ *Miranda*, 384 U.S. at 444. For a discussion of the *Miranda* warnings in pop culture, see Panel Remarks at the Chapman Law Review Symposium: *Miranda* at 40: Applications in a Post-Enron, Post-9/11 World (Jan. 26, 2007), available at http://www.chapman.edu/LawReview/symposium2007_webcast.asp (follow "Click here for Panel #2" hyperlink) (noting that young Americans may be less able to recite the warning than those of an earlier TV-watching generation).

⁹ See *Miranda*, 384 U.S. at 447.

¹⁰ *Id.* at 448.

¹¹ *Id.* at 479–83.

¹² See generally Panel Remarks at the Chapman Law Review Symposium: *Miranda* at 40: Applications in a Post-Enron, Post-9/11 World (Jan. 26, 2007), available at http://www.chapman.edu/LawReview/symposium2007_webcast.asp (follow "Click here for Panel #1" hyperlink).

¹³ For an extensive discussion of the limits of *Miranda*, see, for example, M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319 (2003) (advocating a foreign interrogation exception to *Miranda* combined with a due process "shocks the conscience" standard for interrogation techniques); Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851 (2003) (discussing the applicability of confessional law abroad, including Fifth Amendment self-incrimination and due process involuntary confession rules); Mark A. Godsey, *Miranda's Final Frontier—the International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 DUKE L.J. 1703 (2002) (arguing for modifications to *Miranda* for law enforcement officials interrogating suspects abroad).

¹⁴ See, e.g., Darmer, *supra* note 13, at 348–51 (discussing the Fifth Amendment as a trial right); see also Keller, *supra* note 1, at 559–63 (same).

if the interrogation were aimed at obtaining information crucial to protecting the public, like the location of a gun—or a dirty bomb.¹⁵

In addition, other exceptions might apply, as in the case of Jose Padilla, the alleged dirty bomber who was arrested at Chicago's O'Hare airport.¹⁶ Padilla was eventually released from indefinite detention as an "enemy combatant" and criminally charged with terrorist activities having little to do with the initial dirty bomb allegations.¹⁷ He then moved to suppress the statements made during the interrogation at the airport on the ground that the FBI agents failed to give *Miranda* warnings. The district court denied the motion because the interrogation was not "custodial" under special rules for border questioning.¹⁸ The court cited the Eleventh Circuit's recognition of a border-interrogation exception to *Miranda*.¹⁹

II. TORTURE IN THE U.S. "WAR ON TERROR"

Where *Miranda* warnings are inapplicable or ineffective, other standards might serve the purpose of preventing coerced confessions. In particular, CAT, the leading international treaty on torture, aims to prevent and punish torture. Torture has become a key flashpoint in the War on Terror. The U.S. government has repeatedly asserted that it does not utilize torture even during preventive interrogation of War on Terror detainees.²⁰ In its most recent report to the monitoring body created under CAT, the United States reiterated this point. "The President of the United States has made clear that the United States stands against and will not tolerate torture under any circumstances."²¹ Acknowledging the fundamental changes wrought by the 9/11 attacks, the U.S. report stated: "In fighting terrorism, the U.S. remains committed to respecting the rule of law, including the U.S.

¹⁵ *New York v. Quarles*, 467 U.S. 649, 657–58 (1984) (excusing the failure to give warnings where police were asking arrestee about the location of a gun).

¹⁶ *United States v. Padilla*, No. 04-60001-CR-COOKE, 2006 WL 3678567, at *1 (S.D. Fla. Nov. 17, 2006).

¹⁷ See *Padilla v. Hanft*, 432 F.3d 582, 584 (4th Cir. 2005); see also Jerry Markon, *Court Bars Transfer of Padilla to Face New Terrorism Charges*, WASH. POST, Dec. 22, 2005, at A1 (discussing the refusal of the appellate court to transfer Padilla due to the government's changing rationales for holding Padilla). The Supreme Court subsequently allowed the transfer to go forward. See *Hanft v. Padilla*, 126 S. Ct. 978 (2006) (mem.).

¹⁸ *United States v. Padilla*, No. 04-60001-CR-COOKE, 2006 WL 3678567, at *7 (S.D. Fla. Nov. 17, 2006) (describing a more limited definition of "custody" at the border).

¹⁹ *Id.*

²⁰ See *Keller*, *supra* note 1, at 552–53 & n.150.

²¹ See Comm. against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Reports of States Parties Due in 1999: Addendum: United States of America*, ¶ 5, U.N. Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006).

Constitution, federal statutes, and international treaty obligations, including the Torture Convention.”²²

There have been, however, widespread allegations of the use of tactics tantamount to torture.²³ Moreover, the infamous “torture memos” interpreted the definition of torture so narrowly that tactics commonly considered torture were excluded; they also asserted a Commander-in-Chief exception to the laws prohibiting torture.²⁴ Although these tactics and memos have been partially repudiated,²⁵ it is not clear that the United States prohibits all acts that likely constitute torture under international law.

Even recent legislation meant to quell the controversy over U.S. torture does not amount to a clear repudiation of coercive interrogation.²⁶ For example, the Detainee Treatment Act of 2005 (a.k.a. the McCain Amendment) provides: (1) no one under the custody or control of the Department of Defense shall be subject to interrogation tactics not authorized by the U.S. Army Field

²² *Id.* at ¶ 4.

²³ The various techniques approved and later rescinded by the Department of Defense included coercive techniques like stress positions and waterboarding. See, e.g., Julian G. Ku, *Ali v. Rumsfeld: Challenging the President's Authority to Interpret Customary International Law*, 37 CASE W. RES. J. INT'L L. 371, 380–86 (2006).

²⁴ Two recent articles provide powerful analysis of the torture memos and related Bush Administration policies, calling into question U.S. adherence to the ban on torture. See José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006); M. Cherif Bassiouni, *The Institutionalization of Torture under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 396 n.33 (2006); see also Keller, *supra* note 1, at 550–56 (discussing differences in defining torture in two key Bush Administration memos); cf. U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention ¶ 24, CAT/C/USA/CO/2 (July 25, 2006) (urging the United States to rescind interrogation techniques that constitute torture or cruel, inhuman or degrading treatment or punishment). For the memos themselves and related materials, see THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

²⁵ Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455, 462–63 (2005).

²⁶ This article focuses on legislation related to criminal penalties. Civil remedies include the Torture Victim Protection Act, which is limited to torture by foreign officials. See Torture Victim Protection Act of 1991, Pub. L. No. 102-256 § 2, 106 Stat. 73, 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2000)) (allowing U.S. citizens and aliens to seek damages for torture or extrajudicial killings but limiting its jurisdiction to acts committed by those acting under the authority of foreign nations). The Alien Tort Claims Act provides a remedy for aliens claiming torture as a violation of the laws of nations. See Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (stating that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (holding that torture constitutes a violation of the law of nations for the purposes of the alien tort statute). Although the Alien Tort Claims Act might cover non-citizen War on Terror detainees, it is unlikely to provide a sufficient remedy. See, e.g., Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 763–70 (2006) (discussing sovereign immunity and the exclusivity of the Federal Tort Claims Act as obstacles to civil suits against U.S. government officials). Other civil tort remedies are also unlikely to be effective. See generally *id.*

Manual on Intelligence Interrogation; and (2) no one in the custody or control of the U.S. government shall be subject to cruel, inhuman or degrading treatment or punishment.²⁷ While these two steps seem like progress, both are problematic.

First, the legislation does not prevent changes to the Army Field Manual.²⁸ The Field Manual currently bans tactics like waterboarding, forced sexual positions or nudity, beatings, using military working dogs, and hypothermia or heat injury.²⁹ Yet other disputed techniques like extended periods of forced standing are not listed. In addition, it appears that there is a classified section of the Field Manual, leading to the question of whether there is a waiver provision or exceptions to the list of prohibited techniques.³⁰ Second, the scope of the ban on cruel treatment is unclear. Since cruel, inhuman or degrading treatment is a lesser version of torture, it seems that the Detainee Treatment Act would encompass torture as well. But cruel, inhuman or degrading treatment or punishment is defined in the Act in terms of the Eighth Amendment ban on cruel or unusual *punishment*.³¹ In other words, it might only cover acts that can be considered "punishment." Coercive interrogation, as opposed to post-conviction punishment, might be excluded altogether.³² In addition, the applicability of Eighth Amendment cases to preventive interrogation is unclear.³³

Other positions of the government call into question its commitment to banning torture.³⁴ Perhaps most significantly, the President's signing statement accompanying his signature on the Detainee Treatment Act seems to reserve the right to ignore the legislation to the extent he deems it necessary. The signing

²⁷ Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Title X, 119 Stat. 2680, 2739 (West).

²⁸ See MICHAEL JOHN GARCIA, CRS REPORT FOR CONGRESS: INTERROGATION OF DETAINEES: OVERVIEW OF THE MCCAIN AMENDMENT 2 (2006), available at <http://www.fas.org/spp/crs/intel/RL33655.pdf>.

²⁹ U.S. ARMY FIELD MANUAL FM 2-22.3 (FM 34-52): HUMAN INTELLIGENCE COLLECTOR OPERATIONS at 5-21, § 5-75 (2006), available at <http://www.fas.org/irp/doddir/army/fm2-22-3.pdf>.

³⁰ Eric Schmitt, *New Army Rules May Snarl Talks with McCain on Detainee Issue*, N.Y. TIMES, Dec. 14, 2005, at A1.

³¹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(d), 119 Stat. 2680, 2739-40.

³² See, e.g., Keller, *supra* note 1, at 557-59.

³³ See GARCIA, *supra* note 28, at 4-6 (discussing precedents from the criminal justice system).

³⁴ This article does not address the U.S. practice of extraordinary rendition, i.e., "outsourcing torture" to other countries by extrajudicially capturing (usually abroad) and rendering subjects to other countries known to use torture. For an excellent analysis of this violation of international law in the U.S. War on Terror, see Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE W. RES. J. INT'L L. 309 (2006).

statement provides:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective . . . of protecting the American people from further terrorist attacks.³⁵

In addition, the Detainee Treatment Act provides for a good-faith defense for interrogators and, as amended by the Military Commissions Act, requires the government to pay for counsel and court costs, bail, and other incidental expenses for the accused.³⁶ The Military Commissions Act specifies that the good-faith defense applies retroactively to cover the entire period from 9/11 to the passage of the Detainee Treatment Act.³⁷ The Military Commissions Act also appears to allow evidence, but not statements, obtained via torture to be admitted in military trials of enemy combatants.³⁸ Statements obtained through coercion short of clear torture are admissible in certain circumstances.³⁹ It is striking that the Military Commissions Manual specifically states, "Statements obtained by torture are not admissible (10 U.S.C. § 948r(b)), but statements 'in which the degree of coercion is disputed' may be admitted if reliable, probative, and the admission would best serve the interests of justice."⁴⁰ Given the disputed definition of torture and the circumstances of preventive interrogation, it is likely that most, if not all, proffers of statements will involve disputes regarding the degree of coercion. Because the admissibility of statements hinges on the distinction between torture and cruel treatment, it seems absurd to expect that the level of coercion would not be disputed.

³⁵ Press Release, The White House, President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html#>.

³⁶ GARCIA, *supra* note 28, at 7–10.

³⁷ *Id.* at 9.

³⁸ Stephen F. Rohde, Partner at Rohde & Victoroff and Former President of ACLU of Southern California, Remarks at the Chapman Law Review Symposium: *Miranda* at 40: Applications in a Post-Enron, Post-9/11 World (Jan. 26, 2007), available at http://www.chapman.edu/LawReview/symposium2007_webcast.asp (follow "Click here for Panel #1" hyperlink).

³⁹ JENNIFER K. ELSEA, CRS REPORT, THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE 22 (2006), available at <http://www.fas.org/sgp/crs/natsec/RL33688.pdf> (discussing standards for admitting statements obtained through coercion not constituting torture).

⁴⁰ U.S. SEC'Y OF DEF., MILITARY COMMISSIONS MANUAL ¶ 1(g), at I-1 to I-2, available at <http://jurist.law.pitt.edu/pdf/militarycommissionsmanual.pdf> (citation omitted) (quoting the Military Commissions Act, 10 U.S.C. § 948r(c)).

Finally, the Detainee Treatment Act does not criminalize the acts it prohibits. In fact, the Military Commissions Act strips the federal courts of jurisdiction to hear claims of torture from War on Terror detainees. It provides that “no court . . . shall have jurisdiction to hear . . . action[s] against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of alien enemy combatants.⁴¹ “Thus, the Act eliminates existing means of challenge while not providing for alternative means of enforcing whatever prohibitions against torture it incorporates.”⁴²

Moreover, laws predating the passage of the Detainee Treatment Act and Military Commissions Act that criminalize torture are insufficient. The two major statutes regarding prosecution of torture are the Federal Torture Statute and the War Crimes Act.⁴³ The Federal Torture Statute, 18 U.S.C. § 2340, criminalizes the commission or attempted commission of torture outside U.S. territories, commonwealths and possessions.⁴⁴ The War Crimes Act criminalizes certain acts, committed inside or outside the United States, by or against members of the Armed Services.⁴⁵ As amended by the Military Commissions Act, the War Crimes Act prohibits certain violations of Common Article 3 of the Geneva Conventions, including torture.⁴⁶ But the War Crimes Act had not been used as of 2006.⁴⁷ The first and only prosecution under the Federal Torture Statute charged Charles Taylor, Jr. with torture for acts committed in Liberia.⁴⁸

The Detainee Treatment Act’s new defense for interrogators, as described above, relates to possible prosecution under the

⁴¹ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2636.

⁴² W. Michael Reisman, Editorial Comment, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT’L. L. 852, 854 (2006).

⁴³ For a more extensive discussion of U.S. legislation related to torture, including immigration law, see Gail H. Miller, *Defining Torture*, 3 FLOERSHEIMER CENTER OCCASIONAL PAPERS SERIES 25 (2005), available at <http://www.cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/Defining%20Torture.pdf>. Although some military prosecutions have also dealt with mistreatment of detainees, for example at Abu Ghraib, very few have been held accountable. See, e.g., Bassiouni, *supra* note 24, at 406–11 (discussing the lack of investigations and prosecutions for war crimes or torture within the military justice system).

⁴⁴ 18 U.S.C. §§ 2340, 2340A (2006).

⁴⁵ *Id.* § 2441.

⁴⁶ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2633 (amending 28 U.S.C. § 2441).

⁴⁷ See R. Jeffrey Smith, *War Crimes Act Changes Would Reduce Threat of Prosecution*, WASH. POST, Aug. 9, 2006, at A1 (discussing Military Commissions Act amendments restricting the scope of crimes covered by the War Crimes Act, particularly the exclusions of humiliating or degrading treatment).

⁴⁸ See Siobhan Morrissey, *Torture Law Gets First Test*, ABA JOURNAL EREPORT, Dec. 15, 2006, <http://www.abanet.org/journal/ereport/d15taylor.html>.

Federal Torture Statute or the War Crimes Act. Yet, given the lack of prosecutions under either piece of legislation, it is hard to imagine a sudden spurt of charges against interrogators accused of going too far in the War on Terror. But if such prosecutions do arise, the meaning of “torture” will be crucial. The definitions of torture under both Acts are similar to the CAT definition, as modified by the U.S. conditions attached to the treaty.⁴⁹

III. TRUTH SERUM AS TORTURE

As noted above, the United States has ratified CAT with a package of conditions requiring certain interpretations of terms in the treaty. The definition of torture under CAT, as modified by the United States, does not eliminate the ambiguity of the terms of the statute. This Part explores one possible form of mental torture to illustrate the complexity of the position that “difficult interrogation” is acceptable but “torture” is not. This Part posits a scenario of preventive interrogational truth serum—truth serum used to obtain information in order to prevent another terrorist attack.⁵⁰ It shows that the current understanding of torture leads to an untenable conclusion: the threat of using truth serum constitutes torture, but the actual use of truth serum does not.

The Court in *Miranda* was concerned with the unknowing, incompetent, or coerced waiver of the right to remain silent. Its warnings aimed at ensuring that statements made while in custody were the result of an independent decision to speak, rather than the coercive atmosphere.⁵¹ This ability to make an independent decision to speak is destroyed during the administration of a truth serum that lives up to its name.

Although it may seem that the discussion of truth serum belongs in the realm of science fiction rather than legal analysis, it is not as far-fetched as it seems. For example, after 9/11, it was stated that it was “[t]ime to [t]hink [a]bout [t]orture”—including truth serum.⁵² This call came from *Newsweek*’s columnist, Jonathan Alter, who also stated, “Short of physical torture, there’s

⁴⁹ See Military Commissions Act of 2006 § 5, 120 Stat. at 2633; see also GARCIA, *supra* note 28, at 6–7 (discussing minor distinctions regarding the level of pain and suffering and the intent requirement for torture and cruel treatment under the War Crimes Act as amended by the Military Commissions Act); Keller, *supra* note 1, at 548–49 (pointing to the value of determining U.S. torture in terms of mobilizing shame against such practices).

⁵⁰ Keller, *supra* note 1, at 533–34. Although cruel, inhuman and degrading treatment is also banned by CAT, the questions raised by this related issue are beyond the scope of this article. See *id.* at 566–69.

⁵¹ *Miranda v. Arizona*, 384 U.S. 436, 465 (1966).

⁵² Jonathan Alter, *Time to Think about Torture*, NEWSWEEK, Nov. 5, 2001, at 45.

always sodium pentothal ("truth serum"). The FBI is eager to try it, and deserves the chance."⁵³ Former CIA and FBI director William Webster urged the Pentagon to use truth serum drugs on terror detainees if necessary to obtain information that "would save lives or prevent some catastrophic consequence."⁵⁴ And there have been allegations that various governmental agencies took his advice. For example, Jose Padilla—the so-called dirty-bomber mentioned earlier—alleges that truth serum was used on him while he was being held incommunicado as an enemy combatant.⁵⁵

Truth serum is a fascinating example for several reasons. First, the hostile use of truth serum is often assumed to be something less than torture. Second, it provides an opening to explore mental rather than physical torture. Finally, it illustrates some shortcomings in the way torture is currently defined. For purposes of discussion, imagine an actual "truth serum," a next-generation sodium pentothal that lives up to the term "truth drug." This truth serum would not cause any physical pain, but would render a subject unable to resist while interrogated—she would be helpless to tell a lie or remain silent. She would answer questions with what she believes to be the truth, her will overcome by the perfect truth serum.

There is no evidence that such a drug exists now. But it is likely that the government is working on it, as it has in the past. For example, the U.S. government has tested truth serums and other substances on unwitting subjects in notorious projects like MKULTRA.⁵⁶ Scientists differ on whether various drugs could ever wholly overcome the will of a person. But for purposes of discussion, assume that those scientists who predict that such a thing is possible are correct. If truth serum does not work, that in and of itself argues against its use. This article posits a physically safe and reliable truth drug in order to limit the discussion

⁵³ See *id.* (describing the 9/11 attacks as so horrifying that the U.S. should consider using methods of interrogation formerly deemed unconscionable, but not physical torture).

⁵⁴ See, e.g., Ann Scott Tyson, *US Task: Get inside Head of Captured bin Laden Aide*, CHRISTIAN SCI. MONITOR, Apr. 4, 2002, at 11 (noting that former FBI and CIA director William Webster and others indicated that the United States is justified in using sodium pentothal and other truth drugs, but not physical torture, to prevent catastrophic terrorist attacks), available at <http://www.csmonitor.com/2002/0404/p01s03-uspo.html>. For other calls to consider the use of torture, see Keller, *supra* note 1, at 522–28.

⁵⁵ Richard A. Serrano, *Padilla Terror Case Gets Closer Look*, L.A. TIMES, Dec. 17, 2006, at A18 (describing claims of brutal mistreatment including that Padilla was "injected with truth-serum drugs to coerce him to talk").

⁵⁶ The CIA's Project MKULTRA tested various drugs aimed at behavior modification, including the use of LSD on unwitting subjects; the project allegedly ended after one subject died as a result of the experiment. See Keller, *supra* note 1, at 532.

to potential mental harm.⁵⁷

As noted above, many commentators have assumed that truth serum is not torture.⁵⁸ But the complex definition of torture requires more in-depth exploration of the possibility that the use or threatened use of truth serum constitutes torture. CAT defines torture as

any act

by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

for such purposes as

obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed,

or intimidating or coercing him or a third person,

or for any reason based on discrimination of any kind,

when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁵⁹

When the United States ratified CAT, it attached several conditions, known as Reservations, Understandings and Declarations (“U.S. RUDs”), including an “Understanding” regarding the interpretation of “mental pain or suffering” in CAT.⁶⁰ The United States interpreted mental harm as follows:

mental pain or suffering refers to prolonged mental harm caused by or resulting from:

- (1) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (3) the threat of imminent death;

⁵⁷ See, e.g., David Brown, *Some Believe ‘Truth Serums’ Will Come Back*, WASH. POST, Nov. 20, 2006, at A8 (discussing the history of the development of truth serum and differing opinions on whether current efforts are ongoing or succeeding); see also Keller, *supra* note 1, at 531–32 (describing the unreliability of publicly-known truth serums like sodium pentothal and CIA efforts to create an actual truth serum).

⁵⁸ See *supra* notes 53–54; see also Keller, *supra* note 1, at 527–28.

⁵⁹ CAT, *supra* note 3, at art. 1 (formatting altered).

