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# Miranda's Fourfold Failure

Albert W. Alschuler

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## *MIRANDA'S FOURFOLD FAILURE*

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## MIRANDA'S FOURFOLD FAILURE

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### INTRODUCTION

In 1966, five Justices of the Supreme Court sought to civilize police interrogation in America.<sup>1</sup> Fifty years later, their efforts appear to have been an abject failure. As Scott Howe observes, today's law of interrogation "facilitates bad behavior all around."<sup>2</sup> Howe's criticism of interrogation practices today resembles the criticism offered by Yale Kamisar shortly before *Miranda*.<sup>3</sup>

Howe writes:

For criminal suspects, the law rewards obstruction and concealment. For

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<sup>1</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>2</sup> Scott W. Howe, *Moving Beyond Miranda: Concessions for Confessions*, 110 NW. U. L. REV. 905, 907 (2016).

<sup>3</sup> See Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in CRIMINAL JUSTICE IN OUR TIME 3, 64 (A. E. Dick Howard ed., 1965). The *Miranda* majority cited this work twice. *Miranda*, 384 U.S. at 440 n.2; *id.* at 472 n.41. A *Miranda* dissenter cited it once. *Id.* at 511 (Harlan, J., dissenting).

police officers, it honors deceit and psychological aggression. For the courts and the rest of us, it encourages blindness and rationalization. . . .

. . . .

It goes far to protect noncooperation and cover-up by the most knowledgeable, cunning, and steely criminals, while providing only minimal safeguards for those who are uneducated, unintelligent, or easily coerced. It permits . . . trickery, harassment, and the inducement of despair . . . . It invites courts . . . to declare the irrational or inveigled decisions of arrestees to talk to police as “knowing,” “intelligent,” and “voluntary,” torturing the meaning of these words . . . .<sup>4</sup>

*Miranda*’s failure was foreseeable. From the outset, this decision has been:

- (1) **A Doctrinal Failure** (a) because *Miranda* seriously misconstrued the Fifth Amendment’s privilege against self-incrimination; (b) because the artificiality of *Miranda*’s rules has produced a mountain of nonsense law; and (c) because *Miranda* promised legal assistance at the stationhouse while ensuring that suspects would not get it;
- (2) **An Ethical Failure** (a) because the extravagant right to remain silent asserted by *Miranda* runs counter to ordinary moral principles; and (b) because the unwillingness of just about everyone actually to honor this right has produced a system relying on exploitation and deception;
- (3) **A Jurisprudential Failure** because *Miranda* departed from the appropriate role of courts; and
- (4) **An Empirical Failure** because *Miranda* did next to nothing to protect suspects from police abuse.

#### I. THE INITIAL DOCTRINAL FAILURE: *MIRANDA*’S MISUNDERSTANDING OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

##### A. *Compulsion*

The famous fourfold forewarning begins, “You have a right to remain silent.”<sup>5</sup> The Supreme Court explained, “For those unaware of the privilege, the warning is needed simply to make them aware of it.”<sup>6</sup> The privilege against self-incrimination, however, does not guarantee an unqualified right to remain

<sup>4</sup> Howe, *supra* note 2, at 905-07 (footnotes omitted).

<sup>5</sup> *Miranda*, 384 U.S. at 444, 467-68; *id.* at 504 (Harlan, J., dissenting) (describing the majority opinion) (“The foremost requirement, upon which the later admissibility of a confession depends, is that a four-fold warning be given to a person in custody before he is questioned, namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge.”).

<sup>6</sup> *Id.* at 468 (majority opinion).

silent. It says only that no person “shall be compelled in any criminal case to be a witness against himself.”<sup>7</sup> The crucial constitutional concept is compulsion.

Legal prohibitions of compulsion are ubiquitous. Just as you may not be compelled to incriminate yourself, you may not be compelled to enter a contract, make a will, or have sex. But forbidding compulsion to enter a contract does not preclude persuasion to enter a contract. It requires the authorities to mark a line between legitimate and illegitimate means of convincing you.<sup>8</sup>

You have a right not to enter a contract in the sense that you cannot be imprisoned, whipped, or water-boarded for refusing to enter it. Forbidding compulsion to enter a contract, however, does not mean that no one will think less of you for refusing to enter a contract, that no one will draw adverse inferences from your refusal to enter a contract, or that no one will ever try earnestly and repeatedly to convince you to enter a contract. Prohibiting compulsion to enter a contract does not mean that refusing to enter a contract will never make things worse for you.<sup>9</sup> If the word “compulsion” in the Fifth Amendment were to be given its ordinary meaning, your right to remain silent would be no broader than your right to refuse to enter a contract.<sup>10</sup>

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<sup>7</sup> U.S. CONST. amend. V.

<sup>8</sup> See Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 965-67 (1997) (noting that a focus on overborne wills in coercion cases is misplaced and that a better focus is “the propriety or impropriety of human influences on choice”).

<sup>9</sup> Hardly anyone would proclaim, “Declining to enter a contract should not lead to any adverse consequences because declining to enter a contract is a *right*.”

<sup>10</sup> Defending *Miranda*, Steven Schulhofer maintained that a statement can be “compelled” even when it is not “coerced” or “involuntary.” See Steven J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 440-45 (1987). In ordinary English usage, however, a right not to be “compelled” does not prohibit any governmental action that the Fifth Amendment would have permitted if its text had used the word “coerced” instead. “Coercion” refers to actions by human beings that improperly influence choice. “Compulsion” includes these actions, but it also (and perhaps more clearly) includes human actions that disable choice entirely and natural events that either deprive a person of choice or else strongly influence his choice.

For example, a villain both coerces and compels me to remain where I am when he threatens to shoot me if I move. He compels me to stay where I am but does not coerce me when he ties me down instead. Sub-zero weather may compel me to wear a coat, but it does not coerce me to wear a coat. When the Framers of the Fifth Amendment spoke of “compulsion,” they referred to human actions improperly influencing choice.