⁶⁰ See 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990). Although this article accepts the U.S. RUDs regarding the interpretation of torture, there are serious questions as to whether the U.S. RUDs are improper and severable reservations and/or violative of customary international law. See, e.g., Keller, *supra* note 1, at 540–44 (examining the validity of the U.S. RUDs); Alvarez, *supra* note 24 (contending that the U.S. interpretation of torture is at odds with the treaty’s object and purpose of preventing torture).

or

(4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administratio[n] or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁶¹

In other words, the Understanding itself seems to open the door to finding that truth serum is torture. A perfect truth serum would be a mind-altering drug that disrupts the personality of the subject by negating the core of the person—her ability to control her own mind and act on her beliefs.⁶² This ability is worth protection, as the *Miranda* Court recognized. A decision to speak to interrogators should be an independent judgment, rather than a product of compulsion.⁶³

But would truth serum inflict “severe” mental pain or suffering, causing “prolonged mental harm”? While at first glance it might not appear likely, consider this example. Think of a high-level FBI agent who knows of an al Qaeda sleeper cell in the United States that is planning a future attack on a large U.S. city. Before the government can take action, al Qaeda kidnaps the agent and injects truth serum. The agent reveals the government’s plan to arrest the cell and thwart its attack. Armed with the knowledge gained from the use of truth serum, the cell evades arrest and immediately detonates a dirty bomb at the Sears Tower in Chicago. Tens of thousands are killed and maimed through shrapnel, radiation, and the resulting panic. The contamination shuts down the city, throwing the nation’s economy into a tailspin. While undergoing the waking nightmare of the truth serum session, the agent realizes that his coerced “confession” will lead to the deaths of thousands of innocent people.⁶⁴

Will the FBI agent suffer severe, prolonged mental harm? I would say that it is very likely. The agent might well suffer significant emotional trauma from both the hostile mind control and the horrific results of his inability to withhold the information. The loss of personal integrity will likely have long-lasting detrimental effects.⁶⁵ In a different context, the Supreme Court stated, “Our whole constitutional heritage rebels at the thought

⁶¹ 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990) (formatting altered).

⁶² See Keller, *supra* note 1, at 589–93.

⁶³ Cf. *Miranda v. Arizona*, 384 U.S. 436, 465 (1966) (discussing the need for an independent decision to speak).

⁶⁴ Keller, *supra* note 1, at 586.

⁶⁵ See Keller, *supra* note 1, at 585–88 (discussing the mental trauma of coerced speech as being tantamount to mental rape); *id.* at 603–05 (discussing Supreme Court opinions regarding autonomy).

of giving government the power to control men's minds."⁶⁶ In the international context, acts that have been found to inflict severe mental pain include making the victim believe that family members will be harmed if he fails to cooperate, or forcing him to watch another person being harmed.⁶⁷ Compared to these precedents, the hostile use of truth serum might well cause severe mental pain lasting more than a fleeting moment. Given the harm that his words have caused, the emotional trauma is likely to result in post-traumatic stress disorder ("PTSD") or similar mental harm—trauma that the U.S. government has cited as examples of sufficiently prolonged mental pain and suffering.⁶⁸ Thus, the use of truth serum is likely to meet the mental harm requirement. Furthermore, based on the U.S. interpretation of mental harm, the *threatened* administration might also meet the severe mental pain or suffering requirement.⁶⁹

In order to constitute torture, however, this severe mental pain must be intentionally inflicted for certain purposes by official actors. The latter part is easy in preventive interrogational truth serum—truth serum is clearly being used by U.S. officials for the purpose of obtaining information or a confession. The intent requirement, by contrast, is more difficult. The CAT definition specifically requires that the harm be inflicted for the purpose of obtaining the information.⁷⁰ Moreover, the United States requires "specific intent"⁷¹—ruling out accidental or incidental pain. This is where a major shortcoming of the definition comes into play. By requiring intentional infliction of pain *in order to* obtain the information, CAT rules out some interrogation methods that should be considered torture.

Specifically, although the hostile administration of truth serum might cause severe mental harm, the harm is not intentionally inflicted to obtain the confession. The harm is a mere side effect. The truth serum, not the pain, is intended to fulfill the purpose. The hostile use of truth serum is therefore likely not an "act by which severe pain or suffering . . . is intentionally in-

⁶⁶ *Stanley v. Georgia*, 394 U.S. 557, 565, 568 (1969) (striking down criminalization of private possession of obscene materials).

⁶⁷ See Keller, *supra* note 1, at 581–82, and cases cited therein. For an excellent analysis of relevant definitions and precedents from international tribunals, see William A. Schabas, *The Crime of Torture and the International Criminal Tribunals*, 37 CASE W. RES. J. INT'L L. 349 (2005).

⁶⁸ See Keller, *supra* note 1, at 587–88.

⁶⁹ For a more extensive discussion of threatened administration of mind-altering drugs and severe mental pain or suffering, see Keller, *supra* note 1, at 593–95.

⁷⁰ See CAT, *supra* note 4, at 197.

⁷¹ See 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990) ("[A]n act must be specifically intended to inflict severe physical or mental pain or suffering . . .").

flicted" for the purpose of obtaining information.⁷² The pain is not designed to extract the confession, the truth serum is. If there were some way to eliminate the anticipated side effect of mental pain, the interrogator would still get the necessary information because the truth serum causes the divulgence, irrespective of any simultaneous mental pain.⁷³

Paradoxically, the lesser act of *threatening to administer truth serum* would meet the intentional infliction requirement. The threat is an act by which the interrogator deliberately inflicts mental pain in order to achieve her purpose. The pain itself is the main objective, the driving force behind the confession, whether it is the pain of intense anxiety or the pain of anticipated mind invasion. Without it, the interrogator will not obtain the information. The whole idea behind a threat—"we have ways of making you talk"—is to terrify and traumatize the subject into talking.⁷⁴

Thus, there seems to be a strange loophole in the definition of torture—one that allows the use of truth serum, but not the threat of it. Of course, this creates a perverse incentive for interrogators to go straight to the use of truth serum. I believe that a better understanding of torture would also cover methods like truth serum, where the substance causes the subject to speak, but mental anguish is an anticipated side effect. There are many other reasons why the hostile use of truth serum and other coercive interrogation tactics should be banned; reasons ranging from moral theory to fear of reprisals to reputational damage to the fact that they are banned by other international law.⁷⁵ The current lacuna in the definition of torture only adds to the conclusion that coercive tactics should be abandoned.

CONCLUSION

Although *Miranda* may not protect terror detainees from coerced confessions, other laws can. In particular, the United States has agreed to abide by the international prohibition against torture. The infamous—and now withdrawn—torture memos aside, the government professes to uphold the ban on torture. It can show this commitment by ruling out methods like truth serum. The recent Detainee Treatment Act prohibits some of the most outrageous methods like waterboarding,⁷⁶ but does

⁷² See CAT, *supra* note 4, at 197.

⁷³ See Keller, *supra* note 1, at 595–601.

⁷⁴ *Id.* at 601–03.

⁷⁵ For a more extensive discussion of other bases for banning coercive techniques, see *id.* at 603–12.

⁷⁶ 152 CONG. REC. S10413 (daily ed. Sept. 28, 2006) (statement of Sen. McCain) ("I

not go far enough. Similar mixed messages are evident in the President's signing statement and within the Military Commissions Act, which allows statements obtained through compulsion short of undisputed torture.⁷⁷ A more comprehensive approach is necessary to regain our reputation as a promoter, not a violator, of human rights. In order to win the "Global War on Terror," cooperation is required—cooperation that will not be forthcoming if the United States appears to waver regarding the absolute prohibition of preventive interrogational torture.⁷⁸

am confident that the categories included in this section will criminalize certain interrogation techniques, like waterboarding and other techniques that cause serious pain or suffering . . .").

⁷⁷ See *supra* Part II.

⁷⁸ See, e.g., Keller, *supra* note 1, at 608–09 (discussing examples of the U.S.'s inability to achieve foreign policy goals due to criticism over alleged use of torture).

***Miranda* and the Media: Tracing the Cultural Evolution of a Constitutional Revolution**

*Russell Dean Covey**

INTRODUCTION

Law's interplay with popular culture is fascinatingly multifaceted, and nowhere has the complexity of the relationship played out more fully than with the media's treatment of *Miranda v. Arizona*.¹ Not only did television make the *Miranda* warnings famous,² its adoption of *Miranda* as an icon of criminal procedure may be the main reason *Miranda* is good law today. At least, one can extract that claim from the Court's decision in *Dickerson v. United States*.³

The *Dickerson* Court declined the opportunity to overrule *Miranda* and return interrogation law to its pre-*Miranda* status, it said, largely because "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."⁴ Pop culture thus saved *Miranda*. But why? What, if any, link is there between the procedures that constitute "routine police practice" and the fact that *Miranda* has become a part of the national culture?

To the extent that there is a link at all, I suspect it is quite attenuated. Delivery of *Miranda* warnings to a suspect prior to custodial interrogation is only one of many routine police practices, most of which—say, the search-incident-to-arrest

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¹ 384 U.S. 436 (1966).

² See, e.g., Paul Finkelman, *Civil Rights In Historical Context: In Defense Of Brown*, 118 HARV. L. REV. 973, 998 (2005) (reviewing MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004)) (noting that most Americans "can recite the *Miranda* warning from memory because they have heard it so often on television").

³ *Dickerson v. United States*, 530 U.S. 428, 444 (2000). The issue presented to the Court in *Dickerson* was the constitutionality of 18 U.S.C. § 3501, a provision of the 1968 Omnibus Crime Control Act which purported to replace *Miranda* with an approach to assessing the admissibility of statements obtained in custodial interrogation that directed courts to consider several factors, viewed in the "totality of the circumstances," in assessing whether a statement was "voluntary" and thus admissible under the Fifth and Fourteenth Amendments. *Id.* at 431–32.

⁴ *Id.* at 443.

rules—never became national icons. And what does embeddedness in pop culture have to do with the constitutionality of a warning requirement? On the surface at least, not much. In my view, the *Dickerson* Court's claim is best read as stating not one but two distinct justifications for upholding *Miranda*. One claim is that *Miranda* should be preserved because the *Miranda* warnings have become a *useful* part of routine police practice.⁵ A second is that the *Miranda* warnings should not be dispensed with because of the collateral damage that would result from uprooting such an embedded cultural icon.

This article comments on the second of those two claims. It explores the depiction of interrogation in film and television from the 1940s to the present, and contrasts that imagery with the Supreme Court's interrogation jurisprudence over the same time frame.⁶ Although my treatment of the subject is necessarily only fragmentary (a comprehensive review of either topic would fill many volumes), this article hazards a few tentative hypotheses.

First, a review of the treatment of interrogation in both domains during this period strongly suggests that law and popular culture are not autonomous regions of thought or distinct and isolated disciplines,⁷ but rather that law and culture are in deep dialogue. On the one hand, as Professors Sarat and Kearns have noted, law is "constitutive of culture" in the sense that its "concepts and commands" have a way of penetrating the cultural

⁵ That the *Miranda* warnings have been widely accepted as useful to prosecutors and the police is indicated by the fact that the United States in *Dickerson* agreed with the defendant that the *Miranda* warnings should not be overturned. The opposing position was argued by an amicus appointed by the Court. See Timothy P. O'Neill, *Why Miranda Does Not Prevent Confessions: Some Lessons from Albert Camus, Arthur Miller and Oprah Winfrey*, 51 SYRACUSE L. REV. 863, 865 (2001) (noting that "the federal government in *Dickerson* was happy to accept *Miranda*. Prosecutors have grown to like the fact that following *Miranda*'s formalistic rules almost invariably leads to admission of the confession. Moreover, the vast majority of suspects do not choose to invoke *Miranda*'s protections anyway").

⁶ As discussed below, part of the story concerns the triangular relationship <suspect—detective—law> whereby at different times the three have different relationships. At the risk of gross overgeneralization, in the noir period, suspect and detective were relatively equally matched, and the law was primarily depicted as a brooding omnipresence. During the *Miranda* era, the (good) law was infused with a more activist role as a shield for the (good) suspect against the (bad) police detective. That picture was reversed in the post-*Miranda* period, paradigmatically illustrated in *Dirty Harry*, where the (good) police detective actively opposes the (bad) suspect and the (bad) law. More recently, in cop shows like *NYPD Blue* and *Homicide*, the cycle has come full circle with a return to the depiction of "good/bad" cops squaring off against "good/bad" criminals under a "good/bad" law.

⁷ See PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW & LITERATURE* 4 (2000) (noting that "[j]udges, lawyers, and legal scholars . . . have tended to treat the procedures and the language of the law as if they were fully hermetic").

consciousness almost imperceptibly.⁸ At the same time, “[l]egal meanings are not invented and communicated in a unidirectional process.”⁹ Law’s “internal definitions of some of its terms of art” cannot be reliably understood without reference to popular meanings and ordinary language.¹⁰ Both popular culture and law draw from, and add to, a common set of iconographic images that represent and describe the world, thereby creating something of a collage of interrogation imagery that might be studied through a “semiotics” of law and order—that is, an attempt to construct meaning by analyzing the contexts and mutual relationships in which the concepts of law and order are embedded.¹¹ Because of this dialogic relationship, not only can the history of law be illuminated by reference to pop culture (and vice versa), but the constraints and demands of form and convention that each genre imposes in its own respective sphere necessarily influence and transform its counterpart.

Second, the history of *Miranda*’s iconization, duly noted by the Court in *Dickerson*, aptly illustrates this semiotics. I thus attempt to show that the changing depiction of *Miranda* on film and television intersects revealingly with the successive Warren, Burger, and Rehnquist Courts’ treatment of interrogation law generally, and *Miranda* law in particular.

The origins of the story, however, predate *Miranda*. The “interrogation moment” has always been a central component of the popular image of law and order, from the single-minded effort of Porfiry Petrovich to secure Raskolnikov’s confession in Dostoevsky’s *Crime and Punishment*,¹² to the weekly episodes of *NYPD Blue* in which Detectives Bobby Simone and Andy Sipowicz play good cop/bad cop, using a variety of lawful and unlawful tactics in the “interview room” to induce suspects to confess guilt.¹³ *Miranda*’s story must be understood as a continuation of an older plotline concerning popular culture’s use of confession as a narrative device and its exploitation of police

⁸ See LAW IN THE DOMAINS OF CULTURE 7 (Austin Sarat & Thomas R. Kearns eds., 1998).

⁹ *Id.* at 8.

¹⁰ BROOKS, *supra* note 7, at 4. See also LAW IN THE DOMAINS OF CULTURE, *supra* note 8, at 4–5.

¹¹ For one take on the meaning of the phrase “legal semiotics,” see Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779, 1787–88 (1991) (identifying a central tenet of semiology as providing that “signs [like words or legal arguments] take their meaning from their mutual relationships in a system of signification” (quoting J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1121 (1990))).

¹² See William Burnham, *The Legal Context and Contributions of Dostoevsky’s Crime and Punishment*, 100 MICH. L. REV. 1227, 1236 (2002).

¹³ Susan Bandes & Jack Beermann, *Lawyering Up*, 2 GREEN BAG 2d 5, at 7 (1998) (discussing interrogation tactics portrayed on *NYPD Blue*).

interrogation as the vehicle that brings about these confessions. Confession's narrative convenience collides awkwardly with *Miranda's* function as a legal solution to a problem dogging the Court at least since *Brown v. Mississippi*¹⁴: how to sort out the respective roles of police, trial courts, and appellate courts in setting the parameters of interrogation, in a way that ensures that confessions satisfy whatever qualitative criteria are necessary—be it reliability, voluntariness, or absence of torture or overt coercion—without overstepping their competency and jurisdictional bounds and without undermining effective law enforcement. Both law and pop culture have struggled to reconcile these competing demands.

Pop culture's confessional needs are not dissimilar to law's, but neither are they identical. Like all effective dramatic narratives, crime dramas must tell their stories within the short time their formats permit. Parsimony therefore is extremely important. At the same time, effective dramatic narrative requires enough of a sense of verisimilitude to permit the viewer to suspend disbelief for the duration of the drama.¹⁵ The device of the confession serves the needs of parsimony well; it is the primary vehicle for narrative closure. (As will be discussed later, it is with respect to verisimilitude that confession as a plot device creates problems.) Few and far between are the crime and cop shows that do not end with the criminal's confession. The indispensability of the confession is evidenced by the fact that even in a contemporary crime show like *CSI: Crime Scene Investigation*, which depicts the crime-solving activities of forensic crime investigators whose job is to analyze and piece together *physical* evidence left at crime scenes, virtually every episode concludes with an interrogation (a highly unrealistic bit of role confusion) and confession from the "real" criminal.¹⁶

The screenwriter's dramatic reliance on confessions, regardless of story structure, is intuitively understandable. Where the narrative is presented from the viewpoint of the investigating detective, police officer, or crusading citizen who must solve a crime, the criminal's confession provides the possibility of a definitive resolution of the mystery; it permits revelation of what "really happened." At the same time, where

¹⁴ 297 U.S. 278, 286–87 (1936).

¹⁵ See Norman Rosenberg, *Looking for Law in All the Old Traces: The Movies of Classical Hollywood, the Law, and the Case(s) of Film Noir*, 48 UCLA L. REV. 1443, 1448–50 (2001) (discussing the requirements of realism and effective storytelling, including the need to reach adequate resolution of narrative tensions necessary to construct the plot).

¹⁶ The absurdity of lab technicians conducting interrogations is fairly self-evident. See Joanne Kimberlin, *Forget What You See on 'CSI,'* THE VIRGINIAN-PILOT, Oct. 3, 2006, at A1.

the narrative is presented from the criminal's perspective, the confession permits the character development so essential to effective narrative; the criminal confesses to demonstrate his acknowledgement of transgression, to make vengeance for wrongdoing possible, to create the preconditions for remorse, or to lay the foundation for just retribution. Dramatic convention requires that a villain give some verbal or at least inferable acknowledgement of culpability before the hero is permitted to plug him with lead.¹⁷ Avenging heroes do not kill transgressors unaware. Not only would an unwarned killing be unmanly, it would defeat the very idea of retribution for which the avenging hero stands, because retributive punishment loses its meaning unless its subject is aware of the reasons for his punishment.¹⁸

Confession is equally important where the suspect in a dramatic narrative is innocent. Indeed, confession is perhaps even more important in this context, because a suspected character's innocence cannot be dispositively confirmed absent an exonerating explanation. As Peter Brooks writes, "[E]xculpation depends on articulation."¹⁹ Resolution cannot occur unless the protagonist confesses the truth or the guilty party confesses to absolve the innocent. Thus, regardless of whether the story's protagonist is criminal or cop, guilty or innocent, narrative rules require a response to accusation in order to confirm guilt or to deny it, to justify retribution or defeat it.

Pop culture could hardly live without confession. Nor, as it turns out, can law. Some of the most interesting contemporary jury research suggests that juries evaluate evidence through a narrative lens.²⁰ That is, in reaching verdicts, "jurors impose a narrative story organization on trial information."²¹ As such, the cognitive strategies jurors rely upon in the courtroom are similar, if not identical, to those at work in the living room or theater. Confessions likely perform a narrative function in the courtroom similar to that in fiction—they parsimoniously and definitively resolve doubts regarding the veracity of the prosecutor's story. The legal system's overwhelming reliance on guilty pleas to resolve criminal charges, moreover, further elevates the

¹⁷ PETER A. FRENCH, *THE VIRTUES OF VENGEANCE* 84 (2001) (explaining that retributive vengeance requires that before receiving his (or her) just deserts the wrongdoer "accept that what he (or she) did to someone else was wrong").

¹⁸ *See id.* The requirement that criminal defendants must be competent at the time they are executed has been held to be a fundamental attribute of due process. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

¹⁹ BROOKS, *supra* note 7, at 114.

²⁰ *See* Nancy Pennington and Reid Hastie, *The Story Model for Juror Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 192 (Reid Hastie ed., 1993).

²¹ *Id.* at 194 (emphasis omitted).

importance of confession, since confession serves as a substitute for objective evidence of guilt. Appellate courts have come to rely on confessions (in the form of guilty pleas) in order to minimize post-conviction process. From the point of view of the legal system, confession (in the interrogation room or the courtroom) provides the closure necessary to the system's function and legitimacy. It thus comes as no surprise that the Court has announced that law cannot do without confession, proclaiming that "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."²²

But that still leaves the problem of how, consistent with the demands of verisimilitude and constitutional law, the confession is to be induced. After all, few confessions in reality are freely offered.²³ Bound up with the drama of confession, then, is the distinctive role performed by the confessor's handmaiden: the interrogator, who in drama as in real life may wear many hats,²⁴ including psychoanalyst, priest, lover, or policeman, or who may not be a person at all, but rather a diary²⁵ or dictaphone.²⁶

As we will see, *Miranda's* story reflects an evolving understanding of the relationship between police interrogator and suspect told by successive generations of jurists. But the Supreme Court was far from the only arbiter of the interrogation room. Even as the Supreme Court in its role as constitutional overseer of police evidence-gathering methods focused on the delicate legal intricacies of interrogation—weighing and balancing the respective importance of such values as individual autonomy and the right to be free of coercion against the state's interest in solving crimes and securing convictions—purveyors of popular culture were busily instantiating and appropriating interrogation and confession for their own distinct purposes. Their product—the crime films and police shows that have served as a mainstay of pop culture since Hollywood's birth—simultaneously borrows from authoritative sources of law (such as Supreme Court opinions), mirrors popular assumptions about

²² Moran v. Burbine, 475 U.S. 412, 426 (1986) (citation omitted).

²³ If law demanded voluntary confessions in the purest sense of the term, the only confessions the police could accept would be those in which a person of his own volition "enters a police station and states that he wishes to confess to a crime"—as *Miranda* itself almost but not quite suggested—the screenwriter (and the typical beat-cop) would be in difficult straits. 384 U.S. 436, 478 (1966) (quoting *People v. Dorado*, 62 Cal. 2d 338, 354 (1965)).

²⁴ See BROOKS, *supra* note 7, at 35–42.

²⁵ Nikolai Gogol, *Diary of a Madman*, in *THE DIMENSIONS OF THE SHORT STORY: A CRITICAL ANTHOLOGY* 53 (James E. Miller, Jr. & Bernice Slotte eds., 1964).

²⁶ See BILLY WILDER, *DOUBLE INDEMNITY* 10 (2000). The movie *Double Indemnity* is discussed *infra*.

what law is, and shapes public attitudes toward what law should be. Pop culture's depiction of interrogation reflects and provides a record of evolving legal norms and changing public expectations not only about law and the legal process, but about the nature of the human condition. The next part of this article attempts to illustrate this dynamic by juxtaposing images of interrogation in film and in Supreme Court decisions during the era of film noir.²⁷

I. INTERROGATION IN THE PRE-MIRANDA ERA

The contest between interrogator and suspect featured centrally in the film noir crime dramas of the 1940s and 1950s.²⁸ Indeed, many films noir used the interrogation/confession device as their basic narrative framework.²⁹ In this part, I consider two brief fragments from a pair of the classic films noir, both released in 1944. The first fragment is a bit of dialogue from *Double Indemnity*, a film which follows the ill-fated scheme of insurance salesman Walter Neff and housewife Phyllis Dietrichson to murder Dietrichson's husband, which is told in the form of Neff's dying confession. Shortly after Neff (Fred MacMurray) has commenced an affair with Dietrichson (Barbara Stanwyck), Dietrichson divulges thoughts of murdering her rich and inattentive husband. Neff, with a dawning realization that her interest in him is related to her desire to take out and collect on a secret insurance policy on her husband's life, warns that such a plot would be quickly detected by his company's claims investigator. Says Neff, "[A] set-up like that would be just like a slice of rare roast beef. In three minutes he'd know it wasn't an accident. In ten minutes you'd be sitting under the hot lights. In half an hour you'd be signing your name to a confession."³⁰

²⁷ The tactic used here is to focus more on fragmentary imagery, and less on the overarching moral lessons intended by the creators of popular culture, even if such overarching lessons could be clearly identified. See Rosenberg, *supra* note 15, at 1449–53 (noting that film medium tends towards open-texturedness rather than closed, tight meanings in order to resonate with wider audiences, and thereby increase box-office appeal and profit).

²⁸ Norman Rosenberg defines film noir as "a group of motion pictures released during the 1940s and 1950s that foreground images of 'things legal.'" See Rosenberg, *supra* note 15, at 1446.

²⁹ Both *Mildred Pierce* (Warner Brothers 1945) and *Double Indemnity* (Paramount Pictures 1944) were told in the form of confessions given by their ill-fated protagonists. The Greatest Films, *Mildred Pierce* (1945), <http://www.filmsite.org/mild.html>; The Greatest Films, *Double Indemnity* (1944), <http://www.filmsite.org/doub.html>. In *Mildred Pierce*, Mildred's confession was made to the police in the course of police-station questioning. In *Double Indemnity*, Walter Neff narrates his confession to a Dictaphone in his insurance office while he sits bleeding from a gunshot wound.

³⁰ See Billy Wilder & Raymond Chandler, *Double Indemnity* (screenplay), available at <http://www.weeklyscript.com/Double%20Indemnity.txt> (last visited Mar. 22, 2007). The full dialogue is as follows:

PHYLLIS: The other night we drove home from a party. He was drunk

The second fragment to consider is a climactic scene occurring near the end of another 1944 film, *Laura*.³¹ Laura Hunt (Gene Tierney) has been arrested for the murder of Diane Redfern, and Detective Mark McPherson (Dana Andrews) has brought Laura to the police station for questioning. As soon as McPherson sits down, he flips on two bright interrogation lights directed in Laura's face:

McPherson

"All right, let's have it."

Laura

"What are you trying to do, force a confession out of me?"

McPherson

"You've been holding out and I want to know why. It'll be easier for you if you tell the truth."

Laura

"What difference does it make what I say. You've made up your mind, I'm guilty."

McPherson

"Are you?"

Laura

"Don't tell me you have any doubts, since you. [dropping her head and shielding her eyes] Oh, I can't, please, do I have to have those lights in my face?"

[McPherson turns off the lights.]

"Thanks. [pause] No, I didn't kill Diane Redfern . . ." ³²

What do these two filmic fragments tell us about the popular conception of interrogation? Most obviously, their adoption of the "hot lights" in the interrogation room as a metaphor for police questioning suggests a prevalent assumption that moderate pressure in the interrogation room was standard, the norm rather than the exception. In *Laura*, McPherson turns on the lights without hesitation or pause. In *Double Indemnity*, when

again. When we got into the garage he just sat there with his head on the steering wheel and the motor still running. And I thought what it would be like if I didn't switch it off, just closed the garage door and left him there.

NEFF: I'll tell you what it would be like, if you had that accident policy, and tried to pull a monoxide job. We have a guy in our office named Keyes. For him a set-up like that would be just like a slice of rare roast beef. In three minutes he'd know it wasn't an accident. In ten minutes you'd be sitting under the hot lights. In half an hour you'd be signing your name to a confession.

³¹ LAURA (Twentieth Century Fox 1944).

³² *Id.*

Neff wishes to dissuade Phyllis from killing, he invokes the lights as a metaphor for police questioning. The lights are synonymous with interrogation itself.

In addition to reflecting a basic popular comfort with police pressure tactics in the interrogation room, several additional messages can be gleaned from the interrogation imagery in these pre-*Miranda* films. First, Neff's warning to Phyllis suggests a popular presupposition that when criminal suspicions point to a particular suspect, the suspect will be called to answer questions. Second, both fragments underscore the belief, or at least the pretense, that police pressure will induce revelation of the truth. These messages are of course fully consistent with the "dogmatic"³³ moral lesson of the films of the period: crime (although titillating) doesn't pay. Criminality inevitably leads to confession, which in turn leads to retribution, either in the form of punishment or, more typically, death—the fate that befalls Dietrichson and Neff in *Double Indemnity*, and Waldo Lydecker, the real killer in *Laura*. (Death, for narrative effect, is much neater than legal process.)

If the "hot lights" metaphor demonstrates the popular expectation that suspects will be questioned and that police will apply pressure to get suspects to talk, the juxtaposition of strong pressure tactics and delicate (or apparently delicate) suspects such as Laura Hunt and Phyllis Dietrichson suggests a further expectation that police interrogational pressure will be moderated in proportion to the strength of the suspect's capacity to withstand it. After all, very little pressure is necessary to overcome Laura's capacity—when she shows weakness, McPherson turns off the lights, and Laura talks.³⁴

As the words "film noir" suggest, the prevalence of darkness

³³ Dogmatic, in the sense of reflecting the ordained beliefs authorized and approved by authority. All films of this era were required to comply with the Production Code, which (among other things) dictated that "the sympathy of the audience should never be thrown to the side of crime, wrongdoing, evil or sin," and that "[l]aw, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation." MOTION PICTURE PRODUCTION CODE, GENERAL PRINCIPLES 1, 3 (1930), reprinted in LEONARD J. LEFF & JEROLD L. SIMMONS, *THE DAME IN THE KIMONO: HOLLYWOOD, CENSORSHIP, AND THE PRODUCTION CODE* app., at 286–87 (2d ed. 2001).

³⁴ Laura's encounter further illustrates an image of police interrogation at once familiar and jarring: familiar because audiences are accustomed to the idea that criminals will be subjected to pressure tactics; jarring because McPherson's treatment of the beautiful Laura as a typical criminal upsets our preconceived notions of who should be subjected to them. The jarring quality of Laura's interrogation does not represent a condemnation of police pressure tactics, however, nor is the propriety of interrogation room pressure diminished by the fact that Laura's is an exculpatory confession. The confession is essential to the dissipation of the cloud of suspicion surrounding Laura and allows McPherson to identify the real killer and save Laura's life.

to “convey a bleak or cynical mood”³⁵ is an essential feature of the genre, and the play of light and dark not only serves an important aesthetic function but also works as an important narrative device. In a literary sense, the “hot lights” symbolize the glare of inquisition, a glare that unearths the “subterranean life of guilty secrets.”³⁶ Questioning under the hot lights represents the literal and figurative process by which guilty secrets and wicked motives are dredged from the recesses of the criminal mind and exposed to the light of moral judgment and, ultimately, legal retribution. The harsh glare of the interrogation lights starkly contrasts with the shadowy underworlds in which the characters live. An emerging fascination with Freud also was manifested in the interrogation moment, which did double duty as a metaphor for the struggle between the unconscious (which seeks to remain hidden) and the psychoanalytic impulse to expose it to light.³⁷

If police interrogation was portrayed as a useful, and perhaps essential, instrumentality of truth, interrogation was a soldier in the larger mission to expose the flawed humanity of the interrogated. The classic film noir criminals—Walter Neff and Phyllis Dietrichson in *Double Indemnity*, or even Waldo Lydecker (Clifton Webb) in *Laura*—were not cardboard cutouts but complex, flawed human beings. Part of film noir’s fascination stems from its willingness to trade in shades of gray, to explore the murky complexities of human motive that move men and women to do evil. Criminality in film noir was variously portrayed as a vice or a weakness, stemming in some cases from the all-too-human desire for love, money, or drink, and in others, to moral or mental sickness, but almost always as the product of some recognizable human frailty.³⁸ Film noir thus acknowledged the thin line separating ordinary men and women from criminals.

How does law’s depiction of interrogation compare? Perhaps not surprisingly, the Supreme Court’s narrative tactics in its pre-

35 TIMOTHY O. LENZ, CHANGING IMAGES OF LAW IN FILM & TELEVISION CRIME STORIES 54 (2003).

36 BROOKS, *supra* note 7, at 116.

37 See LEFF & SIMMONS, *supra* note 33, at 131 (noting that many Hollywood scriptwriters, themselves undergoing psychoanalysis, increasingly incorporated Freudian themes into their film scripts in the 1940s). As Brooks notes, like the interrogation room, the “Church’s carefully crafted confessional and the psychoanalyst’s couch are both places designed for the telling of intimate, dark secrets.” BROOKS, *supra* note 7, at 141.

38 As such, the viewer has a complex emotional relationship with the main characters—empathizing with them at the same time that it becomes plain that they cannot escape retribution and punishment for their bad acts. In this way, film noir constructs criminal justice as the unfolding of tragedy—the characters’ fatal flaws inevitably and inexorably causing their downfall.

Miranda involuntary confessions cases bear a striking resemblance to the interrogation-room dynamic depicted in film noir. Walter Neff's description of interrogation in *Double Indemnity*,³⁹ for instance, echoes the interrogation of Major Raymond Lisenba described by the Court in *Lisenba v. California*,⁴⁰ a case involving a defendant who—in classic film noir fashion—murdered his wife in order to collect life insurance on a “double indemnity” clause of the policy. Rejecting Lisenba's claim that his confession was involuntary, the Court explained that although Lisenba was confined and questioned without break by relays of police officers over a period of thirty-six hours, slapped (or worse), and deprived of sleep and food, the interrogation did not violate due process because, like the prototypical film noir villain, Lisenba allegedly remained calm and cool throughout. In the Court's words, Lisenba

exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer.⁴¹

The Court made no mention of interrogation lights in its opinion, but it registered no qualms over the pressure tactics that were admittedly used to interrogate Lisenba. Like *Double Indemnity* and *Laura*, the Court implicitly assumed that some amount of police pressure was permitted and even expected.

The “hot lights” were discussed at some length in *Ashcraft v. Tennessee*, however, where the Court reversed a defendant's murder conviction based on a finding that the defendant's confession, elicited after thirty-eight hours of non-stop questioning, was involuntary.⁴² The Court narrated the events leading up to Ashcraft's confession:

[E]arly in the evening of Saturday, June 14, the officers came to Ashcraft's home and ‘took him into custody.’ In the words of the Tennessee Supreme Court, ‘They took him to an office or room on the northwest corner of the fifth floor of the Shelby County jail. This office is equipped with all sorts of crime and detective devices such as a fingerprint outfit, cameras, high-powered lights, and such other devices as might be found in a homicide investigating office. . . It

³⁹ *Double Indemnity* was adapted from a novel by James M. Cain, which in turn was based on a real murder that made headlines in 1927. The constant recycling of material from one genre to the next underscores the fluidity and seamlessness of the legal and cultural worlds. See IMDb.com, *Double Indemnity* (1944), <http://imdb.com/title/tt0036775/> (last visited Mar. 16, 2007).

⁴⁰ 314 U.S. 219, 223 (1941).

⁴¹ *Id.* at 241.

⁴² *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

appears that the officers placed Ashcraft at a table in this room on the fifth floor of the county jail with a light over his head and began to quiz him. They questioned him in relays until the following Monday morning, June 16, 1941, around nine-thirty or ten o'clock. It appears that Ashcraft from Saturday evening at seven o'clock until Monday morning at approximately nine-thirty never left this homicide room on the fifth floor.⁴³

Ashcraft's interrogation followed the standard noir script in every detail. The interrogation room, equipped with a variety of criminal detection devices and interrogation lights, could have been lifted directly from a Hollywood set. As in *Lisenba*, police officers defended the extended interrogation with the assertion that after thirty-eight hours of questioning, Ashcraft remained "cool,' 'calm,' 'collected,' 'normal.'"⁴⁴ But here the Court diverged from the script. Ashcraft's confession was not deemed, as it so easily might have been, the inevitable triumph of truth over criminal cunning. Instead, the Court critically noted the documented evidence of systematic police misconduct in interrogation, including the use of the "hot lights" to induce confessions,⁴⁵ and threw out Ashcraft's conviction on grounds that the thirty-eight hour interrogation was "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom [the state's] full coercive force is brought to bear."⁴⁶

Ashcraft, decided in the same year that *Double Indemnity* and *Laura* were released, provided an alternative interrogation narrative, and one decidedly more liberal than pop culture's. Certainly, the Court's condemnation of high-pressure police questioning diverged from the hard-nosed assumptions about police questioning embedded in films like *Double Indemnity* and *Laura*.

This is not to say that the Court was unanimous in its condemnation of the popular conception of police interrogation. Justice Jackson cited *Lisenba* in cautioning that he, at least, was "not ready to say that the pressure to disclose crime, involved in decent detention and lengthy examination," even if "inherently coercive," need be "denied to a State by the Constitution, where

⁴³ *Id.* at 149 (emphasis added).

⁴⁴ *Id.* at 151.

⁴⁵ The Wickersham Commission's report on police third-degree practices had found that "[p]owerful lights turned full on the prisoner's face, or switched on and off have been found effective" by police for inducing defendants to confess. *Id.* at 150 n.6 (quoting *Report of Committee on Lawless Enforcement of Law made to the Section of Criminal Law and Criminology of the American Bar Association*, 1 AM. J. POLICE SCI. 575, 579-80 (1930)).

⁴⁶ *Ashcraft*, 322 U.S. at 154 (citing *Bram v. United States*, 168 U.S. 532, 556, 562-63 (1897)).

they are not proved to have passed the individual's ability to resist and to admit, deny, or refuse to answer."⁴⁷ Nonetheless, the Court's basic direction appears to have been set. Although, over the course of the following two decades, the Court grew increasingly skeptical of high-pressure police interrogation, the dominant paradigm continued to be that of the clash of wills between suspect and interrogator, where the question was whether the pressure exerted on the suspect was proportional to her mental, physical, and emotional resources.⁴⁸ The use of belts, whips, and extended relay questioning was clearly improper, but the exploitation of inadequately explained inconsistencies fell safely within fair territory. The suspect's implicit obligation to produce an adequate and consistent explanation thus remained a central fact of police interrogation.

Ultimately, consideration of interrogation imagery in film and law during this era gives rise to a complex picture. On one hand, interrogation in the movies and in Supreme Court opinions share basic preconceptions. Interrogation in both mediums represented a climactic moment in the battle between good and evil, truth and crime, and pressure tactics—moderated so that the will of the suspect was not overborne—were recognized as a valuable tool to uncover wrongdoing. Sometimes the police overreached, but sometimes substantial pressure was both necessary and appropriate to expose chinks in the "almost perfect" story. At the same time, where Hollywood sought to emphasize the drama of the contest of wills, the Court began the project of crafting rules to limit the degree of pressure that interrogators might bring to bear on suspects. The attack on the "hot lights" had begun. To the extent that they lagged in reconceptualizing the interrogation-room narrative, it appears that Hollywood writers were taking their cues from the material around them, and not the other way around.⁴⁹ Led by Justices

⁴⁷ *Id.* at 170 (Jackson, J., dissenting).

⁴⁸ *See, e.g.,* *Culombe v. Connecticut*, 367 U.S. 568 (1961). Justice Frankfurter explained that

a confession made by a person in custody is not always the result of an overborne will. The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation. If that is so, if the 'suction process' has not been at the prisoner and drained his capacity for freedom of choice, does not the awful responsibility of the police for maintaining the peaceful order of society justify the means which they have employed?

Id. at 576.

⁴⁹ At least during this period, however, Hollywood's picture of interrogation lagged behind the progressive efforts of the Court to bring due process principles to bear on confessions. The 1944 films *Laura* and *Double Indemnity* are more akin in their iconography with the 1941 *Lisenba* case than they were with the 1944 *Ashcraft* decision which was already tending in the direction of *Miranda*. *Id.* at 154 (Justice Black's opinion, for example, suggests that interrogation standards should be judged by

Black and Frankfurter, the Court's stepped-up assault on coercive interrogation tactics for the time being would put the Court further out in front of pop culture in the coming decades.

II. PERRY MASON, MIRANDA, AND INTERROGATION ON THE WITNESS STAND

With *Brown v. Board of Education*⁵⁰ on the horizon and an increasing interest in the expansion of civil rights, both law and culture were set for major changes at the mid-century. By the time *Miranda* was decided, the effects of the civil rights movement and the ferment of the 1960s had wrought deep changes in popular culture, including a deep erosion in trust and sympathy for the police.

This distrust was reflected in Hollywood's choice of pop heroes. Although popular in the 1950s, both the crime film and the cop show had almost disappeared in the early 1960s.⁵¹ To the extent police were portrayed at all in the popular culture of the decade, they tended to be depicted not as crime-fighting heroes but rather as "corrupt or inept."⁵² Law, however, did not lose its attraction as a subject of pop culture. Although the police drama may have lost its luster, the stock of lawyers rose to unprecedented heights. The decade preceding *Miranda* witnessed a brief and unparalleled reign of the lawyer drama.⁵³ Three of the most famous trial films ever made, *Anatomy of a Murder* (1959), *12 Angry Men* (1957), and *To Kill a Mockingbird* (1967)⁵⁴ debuted during this period, as did the most famous trial lawyer never to grace an actual courtroom: Perry Mason.⁵⁵

comparison to the standards of the open courtroom: "It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession.").

⁵⁰ 347 U.S. 483 (1954).

⁵¹ See LENZ, *supra* note 35, at 54 (stating that "crime film noir lasted until around 1955 when the public lost some of its interest in crime stories" in lieu of newfound interest in civil rights and the Cold War).

⁵² Bandes & Beermann, *supra* note 13, at 6 (noting that there was "a brief period in the late 1960s and early 1970s in which police (along with other government officials) were often portrayed as corrupt or inept").

⁵³ See LENZ, *supra* note 35, at 54.

⁵⁴ *Id.* at 46 (noting that these films continue to be "used in classrooms to teach civics lessons about law and politics").

⁵⁵ Mason made his television debut in 1957. See Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229, 249 (1987). One of the dominant themes of *Perry Mason*, and indeed many of the major television series of the 1960s, was the ineptness of the police who, week after week, managed to arrest the wrong suspect only so Mason could expose the mistake in court. Other shows similarly "mocked the wayward ways of the crime-fighting establishment and even the law itself." *Id.* at 250. At the same time, several shows in the

Just as the Supreme Court's confession cases of the 1940s conceptualized interrogation in a manner paralleling the pop culture imagery of the era—as a battle of wits and wills between police officers and criminal suspects—Chief Justice Warren's opinion in *Miranda*, like the Court's opinions in *Gideon v. Wainwright*,⁵⁶ *Massiah v. United States*,⁵⁷ *Escobedo v. Illinois*,⁵⁸ and *Duncan v. Louisiana*,⁵⁹ reflected an approach to constitutional criminal procedure that elevated the role of lawyers above that of the police.⁶⁰ It is not farfetched to say, as some indeed have said, that the Warren Court's major milestones were in some sense a product of *Perry Mason*, or at least a reflection of the assumptions about the roles of lawyers, law, courts, prosecutors, and police common to pop cultural depictions of the era.⁶¹

In the *Perry Mason* view of the world, the defense lawyer rather than the police detective plays the principal role of guardian of justice. Week after week on television, *Perry Mason* induced criminals to confess, not in the interrogation room under the hot lights, but instead in the open courtroom, in response to irrefutable evidence or withering cross-examination and with the whole community as witness.⁶² In the era of the lawyer drama, the law was certainly not depicted as perfect, as illustrated by the repeated false accusations of Mason's clients or the unjust conviction of Tom Robinson in *To Kill a Mockingbird*. But the solution to an imperfect law offered in the *Perry Mason* era was not the abandonment of law, but more and better law.⁶³

wake of *Perry Mason's* success featured prosecutors as outright villains and defense lawyers as heroes. *Id.* at 254 (discussing the television shows *The Defenders*, *Cain's Hundred*, and *Arrest and Trial*). Indeed, the period from 1960 to 1968 featured a remarkably small number of traditional crime and cops-and-robbers dramas.