Schulhofer does not in fact contend that ordinary usage suggests any relevant difference between the word “coercion” and the word “compulsion.” See Schulhofer, *supra*, at 442 n.17. His argument appears to be that *Miranda* was not the first Supreme Court decision to give the word “compulsion” a strange and artificial meaning. See Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 182-86 (1988).

B. *The Griffin-Miranda Misinterpretation*

A year before *Miranda*, the Supreme Court appeared to equate compulsion with any action that makes a choice disadvantageous. In *Griffin v. California*,<sup>11</sup> it held jury instructions unconstitutional because they allowed a jury to draw an adverse inference from a defendant's failure to explain incriminating evidence.<sup>12</sup> For the Court, it was enough that comment on a defendant's failure to testify "cut[] down on the [constitutional] privilege by making its assertion costly."<sup>13</sup> Any adverse comment "compelled" speech because it disadvantaged silence. Even if drawing an adverse inference might lead to more accurate verdicts, the Constitution barred the government from tilting the scales in favor of speaking.

The Court's view that the government may not make silence costly departed not only from the ordinary meaning of the constitutional text but also from the Framers' understanding of this text.<sup>14</sup> At the Framing, although defendants were not sworn, they were expected to explain incriminating evidence during pretrial interrogation by a magistrate and then to explain it again at trial. Few if any defendants remained silent, and jurors would have viewed their silence as incriminating if they had.<sup>15</sup>

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<sup>11</sup> 380 U.S. 609 (1965).

<sup>12</sup> *Id.* at 615.

<sup>13</sup> *Id.* at 614. The Court could not have meant this statement literally. Presenting a strong prima facie case of a defendant's guilt often makes it costly for him to remain silent, but the Fifth Amendment does not bar a prosecutor from presenting a strong case.

<sup>14</sup> *See id.* at 620 (Stewart, J., dissenting).

<sup>15</sup> *See* J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660-1800, at 348-49 (1986) (describing eighteenth century English trials) ("There was no thought that the prisoner had a right to remain silent on the grounds that he would otherwise be liable to incriminate himself . . . . [T]he assumption was clear that if the case against him was false the prisoner ought to say so and suggest why, and that if he did not speak that could only be because he was unable to deny the truth of the evidence."); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1048-49 (1994) (explaining how common law procedures produced the "accused speaks" trial); Eben Moglen, *Taking the Fifth: Reconsidering the Constitutional Origins of the Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1091 (1994) (indicating that American practice at the time of the Framing was no different from the English practice described by Beattie and Langbein); *see also* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2651-60 (1996).

Rather than speak of chilling the exercise of a defendant's right not to testify, *Griffin* might have concluded that comment on a defendant's failure to testify directly violated the privilege by converting even a silent defendant into a witness against himself. If a guilty defendant testified and spoke the truth, he would incriminate himself, and if he remained silent, he would again incriminate himself. Because this defendant could not avoid incriminating himself, he was "compelled" to incriminate himself. This analysis would have rested on a plausible interpretation of the constitutional text. Like the analysis upon which *Griffin* relied, however, it would have departed from the historic understanding of this text.

*Miranda* echoed *Griffin*. Declaring it “impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation,” the Court declared that “[t]he prosecution may not . . . use at trial the fact that he stood mute or claimed his privilege in the face of accusation.”<sup>16</sup> The Court said that the government must “shoulder the entire load.”<sup>17</sup> From the Court’s perspective, it apparently was unconstitutional to encourage a criminal suspect to reveal what he knows.<sup>18</sup>

*Miranda* observed, “[T]he privilege 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.’”<sup>19</sup> It added, “Our aim is to assure that the individual’s right to choose between silence and speech remains unfettered throughout the interrogation process.”<sup>20</sup> These statements indicated that the government must remain neutral between silence and speech. Other statements, however—particularly the Court’s talk of waiver—seemed to tilt the scales in favor of silence. The Court wrote, “If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination . . .”<sup>21</sup> Under *Miranda* as originally conceived, a suspect might choose to speak, but it wouldn’t be easy.

*Miranda*’s emphasis on waiver underscored its misunderstanding of the privilege. If the Fifth Amendment guaranteed an unqualified right to remain silent, suspects might intelligently waive this right, but, as Justice Marshall once observed, “[N]o sane person would knowingly relinquish a right to be free of compulsion.”<sup>22</sup>

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*See infra* note 79 (criticizing this alternate rationale for *Griffin*).

<sup>16</sup> *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966).

<sup>17</sup> *Id.* at 460 (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 317 (McNaughton rev. 1961)).

<sup>18</sup> Although the Framers had no objection to drawing an adverse inference from an unsworn defendant’s silence before a magistrate or at trial, they might not have approved of drawing an adverse inference from a defendant’s refusal to offer *sworn* testimony. *See* Alschuler, *supra* note 15, at 2653. *Griffin*, however, offered no indication that a refusal to testify under oath might differ from any other form of silence, and *Miranda* extended the right to remain silent to unsworn suspects. Even if the Framers might have approved of the result in *Griffin*, they would have disapproved of the right to silence created by *Miranda*.

<sup>19</sup> *Miranda*, 384 U.S. at 460 (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).

<sup>20</sup> *Id.* at 469.

<sup>21</sup> *Id.* at 475.

<sup>22</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 281 (1973) (Marshall, J., dissenting).