⁵⁶ 372 U.S. 335, 342 (1963) (holding that the Sixth Amendment right to assistance of counsel is a fundamental right incorporated by the Fourteenth Amendment's due process clause).

⁵⁷ 377 U.S. 201 (1964).

⁵⁸ 378 U.S. 478 (1964).

⁵⁹ 391 U.S. 145, 149 (1968) (holding that the right to trial by jury is a fundamental right incorporated by the Fourteenth Amendment's due process clause).

⁶⁰ See, e.g., *Prime Time Law: Fictional Television as Legal Narrative*, N.J. LAW., Oct. 1998, at 34 (reviewing PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE (Robert Jarvis & Paul Joseph eds., 1998) (noting that "Perry Mason's success was . . . a function of what the public wanted to believe about its lawyers in that time").

⁶¹ See Stark, *supra* note 55, at 230 (arguing that "it would be . . . foolish to pretend that [*Perry Mason*] played no role at all" in the Warren Court's criminal procedure decisions).

⁶² See *id.* at 249 (describing the "formulaic" structure of *Perry Mason*, in which every episode concluded with Mason putting on a string of witnesses that "forced the real culprit to confess in the courtroom").

⁶³ See LENZ, *supra* note 35, at 70 (noting that the message of *To Kill a Mockingbird* is "that law needs to be strengthened as an instrument of justice," a message that is "consistent with the liberal model of justice").

The need for more and better law is precisely what *Miranda* sought to deliver. But if *Miranda's* spin on interrogation was not truly original,⁶⁴ its true genius, and perhaps what made it so controversial, was its wholesale inversion of the semiotics of interrogation. Hollywood writers "worth their salt" have always known that credible drama demands congruence between plot and character, as have sophisticated judges and lawyers. In *Miranda*, Warren sought to bolster the credence of the Court's attempt to reshape interrogation law by presenting the story of interrogation from the perspective of the suspect rather than the police. In this respect, he followed the teaching of Peter Fonda's character in *12 Angry Men*, in which Fonda explains that he does not share his fellow jurors' initial inclination to convict the defendant because he "chose to see the case from the perspective of the defendant rather than the prosecution."⁶⁵ By narrating the process of interrogation by recounting the tricks described in police interrogation manuals, *Miranda* deftly inverted the traditional roles of criminal and cop. By emphasizing the ploys used by interrogators to induce suspects to confess, Warren cast the police as the bad guys and suspects not as "criminals" but rather isolated, fearful, and helpless victims.⁶⁶

Not only did *Miranda* shift perspective on familiar character roles, it also inverted traditional metaphors of light and darkness in the criminal law iconography. If in film noir the hot lights were a metaphor for the act of probing the dark recesses of the criminal mind—inevitably exposing the criminal's secrets to view—in *Miranda*, interrogation itself became a kind of virtually "criminal" secret, and the interrogation room a place where "police violence and the 'third degree' flourished."⁶⁷ Occurring unrecorded, in private, and thus eluding our scope of

⁶⁴ *Miranda*, of course, was not the first Supreme Court case to castigate police interrogation or to contrast it unfavorably with public, open-court proceedings. Beginning with Justice Black's decision in *Ashcraft*, the Court grew increasingly critical of high-pressure police interrogation tactics that diverged from courtroom standards. Justice Frankfurter, for instance, wrote in *Watts v. Indiana* that "[t]o turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process." 338 U.S. 49, 54 (1949).

⁶⁵ LENZ, *supra* note 35, at 64.

⁶⁶ George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: "Embedded" In Our National Culture?*, in 29 CRIME & JUST. 203, 217 (Michael Tonry ed., 2002) ("Somehow, suspects gained a measure of the Court's sympathy between *Lisenba* and *Miranda*. Somehow, the police had become authoritarian rather than simply overzealous."); Gerald Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1447, 1472 (1985) (noting that although previous Supreme Court cases viewed the arrestee "as a hardy suspect—unwilling to confess and able to resist police questioning for hours without having his will overborne," *Miranda* portrayed arrestees as easily manipulatable persons).

⁶⁷ *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

understanding, the interrogation room became the procedural equivalent of the Freudian unconscious—calling forth for a different sort of confession.⁶⁸ *Miranda's* solution was to expose interrogation's own dark secrets to public scrutiny, and in so doing to "interrogate" interrogation itself.⁶⁹

Ultimately, this narrative move may not have been possible without the cover provided by the pop culture tropes of the period. The interplay between the Supreme Court's interrogation jurisprudence and popular culture's changing depiction of the role of lawyers, police and suspects is hard to pin down. It may be, however, that just as the creators of *Perry Mason* needed Justices Black and Frankfurter to lay the groundwork that would make Mason a compelling character, Chief Justice Warren needed *Perry Mason* to establish the cultural preconditions necessary for the large-scale transformation of legal culture he so obviously envisioned.

In any event, Justice Harlan's dissenting opinion in *Miranda*, which offered as a rejoinder to Warren's narrative the assertion that "peaceful interrogation is not one of the dark moments of the law,"⁷⁰ suggests that Warren's semiotic inversion did not pass wholly unnoticed. As the dissenters pointed out, the majority opinion reflected not merely a concern with the circumstances in which some confessions are made, but rather "a deep-seated distrust of all confessions."⁷¹ To those who accepted the film noir image of interrogation as a necessary process of subjecting the suspect to questioning under the "hot lights," as did Justice Harlan, *Miranda* was a wolf in sheep's clothing.⁷² It threatened inevitably to "return a killer, a rapist or other criminal to the streets and to the environment which produced

⁶⁸ *Id.* at 445. Chief Justice Warren imagines what happens during interrogation by recounting the interrogation tactics detailed in training manuals.

⁶⁹ At least in a literary sense, the *Miranda* warnings perform an illuminative function very different from the interrogation room lights in the classic films noir. Not only do they educate suspects about their rights, but they also highlight, emphasize, and focus suspects on those rights. Repetition of the warnings makes it plain to the suspect that the decision to speak or remain silent is a choice with serious consequences. *Miranda* further illuminated the interrogation room chamber by opening its door to defense counsel. Knowledge of rights and the presence of counsel, the majority clearly hoped, would allow a fearful defendant to confront his interrogators with the assistance of law and thereby "to tell his story without fear." *Id.* at 466. Either by teaching suspects their rights, by opening up the interrogation room to the watchful eye of counsel, or by shifting the locus of the defendant's questioning from the interrogation room to the courtroom, *Miranda* was intended to dissipate the darkness surrounding the interrogation process, permitting truth to prevail in the courtroom—not in the backroom.

⁷⁰ *Id.* at 517 (Harlan, J., dissenting).

⁷¹ *Id.* at 537 (White, J., dissenting).

⁷² Like Justice Jackson before him, Justice Harlan accepted that some pressure in the police interrogation room was essential to the revelation of truth. See *id.* at 515 (Harlan, J., dissenting).

him, to repeat his crime whenever it pleases him."⁷³ It also posed a veiled threat to every Hollywood screenwriter who needed to find a realistic way to allow his or her characters to confess in accord with the rules of dramatic narrative.

III. *DRAGNET* AND *MIRANDA*'S POPULAR DISSEMINATION

It did not take long for *Miranda* to travel from slip opinion to television script. Less than a year after the decision was handed down, the *Miranda* warnings became a regular component of Sergeant Joe Friday's arrest spiel on the television cop show, *Dragnet*. *Dragnet*, the brainchild of its star and creator Jack Webb, dramatized the day-to-day police work of the Los Angeles Police Department ("LAPD"). The show, which first aired on radio and then ran on television from 1952–1957, and was revived in 1967 for a second run through 1970, purported to dramatize real cases drawn from the files of the LAPD. Because of Webb's insistence on realism—real LAPD detectives served as technical advisers to the show⁷⁴—the new *Miranda* rules were duly incorporated into the stories.

Given *Dragnet*'s tremendous popularity, the *Miranda* warnings quickly entered the American consciousness, but to what end? Friday's matter-of-fact delivery of the *Miranda* warnings undoubtedly suggested that law enforcement officers were cognizant of their legal duties and scrupulously respectful of civil rights. Detached, taciturn, devoted to his job and little else, Friday presented a calm and reassuring portrait of American law enforcement—an image likely to be comforting to the public and to television sponsors hoping for an antidote to the sense of a growing crime threat and perceptions of increasing disorder on the streets in the late 1960s.⁷⁵ *Miranda*'s apparently easy incorporation into the arrest and police questioning rituals might also have given *Dragnet* viewers the impression that respecting civil rights in general, and *Miranda* in particular, was not a difficult ordeal for the police. In addition, and perhaps most importantly, *Dragnet*'s treatment of *Miranda* suggested that the new procedures were in any event largely symbolic. On any typical episode, the arrest proceeded as follows: First, Friday or his partner would recite the *Miranda* warnings. Second, as soon as the warnings were given, Friday or his partner would launch into questioning. Third, in response, suspects

⁷³ *Id.* at 542 (White, J., dissenting).

⁷⁴ LENZ, *supra* note 35, at 86.

⁷⁵ See Stark, *supra* note 55, at 246 ("In broadcasting, . . . there is a key intermediary, the sponsor, who controls all air time, either directly or indirectly. *Dragnet*'s portrayal of the police undoubtedly warmed the hearts of advertisers, who found a pro-establishment sentiment more in keeping with their conservative political views.").

volunteered (often incriminating) answers.⁷⁶ On *Dragnet*, recitation of the warnings did nothing to change the essential nature of the custodial encounter.

In retrospect, Hollywood's decision to cast *Miranda* in this symbolic and ineffectual manner is not surprising; the dramatic demand for confession was as great after *Miranda* as it had been before. An interesting question, however, is whether Joe Friday's taciturn treatment of *Miranda* had any effect in actual interrogation rooms. Given that *Miranda* itself has had little, if any, effect on the confession rate, perhaps Joe Friday did teach a lesson to police and their suspects.⁷⁷ Several studies of police interrogation after *Miranda* have documented that police typically deliver *Miranda* in essentially the same droning monotone as Joe Friday, a tactic calculated to minimize the perception that the stakes have increased. What happens in real life is thus essentially what happened on *Dragnet*: the warnings are read, and the suspect talks.⁷⁸

Dragnet, of course, depicted the criminal justice system from the perspective of law enforcement officers. As such, it demanded that viewers empathize with cops, not criminals. Nonetheless, the relatively peaceful, matter-of-fact, just-the-facts-ma'am policing style shown on *Dragnet* drew from and suggested a system that was fundamentally at peace with the law. On *Dragnet*, the police were competent and disinterested, they caught the bad guys, and they played "by the book." Consistent with the values of Perry Mason and the lawyer dramas of the earlier part of the decade, *Dragnet* presented "a formal, idealistic, civics conception of the criminal justice system. The police and judges are still on the same side," and "law, order, and justice are still closely related."⁷⁹

⁷⁶ See, for example, *Dragnet: The Kidnapping* (NBC television broadcast Jan. 26, 1967) (or virtually any episode, where suspects make incriminating statements immediately after receiving the warnings).

⁷⁷ See Yale Kamisar, *On the Fortieth Anniversary of Miranda: Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. CRIM. L. (forthcoming 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944546#PaperDownload, at 23 (observing that "[w]ith one conspicuous exception, there is wide agreement that *Miranda* has had a negligible impact on the confession rate").

⁷⁸ See Thomas & Leo, *supra* note 66, at 237 (noting that empirical studies indicate that "despite the fourfold warnings, suspects frequently waived their *Miranda* rights and chose to speak to their interrogators. Some researchers attributed this largely unexpected finding to the manner in which detectives delivered the *Miranda* warnings, while others attributed it to the failure of suspects to understand the meaning or significance of their *Miranda* rights").

⁷⁹ LENZ, *supra* note 35, at 89.

IV. THE POST-MIRANDA ERA

Joe Friday's stoic acceptance of *Miranda*, however, hardly reflected the storm of controversy that surrounded *Miranda* in the "real world." In Congress and in police departments across the nation, *Miranda* was greeted with outrage and hostility.⁸⁰ Although that hostility was not reflected on *Dragnet*, during the 1970s, television crime fighters grew increasingly jaded and dismissive both of *Miranda* and of the need more generally to protect the civil rights of criminal suspects.⁸¹ Indeed, Jack Webb's sequel to the *Dragnet* series—*Adam-12* (which ran from 1968–1975)—regularly featured uniformed LAPD officers complaining about the Warren Court's criminal procedure decisions.⁸² By the time *Kojak* debuted in 1976, the dominant attitude of cops toward law had undergone a total transformation from the *Perry Mason/Dragnet* era.

Kojak, played by bald-is-beautiful Telly Savalas, was a hard-nosed, "blue-collar, ethnic cop" who "was tougher than his predecessors, as well as more violent, unyielding, and obsessed with the way criminals were 'getting off' because the police were not allowed to do their job properly."⁸³ In stark contrast to Detective Friday's stoic and dutiful delivery of the *Miranda* warnings to arrestees, *Kojak* glibly announced to his captives in a first-season episode: "You guys all know your rights, you don't have to say anything."⁸⁴ In another episode, a suspect interrupted his interrogation by asserting that he would like a lawyer, and *Kojak* retorted, "Doesn't everybody?" The interrogation continued without a lawyer.⁸⁵ As *Kojak* demonstrates, by 1976, television cop shows had taken a turn away from the bland, just-the-facts-ma'am style of *Dragnet* and

⁸⁰ See Thomas & Leo, *supra* note 66, at 205 (noting that "[t]he political reaction was swift and clear," including passage of legislation in 1968 purporting to repeal the decision); *id.* at 214 ("The instrumental fear was that warning suspects of a 'right to remain silent' and then promising a free lawyer to stand between them and the police would cause the rate of successful interrogations to plummet and the crime rate to soar.").

⁸¹ Buoyed in part by the popular success of *Dragnet* and the networks' insatiable appetite for popular programming, the era of the television police drama dawned with a vengeance. During the next several years, the networks debuted a number of new police shows, including popular hits such as *The Mod Squad* (ABC television broadcast 1968–73), *Adam-12* (NBC television broadcast 1968–75), and *Hawaii-Five-0* (CBS television broadcast 1968–80), and countless more detective shows, from *Columbo* (NBC television broadcast 1968) to *Baretta* (ABC television broadcast 1975–78).

⁸² See LENZ, *supra* note 35, at 87.

⁸³ Stark, *supra* note 55, at 262–63.

⁸⁴ *Kojak: Knockover* (CBS television broadcast Nov. 14, 1973). Following this truncated *Miranda* warning, *Kojak* grabs two suspects for an arrest photo and asks them to "say cheese."

⁸⁵ Stark, *supra* note 55, at 264.

stopped doing things “by the book.”⁸⁶ Not only did Hollywood cool to *Dragnet’s* (and *Miranda’s*) sense of procedural regularity, Hollywood affirmatively embraced the perspective of the dissenters in *Miranda* who predicted not only that *Miranda* would return rapists and killers to the streets, but that it would harm “those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined.”⁸⁷

Dirty Harry was the first of several major Hollywood films to dramatize that prediction.⁸⁸ In *Dirty Harry*, Clint Eastwood starred as Detective Harry Callahan, a rogue cop with blatant disdain for the law but a “good heart.” Merciless to the bad guys, Dirty Harry is precisely the kind of cop you want on your side when the going gets tough. Rich in a symbolism of political and cultural criticism, the set-up of the movie involves the San Francisco police department’s failing efforts to catch a serial killer loose on the streets of San Francisco. The killer has kidnapped a young girl and has demanded ransom. The Mayor, somewhat like Neville Chamberlain in 1939, agrees to appease the killer and pay the ransom. Although Detective Callahan is scornful, he consents to deliver the ransom money (although obviously he has no intention of obeying orders). After a vicious battle that almost costs Callahan his life, Dirty Harry tracks down and corners the killer in an empty football stadium. Displaying no mercy, Callahan coldly shoots the fleeing killer in the leg, and in a haunting and violent scene, demands to know where the kidnapped girl is. When the killer fails to reply, Callahan grinds his heel into the killer’s mangled limb, provoking a desperate cry: “I want a lawyer . . . I have a right to a lawyer . . . I have rights . . .” The scene fades to black while the wounded killer howls like an animal in pain.

The film immediately cuts to Detective Callahan watching the girl’s dead body being retrieved from a hole, confirming that his act of torture succeeded in inducing the killer to confess. Then, in the next scene, Callahan has been called into his boss’s office and arrives expecting congratulations. Instead, he is berated for his use of unlawful methods, informed that his search violated the suspect’s *Miranda* and Fourth Amendment rights,

⁸⁶ *Id.* (“On television, the police of the 1970’s [sic] grew increasingly more contemptuous of the Constitution.”).

⁸⁷ *Miranda v. Arizona*, 384 U.S. 436, 542 (1966) (White, J., dissenting).

⁸⁸ *DIRTY HARRY* (Warner Bros. 1971). See also Charles Bronson in *Death Wish* (Paramount Pictures 1974), described as a “key film in the vigilante cycle,” and a mutation of “cop movies like *Dirty Harry* into an uncomfortable lynch mob attitude.” *THE BFI COMPANION TO CRIME* (Phil Hardy ed., 1997).

and told that the evidence is inadmissible in court and that the killer would go free.⁸⁹

The interrogation scene in *Dirty Harry* contrasts vividly, to say the least, with those in *Laura* and *Dragnet*. Not only does the film openly accuse the law of coddling vicious criminals to the detriment of public safety, but it seems to challenge the very premise of police regulation of interrogation. *Dirty Harry's* political message is hardly subtle: the law is the problem, not the solution, because it creates a wedge between the forces of justice that need information and the criminals who seeks to conceal it.⁹⁰ And what is the law? What are the rights that let serial killers get off the hook for their crimes? Largely, the film suggests, *Miranda*, and particularly its promised right to counsel. *Dirty Harry* makes *Miranda* an icon of all that is perverse and ineffective in the justice system. *Dirty Harry's* torture of the suspect, though portrayed with brutality, is ultimately meant to seem justifiable as a matter of simple justice, even if not legal in the eyes of the lawyers. In this manner, *Dirty Harry* not only takes on *Miranda*, it harkens all the way back to *Brown v. Mississippi*.⁹¹ If law undermines the ability of cops to get confessions from clearly guilty suspects, does it not also undermine the possibility of justice?

Like *Dragnet*, the cop shows of the 1970s told their stories from the point of view of the police. As the cop shows became more sophisticated, the characters of the police men and women they featured gradually grew increasingly textured. But the criminals of this era, unlike their film noir predecessors, remained simple caricatures: animals so lost in their lust to do evil that it rarely mattered what fate befell them—arrest, shooting, or death by car crash—as long as they were ultimately tamed and subdued.⁹² In *Dirty Harry's* climactic interrogation

⁸⁹ In the end, Callahan disobeys a direct order to stay away from the case, saves a busload of children abducted by the killer, and delivers proper retribution. See IMDb.com, Plot Summary for *Dirty Harry* (1971), <http://imdb.com/title/tt0066999/plotsummary> (last visited Feb. 27, 2007).

⁹⁰ See William Ian Miller, *Clint Eastwood and Equity: Popular Culture's Theory of Revenge*, in *LAW IN THE DOMAINS OF CULTURE*, *supra* note 8, at 161, 174 (noting that films like *Dirty Harry* and *Death Wish* depict *Miranda* warnings and other legal rules as symbols of the state's failure to deliver real justice; that is, they depict the loss of faith in public institutions).

⁹¹ 297 U.S. 278, 285–86 (1936) (holding that a confession procured through torture violates the Fifth Amendment privilege against self-incrimination, and further, that this applies to the states).

⁹² The villain in *Dirty Harry* was as extreme an example of this as possible, a “psycho hippie” who “rapes and buries alive a teenager, shoots innocent people at random, tries to blackmail the whole city and finally terrorises [sic] a busload of children.” *THE BFI COMPANION TO CRIME*, *supra* note 88, at 108. This phenomenon might be explained in part by an increasing emphasis on the portrayal of cops in contrast to film noir's focus

scene, Detective Callahan does not question a person, he breaks an animal.

Released in 1971, *Dirty Harry* anticipated the Burger and Rehnquist Courts' campaign to scale back *Miranda*. Numerous factors undoubtedly contributed to the backlash against *Miranda*. Most obviously, conservative judicial appointments from the Nixon, Reagan, and Bush administrations replaced liberals who were sympathetic to the Warren Court's progressive goals. But it is likely that pop culture's attack on law's benign image, an attack that necessarily undermined the Court's own legitimacy, further encouraged the Court's retreat. After all, the Justices, lacking both purse and sword, "must rely on public support for the implementation of their policies."⁹³ Here, it is Hollywood that is clearing space for a post-Warren Court retrenchment by reshaping the iconography, not only of interrogation, but of law itself. In any event, with only a few exceptions,⁹⁴ what followed *Dirty Harry* was a barrage of decisions that whittled down the scope and effect of *Miranda* and, at the same time, the costs to police of using pressure tactics to induce confessions. The first, and perhaps the most important, of these decisions was handed down the same year *Dirty Harry* was released. In *Harris v. New York*, the Court held that statements obtained in violation of *Miranda* could be used for impeachment purposes.⁹⁵ *Harris* undercut the hope that *Miranda* would provide the foundation for an interrogation-room code of conduct, and gave police ample incentive to ignore *Miranda* when doing so proved convenient. It also set the tone for the decisions to follow. Three years later, *Michigan v. Tucker* introduced the theory of *Miranda* as a "prophylactic" rule.⁹⁶ In 1979, *North Carolina v. Butler* established the critical clarification (really, partial overruling) of *Miranda*'s waiver rules, relieving police of the supposed heavy burden of showing that a suspect expressly waived his *Miranda* rights, so long as the facts and circumstances show that an implicit waiver was

on criminals. But even prominent films that did give villains a high profile, such as *THE SILENCE OF THE LAMBS* (Orion Pictures Corporation 1991), tended to depict the villains as grotesqueries, not as normal human beings gone astray. See IMDb.com, Plot Summary for *Silence of the Lambs* (1991), <http://imdb.com/title/tt0102926/plotsummary> (last visited Feb. 27, 2007).

⁹³ VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 5 (2003).

⁹⁴ See, for example, *Brewer v. Williams*, 430 U.S. 387 (1977), which illustrated almost precisely the specter that *Dirty Harry* dramatized.

⁹⁵ 401 U.S. 222, 225 (1971).

⁹⁶ 417 U.S. 433, 445–46 (1974) ("[T]he police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege.").

knowing and intelligent.⁹⁷ Numerous decisions in the 1980s and 1990s only further watered down *Miranda*'s substantive protections.⁹⁸

By the time *Dickerson* came before the Court, *Miranda* had been broken—much like *Dirty Harry*'s serial killer. As the Court somewhat euphemistically stated, “[O]ur subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling”⁹⁹ The notion that *Miranda* would make obsolete the backroom interrogation, that confessions would be made in the courtroom, if at all, or for that matter, that suspects needed much legal protection from their interrogators was long gone.¹⁰⁰ *Miranda* as legal formalism, however, was more entrenched than ever both in popular culture and in legal practice. Police departments had grown accustomed to *Miranda*, and even began to see its charm.¹⁰¹ While *Miranda*—especially in its watered down post-*Dirty Harry* incarnation—placed few real constraints on police interrogation, it shielded interrogation practices from substantive scrutiny.¹⁰² As long as *Miranda*'s formal warnings and waiver requirements were met, any confession obtained thereafter was almost always been treated as voluntary.¹⁰³

⁹⁷ 441 U.S. 369, 373 (1979).

⁹⁸ See *Oregon v. Hass*, 420 U.S. 714, 722–23 (1975) (expanding *Harris v. New York*'s exception to permit the use of statements obtained after police disregarded the defendant's request for counsel for impeachment purposes); *Jenkins v. Anderson*, 447 U.S. 231, 240–41 (1980) (permitting the use of pre-arrest silence for impeachment purposes); *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (permitting the use of post-arrest silence for impeachment purposes); *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (holding that *Miranda* warnings are not required prior to roadside questioning during a routine traffic stop); *New York v. Quarles*, 467 U.S. 649 (1984) (creating a “public-safety exception” to *Miranda*); *Oregon v. Elstad*, 470 U.S. 298 (1985) (holding that the fruit of the poisonous tree doctrine does not apply to *Miranda* violations), *Moran v. Burbine*, 475 U.S. 412 (1986) (holding that a suspect's waiver of *Miranda* rights was knowing and voluntary despite failure of the police to inform him that a lawyer was attempting to contact him during interrogation); *Colorado v. Spring*, 479 U.S. 564 (1987) (holding that the police are not obliged to inform suspect of specific crimes that are subject of interrogation); *Illinois v. Perkins*, 496 U.S. 292 (1990) (holding that an undercover police officer is not required to administer warnings to a suspect interrogated in a jail cell); and *Davis v. United States*, 512 U.S. 452 (1994) (holding that ambiguous invocations of *Miranda* rights may be ignored).

⁹⁹ *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

¹⁰⁰ See Kamisar, *supra* note 77, at 25 (“[T]he *Miranda* that had survived the Burger Court-Rehnquist Court gauntlet . . . was a far cry from what might be called the ‘original *Miranda*.’”).

¹⁰¹ See Thomas & Leo, *supra* note 66, at 252–53 (noting that “for the most part law enforcement supports *Miranda*” and pointing out that “none of the major police lobbying groups . . . joined in then[-]Attorney General Edwin Meese’s call to overrule *Miranda*” in the mid-1980s).

¹⁰² Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1218 (2001).

¹⁰³ *Id.*

Perhaps because the post-*Miranda* crime shows have focused so heavily on cops, the dramatic function of confession has assumed an ever more instrumental quality, at least on the cop shows. Confession undoubtedly did little for the killer's soul in *Dirty Harry*, but it did permit police to find the abducted victim. This instrumentalism might be seen as a reflection of deeper societal attitudes toward criminals over the course of a three-decade period that saw the incarceration rate quadruple since *Dirty Harry* was released.

By the 1990s, *Miranda*'s iconization was complete. The *Miranda* warnings indeed had become "embedded" in popular culture. Today, a whole complex of narrative events signifying a character's arrest can be concisely depicted by a writer merely with the image of a police officer taking physical custody of a suspect and intoning: "You have the right to remain silent" At the same time, a new brand of television cop shows such as *Homicide* and, in particular, *NYPD Blue*, have constructed their basic narrative formulas around the suspect's interrogation. As such, the suspect's decision to forgo his or her right to counsel and to talk to police has taken a central place in the storyline.¹⁰⁴ For better or worse, the reading of *Miranda* warnings is no longer the mere formalism it was on *Dragnet*. Indeed, because the narrative in these shows is driven by the unfolding interrogation, and the dramatic catharsis almost invariably arrives in the form of the suspect's confession, the *Miranda* rights serve, alongside the suspect's own mental and psychological prowess, as the foil that creates the story's dramatic tension.

Thus over the course of nearly 70 years, the imagery of interrogation seems to have traveled a circle in four curvilinear steps. In the pre-*Miranda* period of the 1930s and 1940s, police use of interrogation room pressure was normal and expected. The 1950s and 1960s witnessed an accelerating rejection of pressure tactics by the Supreme Court and an era of popular culture which increasingly, albeit briefly, held up lawyers as heroes and law as a force of both truth (*Perry Mason*) and order (*Dragnet*). These developments laid the foundation for the classic "*Miranda* era," which was characterized by a popular, albeit temporary, inversion of the traditional demonization of the criminal and glorification of the cop, a corresponding celebration of formal law and of criminal defense lawyers in particular, and which saw the mass public dissemination of the warnings on

¹⁰⁴ See Bandes & Beermann, *supra* note 13, at 8 (1998) (noting that "[t]he unifying principle in [*NYPD Blue*] interrogations is the need to convince suspects not to consult a lawyer").

shows like *Dragnet* and *Adam-12*. Beginning with President Nixon's election in 1968, however, the *Miranda* era gave way to a post-*Miranda* period characterized by an increasing backlash against the Warren Court agenda. In the post-*Miranda* world, *Miranda* was targeted by critics and reactionaries and became an icon of the law's perceived tenderness toward criminals. And at the same time that *Miranda* became an object of derision in the crime dramas of the 1970s and 1980s, it was slowly but steadily gutted by the Supreme Court in a long series of decisions that sought to make compliance with the *Miranda* rules simple and to minimize the consequences of noncompliance.

By 1999, *Miranda* had been neutered as an instrument of progressive legal regulation even while it had become the symbol of constitutional rights in the popular imagination. Viewed from this vantage point, the Court's decision in *Dickerson* was a fait accompli. Having cut *Miranda* down to manageable size, a conservative Court had nothing left to gain by formally overruling *Miranda*. But it stood to lose an inestimable amount of popular esteem should it purport to withdraw from the citizenry the most familiar set of legal rights known to them. It perhaps even risked losing "the Nation's confidence in the judge as an impartial guardian of the rule of law."¹⁰⁵

Meanwhile, contemporary cop shows have subtly altered *Miranda* by making it part and parcel of the drama of interrogation. If *Miranda* is no longer vilified as the enemy of the beat cop, neither is it his friend.¹⁰⁶ Still, it remains as ineffective a safeguard for preventing confessions as ever. In retrospect, this process, too, seems to have been inevitable. *Miranda's* purpose—the regulation of custodial interrogation—strikes such a sensitive narrative nerve that its neutralization was a dramatic imperative. To comply with the demands of verisimilitude, screenwriters had no choice but to incorporate *Miranda* into the dramatic representation of the interrogation moment. At the same time, the overarching narrative demands of the format continued to require confessions. As a result, although *Miranda* has been widely publicized in pop culture, it has been portrayed in a manner that underscores its impotence; in popular culture, *Miranda* warnings or no, the suspect always confesses.

Finally, although *Miranda's* post-*Dragnet* decline can be understood partly as the work of an increasingly conservative

¹⁰⁵ Bush v. Gore, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting).

¹⁰⁶ See Bandes & Beermann, *supra* note 13, at 7 (noting the willingness of *NYPD Blue* characters to ignore the Constitution when it is necessary to get the bad guys).

Court, a response to a continuing explosion in the crime rate, and a pervasive cultural cynicism fueled by Vietnam and Watergate, it also must be understood in part as an almost inevitable aesthetic development. After all, films and television shows are first and foremost entertainment vehicles; their function is to titillate and amuse, all with the intent of maximizing viewership from the right demographic and, a fortiori, network and studio revenue. Given the aesthetic demands of popular drama, *Dragnet*-style rectitude inevitably had to give way to something more interesting. As one writer in the 1970s complained, "Our whole show has to come to a dead stop every week while the cop politely reads the crook his rights."¹⁰⁷ And as another added, "This civil rights business may be all right in real life but it makes miserable drama."¹⁰⁸

CONCLUSION

The *Dirty Harry*-style paranoia eventually faded, but it left in its wake a pop culture version of *Miranda* in which the warnings have become an icon representing the whole awkward apparatus of courts, law, and constitutional regulation of criminal justice. To many, these rights undoubtedly "stand for" the very idea of constitutional law.

Because the *Miranda* warnings—routine or reviled—have become synonymous with constitutional law—and thus with the Supreme Court itself—it is no surprise that the Court declined to eradicate them in *Dickerson*. Doing so would have amounted to eradication of law itself in the eyes of popular culture. The Court's institutional interest in preserving its own popular status, and in protecting a legal regime that, thanks to the media, looks like it bends over backward for defendants, while in reality (as a result of a sustained judicial attack on its fundamental functions) provides defendants very little legal protection, allows a conservative Court to have its cake and eat it, too.

In sum, just as the media necessarily creates and depends upon signs, symbols, and icons, and manipulates them to serve its basic purposes—to tell its stories effectively and efficiently, to keep viewers engaged, and to keep sponsors happy—in narrating and explicating legal decisions, courts do precisely the same

¹⁰⁷ Stark, *supra* note 55, at 261 (quoting Gunther, *TV Police Dramas are Teaching Civil Rights to a Generation of Viewers*, TV GUIDE, Dec. 18, 1971, at 9). Perhaps the underlying sentiment of *Dickerson* is just the opposite, that this civil rights business may make good drama, but it is pretty miserable in real life.

¹⁰⁸ *Id.* (quoting Gunther, *TV Police Dramas are Teaching Civil Rights to a Generation of Viewers*, TV GUIDE, Dec. 18, 1971, at 9).

thing, with their own institutional interests dictating the manner in which those signs will be treated. Certainly, the semiotics of interrogation, followed over time, elucidates important changes in popular and legal assumptions about a variety of aspects of criminal justice, including the identity of criminals, the causes of criminality, the purposes of interrogation, and the proper role of interrogators. The fact that popular and legal iconography has moved along the same trajectory suggests not only that popular culture draws its source material from the courts, but also that the courts narrate, and perhaps resolve, legal problems based in no small part on iconographic assumptions drawn from popular culture and the media as well.

Be Careful What You Wish For: Copyright's Campaign for Property Rights and an Eminent Consequence of Intellectual Monopoly

*Ian McClure**

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INTRODUCTION

Two competing theories attempt to define the essence of intellectual property. One theory holds that intellectual property rights are no different than the ownership of tangible private property, such as houses and cars.¹ The contrasting theory is that the right to own an idea is quite different from the property rights afforded to ownership of physical property.² Proponents of this latter argument generally disagree with intellectual property laws, claiming that they effectuate “intellectual monopolies” in an economy that should instead encourage competition.³ Part I of this Comment explains the problems with characterizing intellectual property as tangible private property. An understanding of each rationale is necessary to comprehend each side’s justification for protecting, or not protecting, intellectual property rights.

Part II of this Comment highlights the historical campaign for property rights conducted by copyright proponents. It outlines the path toward absolute and perpetual copyright protection that is currently being taken both by Congress and the Courts. Furthermore, it stresses the blatant disregard for both the intended meaning of the Constitution and the importance of free and unobstructed dissemination of information.

To show exactly what this campaign means for creative and economic efficiencies, Part III parallels the current copyright legal model with implications that violate the honorable intentions of antitrust law. Here, an analysis of the media industries is undertaken, specifically calling attention to empirical data of market monopolization. Furthermore, government-granted monopolies generate undue market power, causing market fragmentation and consumer frustration when copyrighted products are tied with incompatible patented technology. Finally, Part III emphasizes the internal burdens that intellectual property laws, and more specifically copyright laws, place on the creative process.

Part IV discusses recent changes in the law of eminent domain, in evaluating the Fifth Amendment’s application to the framework of copyrights. Although the idea has never been implemented due to strong opposition, this Part explains that intel-

1 Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 73 S. CAL. L. REV. 1161, 1167 (2000) (“Intellectual property advocates often stress that intellectual property is property, with dignity and worth equal to that of tangible property.”).

2 Michele Boldrin & David K. Levine, *Property Rights and Intellectual Monopoly*, at para. 2, <http://www.dklevine.com/general/intellectual/coffee.htm> (last visited Apr. 8, 2007).

3 *Id.* at para. 9.

lectual property, and more specifically copyrights, are at risk of becoming subject to the government's power of eminent domain. State governments have the constitutional authority to undertake this action, and the U.S. Supreme Court has ensured state immunity from suit for infringing certain intellectual property rights. Through a proposed system of compulsory licensing and periodical payments of just compensation, the market inefficiencies caused by perpetual copyright protection will be alleviated, and the incentive to create will remain intact.

Part IV discusses the real possibility of eminent domain's application to copyright, and should be considered as a warning to copyright proponents. Thus, it does not zealously advocate for broad government power over property, whether that property is tangible or intangible. Instead, Part IV should be understood to proffer one possible resolution, albeit unfavorable to copyright owners, to the problems that arise from copyright's campaign for perpetual protection. Copyright proponents should take heed to this suggested path and realize that their staunch position for property rights may lead them to unwanted consequences. Indeed, the very position that they take opens the door for the government to apply its eminent domain power over copyrights.

I. INTELLECTUAL PROPERTY OR GOVERNMENT-GRANTED MONOPOLY: WHY THE INTANGIBLE SHOULD NOT BECOME TANGIBLE

A. Theory One: Intellectual Property

The Copyright Clause of the U.S. Constitution secures for authors "the exclusive Right to their respective Writings," but only "for limited Times."⁴ Literalists, while disregarding the language "for limited Times," equate such exclusivity to that which is afforded by property laws to owners of real and personal private property.⁵ Proponents make a case that an idea is "property," as that word is read and understood in property class as a first year law student.⁶ Thus, "[t]he argument exploits an ambiguity in the common usage of the word 'idea' to incorrectly equate the usual meaning of the word 'property' and its specific meaning in 'intellectual property.'"⁷ Advocates for the private property argument ("Private Property") tend to be "rent-seekers with a vested interest in the existing law."⁸ It is no surprise that the most recent legislation pushing copyright protection closer to

⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵ Volokh, *supra* note 1, at 1167.

⁶ *Id.*

⁷ Boldrin & Levine, *supra* note 2, at para. 2.

⁸ *Id.*

perpetual property rights⁹ was backed by notorious copyright owners such as Disney and Bob Dylan.¹⁰ Understandably, owners of moneymaking assets will want those assets protected. Thus, it is the result of lobbying and rent-seeking motives that the term “intellectual property” has replaced that which only a generation ago was coined “copyright.”¹¹ Regardless of the motive for the campaign for Private Property, legislators have taken heed.¹²

Proponents of Private Property continue to rest their case on Locke’s Labor Theory,¹³ which creates the assumption that by mixing our labor with something, we make that thing our own. Thus, the application of intellectual property to this theory creates the following equation: mental labor plus other ideas equals private property. Accordingly, “[i]deas and expressions and inventions are all the product of mixing our labor, in this case our mental labor, with the common property of preexisting ideas and information.”¹⁴ It is a fundamental assumption that property rights, if recognized through a legal system, provide incentive to expend resources to improve that property.¹⁵ The argument follows that authors and inventors need incentive to create their works, and that without this incentive, innovation and invention would be no more. Pointing to the Copyright Clause in the Constitution, advocates latch onto legal positivism, claiming that the Framers promised to “promote the . . . Arts”¹⁶ by affording exclusive control over that which is original. Without such a guarantee, there would be no incentive to expend mental labor.¹⁷ There-

⁹ Copyright Term Extension Act, 17 U.S.C. § 302(a) (2000).

¹⁰ Jesse Walker, *How Intellectual Property Laws Stifle Popular Culture*, REASON, Mar. 2000, at 46, available at <http://www.reason.com/news/show/27635.html> (last visited Apr. 8, 2007).

¹¹ Gary Shapiro, President, Consumer Electronics Assoc., Remarks at the Cato Institute Conference: Copyright Controversies: Freedom, Property, Content Creation, and the DMCA, in *Copyrights and Property Rights*, CATO POLICY REPORT, July–Aug. 2006, at 17 (“[I]ntellectual property’ didn’t even exist a generation ago: it was just called copyright.”).

¹² *Id.* (“Copyright protection has also expanded immeasurably over the last three decades. Terms of protection are much longer. The original term was set in 1790 at 14 years. Congress has acted 13 times to expand the length of the copyright terms: 11 of those expansions were passed during the last 40 years.”).

¹³ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.”).

¹⁴ Jim Harper, Director of Information Policy Studies, Cato Institute, Remarks at the Cato Institute Conference: Copyright Controversies: Freedom, Property, Content Creation, and the DMCA, in *Copyrights and Property Rights*, *supra* note 11, at 15.

¹⁵ David K. Levine, Co-author of *Against Intellectual Monopoly*, Remarks at the Cato Institute Conference: Copyright Controversies: Freedom, Property, Content Creation, and the DMCA, in *Copyrights and Property Rights*, *supra* note 11, at 16.

¹⁶ U.S. CONST. art. I, § 8, cl. 8.

¹⁷ Thomas G. Field Jr., *What is Intellectual Property?*, FOCUS ON INTELLECTUAL PROPERTY RIGHTS 2 (2006), available at <http://usinfo.state.gov/products/pubs/intelprp/>

fore, this incentive is so necessary that intellectual property should be governed similarly to tangible private property.¹⁸ The creator of an original idea should be able to completely exclude all others from it, and should be able to possess, use, and transfer it as the owner sees fit. As one professor has stated,

Intellectually or artistically gifted people have the right to prevent the unauthorized use or sale of their creations, just the same as owners of physical property, such as cars, buildings, and stores. Yet, compared to makers of chairs, refrigerators, and other tangible goods, people whose work is essentially intangible face *more* difficulties in earning a living if their claim to their creations is not respected. Artists, authors, inventors, and others unable to rely on locks and fences to protect their work turn to IP rights to keep others from harvesting the fruits of their labor.¹⁹

B. Theory Two: Intellectual Monopoly

Opponents of Private Property distinguish intellectual property from private property.²⁰ The Constitution, the importance of the public domain, and the effect that intellectual property laws ostensibly have on economic efficiency all lend support to this argument.²¹ At the outset, this theory is more easily understood by defining the fundamental characteristics of tangible property and contrasting these inherent traits with those of intangible property.

Physical property is a scarce resource, and its use and possession is limited. Inherent in tangible things is the fact that two people cannot possess the same thing at the same time.²² Thus, the sale or transfer of physical property necessarily means that the prior possessor cannot use it anymore. Similarly, the execution of the right to exclude necessarily means that the owner will be the only one who can use it. Copying tangible goods is a limited process, because again, other tangible goods must be used as production materials.²³ “[P]roperty rights in tangible goods,” from an economics perspective, help facilitate efficient transactional interaction “in the context of scarcity.”²⁴ Without such

iprbook.pdf.

¹⁸ Volokh, *supra* note 1, at 1167.

¹⁹ Field Jr., *supra* note 17, at 2–3 (emphasis added).

²⁰ Boldrin & Levine, *supra* note 2, at para. 2.

²¹ The constitutional support and the importance of the public domain are analyzed in Part I. The effect of IP laws on economic efficiency is evaluated in Part III.