History helps to explain the Court’s conceptual and terminological confusion. When, before the turn of the eighteenth century, English courts recognized a testimonial privilege against self-incrimination, the principal (and perhaps the only) beneficiaries of this privilege were prosecution witnesses and witnesses in civil cases. Alschuler, *supra* note 15, at 2659. Criminal defendants had no need for a testimonial privilege because they were not placed on oath. Although these defendants were expected to tell their stories both before trial and at

### C. *Doctrinal Mud*

*Miranda* apparently interpreted the Fifth Amendment to confer a right to remain silent that one must knowingly waive. But one of *Miranda*'s rulings was flatly inconsistent with this interpretation. A suspect's knowledge or ignorance of his right to remain silent does not depend on whether he is in custody. If the Fifth Amendment requires a knowing waiver of the right to remain silent, the police should be required to advise a suspect of this right and to obtain a knowing waiver whenever they ask him to incriminate himself.<sup>23</sup>

trial, they were not "witnesses," and the inferences jurors would have drawn if they had remained silent were not seen as compulsion. *See id.* at 2657-58.

Because prosecution witnesses and witnesses in civil cases were sworn to tell the truth, their refusal to speak subjected them to imprisonment for contempt, and the threat of imprisonment unmistakably qualifies as compulsion. *See id.* at 2659. Common-law judges, however, allowed them to decline to answer when their testimony would be incriminating. *See* Trial of John Friend, 13 How. St. Tr. 1, 17 (1696) ("[N]o man is bound to answer any question that will subject him to a penalty or to infamy."). At common law, a sworn witness had "a right to remain silent" when his answers would incriminate him. Of course he could "waive" this right by answering incriminating questions.

But a witness whose sworn answers would incriminate him had a "right to remain silent" only because, in the absence of an evidentiary privilege, he would have been subject to "compulsion" to speak. The authors of the privilege did not imagine that a "right to remain silent"—a right one must "waive"—extended to people who were not under oath and not subject to compulsion. Before *Miranda*, some commentators contended in fact that the privilege against self-incrimination did not apply to stationhouse interrogation:

Since police have no legal right to compel answers, there is no legal obligation to which a privilege in the technical sense can apply. That is, it makes no sense to say that one is privileged not to disclose—that one is excused from the legal consequences of contumacy—when there are no legal consequences of contumacy.

WIGMORE, *supra* note 17, at 329 n.27.

These commentators overlooked the fact that imprisonment for contempt is not the only sort of compulsion the privilege forbids. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 203 n.18 (1997) (showing that the Framers saw the privilege as outlawing torture); Alschuler, *supra* note 15, at 2647-52 (same). The Fifth Amendment prohibits compulsion by police officers as well as by judges. *See* Bram v. United States, 168 U.S. 532, 542 (1897); 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, 143-47, 152-53, 168-69, 178-79 (1992). Nevertheless, conflating a sworn witness's right to refuse to answer incriminating questions with a general right to refuse to answer is a mistake. In the absence of an oath subjecting a witness to compulsion, finding a Fifth Amendment violation depends on finding compulsion somewhere else. Nothing in the Constitution indicates that the Framers expected the government to "shoulder the entire load." The Fifth Amendment forbids using imprisonment, torture, and other harsh measures to induce self-incrimination.

<sup>23</sup> *See* Escobedo v. Illinois, 378 U.S. 478, 490, 492 (1964) (emphasizing—in the first decision to extend the right to counsel to police interrogation—that "the investigation [was] no longer a general inquiry into an unsolved crime but [had] begun to focus on a particular suspect"). *But see* *Miranda*, 384 U.S. at 444 n.4 (claiming incredibly that, when *Escobedo*

Whether the suspect is under arrest should not matter. *Miranda*, however, limited its protections to suspects in custody.<sup>24</sup> If the Fifth Amendment guarantees a right to remain silent that one must knowingly waive, *Miranda* seems seriously under protective.

The Court explained its focus on custody by declaring that, in the absence of proper safeguards, “the process of in-custody interrogation . . . 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.”<sup>25</sup> This statement indicated that the Court might not regard the Fifth Amendment as guaranteeing all suspects, even those not in custody, an unqualified right to remain silent. Perhaps the Court had not abandoned the ordinary meaning of “compulsion” after all, and perhaps it was still concerned with evaluating the quality and extent of the pressures brought to bear upon a suspect. Perhaps officials could still tilt the scales in favor of revealing incriminating information as long as they did so within appropriate limits.<sup>26</sup>

The Court reinforced the sense that it was concerned with genuine “compulsion” when it devoted several pages of its opinion to describing the psychological stratagems recommended by police interrogation manuals.<sup>27</sup> It accurately observed that many of the tactics endorsed by these manuals would be judged coercive if someone used them, not to obtain a confession, but to induce a “well-to-do testatrix” to alter her will.<sup>28</sup>

To claim that every incriminating response to postarrest questioning is the product of compulsion, however, would be extravagant. Following an arrest, a suspect might ask what he’s charged with, and an officer might answer this question truthfully. If, in the absence of warnings, the officer then inquired, “Did you do it?” and the suspect said “Yes,” *Miranda* would require exclusion of the suspect’s answer. The reason, however, cannot be that the officer compelled the suspect’s response—not if the word “compulsion” retains its ordinary meaning.<sup>29</sup> If the Fifth Amendment bars only compulsion, *Miranda* seems overly protective.<sup>30</sup>

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said “focus,” it meant “custody”).

<sup>24</sup> See *Miranda*, 384 U.S. at 444 (defining custodial interrogation as “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”).

<sup>25</sup> *Id.* at 467.

<sup>26</sup> The Court might have seen custody as supplying “compulsion” in the same way that English courts once saw testimonial oaths as supplying compulsion. See *supra* note 22.

<sup>27</sup> See *Miranda*, 384 U.S. at 448-55.

<sup>28</sup> *Id.* at 457 n.26 (quoting Arthur E. Sutherland, Jr., *Crime and Confession*, 79 HARV. L. REV. 21, 37 (1965)).

<sup>29</sup> But see Schulhofer, *supra* note 10, at 446-53 (apparently arguing that even in this hypothetical scenario the suspect’s answer can fairly be presumed to be the product of compulsion).