²² Harper, *supra* note 14, at 15 (“If I have an apple and you want to eat it too, we can’t both eat it without bumping our faces together and making quite a mess. In economic parlance, an apple is a rivalrous physical good. No two people can possess it at the same time.”).

²³ *Id.*

²⁴ *Id.*

property rights, transaction costs would be extremely high because resources such as time and energy would be spent ensuring exclusive possession and protection. Realistically, the market for transferring tangible goods becomes an arena for animalistic behavior.

In contrast, intellectual property is not similarly scarce. The creator of an idea may still enjoy that idea exclusively, but only if he or she does not reveal it. He or she may, however, communicate that idea to another person, and still retain an identical copy; the original copy.²⁵ However, the transferee's copy "leads an existence entirely independent of [the transferor's] copy."²⁶ The new copy may be limitlessly transferred or duplicated without affecting the original copy. Consider the following scenario:

You teaching me the law is a production process through which at least three private, rivalrous, and excludable inputs (your idea, your time, and my time) generate a private, rivalrous, and excludable output: my knowledge of the law . . . If you were to die, my copy of the idea of the law . . . would continue to exist, and would be at least just as useful as it would have been had you remained alive. My copy of the law . . . possesses, therefore, economic value. Similarly, your copy of the law . . . also possesses economic value.²⁷

An idea is not a public good, and may be excludable. Yet, an idea may multiply without depleting resources, and once it is disclosed, it becomes public.²⁸

The argument against Private Property, then, insists that intellectual property is not 'property' at all. Instead, it is simply a government-granted monopoly;²⁹ it is a license to possess, use, and transfer your idea. From an economic standpoint, monopolies are unfavorable in a capitalist system, because they thwart efficiency while raising prices to consumers.³⁰ Therefore, intellectual monopolies "restrict distribution—by producing fewer copies and by making copies more expensive,"³¹ availing fewer people of the intellectual product.

Furthermore, many ideas are born from other ideas. Many patents are innovations, or rather, new ways of using other resources or patents.³² Numerous nonfiction books are written by

²⁵ Boldrin & Levine, *supra* note 2, at para. 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Harper, *supra* note 14, at 15.

²⁹ Walker, *supra* note 10, at 46.

³⁰ Levine, *supra* note 15, at 16.

³¹ *Id.*

³² Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *SCIENCE* 698, 699 (1998), available at www.sciencemag.org/cgi/reprint/280/5364/698.pdf ("By conferring monopolies in discover-

reading and researching other books. Many songs contain samples of other songs.³³ Therefore, an author may be able to earn more money from the use of his or her copyright, but may have to pay more for the ingredients for creating the work.³⁴ There is friction in the creative process imputable to the recognition of copyrights. The argument that copyrights instill incentive to create is met with the fact that they deter innovative action.³⁵

The notion that copyrights are slowing, instead of protecting, the creative process is all too evident in the realm of software and technology.³⁶ Our current economy, including the entertainment industry, is driven by technology.³⁷ While the Record Industry Association of America ("RIAA") complains of lost sales on the front end because of technology's facilitation of pirating music, it neglects to mention that the cost of recording and the difficulty with which it is now done has been extremely diminished by new technology.³⁸ Because of new technology, major studios are not the only producers of professional-sounding music. Software programs such as Sony Acid Pro³⁹ can be purchased and used in a living room with a personal computer. Accordingly, more production means more music at a cheaper price. In the software industry, the concept has been pushed by many eager advocates, exemplified by the Open Source Software initiative.⁴⁰ Still, the

ies . . . complex obstacles . . . arise when a user needs access to multiple patented inputs to create a single useful product.").

33 Boldrin & Levine, *supra* note 2, at para. 20 ("We can't create great new music by modifying wonderful old music because all the wonderful old music is under copyright at least until the 22nd century.").

34 Levine, *supra* note 15, at 16.

35 Boldrin & Levine, *supra* note 2, at para. 20 ("The greatest bar to this outpouring of wonderful new innovative music . . . is the copyright system. If we were to abolish copyright today we are confident that the most important effect would be a vast increase in the quantity and quality of music available.").

36 *Id.* at para. 20 ("[M]odern technology, rather than strengthening the case for intellectual monopoly in music, weakens it.").

37 Walker, *supra* note 10, at 49 ("Where samizdat artists once had to make do with photocopiers and audio cassettes, they now can use videotapes, camcorders, Photoshop, digital film editing, recordable CDs, MP3 files, and the Internet. The result has been an explosion of amateur films, fiction, and music, all of which can be 'published' for a minimal investment by putting them on the Web.").

38 Boldrin & Levine, *supra* note 2, at para. 20 ("[T]he cost of producing the first copy . . . has decreased enormously due to the same computer technology that makes it so easy to copy music.").

39 Sony Announces Major Acid Pro Software Upgrade, INTERNET VIDEO MAGAZINE, Jan. 19, 2006, http://www.internetvideomag.com/News/News2006/011906_Sony_Acid_Pro.htm.

40 Go Open Source, The Basics of OSS, http://www.go-opensource.org/software_basics/ (last visited Apr. 8, 2007) ("The basic idea behind open source is very simple: when programmers can read, redistribute, and modify the source code for a piece of software, the software evolves. People improve it, people adapt it, people fix bugs. And this can happen at a speed that, if one is used to the slow pace of conventional software development, seems astonishing.").

Digital Millennium Copyright Act (DMCA) “creates new restrictions on technology, and those restrictions lead to lawsuits and a sharp decline in available venture capital.”⁴¹ The DMCA, the latest major copyright legislation, provides copyright owners with added protection against new technology.⁴² In its wake, technology, itself subject to copyright law, suffers from constraints. Summarily, increased copyright protection results in decreased facilitation of copyright production.

C. Contrast: Property Rights and Intellectual Property Rights

In comparison, intellectual property laws take a step further in affording protection than do most tangible property rights. Tangible property rights give a person the right to use the property exclusively or to transfer it. Once tangible property has been transferred, the rights of the prior possessor are discontinued. However, intellectual property rights continue after the property has been transferred.⁴³ Effectively, intellectual property laws grant the owner the right to control the transferee’s use of the property after it has been transferred. Economists Michael Boldrin and David Levine view the sale of intellectual property, under current intellectual property law, as a contract not to compete. They assert that “[t]he most significant feature is the agreement not to sell copies of the idea in competition with the person who sold you the idea. Outside of the area of ‘intellectual property’ such an agreement would be called anti-competitive, and a violation of the antitrust law.”⁴⁴

The argument against treating intellectual property as private property, in essence, claims that intellectual property laws implicitly violate antitrust law, and consequently create monopolies that are not allowed otherwise.⁴⁵ This argument is supported by Article I, Section 8, Clause 8 of the Constitution, which explicitly prevents intellectual property laws from effectuating perpetual monopolies. This Clause affords exclusive rights to “Writings and Discoveries” for “limited Times.”⁴⁶ Thus, while proponents of Private Property point to exclusive rights, opponents point to the limited nature of the guarantee. Inferred from this limited right or limited license is Congress’s intention to create a public do-

⁴¹ Shapiro, *supra* note 11, at 17.

⁴² 17 U.S.C. § 1201(a) (2000).

⁴³ Boldrin & Levine, *supra* note 2, at para. 7 (“Intellectual property law is not about your right to control your copy of your idea What intellectual property law is really about is about your right to control my copy of your idea.”).

⁴⁴ *Id.* at para. 8.

⁴⁵ *Id.* (“Ordinarily . . . we do not consider monopoly power necessary to provide adequate incentives for economic activity.”).

⁴⁶ U.S. CONST. art I, § 8, cl. 8.

main, or a pool of ideas for public use without limitation.⁴⁷ The rationale for creating a public domain goes hand-in-hand with the argument against intellectual monopoly. The Founding Fathers must have anticipated that the free flow of information would be pertinent to the creative process and the furtherance of original but resourceful ingeniousness. A public domain, it is argued, "contributes to a democratic society, a strong economy, and the advancement of science."⁴⁸

On one hand, the argument that intellectual property laws provide incentive to create has some merit, for monetary motivations are reasonably understandable. On the other, perpetual protection resembling property rights might effectuate monopolies which, in turn, implicitly violate antitrust laws.⁴⁹ The argument against Private Property makes it evident that intellectual property is not tangible property, and the laws that govern tangible property elicit economic efficiency problems when applied to ideas. While most advocates of Private Property relish protection of their own rights, they would be narrow-minded to discount the importance of access to other ideas. When balancing the importance of the broad dissemination of knowledge and information with the significance of ensuring appropriate protection to authors and inventors, one commentator has offered a settlement-inducing observation: "Free and forward-moving societies need both."⁵⁰ Nevertheless, Private Property advocates should be wary of the extent to which the need for protection is overstated, for unforeseen implications may surface as a result of overcompensation.

II. COPYRIGHT'S CAMPAIGN FOR PROPERTY RIGHTS

The Copyright Clause of the Constitution provides Congress the power "[t]o promote the Progress of . . . useful Arts."⁵¹ Such promotion is to be accomplished, specifically, "by securing *for limited Times* to Authors . . . the exclusive Right to their respective Writings."⁵² The foresight of the Founding Fathers was impressive, for they recognized the importance of creative roles in a progressive society. Yet, "useful Arts" in the late eighteenth century could not have put the Founding Fathers on notice of the ex-

47 Anita Eisenstadt, *The Importance of the Public Domain, in FOCUS ON INTELLECTUAL PROPERTY RIGHTS*, *supra* note 17, at 60 ("[T]he Founding Fathers of the United States realized that it is critical to balance the intellectual property interests of authors and inventors with society's need for the exchange of ideas.")

48 *Id.*

49 See *infra* Part III.

50 Eisenstadt, *supra* note 47, at 61.

51 U.S. CONST. art. I, § 8, cl. 8.

52 *Id.* (emphasis added).

tensive material which would become subject to legislation because of the power granted by this Clause. In the two-plus centuries that Congress has possessed this power to promote the arts, it has only *increased* the duration of the copyright term, and therefore the strength of the right, for authors and creators.⁵³ Implicit in this line of legislation is the continued assumption that incentive is the most important, and most vulnerable, factor for furthering creative progressiveness, and that term extensions stimulate incentive.⁵⁴

In *Eldred v. Ashcroft*, the Supreme Court encountered the constitutionality of the latest copyright term extension.⁵⁵ The copyright legislation at issue was the Copyright Term Extension Act, passed in 1998.⁵⁶ The Act enlarged the duration of copyrights by twenty years.⁵⁷ Before upholding the extension, Justice Ginsberg gave a detailed and chronological account of the history of copyright legislation.⁵⁸ What she uncovered was a steadfast course toward perpetual exclusive ownership of copyrights.

Copyright's campaign for property rights began in 1790, when "[t]he Nation's first copyright statute . . . provided a federal copyright term of 14 years from the date of publication, renewable for an additional 14 years if the author survived the first term."⁵⁹ In 1831, copyright protection enjoyed its first extension, expanding the federal copyright term to forty-two years, including twenty-eight years of protection from the date of publication and a fourteen-year renewal.⁶⁰ The copyright front was silent until 1909, when the term was again expanded to fifty-six years, keeping the twenty-eight-year protection but extending the renewal period to twenty-eight years.⁶¹ In 1976, "Congress altered the method for computing federal copyright terms."⁶² The 1976 Act extended protection for all works created after the effective date of January 1, 1978, by an identified natural person, to fifty years after the author's death.⁶³ For works already published be-

⁵³ Tim Lee, *What's So Eminent About Public Domain: The Copyright Lobby Makes a Dubious Case for IP Protection*, REASONONLINE, Oct. 31, 2005, <http://www.reason.com/news/show/32988.html> ("Despite the [c]onstitutional requirement that copyrights be 'for limited [T]imes,' Congress has effectively made them perpetual, one extension at a time.")

⁵⁴ See H.R. REP. NO. 105-452, at 4 (1998) (stating that term extension "provide[s] copyright owners generally with the incentive to restore older works and further disseminate them to the public").

⁵⁵ *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003).

⁵⁶ *Id.* at 195.

⁵⁷ *Id.* at 193, 195.

⁵⁸ *Id.* at 194-96.

⁵⁹ *Id.* at 194; Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790).

⁶⁰ Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 436, 439 (1831).

⁶¹ Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (1909).

⁶² *Eldred*, 537 U.S. at 194.

⁶³ 1976 Act, Pub. L. No. 94-553 § 302(a), 90 Stat. 2541, 2572 (1976) (current version)

fore the effective date, "the 1976 Act granted a copyright term of 75 years from the date of publication," which was a nineteen-year increase from the fifty-six-year term granted under the 1909 Act.⁶⁴ The last major extension, the CTEA, increased the copyright term to the life of the author plus seventy years.⁶⁵ However, these major Acts do not complete the list of legislative activity expanding copyright terms. The copyright term has been lengthened eleven times in the past forty years.⁶⁶ In just a twelve-year span between 1962 and 1974, it was lengthened nine times.⁶⁷ Not a single legislative act has curtailed this expansion towards perpetual protection for copyrights.

In *Eldred*, Justice Ginsburg used this history as evidence of Congress's intentions, and, presuming the correctness behind the rationale for it, she reasoned that such a course should be shown deference.⁶⁸ Such deference, though, and such a course, must discontinue at some point if it is going to parallel the Constitution's mandate that such a monopoly be "for limited Times,"⁶⁹ and in order to create an all-important public domain. Still, the *Eldred* court elected to follow "rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works."⁷⁰ This rationale works for copyrights already owned by companies such as Disney and artists such as Bob Dylan.⁷¹ However, for works that have yet to be created, no resourceful knowledge or creation has become accessible through the public domain since the 1970s, unless copyright owners chose not to renew them.⁷² Importantly, "[t]he limitation is not for the advantage of the inventor, but of society at large, which is to take the benefit of the invention after the period of limitation has expired."⁷³ This means that society's advantage has not been realized in the past thirty years.⁷⁴

at 17 U.S.C. § 302(a) (2000)).

⁶⁴ *Eldred*, 537 U.S. at 195 (citations omitted); 1976 Act, Pub. L. No. 94-553, § 304(a)-(b), 90 Stat. 2541, 2573-74 (1976) (current version at 17 U.S.C. §§ 304(a)-(b) (2000)).

⁶⁵ 17 U.S.C. § 302 (2000).

⁶⁶ Walker, *supra* note 10, at 46.

⁶⁷ *Eldred*, 537 U.S. at 195 n.2.

⁶⁸ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . ."); *Eldred*, 537 U.S. at 198 ("[T]his Court has been similarly deferential to the judgment of Congress in the realm of copyright.").

⁶⁹ U.S. CONST. art I, § 8, cl. 8.

⁷⁰ *Eldred*, 537 U.S. at 207.

⁷¹ Walker, *supra* note 10, at 46.

⁷² Tim Lee, *supra* note 53.

⁷³ *Eldred*, 537 U.S. at 224 n.2 (Stevens, J., dissenting) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 175 (1824)).

⁷⁴ Boldrin & Levine, *supra* note 2, at para. 20 ("Indeed, with modern computers there are a great many creative innovators . . . lacking perhaps the physical skills and training to play an instrument . . . or even to read sheet music . . . who could modify, edit

Over two hundred years ago, the rationale was much different than it is today. In 1829, the "main object was 'to promote the progress of . . . useful arts;' and this could be done best, by giving the public at large [access to the works] . . . at as early a period as possible."⁷⁵ This rationale remains consistent in patent law, as the Supreme Court noted in 1964 that a state could not "extend the life of a patent beyond its expiration date," and in 1989 that "free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception."⁷⁶ Still, the campaign for property rights continues in the copyright arena. This campaign can, without mistake, be somewhat attributed to the lobbying efforts of copyright owners, and in particular by corporate copyright owners.⁷⁷ Justice Breyer has commented that the "primary legal effect is to grant the extended term not to authors but to their . . . corporate successors."⁷⁸ In the past decade, RIAA has increasingly complained of music pirating on the internet, which is facilitated by file-sharing websites.⁷⁹ It brought its plight to the eyes of the watching world, and it received enormous sympathy and compassion in the courts. Consequently, copyright owners are undefeated in the past decade in the Supreme Court, including a recent 9-0 victory in *MGM v. Grokster*.⁸⁰

Grokster involved copyright infringement claims against a company that provided an arena for, and facilitated the practice of, sharing music files online.⁸¹ In that case, the Court held that "one who distributes a device with the object of promoting its use to infringe copyright . . . is liable for the resulting acts of infringement by third parties."⁸² Drawing a parallel to real property, one who sets up a gun or knife store undoubtedly "distributes a device with the object of promoting its use" to kill or injure. Nevertheless, he is not "liable for the resulting acts" of murder "by third parties." This parallel may not include all of

and create great new music on their home computers at trivial cost. The greatest bar to this outpouring of wonderful new innovative music . . . if you haven't guessed already . . . is the copyright system.")

⁷⁵ *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 19 (1829) (quoting U.S. CONST. art I, § 8, cl. 8).

⁷⁶ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989).

⁷⁷ Lee, *supra* note 53 ("[T]hanks to industry lobbying, Congress extended the terms in 1976, and again in 1998."); see also Walker, *supra* note 10, at 46 ("Congress acts as a rubber stamp for copyright holders, especially the big campaign donors in the entertainment industry.")

⁷⁸ *Eldred*, 537 U.S. at 243 (Breyer, J., dissenting).

⁷⁹ John Borland, *RIAA Sues 261 File Swappers*, CNET NEWS.COM, Sept. 8, 2003, http://news.com.com/2100-1023_3-5072564.html.

⁸⁰ Lee, *supra* note 53; *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2769 (2005).

⁸¹ *Grokster*, 125 S. Ct. at 2770.

⁸² *Id.*

the nuances which led to the Court's reasoning in *Grokster*, but it displays the echelon that copyright protection has reached in the Court.

The Court went on to admit that "it may be impossible to enforce rights in the protected work effectively against all direct infringers."⁸³ However, such impossibility results from Congress's inability to grasp the profundity and complexity that protecting ideas entails. Without question, rewarding creation is important. That the means for this end must be absolute and unqualified, similar to property rights, is unreasonable and "impossible." Nevertheless, like Congress, the Court decided that artistic protection was more important than encouraging technological innovation, and the only way to absolutely protect it was to penalize somebody.⁸⁴ In light of the recognized impossibility for absolute protection, the Court resorted to the position that "the only practical alternative [would be] to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement."⁸⁵ The Court's retreat to alternatives, while recognizing that "technological innovation may be discouraged,"⁸⁶ elicits one clear interpretation: protecting ideas as if they were property, though noble, may not be efficient.

The entertainment industry has argued for, and received, longer protection. Adversaries have noted, however, that it is not about increasing the protection of *copyrights* that is at issue. Instead, it is about increasing the protection of a business model.⁸⁷ One commentator has warily observed that "[i]t is not about the right to the fruits of one's own labor. It is not about the incentive to create, innovate or improve. It is about the 'right' to preserve an existing way of doing business."⁸⁸ Ironically, the business model of the recording industry, which thrives on creation, has clearly been threatened by creation. To this end, famous author Robert Heinlein ascribes the following:

There has grown up in the minds of certain groups in this country the notion that because a man or corporation has made a profit out of the public for a number of years, the government and the courts are charged with the duty of guaranteeing such profit in the future, even in the face of changing circumstances and contrary public interest. This strange doctrine is not supported by statute nor common law. Neither individuals nor corporations have any right to come into court

⁸³ *Id.* at 2776.

⁸⁴ *Id.* at 2775 ("The more artistic protection is favored, the more technological innovation may be discouraged . . .").

⁸⁵ *Id.* at 2776.

⁸⁶ *Id.*

⁸⁷ Boldrin & Levine, *supra* note 2, at para. 21.

⁸⁸ *Id.*

and ask that the clock of history be stopped, or turned back, for their private benefit.⁸⁹

The recording industry, more than any other copyright-driven industry, is undergoing changes and challenges to its business model.⁹⁰ Despite the woes that new technology supposedly has caused, “[t]he music industry will be the greatest beneficiary of the digital revolution.”⁹¹ Despite the revenue streams that have been created, and that will be created, through new and more refined licensing models enabled by innovative technologies, the industry continues to look to “technical protection measures to ensure that producers reali[z]e the value of recorded music.”⁹² Such measures include encryption technology which would prevent certain uses of a copyright after it is purchased, propounding the idea that copyright protection controls not only how a good is distributed but also how that good is used after a consumer purchases it.⁹³ Additionally, industry leaders believe that internationally compatible systems for identification of information technology are necessary for increased copyright protection, and that “tattooing” of protected materials and electronic copyright management is essential.⁹⁴

It is ironic that proponents of increased copyright protection should call technology the culprit and the savior at the same time. Even more astonishing is the recent Digital Millennium Copyright Act (“DMCA”), which made it illegal to circumvent certain protection technologies with new technology.⁹⁵ Allen Dixon, General Counsel and Executive Director for IFPI, has proclaimed that “[u]nauthori[z]ed circumvention activities and circumvention devices weaken the robustness and integrity of any technical measure developed”⁹⁶ In other words, the DMCA, and proponents of stronger copyright protection like Dixon, would undermine the rationale for copyright protection, i.e., the incentive to create and innovate, by preventing the advancement of technological innovation in order to preserve a way of doing business. Dixon adds that “[w]hile telecommunications and information

⁸⁹ ROBERT A. HEINLEIN, *Life-Line*, in *THE PAST THROUGH TOMORROW* 25 (1967).