<sup>30</sup> The Supreme Court declared, “In these cases, we might not find the defendants’ statements to have been involuntary in traditional terms. Our concern for adequate

One need not read *Miranda* to say either that the Fifth Amendment requires every suspect to make a knowing waiver of the right to remain silent (an interpretation that leaves *Miranda* protecting too little) or that it deems every incriminating statement obtained through in-custody interrogation a product of compulsion (a proposition that leaves *Miranda* protecting too much). A third reading sees *Miranda* as providing prophylactic protection against compulsion. The suspect's statement in the scenario just described must be excluded, not because this statement itself is deemed compelled, but because excluding it makes compulsion in other situations less likely.

How *Miranda* guards against compulsion, however, is unclear. The Court wrote, "The requirement of warnings and waiver of rights is . . . not simply a preliminary ritual to existing methods of interrogation."<sup>31</sup> When suspects waive their *Miranda* rights, however—as more than three-quarters do<sup>32</sup>—*Miranda*'s formalities are no more than a preliminary ritual to the methods the Court deplored.<sup>33</sup> One wonders how the Court could have imagined that its

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safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest." *Miranda*, 384 U.S. at 457. When our precious Fifth Amendment confers only a right not to be "compelled," however, it bars only "compelled" or "involuntary" statements.

<sup>31</sup> *Id.* at 476.

<sup>32</sup> See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 (1996) (reporting that 83.7% of 173 suspects whom the police advised of their *Miranda* rights waived them—although 3.9% withdrew their initial waivers before questioning ended); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids?*, 23 CORNELL J.L. & PUB. POL'Y 395, 429 (2013) (reporting that 92.8% of 307 juvenile suspects in recorded interrogations waived their *Miranda* rights); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 255-56 (2006) (reporting that 80% of 53 sixteen- and seventeen-year-old suspects whose video-recorded interrogations were included in prosecutors' files waived their *Miranda* rights); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 226, 286 (1996) (reporting that 78% of the suspects in 182 directly observed or recorded police interrogations in California waived their *Miranda* rights).

<sup>33</sup> See FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS 1 (2d ed. 1967) ("As we interpret the June, 1966, five to four decision . . . , all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used after the recently prescribed warnings have been given to the suspect . . . , and after he has waived his self-incrimination privilege and his right to counsel."); Howe, *supra* note 2, at 933 ("*Miranda* . . . allows the police, after securing a waiver, to use at least as much deceit and pressure as they could have employed under the old due process 'voluntariness' test.").

The Supreme Court has come close to treating compliance with *Miranda*'s formalities as giving the police a safe harbor. See *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that law enforcement authorities adhered to the dictates of *Miranda* are rare."). In some respects, moreover, the Court has weakened the voluntariness standards it applied before *Miranda*. For example, the Court has abandoned

“safeguards” would ever be anything else.

Most of the suspects who invoke their *Miranda* rights probably would not have cooperated with the police in the absence of *Miranda*. Perhaps, however, the decision emboldened some suspects who otherwise would have succumbed

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the centuries-old rule that confessions may not be “obtained by any direct or implied promises, however slight”—a development described *infra* in text at notes 47-57. The decision in *Chavez v. Martinez*, 538 U.S. 760 (2003), suggests another way in which the Court has become less receptive to claims of coercion.

*Chavez* concerned the interrogation in a hospital emergency room of a suspect who had been shot several times, leaving him partially blinded, paralyzed from the waist down, and in great pain. *Id.* at 764 (plurality opinion). At one point, this suspect told the interrogating officer, “If you treat me, I tell you everything, if not, no.” *Id.* at 786 (Stevens, J., concurring in part and dissenting in part) (setting forth an English translation of the emergency-room questioning). Although the suspect in fact received medical treatment, the officer apparently questioned him without disabusing him of the idea that he would receive treatment only if he talked. *Id.* at 784-86. The suspect was not prosecuted, but he alleged in a civil lawsuit that the interrogating officer violated his constitutional rights. *Id.* at 764-65 (plurality opinion).

*Chavez*'s principal holding was that, because the suspect was not prosecuted, the Fifth Amendment privilege against self-incrimination had no bearing on his case. In the Court's view, the privilege does not forbid torturing suspects to induce them to talk; it forbids only the *use at trial* of incriminating statements obtained through torture and other forms of compulsion. *Id.* at 773. The Court, however, remanded the suspect's case to permit a lower court to determine whether his interrogation violated the Due Process Clause. *Id.* at 779-80 (Souter, J., concurring) (providing the one-sentence opinion of the Court on this point). What the Court said about due process standards has received considerably less attention than its ruling concerning the limited scope of the privilege against self-incrimination.

Several *Chavez* opinions indicated that the issue under the Due Process Clause was whether the police conduct “shock[ed] the conscience.” *Id.* at 774 (plurality opinion); *id.* at 779, 783 (Souter, J., concurring) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)); *id.* at 787 (Stevens, J., concurring in part and dissenting in part) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)). No Justice in fact questioned the use of this standard. For decades prior to *Miranda*'s elaboration of a system for protecting the Fifth Amendment privilege, however, the Supreme Court had evaluated the voluntariness of confessions under the Due Process Clause, and the words “shock the conscience” never appeared in its opinions. Instead, the Court insisted that the exclusion of improperly obtained confessions rested on the idea that “the police must obey the law while enforcing the law.” *Spano v. New York*, 360 U.S. 315, 320 (1959). It wrote:

Our decisions . . . have made clear that convictions following the admission into evidence of [involuntary] confessions . . . cannot stand . . . not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system . . .

*Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

*Miranda* appears largely to have halted the development of voluntariness standards under the Due Process Clause. It may in fact have encouraged judges to weaken the standards previously developed. Judges, lawyers, and academics have all taken their eyes off the ball.

to coercive interrogation to opt out of interrogation altogether or to halt questioning already underway. It is only in this sense that *Miranda* may guard against compulsion.<sup>34</sup>

None of the alternative readings of *Miranda* make much sense, but they enable *Miranda*'s defenders to respond to criticism of one possible reading by insisting that the decision is “really” about something else. More significant than the weakness of each interpretation is the fact that no one can tell which interpretation is correct. *Miranda* moves from statements indicating that the government must remain neutral between silence and speech to statements indicating a strong presumption in favor of silence to statements suggesting that the government must merely refrain from coercion. No one knows what *Miranda* means. Perhaps the Court cared less about providing a coherent interpretation of the Fifth Amendment than about devising a legislative code for police interrogation. The Court's doctrinal confusion might have stemmed from its misconception of its role.<sup>35</sup>

D. *The Significance of the No-Penalty-for-Silence Decisions: A Cruel Trilemma for Miranda's Defenders*

It is difficult to envision a milder or more appropriate “penalty” for a suspect's refusal to explain incriminating evidence than allowing a fact finder to consider this refusal for whatever evidentiary significance it may have. By declaring this “penalty” impermissible, *Griffin* and *Miranda* confirm what some of their rhetoric suggests—that the government may not make silence costly in any way. This misunderstanding of the Fifth Amendment has implications that extend beyond forbidding comment on silence. It ensures that police interrogation can have only one purpose—tricking and cajoling suspects into doing something that is not in their interest.

This Article has noted that, just as you may not be compelled to incriminate yourself, you may not be compelled to enter a contract. Entering a contract, however, and answering police questions are very different moves. Entering a contract sometimes can make you better off, but when the courts forbid even rational inferences from silence, submitting to police interrogation never can. Especially (but not only) when you are guilty, agreeing to answer police questions is likely to send you to the penitentiary.<sup>36</sup> Justice Jackson remarked,

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<sup>34</sup> Interrogating officers conceivably might refrain from coercion because they understand that suspects have the power to bring interrogation to a halt. There is no reason, however, to believe that *Miranda* has changed in the slightest the way the police interrogate suspects after these suspects waive their rights.

<sup>35</sup> See *infra* Part VI.

<sup>36</sup> James Duane marvelously demonstrates this fact in both his popular lecture *Don't Talk to the Police*, Regent Law, YOUTUBE (Mar. 20, 2012), <https://www.youtube.com/watch?v=d-7o9xYp7eE>, and his recent book, JAMES DUANE, YOU HAVE THE RIGHT TO REMAIN INNOCENT (2016). Duane describes several miscarriages of justice that occurred only because innocent suspects agreed to cooperate with deceptive

“[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances.”<sup>37</sup> Police officers tell their children the same thing.<sup>38</sup>

Limitless ways of persuading you to enter a contract are appropriate and beneficial, but when a choice is plainly not in your interest, every means of convincing you to make this choice requires force or deception—actual, threatened, or implicit. To obtain cooperation and confessions in the post-*Miranda* era, interrogating officers do just what they did before *Miranda*—disparage, disbelieve, ridicule, and lie. They lie about the evidence, about the power of their technology, about the seriousness of the crime, about the usefulness of having a lawyer, about what could happen to the suspect if he does not confess, and about what could happen to him if he does.<sup>39</sup> For the most part, the courts let them do it.<sup>40</sup> Even when officers do not lie overtly, their methods are intended to deceive. The routine use and approval of these methods habituates the police to dishonesty and breeds community mistrust. What Sissela Bok wrote after the experiences of Vietnam and Watergate seems even more apropos today: “The veneer of social trust is often thin. As lies spread . . . trust is damaged. Yet social trust is a social good to be protected . . . . When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse.”<sup>41</sup>

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officers. *Id.* at 39-64.

<sup>37</sup> *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part); *see also* *Miranda v. Arizona*, 384 U.S. 436, 516 n.12 (1966) (Harlan, J., dissenting).

<sup>38</sup> *See* DUANE, *supra* note 36, at 3.

<sup>39</sup> *See, e.g., Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (per curiam) (noting that the police obtained a confession after falsely telling a suspect that his fingerprints had been found at the scene of the crime); *Michigan v. Mosley*, 423 U.S. 96, 98 (1975) (noting that the police obtained a confession after falsely telling a suspect that another suspect had identified him as the gunman); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 429-30 (1996) (describing other reported cases in which the police obtained confessions by misrepresenting evidence).

<sup>40</sup> *See, e.g., Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (declaring, in a case in which an officer claimed falsely that a suspect's companion had confessed, that the officer's lie, “while relevant, is insufficient . . . to make this otherwise voluntary confession inadmissible”); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 777 (1997) (“[C]urrent constitutional doctrine . . . by and large has acquiesced in, if not affirmatively sanctioned, police deception during the investigative phase.”); Young, *supra* note 39, at 426 (“[T]he courts regularly admit confessions obtained by police lying.”). *But see* *People v. Thomas*, 8 N.E.3d 308, 310 (N.Y. 2014) (ordering a confession excluded because police lies created a substantial risk of a false confession).

<sup>41</sup> SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 26-27 (1978). The percentage of Americans who believed they could trust the federal government most of the time fell from 77% before Vietnam and Watergate to 36% afterwards. It is 19% today. PEW RESEARCH CTR., *BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT* (2015), <http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/>

The no-penalty-for-silence decisions bar national, state, and local governments from making cooperation advantageous, but these governments employ thousands of people whose mission is to convince suspects that cooperation will be advantageous. Our system of police interrogation relies on deception, cajolery, and intimidation—nothing else. The defenders of *Miranda* should ask themselves whether this is the system they want.