⁹⁰ Allen N. Dixon, General Counsel and Executive Director, IFPI, Future Issues for the Protection of Phonogram Producers, Speech at the JSO 4th Asia-Pacific Copyright and Neighbouring Rights Seminar, Tokyo, Mar. 8, 2000, available at http://www.ifpi.org/content/section_views/allen_dixon_speech.html (last visited Apr. 5, 2007).

⁹¹ *Id.* (quoting Gerald Levin, Chairman and Chief Executive Officer, Time Warner).

⁹² *Id.*

⁹³ Boldrin & Levine, *supra* note 2, at para. 6.

⁹⁴ Dixon, *supra* note 90, at II(a).

⁹⁵ 17 U.S.C. § 1201 (2000). For more details on the legislative history of the DMCA, see David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, at 702–38 (2000).

⁹⁶ Dixon, *supra* note 90, at II(b).

technologies are intriguing in their own right, public acceptance and demand for advanced communications and information processing technology is driven by *content*.⁹⁷ This is where the industry is wrong. The demand for content, or music, already existed before advanced information technologies were born. It is the demand for the new technologies—the handheld MP3 player, the cell phone, or the next big thing—that makes music more accessible, that drives the demand for more content. Take the new information technologies away, and people will find ways to create them again. That is innovation, not circumvention.

Whatever the intent of the campaign may be, the effect is real and the same. Copyright protection, evidenced by both congressional activity and judicial decision, has continuously and increasingly resembled that which is afforded property rights. In some capacities, copyright protection exceeds that afforded to tangible property. This course has both current and future implications. These legal monopolies have begun to sustain recognizable impacts on relevant markets.⁹⁸ In the aggregate, these effects can influence commerce and economic efficiency in ways that antitrust laws seek to prevent.

III. WHY ABSOLUTE COPYRIGHT PROTECTION AMOUNTS TO A VIOLATION OF ANTITRUST LAW

A. Antitrust and Intellectual Property: The Intersection

During the U.S. Industrial Revolution, railroad tycoons, oil robber barons, and steel giants swallowed competition “while reaping monster profits through unconscionable business activity.”⁹⁹ Technological innovation, manufacturing, and transportation were all stabilized by set standards created in “Trusts.”¹⁰⁰ Effectively, these Trusts created predictable standards in prices and quality, but as a result, they restrained price competition by controlling production.¹⁰¹ Market entry barriers stifled the incentive for improving products. Such monopolistic business practices led to the birth of antitrust law.¹⁰² Today, courts do not usually see such blatantly unlawful business activity. However, with the assistance of intellectual property laws, subtle market

⁹⁷ *Id.* at para. 4 (emphasis added).

⁹⁸ See *infra* Part III.

⁹⁹ Eddy Hsu, *Anti-Trust Regulation Applied to Problems in Cyberspace: iTunes and iPod*, 9 INTELL. PROP. L. BULL. 117, 122 (2005); see also Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 6–7 (2003) (describing the history of antitrust in more detail).

¹⁰⁰ Hsu, *supra* note 99, at 122.

¹⁰¹ *Id.*

¹⁰² *Id.*

mechanisms are exploited to create economies of scale.¹⁰³ The question to be determined in the copyright forum is whether these economies of scale negatively impact economic efficiency and consumer behavior, and whether they deter the incentive to create. If so, advocacy for absolutely exclusive and perpetual copyright protection may rise to the level of encouraging the violation of antitrust law.

The right to own an idea exclusively is often conceded to be a government-granted monopoly.¹⁰⁴ Monopolistic behavior is more easily attributable to the work of patents, for such a right enables an individual or corporation to exclude others from using or selling a useful, and in some cases necessary, product or good. For example, in the pharmaceutical industry, the cure for cancer could, in theory, be patented and held exclusively. As a result, the owner of such a patent could charge unconscionable prices for the remedy to this deadly disease.

B. The Early Doctrine: Patents

In patent law, the courts have frequently confronted the question of whether a government-granted monopoly is an exception to antitrust law. "In any given case, courts . . . had to find that one or the other concept took precedence," and at first, "courts considered patents to be a government-endorsed exception to the antitrust laws."¹⁰⁵ In 1902, one Supreme Court decision explicitly held that the practice of price-fixing by patent holders deserved immunity.¹⁰⁶ In the early days of antitrust law, patent law and antitrust law were at odds, and many believed that they worked in different directions.¹⁰⁷ After all, patent law granted monopolies, and antitrust law prevented them.¹⁰⁸ Nevertheless, the recent prevailing idea is that they work together.¹⁰⁹ In *Atari Games Corp. v. Nintendo of America, Inc.*, the court proclaimed that "the aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at

¹⁰³ *Id.*

¹⁰⁴ Sheila F. Anthony, *Antitrust and Intellectual Property Law: From Adversaries to Partners*, 28 AIPLA Q.J. 1, 4 (Winter 2000) ("For much of this century, courts and federal agencies regarded patents as conferring monopoly power in a relevant market."); Walker, *supra* note 10, at 46 ("Copyrights, unlike trademarks, have always posed problems, even if you think they're necessary. They are, after all, government-granted monopolies . . .").

¹⁰⁵ Anthony, *supra* note 104, at 4-5.

¹⁰⁶ *Bement v. Nat'l Harrow Co.*, 186 U.S. 70, 92, 95 (1902) (holding that the practice of patent pooling was exempted from the reach of antitrust, despite blatant price fixing).

¹⁰⁷ Anthony, *supra* note 104, at 4.

¹⁰⁸ *Id.* at 4-6.

¹⁰⁹ *Id.* at 7.

encouraging innovation, industry and competition.”¹¹⁰ The court in *Atari Games*, exemplifying the current movement of thinking in this arena, may have confused two very important factors. That is, there is a large difference between protecting the competitive process and protecting the competitor.¹¹¹ Both bodies of law may fundamentally encourage innovation in some respect, and both may encourage, or preserve, industry to some capacity.¹¹² Yet antitrust law protects competition, while intellectual property law protects one competitor. This concept is what keeps antitrust and intellectual property law at odds, and in the court, together.

C. The New Problem: Copyrights

Copyrights involve antitrust inclinations in a much more contained faculty than do patents. The right to exclusively use and sell the cure for cancer, conceivably the result of a single patent, could obviously confer monopoly power that would harm consumers and production of the product. On the other hand, the right to exclusively use and sell a book or a song, by itself, would not normally impact an entire market for literature or music. However, in the aggregate, such exclusive rights could bring copyright ownership to the same level of projected impact as that of an important and useful process or product.

Recently, at a House of Representatives hearing, the Chair of the Subcommittee on Courts, the Internet, and Intellectual Property stated the obvious: “Digital music not only has a future in the music business; it is the future.”¹¹³ As discussed above, this inevitably means that, as technology goes, so goes the music industry. Again, however, the legal system which supposedly protects and encourages the creation of music also hinders the advancement of certain technology.¹¹⁴ This notion is what

¹¹⁰ 897 F.2d 1572, 1576, (Fed. Cir. 1990) (citing *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 876–77 (Fed. Cir. 1985)).

¹¹¹ Connie C. Davis, *Copyright and Antitrust: The Effects of the Digital Performance Rights in Sound Recordings Act of 1995 in Foreign Markets*, 52 FED. COMM. L.J. 411, 419 (2000) (“Antitrust laws are intended to protect the competitive process through economic efficiency and competition. Antitrust laws are also geared towards enhancing competition, rather than protecting competitors.”).

¹¹² Though this comment lays out problems resulting from this line of thinking, there is still some merit to the argument that affording the right to some limited form of compensation to a creator will encourage further innovation. Similarly, such rights can preserve an industry, although such preservation may hinder the progressive nature of a capitalist society.

¹¹³ *Digital Music Licensing and Section 115 of the Copyright Act: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 1 (2005) (opening statement of Hon. Lamar Smith).

¹¹⁴ Boldrin & Levine, *supra* note 2, para. 20.

revolutionized the aforementioned Open Source Initiative.¹¹⁵ Nevertheless, recognition of the need to sync music and new technology has led companies which hold patented technology to bid into the entertainment industry, and more specifically, into the market for copyrights.¹¹⁶ The cross-market merging of giant conglomerates has shrunk the diversity among those doing business in the entertainment and media industries.¹¹⁷ Reflect on the following passage:

[I]n 1983, fifty corporations dominated most of every mass medium and the biggest media merger in history was a \$340 million deal. . . [I]n 1987, the fifty companies had shrunk to twenty-nine. . . [I]n 1990, the twenty-nine had shrunk to twenty-three . . . [I]n 1997, the biggest firms numbered ten and involved the \$19 billion Disney-ABC deal, at the time the biggest media merger ever. . . [In 2000,] AOL Time Warner's \$350 billion merged corporation [was] more than 1,000 times larger [than the biggest deal of 1983].¹¹⁸

Currently, 71.7% of the recording industry's global market share is allocated to just four companies.¹¹⁹ However, horizontal integration, the significant control of a specific media sector, is not the largest problem for the free dissemination of information. Instead, vertical integration of the media market, with the same companies gaining ownership of content and the means to distribute it, causes this problem.¹²⁰ In other words, the media moguls are gaining ownership of copyrights and patents, and they are using them both to monopolize the content provided and the means for distributing the content.

The best example of antitrust implications arising from combining a patented instrument for distribution with copyrighted content comes from Apple's iPod and iTunes venture.¹²¹ While multiple MP3 players exist, the iPod is the only player licensed by Apple to play music securely encoded with Apple's AAC codec technology.¹²² Thus, if consumers want to buy the iPod to listen

115 Open Source Initiative, <http://www.opensource.org> (last visited Apr. 8, 2007).

116 Kevin J. Delaney, *Yahoo Bets on Media in Search for Online Advertising vs. Rival Google*, PITTSBURGH POST-GAZETTE.COM, Mar. 2, 2005, <http://www.post-gazette.com/pg/05061/465147.stm> (last visited Apr. 5, 2007).

117 BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* xx-xxi (6th ed. 2000).

118 *Id.* (emphasis added).

119 Press Release, IFPI, *The Recording Industry in Numbers 2005* (Aug. 2, 2005), available at http://www.ifpi.org/content/section_news/20050802.html.

120 Robert W. McChesney, *The New Global Media*, THE NATION, Nov. 29, 1999, at 11, available at <http://www.thenation.com/doc/19991129/mcchesney>.

121 See Apple's homepage for the iPod, <http://www.apple.com/ipod/> (last visited Apr. 5, 2007).

122 Apple, *iTunes: About Third-party Music Players and AAC File Support*, <http://docs.info.apple.com/article.html?artnum=93032> (last visited Apr. 5, 2007). Similarly, songs downloaded using other codec technology will not be able to play through

to music on a portable music player, they must buy content from iTunes. Therefore, the embedded link of AAC-encoded music between iTunes and the iPod raises a possible antitrust violation by creating an illegal tie.¹²³ Under Sections One and Two of the Sherman Act, parties to a contract or an agreement in restraint of trade, or made in an attempt to monopolize, shall be guilty of a felony.¹²⁴ "The Supreme Court has defined a tying arrangement as an agreement by one party to sell [the tying] product to another on the condition that the buyer also purchase [the tied product]."¹²⁵ In this case, the collusion occurs between the consumer, who exclusively deals with Apple in the second market for the tied product, and Apple, who excludes competition from the second market.¹²⁶

Apple's product is technologically incompatible with the rest of the market, and because the process becomes patented, other companies are forced to invent different solutions to avoid paying licensing fees. Proponents of intellectual property laws might argue that this exemplifies incentive to invent, resulting in added competition and availability. In actuality, the market becomes fractured because of non-compliant standards, causing consumer frustration.¹²⁷ Consumers resort to buying the most accessible product for a higher price. Economies of scale are achieved through intellectual property protection at economic efficiency's expense. Consequently, an intellectual monopoly is born.

D. The Department of Justice's Solution, the "Rule of Reason," and Copyrights

The legal community, specifically the Federal Trade Commission (FTC) and the Department of Justice (DOJ), has attempted to address the clash between antitrust and intellectual property by adopting the "rule of reason."¹²⁸ As a preliminary as-

iTunes. *Id.*

¹²³ Hsu, *supra* note 99, at 123.

¹²⁴ *Id.*; 15 U.S.C. § 1. The Sherman Act declares that "[e]very contract . . . in restraint of trade or commerce . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . ." *Id.* "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony . . ." *Id.* § 2.

¹²⁵ Carl Sandburg Vill. Condo. Assoc. No. 1 v. First Condo. Dev. Co., 758 F.2d 203, 207 (7th Cir. 1985) (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958)).

¹²⁶ Hsu, *supra* note 99, at 123.

¹²⁷ *Id.*

¹²⁸ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 3.4 (1995), available at <http://www.usdoj.gov/atr/public/guidelines/0558.pdf> [hereinafter ANTITRUST GUIDELINES] (stating that the rule of reason applies in the "vast majority of cases"); see also *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 7-8 (1979).

assessment method, this doctrine inquires into the anticompetitive impact of a certain practice involving the licensing or use of intellectual property by raising particular questions about it.¹²⁹ The first question posed is "whether the restraint is likely to adversely affect competition. Second, if there is a likely anticompetitive effect, the inquiry determines whether the restraint on competition is reasonably necessary to achieve pro-competitive . . . efficiencies . . . that outweigh those anticompetitive effects."¹³⁰ The analysis involves several steps, the first of which is to define the "relevant market."¹³¹ The definition of a relevant market includes the product market and the geographic market. The product market is defined by identifying substitutes for the product, while the geographic market is defined by asking whether consumers would import substitutes or similar products if the price of a domestically produced product goes up.¹³²

Once the relevant market is defined, the FTC or the DOJ will assess market power. Market power is defined by these agencies as "the ability profitably to maintain prices above, or output below, competitive levels [in a relevant market] for a significant period of time."¹³³ An important factor in the ability to exercise market power is the ease with which competitors can enter the relevant market.¹³⁴ If market power exists, the agencies will determine how that power was acquired, or how it will be maintained. Transactions involving an agreement that might hinder competition will be closely scrutinized.¹³⁵ Moreover, market power may be acquired legally, but sustained illegally.¹³⁶ Finally, even if market power is legally acquired and maintained, certain anticompetitive business activity may violate antitrust law if it unreasonably restrains competition.¹³⁷

Evaluating copyrights arbitrarily under the "rule of reason" illustrates why this area of intellectual property poses antitrust problems that may be circumvented when analyzing patents under this doctrine. First, the relevant market for a book or song proves that there are few substitutes for a consumer's favorite music or novel. A Bruce Springsteen fan is not likely to find solace listening to soft jazz instead, and neither is that consumer

129 ANTITRUST GUIDELINES, *supra* note 128, § 3.4.

130 Anthony, *supra* note 104, at 9.

131 *Id.* A relevant market is one in which products would actually and directly compete with one another. *Id.* at 10.

132 *Id.* at 9-10.

133 ANTITRUST GUIDELINES, *supra* note 128, § 2.2

134 *Id.* § 4.1.1.

135 *See id.* § 3.4.

136 *Id.* § 2.2.

137 *Id.*

likely to import a CD from France to quench his desire to rock out to "Born in the USA" if the price increases domestically. Music, like a good novel, is a particular good which consumers choose because they identify the artist or author. By contrast, many patented products, such as a car, can and will be substituted easily if domestic prices rise above certain utility levels. Furthermore, the vast number of foreign cars on the streets is a testament to the importability of such patented products. Still, certain patented products, when used with and complimented by copyrighted products, have become impossible to substitute, such as iTunes and the iPod.

Market power can be quite accurately measured by the ability of a competitor to enter the market. Viewing copyrights through a fundamental lens, not anyone can create a marketable copyright to compete with those that are profitable. Authors publish once and never publish again. Musicians come and go without notice. Surprisingly, and quite unnoticed by most of the music-consuming public, over 180 legitimate music download services were launched globally in 2004.¹³⁸ Why so unnoticed? One commentator easily answers, emphasizing that "[y]our first step in choosing a store should be determining which stores are compatible with your portable music player, since online music stores will not give refunds if you find you've made a mistake later on."¹³⁹ Undoubtedly, such constraints keep Apple in control of the market, selling over 600 million downloads between 2003 and the end of 2005, which accounted for 80% of legal music downloads in the United States.¹⁴⁰ Here, Apple's tying arrangement, coupled with its first mover advantage, comes to fruition.

A first mover is a firm that is first to enter a market, creating opportunities to raise barriers to entry.¹⁴¹ The advantage can translate into the ability to keep competitors out of the marketplace. Before competitors attempt to enter the market, the first mover has the opportunity to collect substantial economic rents through monopoly pricing.¹⁴² The first mover advantage can create economies of scale, which also deter competition because new entries would have to incur losses once they enter the market be-

¹³⁸ Press Release, IFPI, *supra* note 119.

¹³⁹ Troy Dreier, *Understanding Online Music Stores*, CNET'S QUICK GUIDE, May 9, 2006, http://reviews.cnet.com/4520-11297_7-6518467-1.html.

¹⁴⁰ Adam L. Penenberg, *The Right Price for Digital Music*, SLATE, Dec. 5, 2005, <http://www.slate.com/id/2131573/>.

¹⁴¹ Posting of Narasimha Chari to VenChar, *First Mover Advantage and Barriers to Entry*, http://www.venchar.com/2004/01/first_mover_adv.html (Jan. 8, 2004).

¹⁴² iTunes sells downloads for a flat rate of 99 cents. However, due to industry and consumer criticism, the pricing structure may be changing to reflect the popularity of different types of music. See Jeff Leeds, *Apple, Digital Music's Angel, Earns Record Industry's Scorn*, N.Y. TIMES, Aug. 27, 2005, at A1.

fore they can attain the same efficiencies of scale.¹⁴³ If the first mover exploits a patent, especially if it is non-compatible with other complimentary goods sold in the market, the ability to capture the consumer group and deter competition is great.¹⁴⁴ In this way, market power can be easily attained, as it has been by Apple, by combining the licensing of copyrights with a patented non-compatible technology.

As copyright's campaign for property rights continues, the economic inefficiencies that perpetual and overreaching protection creates will become manifest. The legal monopoly that is conferred by the government should not exempt rights holders from antitrust violations. Nevertheless, monopoly market power can be alleviated by other instruments of law. One proposition that has never been completely adopted is the government's use of its eminent domain power.

As Private Property advocates push for rights similar to those recognized in tangible property, certain consequences to copyright ownership may gain potential, including the concern of copyrights becoming subject to the government's eminent domain power. This prospect, exposed in the next section, is made possible by copyright's steadfast campaign and the antitrust problems caused by this position. Adherence to the words of Article I, Section 8, Clause 8, as explained in Parts I and II, might diminish the viability of this phenomenon. Nevertheless, because of the current state of copyright law and the position that its proponents take, eminent domain has become a practicable possibility for the government to alleviate the inefficiencies in copyright law, which, ironically, were created by the government in the first place. This occurrence would be unfortunate for copyright owners. Therefore, the reality of this possibility, and the following proposal, should be recognized as both a warning to copyright owners and an appeal for change in the way that copyright law is made and interpreted.¹⁴⁵

¹⁴³ Posting of Narasimha Chari, *supra* note 141.

¹⁴⁴ *Id.* ("[M]any elements of the first mover advantage can be leveraged into creating strong barriers to entry[, including patents].").

¹⁴⁵ Complete abolishment of all copyright protection is not necessary. There is, after all, *some* merit in rewarding creation by reserving a right to capitalize on that creation, whether that capitalization be economic or otherwise. However, the correct interpretation of the protection under Article I, Section 8, Clause 8 of the Constitution calls for legislative reformation to account for a growing need for a public domain and the further accessibility of new information and ideas. A starting point for changing the currently prevailing interpretation is at the length of the term for copyright protection. Next, particularly stifling legislation such as the DMCA should be reconsidered to minimize the see-saw relationship between technology and copyrighted content and to create a more balanced equilibrium for the two so that technological advancement and new creative content can progress as one.

IV. AN EMINENT CONSEQUENCE: WHY COPYRIGHTS COULD BECOME SUBJECT TO EMINENT DOMAIN

The Fifth Amendment states, in the negative, "nor shall private property be taken for public use, without just compensation."¹⁴⁶ This Clause elicits the inference that the government has the power to take certain private property, but the power is limited by the requirements that the taking be only for a public use, and that the government pay the owner just compensation for harm done.¹⁴⁷ Ambiguity in the Constitution is not an anomaly, and the clause conferring eminent domain power to the government is no exception. The assessments to be made when analyzing a taking under the Fifth Amendment include (1) whether the thing to be taken actually constitutes private property, (2) whether that private property is being taken for a public use, and (3) what comprises just compensation.¹⁴⁸ If all three are satisfied according to the meaning conferred under the Constitution, then such private property may be legally taken without successful objection by the owner of the property.¹⁴⁹

A. Intellectual Property as Private Property

The U.S. Supreme Court recognizes that the eminent domain power conferred under the Fifth Amendment applies to the states via the Fourteenth Amendment.¹⁵⁰ When read literally, private property must be taken to invoke the Takings Clause. Land, because of its limited nature, is coveted by the government for particular uses which are easily attributable to the public interest. Hence, the Clause chiefly applies in cases involving the disposition of real property.¹⁵¹ In such cases, the Court has deferred to legislative judgment when analyzing public need for the use of the takings power.¹⁵² If another form of private property exhibits such a public need, it is reasonable to believe that the Court would show similar deference when analyzing such a case under

¹⁴⁶ U.S. CONST. amend. V.

¹⁴⁷ Donald J. Kochan, "Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 60 (1998) ("The government is given the power to take property for public uses when it is necessary to control the governed, but it is obliged to control itself by compensating property owners harmed by its actions and by taking property only for public use.")

¹⁴⁸ See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003).

¹⁴⁹ *Id.* at 232.

¹⁵⁰ See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

¹⁵¹ See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *Berman v. Parker*, 348 U.S. 26 (1954); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

¹⁵² *Berman*, 348 U.S. at 33 ("If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.")

the Eminent Domain Clause.¹⁵³

The Court has expressed that the takings power may be applied to private property other than real property. In *Phillips v. Washington Legal Foundation*,¹⁵⁴ the Court was confronted with a case involving the state's use of interest on lawyers' trust accounts ("IOLTA") to pay for legal services provided to the needy. The Court held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."¹⁵⁵ In *Brown v. Legal Foundation of Washington*,¹⁵⁶ the Court reaffirmed that the interest earned was private property. The Court likened the transfer of the interest to a per se taking, stating that the transfer of interest "seems more akin to the occupation of a small amount of rooftop space in *Loretto*."¹⁵⁷ In *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁵⁸ the occupation of rooftop space constituted a per se taking of private property under the Fifth Amendment. Accordingly, in *Brown*, the Court found the transfer of interest applicable under the Takings Clause.¹⁵⁹

Two sources could potentially provide states with the authority to take a privately owned patent from one company and have another company manufacture the same patented product.¹⁶⁰ First, a government's eminent domain power, already executed for the redevelopment of land and buildings, may be extended to intellectual property such as prescription drug patents.¹⁶¹ In a presentation to the National Legislative Association on Prescription Drug Prices, Law Professor Kevin Outterson proposed that "[s]tates may exercise this power against pharmaceutical patents, just as they have always exercised eminent domain over real property."¹⁶² Second, in 1999, the U.S. Supreme Court held in *Florida Prepaid Postsecondary Education Expense Board v.*

¹⁵³ *But see* LEONARD C. GILROY, REASON FOUNDATION, STATEWIDE REGULATORY TAKINGS REFORM: EXPORTING OREGON'S MEASURE 37 TO OTHER STATES (2006), available at <http://www.reason.org/ps343.pdf> (examining eminent domain and the need for a movement toward stronger property rights and a limit on eminent domain's application).

¹⁵⁴ 524 U.S. 156 (1998).

¹⁵⁵ *Id.* at 172.

¹⁵⁶ 538 U.S. 216 (2003).

¹⁵⁷ *Id.* at 235.

¹⁵⁸ 458 U.S. 419, 421 (1982) (holding that the occupation of rooftop space constituted a per se taking of private property under the Fifth Amendment).

¹⁵⁹ *Brown*, 538 U.S. at 235.

¹⁶⁰ Barbara T. Dreyfuss, *Patents Pending: A D.C. Official Takes a Renegade Approach to Get Lower-Priced Drugs for Residents*, THE AMERICAN PROSPECT ONLINE EDITION, Feb. 23, 2005, www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=9237.

¹⁶¹ *Id.*; Volokh, *supra* note 1, at 1167.

¹⁶² Kevin Outterson, *States May Reduce Drug Prices with an Eminent Domain Process for Pharmaceutical Patents*, Presentation to the National Legislative Association on Prescription Drug Prices, www.nlarx.org/present/modelpharmEDpresent.html (last visited April. 1, 2006).

*College Savings Bank*¹⁶³ that states are generally immune from patent infringement if due process, by way of just compensation, is afforded to the patent owner. The Court in *Florida Prepaid* stressed that a state's infringement of a patent is not by itself unconstitutional, as long as some remedy is provided. In fact, "only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result."¹⁶⁴ Thus, per this decision, a state may take a privately held patent, as long as it pays just compensation to the patent owner. This holding seems odd considering the lengths to which the Supreme Court has gone to uphold absolute protection of intellectual property. Nevertheless, interpreted broadly, this holding highlights the fact that protection for intellectual property is not an absolute right, and government intervention may supersede the exclusivity of this right.

The decision in *Florida Prepaid*, together with the decisions in the IOLTA cases, fuel the prospect that intellectual property could viably become subject to a state's eminent domain power. This idea was considered seriously by legislators in the District of Columbia, when David A. Catania, Councilmember of the Committee on Health, introduced the Prescription Drug Compulsory Manufacture License Act of 2005.¹⁶⁵ The bill proposed that, under eminent domain authority, a state should be able to require a compulsory license to produce a patented pharmaceutical product. Further, the state should be able to pass that license on to a generic firm to produce the product in an effort to alleviate pharmaceutical prices.¹⁶⁶ At a public hearing concerning the bill, Professor Kevin Outterson stated the following:

[I]ntellectual property proponents are making a push to call patents, copyrights and trademarks "intellectual property" so they are covered by eminent domain protections. The Supreme Court has gone along with this argument. States have the right, for a public purpose, to take private property as long as they pay just compensation. If we can do it with a house, why should the state not be able to, not take the patent right, but force pharmaceutical manufacturers to give us a non-exclusive license? Given that this policy would positively impact

¹⁶³ 527 U.S. 627, 643 (1999).

¹⁶⁴ *Id.*

¹⁶⁵ Bill 16-114, Comm. on Health, Council of the District of Columbia, 16th Council Period (D.C. 2005) (codified as amended as the Prescription Drug Excessive Pricing Act of 2005, D.C. CODE § 28-4551 (2006)), available at <http://www.dccouncil.washington.dc.us/images/00001/20050211092234.pdf>.

¹⁶⁶ Committee on Health, Council of the District of Columbia, Draft Committee Report on Bill 16-114, the "Prescription Drug Compulsory Manufacture License Act of 2005", at 3-4 (Mar. 23, 2005), available at <http://www.nlarx.com/modelleg/docs/DCRprtCompulsoryLicensing16-114.doc>.

Medicaid recipients and employees of the state, eminent domain should be available to serve this public purpose.¹⁶⁷

Though the bill's sponsor, Catania, backed off from the eminent domain idea, the precedent was set for the novel theory. Eminent domain's application to intellectual property may be close in time.

Substituting copyrights for patents in such a bill, and under the "private property" assessment in an eminent domain analysis, is, unfortunately, easily envisioned. As mentioned previously, copyright owners have campaigned for years that copyrights are in fact "private property," as that word is meant under the Fifth Amendment. The writers of Catania's bill agreed, stating that "intellectual property proponents are making a push to call patents, *copyrights* and trademarks 'intellectual property' so they are covered by eminent domain . . ." ¹⁶⁸ Although there are shortfalls in the parallel between intellectual property and "private property," the current prevailing campaign by Congress and in the Court is to equate the two.¹⁶⁹ Thus, it is not the inherent nature of copyrights that calls for application of the eminent domain process. Instead, it is the incorrect insistence that copyright proponents themselves have made for over two hundred years that invites the application of copyrights to this process. In sum, copyrights satisfy the first step in the eminent domain analysis not by their own attributes, but because they have been mistakenly forced into this assessment by their own sponsors.

B. A Public Use for Copyrights

The Supreme Court, within the last century, has claimed that the public use provision within the Takings Clause does not particularly mean what it literally says.¹⁷⁰ In practice, there is now no requisite public use of the property taken.¹⁷¹ Rather, the Court has explicitly rejected any "use by the public" test for public use.¹⁷² Specifically, the Court has stated that "[i]t is not essential that the entire community, nor even any considerable portion . . . directly enjoy or participate in any improvement in

¹⁶⁷ *Id.* at 4.

¹⁶⁸ *Id.* (emphasis added).

¹⁶⁹ The continued extension of the copyright term toward perpetual protection, and the decisions by the Court to uphold these extensions, shows that Congress and the Court have slowly but surely agreed that intellectual property owners should be afforded the same rights as private tangible property owners. See *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003).

¹⁷⁰ Kochan, *supra* note 147, at 51–52.

¹⁷¹ *Id.*

¹⁷² *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923).

order [for it] to constitute a public use.”¹⁷³ Moreover, the Court has expressly provided that the legislature’s determination will receive deference as “well-nigh conclusive” of the public interest in the taking.¹⁷⁴ Provided with the Court’s deference, the legislature needs only a good reason, or purpose, to take private property in the public interest.

Most recently, in *Kelo v. City of New London*, the Court held that “a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking”¹⁷⁵ The Supreme Court has conveniently reduced “use by the public” to a “carefully considered” economic plan¹⁷⁶ that serves a broadly defined public purpose.¹⁷⁷ In fact, the Court has approved of takings for “public use” in a purely economic context. In *Hawaii Housing Authority v. Midkiff*, the Court approved a statute allowing the state to take land from lessors and transfer it to lessees in order to reduce the concentration of land ownership.¹⁷⁸ The Court concluded that eliminating the “social and economic evils of a land oligopoly” qualified as a valid public use.¹⁷⁹ In *Ruckelshaus v. Monsanto Co.*, the Court concluded that eliminating a significant barrier to entry in the pesticide market and thereby enhancing competition constituted a public use.¹⁸⁰ This line of decisions under the Takings Clause increases the likelihood that intellectual property, under copyright proponents’ stretched definition, may be taken for public use.

Legislatures may soon claim that the economic inefficiencies resulting from its own government-granted monopolies in copyrights and patents may just prove reason enough for federal and state governing bodies to follow the lead of David Catania and the District of Columbia. The public purpose in that specific instance, to alleviate pharmaceutical prices to the consuming public,¹⁸¹ would surely pass the Supreme Court’s current public use doctrine. As discussed, in the copyright arena, a similar situation may have already surfaced with iTunes and the iPod.¹⁸² That problem may worsen as the music industry collapses into one media conglomerate,¹⁸³ and the right to sell music is decided

¹⁷³ *Id.*

¹⁷⁴ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

¹⁷⁵ 125 S. Ct. 2655, 2661 (2005).

¹⁷⁶ *Id.* at 2661.

¹⁷⁷ *Id.* at 2663.

¹⁷⁸ 467 U.S. 229, 231–32 (1984).

¹⁷⁹ *Id.* at 241–42.

¹⁸⁰ 467 U.S. 986, 1015–16 (1984).

¹⁸¹ *Outterson*, *supra* note 162.

¹⁸² Hsu, *supra* note 99, at 122.

¹⁸³ See Press Release, IFPI, *supra* note 119 (noting that currently, 71.7% of the recording industry’s global market share is allocated to just four companies).

by one company, or even one person. Surely, if breaking up a land oligopoly serves a public purpose, constituting a valid taking of land,¹⁸⁴ so could breaking up a media oligopoly, constituting a “valid” taking of copyrights.

Under this hypothesized exercise, a state might implement legislation calling for compulsory licensing of copyrights for just compensation. In this way, the government will force the transfer of certain rights to the use and sale of a copyrighted product from one private party to another, or many others. The price, just compensation, will be paid by the government. In effect, the result of the process is similar to a right of first sale.¹⁸⁵ The transferees will be similarly situated entities with the capabilities of marketing and selling such products to the public. The result will be increased competition, increased output, and decreased prices to the public, which legislatures will call a beneficial public purpose. This directly mimics the purely economic benefit in *Midkiff*—the Supreme Court has already given its blessing to this supposed public use, taking from A and giving to the rest of the alphabet. Again, in *Kelo*, the Court approved such a maneuver.¹⁸⁶

In the context of eminent domain as applied to copyright, the benefit could be deemed public because of the facilitation of public access to information. Moreover, if the same practice is duplicated for patented technology such as Apple’s AAC codec technology,¹⁸⁷ market frustration and fragmentation will be alleviated by technological homogeneity. As a result, the consuming public will not have to ask whether the music they are buying will work with their respective player, and the 180 legal music downloading services launched in 2004¹⁸⁸ will sell more downloads. Presumably, the holding in *Florida Prepaid* will extend to copyrights, leaving the state immune from an infringement suit as long as due process is granted by paying just compensation for the taking.

The ease with which the proposed system fits within the legal framework for “public use,” and the compelling justifications that seemingly create valid benefits for imposing the process,

¹⁸⁴ *Haw. Hous. Auth.*, 467 U.S. at 231.

¹⁸⁵ Douglas Clement, *Creation Myths: Does Innovation Require Intellectual Property Rights?*, REASON, Mar. 2003, at 35, available at <http://www.reason.com/news/show/28703.html> (“Boldrin and Levine emphasize that . . . innovators should be given ‘a well defined right of first sale.’ . . . [a]nd creators should be paid the full market value of their invention, the first unit of the new product. That value is . . . the current value of everything it’s going to earn in the future.”).

¹⁸⁶ *Kelo*, 125 S. Ct. at 2661.

¹⁸⁷ Apple, *supra* note 122.

¹⁸⁸ Press Release, IFPI, *supra* note 119.

should be heeded by copyright proponents. Open eyes do not have to strain to foresee the possibility and its apparent suitability under current Supreme Court interpretation. This should be enough to curtail current practice and interpretation.

C. Just Compensation for Copyrights

The U.S. Supreme Court has stated that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”¹⁸⁹ Just compensation is measured by the property owner’s loss, not the government’s gain.¹⁹⁰ The owner must be returned to a position as if the property had not been taken; he is entitled to no more.¹⁹¹ If the net loss is zero, however, then just compensation due will be zero.¹⁹² On its surface, this raises a concern for those who might invest in property; but even in the open market, those investors would receive nothing in return for this investment because there is no expectation of a return.

In the case of a copyright owner, just compensation will be the loss of the right to sell the copyrighted product. A copyright is not limited, and therefore the sale, or lease, of a copyright is not a one-time transaction. Profits from the sale of a copyrighted product are earned over time by collecting royalties. Therefore, the current net loss to the copyright owner will be the future right to collect royalties. In such a case, just compensation would be difficult to measure, if not impossible. Nonetheless, by using a system which calculates actual sales and downloads of the copyright, just compensation could be measured and paid over time, just as royalties are collected. However, it is possible that the legislation would not include future profits in “just” compensation.¹⁹³ In this case, a reasonable royalty, including interest and costs, would be calculated and paid.¹⁹⁴ This raises an important concern for copyright owners because most revenue generated by copyrights is earned over a long period of time. Legislation, by neglecting to include future profits in just compensation, would be getting off easy without accounting for an adequate return on investment. Again, this possibility should encourage copyright

¹⁸⁹ *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

¹⁹⁰ *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 237 (2003).

¹⁹¹ *Olson v. United States*, 292 U.S. 246, 255 (1934).

¹⁹² *Brown*, 538 U.S. at 237–38.

¹⁹³ Committee on Health, *supra* note 166, at 11 (stating that Councilmember Catania responded that “the current body of law supports the idea that such a payment would not include compensation for lost profits”).

¹⁹⁴ *Id.* (“[U]nder equitable principles of fairness, a reasonable, not excessive royalty would be appropriate.”).

owners to change the course of their current campaign to ensure that this does not become a reality.

D. Research and Development

In the patent arena, the adverse effect on research and development is the most recognized and wholly legitimate argument against the use of eminent domain.¹⁹⁵ Opponents argue that compulsory licensure of patents will undermine the incentives for research and development.¹⁹⁶ In light of the huge costs associated with research and development,¹⁹⁷ companies investing in patents will be hesitant to spend such time and money on their creations if their creations can be taken away.

This argument is not as successful in the copyright arena, making copyrights more apt to be subject to eminent domain. Although research and development plays an integral part in the development process of a patent, demanding substantial investments of time and money,¹⁹⁸ these investments of time and money are not usually as substantial in the development of a copyright. A songwriter does not employ a research and development team as does a pharmaceutical company.¹⁹⁹ During the mid-1990s, one patent was granted in the software industry for every \$10 million spent on research and development.²⁰⁰ It is difficult to imagine that the same level of investment is usually expended to create a song, book, or painting.²⁰¹ Thus, the fear of expending resources for little return must be far less with copyrights than with patents. Following this intuition, Nobel Prize winner and renowned economist Robert Lucas offers the following comparison of copyrights with patents:

If we do not enforce copyrights to music, will people stop writing and recording songs? Not likely If so, then protection against musical 'piracy' just comes down to protecting monopoly positions: something economists usually oppose, and with reason.

. . . [But w]hat about pharmaceuticals? . Here millions are spent

¹⁹⁵ Outterson, *supra* note 162.

¹⁹⁶ *Id.*

¹⁹⁷ Committee on Health, *supra* note 166, at 11 (summarizing Sharon Treat's testimony that "drug companies often cite research and development as huge costs").

¹⁹⁸ *Id.*

¹⁹⁹ Clement, *supra* note 185, at 38 ("Much of the high cost of pharmaceutical R&D . . . is due to the inflated values placed on drug researchers' time because they are employed by monopolists.").

²⁰⁰ James Bessen & Robert M. Hunt, *The Software Patent Experiment*, 2004 FED. RES. BANK OF PHILA. BUS. REV. 27 (2004), available at <http://www.phil.frb.org/files/brq304rh.pdf>.

²⁰¹ The music industry will argue that recording costs are relatively high, but these costs are steadily in decline because new technology makes music recording inexpensive. See *supra* note 37.

on developing new drugs. Why do this if the good ideas can be quickly copied?²⁰²

In this light, unfortunately, it is easy to envision the government's prospective argument that compulsory licensing of copyrights would not destroy the copyright creation process in the same way that compulsory licensing of patents might destroy the incentive to invest in patent creation. Because the incentive does not disappear, and because lower costs are more easily covered by payment of just compensation, the primary argument that prevents subjecting patents to the eminent domain process does not translate to the copyright arena. Copyright campaigners should take note of this and amend their practices accordingly.

CONCLUSION

This Comment demonstrates to copyright proponents that their very insistence on lobbying for absolute and perpetual protection actually opens the door to unwanted consequences. First, there are fundamental problems associated with characterizing intellectual property as tangible private property. Although fine arguments have been made by proponents of the private property theory, most of these proponents are self-interested owners of intellectual property rights. These owners understandably have a vested interest in securing profits for themselves in a system that promotes rent-seeking activities. Nevertheless, affording to intellectual property the same perpetual and absolute property rights that are granted to tangible private property causes economic inefficiencies as well as internal friction in the creative process.

Second, the historical, and currently prevailing, campaign for property rights conducted by copyright advocates has never been denied, despite the inefficiencies created by recognizing perpetual intellectual monopolies. Courts and legislators have heeded to lobbying pressures, continually strengthening and extending copyright protection, approaching the perpetual protection afforded to tangible property. Although protecting the interests of authors is not without merit, absolute copyright protection is not the most efficient method to spur creativity. In fact, this method actually thwarts the creative process by failing to recognize the importance of free and unobstructed dissemination of information to the creative process. Furthermore, the true intent of the Constitution, which states that such protection shall only

²⁰² Clement, *supra* note 185, at 37 (quoting Robert E. Lucas, Jr., Nobel Laureate and Economist, Univ. of Chi.).

be “for limited Times,”²⁰³ is not being correctly followed.

Third, copyright’s historical outline, proof that Congress and the Courts tend to treat copyrights like absolute property rights, has antitrust implications. The practical application shows that market inefficiencies are created through the monopoly power conferred by intellectual property laws to copyright and patent owners. Such inefficiencies cause less output, and higher prices to consumers, of patented and copyrighted products. Furthermore, the sale of copyrighted products tied with the sale of an incompatible patented technology, such as iTunes and the iPod, produces a fragmented and frustrated market for the copyrighted products. When a monopoly over this business model is legally obtained, antitrust law intentions are debased, and antitrust law is violated.

This phenomenon is consistent with, and provides further support for, the proposition that legislators may create for themselves an escape from the quagmire they have established, and find it both worthy and constitutional to subject intellectual property, and more specifically copyrights, to the power of eminent domain. It is not the author’s intention to argue for the immediate application of eminent domain with blind ambition. Instead, the intention has been to suggest a viable, although unattractive, alternative to the inefficiencies created by intellectual monopolies in an effort to instill motivation to change current legislation and copyright law interpretations. The proposed system would involve a compulsory licensing scheme that mirrors a right of first sale for copyright owners. The transaction would include the required transfer of a copyrighted product, in return for just compensation to be paid over time as royalties are paid. Utilizing the Takings Clause²⁰⁴ in the Constitution as a sword, and exploiting the U.S. Supreme Court’s decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*²⁰⁵ as a shield, legislators have created for themselves both the authority and purpose to take copyrighted materials and transfer them to other entities, private or not, for a public use. The rationale to do so depends on the extremity of antitrust implications that will arise from perpetual ownership of intellectual monopolies. In the media industry, which includes music, film, and publishing, this possibility becomes more evident as market diversity moves toward singular control by one media conglomerate.

²⁰³ U.S. CONST. art. I, § 8, cl. 8.

²⁰⁴ U.S. CONST. amend. V.

²⁰⁵ 527 U.S. 627, 630 (1999).

Although this use of the Takings Clause will undoubtedly solicit great opposition, it seems hypocritical for copyright proponents to argue for equating copyrights with private property for the last two hundred years, and then to argue that those very same copyrights should not become subject to the Takings Clause. Copyright proponents can only avoid such a hypocritical position by receiving this warning and modifying their stance on property rights. In sum, for the benefit of copyright owners, copyright's campaign for property rights should blow the whistle on itself. If this Comment's proposed action should indeed present itself in legislation, the words "for limited Times" will be the "I told you so" from the Founding Fathers.