One alternative to this system is to reconsider *Griffin* and *Miranda* and permit comment on silence. Advise a suspect that, although he need not speak, his silence will be noted and may be considered as one circumstance suggesting his guilt. With a forthright, moderate incentive for cooperation in place, perhaps the deceptive stratagems could be abandoned. Perhaps interrogation could occur, not in the backroom of a stationhouse, but before a magistrate. Perhaps the civilized interrogation procedure that persisted for almost three centuries in England pursuant to the Marian Committal Statute of 1555<sup>42</sup> could be restored.<sup>43</sup> With this procedure in place, outcomes would depend less on the deviousness and skill of particular interrogators and on the ignorance, foolishness, and vulnerability of particular suspects. I realize, however, that righteous rhetoric on the part of both the hawks and the doves of the criminal process probably makes this reform impossible.

The doves' objection to replacing today's deceptive psychological ploys with an open incentive for speech is the *Griffin-Miranda* objection: Any visible incentive is incompatible with the privilege, for it puts a price on silence. The hawks' objection is that comment would be less effective in producing confessions than today's backroom practices.

If the latter objection seemed persuasive, the appropriate response might be,

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[<https://perma.cc/F6YE-5H46>].

<sup>42</sup> 2 & 3 Phil. & M. c. 10 (Eng.). A practice codified in Sir John Jervis's Act 1848, 11 & 12 Vict. c. 42, § 18 (Eng.), effectively ended the Marian procedure. This statute required a caution that an arrested person brought before a magistrate need not answer and that, if he did answer, his answers could be used against him. Although the caution was intended to advance the rights of people accused of crime, it backfired by leading to the development of police interrogation. See COSMAS MOISIDIS, *CRIMINAL DISCOVERY: FROM TRUTH TO PROOF AND BACK AGAIN* 19-21 (2008).

<sup>43</sup> People whose names "read[] like an honor roll of the legal profession"—among them Wigmore, Pound, Kauper, Friendly, Schaefer, and Frankel—have proposed a return to something like the Marian procedure. *Lakeside v. Oregon*, 435 U.S. 333, 345 n.5 (1978) (Stevens, J., dissenting); MARVIN E. FRANKEL, *PARTISAN JUSTICE* 98-99 (1980); WALTER V. SCHAEFER, *THE SUSPECT AND SOCIETY* 76-81 (1967); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968); Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932); Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & CRIMINOLOGY 1014 (1934); John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 85-88 (1891); see also Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1974).

not to retain today's deceptive methods, but to increase the incentive for cooperation. Advise a suspect that revealing the truth as he sees it will lead to a specified reduction in whatever sentence a court may impose if he is convicted—say, a twenty percent reduction in a prison sentence and a comparable reduction in any other sanction.<sup>44</sup> A magistrate might add that a subsequent decision to plead guilty could lead to a further reduction of, say, fifteen percent.<sup>45</sup> He might afford the suspect an opportunity to consult with counsel about how to proceed.<sup>46</sup>

Although drawing an adverse inference from silence did not trouble the Framers of the Fifth Amendment, the proposal to reward cooperation with a lighter sentence would have appalled them. Before the Constitution was written, common law judges had established the rule that a confession obtained

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<sup>44</sup> Any suspect who tells the truth as he sees it should be entitled to the proposed reduction in punishment. A sentencing judge might occasionally conclude that even a suspect who denied his guilt and later was convicted at trial had told the truth as he understood it. Bargaining for a confession rather than simply a truthful statement, like bargaining for a guilty plea, is offensive; it assumes that the only correct answer is a confession or, even worse, that the correct answer doesn't matter. Bargaining for the accused to tell the truth as he understands it is at least somewhat less troublesome.

Howe proposes a system for rewarding cooperation similar to the one suggested here, but the one he proposes is more complicated. *See* Howe, *supra* note 2, at 948-61.

<sup>45</sup> With forthright incentives for cooperation in place, perhaps two stains on American criminal justice—stationhouse interrogation and prosecutorial plea bargaining—could both be eradicated.

<sup>46</sup> In England, Section 144 of the Criminal Justice Act of 2003 declares: "In determining what sentence to pass on an offender who has pleaded guilty . . . , a court must take into account . . . the stage in the proceedings at which the offender indicated his intention to plead guilty . . ." Criminal Justice Act 2003, c. 44, § 144 (Eng.). The Sentencing Guidelines Council implemented this statute by recommending a scale of diminishing discounts for guilty pleas. The scale ranges from a thirty-three percent discount when a defendant pleads guilty at the earliest opportunity to a ten percent discount when he pleads guilty on the day he appears for trial. *See* SENTENCING GUIDELINES COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA 6 (rev. 2007), [http://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction\\_in\\_Sentence\\_for\\_a\\_Guilty\\_Plea\\_-Revised\\_2007.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf) [<https://perma.cc/7VGW-YQP6>]; *see also* SENTENCING COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA GUIDELINE CONSULTATION 5-6 (2016), <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf> [<https://perma.cc/89N6-J6BA>] (inviting comment on a proposed revision of the current guideline).

In a six-month period in 2010 and 2011, eighty-seven percent of the defendants who were sentenced in the Crown Court pleaded guilty. Sixty-four percent of the defendants who pleaded guilty did so at the earliest opportunity, and thirty-five percent of those who pleaded guilty had confessed to the police. *See* SENTENCING COUNCIL, CROWN COURT SENTENCING SURVEY 21 (2011), [https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS\\_Experimental\\_Release\\_web.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS_Experimental_Release_web.pdf) [<https://perma.cc/A57X-4RLW>].

“by promises of favour” could not be received in evidence.<sup>47</sup>

This rule persisted until after *Miranda*. The Supreme Court’s first coerced confession decision, *Hopt v. Utah*,<sup>48</sup> said in 1884 that a confession, to be voluntary, must be “uninfluenced by hope of reward or fear of punishment.”<sup>49</sup> In 1896, the Court declared a confession “inadmissible if made under any threat, promise, or encouragement of any hope or favor.”<sup>50</sup> One year later, in *Bram v. United States*,<sup>51</sup> the Court placed the common law rule on a constitutional foundation: “[W]herever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person ‘shall be compelled in any criminal case to be a witness against himself.’”<sup>52</sup> The Court reiterated that a confession could not be received unless it was “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.”<sup>53</sup>

Before *Miranda*, police and prosecutorial practice departed from this rule, and after *Miranda*, the law changed. The Supreme Court abandoned *Bram* as a standard for judging the voluntariness of guilty pleas in 1970<sup>54</sup> and as a standard for judging the voluntariness of out-of-court confessions in 1991.<sup>55</sup> Today, as the Supreme Court observes, bargaining for guilty pleas is “not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>56</sup> Our courts have become fully dependent on a practice they once condemned as a violation of the Fifth Amendment privilege.<sup>57</sup>

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<sup>47</sup> R v. Warickshall (1783) 168 Eng. Rep. 234 (KB); R v. Rudd (1775) 98 Eng. Rep. 1114, 1116 (KB) (Mansfield, J.); *see also* State v. Bostick, 4 Del. (1 Harr.) 563, 564 (1845) (“However slight the promise or threat may have been, the confession cannot be received.”).

<sup>48</sup> 110 U.S. 574 (1884).

<sup>49</sup> *Id.* at 584.

<sup>50</sup> *Wilson v. United States*, 162 U.S. 613, 622 (1896).

<sup>51</sup> 168 U.S. 532 (1897).

<sup>52</sup> *Id.* at 542 (quoting U.S. CONST. amend. V).

<sup>53</sup> *Id.* at 542-43 (quoting 3 RUSSELL ON CRIMES 478 (Horace Smith & A.P.P. Keep eds., 6th ed. 1896)).

Exhibit A in *Miranda*’s depiction of the unseemliness of in-custody interrogation was an instruction manual co-authored by Fred Inbau. *See* *Miranda v. Arizona*, 384 U.S. 436, 448-55 (1966) (citing Inbau and Reid’s *Criminal Interrogation and Confessions* nine times). Inbau, however, declared that he was “unalterably opposed” to “the use of force, threats, or promises of leniency—all of which might well induce an innocent person to confess.” Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L. & CRIMINOLOGY 16, 16 (1961).

<sup>54</sup> *See* *Brady v. United States*, 397 U.S. 742, 754 (1970).

<sup>55</sup> *See* *Arizona v. Fulminate*, 499 U.S. 279, 285 (1991) (declaring that *Bram* “does not state the standard for determining the voluntariness of a confession”).

<sup>56</sup> *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

<sup>57</sup> *See generally* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L.

For almost fifty years, in hundreds of pages of law review articles, I have decried plea bargaining,<sup>58</sup> but I have acknowledged that the practice is here to stay.<sup>59</sup> When our justice system does not balk at using promises of leniency to induce the ultimate act of self-incrimination—a plea of guilty—it need not be squeamish about using similar leverage to induce suspects to say truthfully what happened. Of course neither I nor other critics of plea bargaining ever maintained that, rather than offer benefits in exchange for pleas of guilty, prosecutors and judges should trick defendants into believing falsely that their guilty pleas will be advantageous.

If one opposes both providing forthright incentives for cooperation and our current regime of cajolery and deception, one alternative remains—shutting down police interrogation. Our justice system could abandon altogether its efforts to obtain evidence from criminal suspects and could require the government to shoulder the entire load.

The trilemma, however, cannot be avoided.<sup>60</sup> The options are:

- A regime in which the prospect of comment on a suspect's refusal to speak and possibly a promised reduction in sentence supply forthright reasons to speak;
- A regime in which suspects may be tricked into the false belief that speaking will be advantageous—although they may not be tricked too much; and
- A regime in which suspects may not be offered incentives to speak and may not be tricked, leaving police interrogation with nothing to do and ensuring that the government will almost never learn what suspects have to say.

For fifty years, *Miranda*'s defenders, following the example of the *Miranda* majority, have evaded this trilemma.<sup>61</sup> It is time to face up to it. A regime in which police interrogation continues to serve a purpose although the police may neither make silence costly nor convince people falsely that it will be costly is an unreal dream.

## II. *MIRANDA*'S ETHICAL FAILURE: THE FLAWED MORALITY OF THE RIGHT TO

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REV. 1 (1979).

<sup>58</sup> See, e.g., Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

<sup>59</sup> See Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 706 (2013) ("The time for a crusade to prohibit plea bargaining has passed.").

<sup>60</sup> Cf. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (suggesting that "the cruel trilemma of self-accusation, perjury, or contempt" contributed to the development of the privilege against self-incrimination).

<sup>61</sup> See *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) ("Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.").

## REMAIN SILENT

The person who knows best whether a charge of crime is true is usually the person charged with committing it. No legal system has failed to seek evidence from the accused, and no sensible legal system ever would. *Miranda's* interpretation of the Fifth Amendment privilege, however, appears to rest on the view that it is unseemly (and perhaps even inhuman) to encourage someone accused of crime to reveal what he knows. Requiring the government to shoulder the entire load is noble (and perhaps even thrilling).

This moral vision is upside down. As I've explained:

No parent or schoolteacher feels guilty about asking questions of a child strongly suspected of misconduct. Similarly, no employer considers it improper to ask an employee accused of wrongdoing to give his side of the story. Criminal cases aside, there are apparently no investigative or fact-finding proceedings in which asking questions and expecting answers is regarded as dirty business. Noting that "parents try hard to inculcate in their children the simple virtues of truth and responsibility," Justice Walter V. Schaefer once wrote that "the Fifth Amendment privilege against self-incrimination . . . runs counter to our ordinary standards of morality."<sup>62</sup>

Defenders of the *Griffin-Miranda* perspective reject the analogy to interrogation by private individuals: "[C]riminal defendants aren't kids. A kid who steals cookies might be sent to his room for an hour, but a criminal defendant will be sent to a very small cell for a very long time."<sup>63</sup> Because criminal sanctions are usually (although not invariably) more severe than private sanctions, it may be more difficult for a guilty suspect to speak the truth and to accept the prescribed penalty than for a guilty child or employee to do so. At the same time, however, someone who has committed a more serious wrong than stealing cookies may have a greater moral obligation to do what he

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<sup>62</sup> Alschuler, *supra* note 15, at 2637 (quoting SCHAEFER, *supra* note 43, at 59). Justice Schaefer might better have spoken of the right to remain silent than of the Fifth Amendment privilege against self-incrimination. When read simply as a prohibition of the use of torture, imprisonment, and other harsh methods to induce self-incrimination, the Fifth Amendment privilege does not run counter to ordinary morality. See Charles T. McCormick, *Law and the Future: Evidence*, 51 NW. U. L. REV. 218, 222 (1956) ("[O]rdinary morality . . . sees nothing wrong in asking a man, for adequate reason, about particular misdeeds of which he has been suspected and charged."). As Dean McCormick's statement suggests, interrogation intrudes upon privacy and, like a police search, should occur only upon a showing of probable cause. See generally R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981). In the early seventeenth century, the maxim *nemo tenetur prodere seipsum* apparently meant only that officials could not ask suspects to respond under oath to incriminating questions without antecedent justification. Alschuler, *supra* note 15, at 2640-41.

<sup>63</sup> Myron Moskovitz, *The O.J. Inquisition: A United States Encounter with Continental Criminal Justice*, 28 VAND. J. TRANSNAT'L L. 1121, 1140 (1995).

can to set things right.

Acknowledging one's wrong is laudable, but of course it is also difficult. The failure of guilty suspects and defendants to do what most others in their situations would not do should not be punished criminally. The Fifth Amendment accordingly provides that an accused who refuses to speak cannot be imprisoned for contempt of court in the same way as other recalcitrant witnesses. Nevertheless, a wrongdoer who confesses remains more virtuous than one who does not. A suspect's refusal to cooperate should not be romanticized as something noble and should not be shielded from the inferences that would be drawn from silence in other social situations.<sup>64</sup>

The Supreme Court's most recent decision on the right to remain silent, *Salinas v. Texas*,<sup>65</sup> posed the ethical question nicely, but the Court gave an equivocal answer. In *Salinas*, a suspect in a double homicide agreed to provide his shotgun for ballistics testing and to submit to questioning in a police interview room. Because the suspect was not formally in custody, *Miranda*'s protections did not apply. He was not warned of his right to remain silent or his right to counsel.

Through most of a one-hour interrogation, the suspect answered questions. When, however, an officer asked whether his shotgun would "match the shells recovered at the scene of the murder," the suspect did not speak. Instead, he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up."<sup>66</sup>

A three-Justice plurality—Justices Alito and Kennedy and Chief Justice

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<sup>64</sup> The *Miranda* warnings themselves have muddied the issue. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Supreme Court declared it "fundamentally unfair" to warn a suspect of his right to remain silent and then to use the fact that he remained silent to impeach his testimony. *Id.* at 618. According to the Court, the *Miranda* warnings convey an "implicit" assurance that "silence will carry no penalty." *Id.*

Similar unfairness may now exist whenever silence is used against a suspect. The repetition of the *Miranda* warnings in countless films and television programs has made *Miranda* "the most famous appellate case in the world." Frederick Schauer, *The Miranda Warning*, 88 WASH. L. REV. 155, 155 (2013). *Miranda* told *everyone* they have a right to remain silent.

A revised warning, however, could make the absence of an estoppel clear: "You have a right to remain silent, but your silence will be noted and may be considered as one circumstance suggesting your guilt." This warning would resemble the warning currently given suspects in England and Wales: "You do not have to say anything. But it may harm your defence if you do not mention, when questioned, something which you later rely on in Court. Anything you do say may be given in evidence." Home Office, Police and Criminal Evidence Act 1984: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code C) ¶ 10.5 (rev. ed., effective May 2014). See generally Craig M. Bradley, *Interrogation and Silence: A Comparative Study*, 27 WIS. INT'L L.J. 271 (2009).

<sup>65</sup> 133 S. Ct. 2174 (2013).

<sup>66</sup> *Id.* at 2178 (plurality opinion) (alteration in original).

Roberts—supplied the decisive opinion.<sup>67</sup> This opinion declared the suspect's failure to answer admissible, but only because he had not invoked the privilege against self-incrimination at the time he remained silent.<sup>68</sup> The plurality took no position on whether the silence of a suspect who did invoke the privilege would be admissible.<sup>69</sup>

The *Salinas* ruling added another formality to the pile spawned by *Miranda*. It favored suspects who had attended law school while demanding an incantation few nonlawyer suspects would think of providing. Moreover, the pleading it required served no significant function.<sup>70</sup> In *Salinas*, one did not need this pleading to know the reason for the suspect's silence: He feared that his answer would incriminate him. It was only this fact that made his failure to speak probative.<sup>71</sup>

Two Justices—Justices Thomas and Scalia—would have held the suspect's failure to speak admissible even if he had invoked the privilege.<sup>72</sup> Four dissenters—Justices Breyer, Ginsburg, Sotomayor, and Kagan—would have excluded his failure to respond.<sup>73</sup>

The dissenters' position—as well as that of the *Griffin* and *Miranda* majorities—was incongruous. If the suspect had responded to the question about testing the shotgun and shells by saying either “Uh-oh” or “I'm sunk,” his statement would have been admissible. If one assumes that the suspect's conduct—failing to respond, looking at the floor, biting his lip, clenching his hands, and tightening up—was similarly probative (and it was<sup>74</sup>), why did the

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<sup>67</sup> *Id.* at 2177.

<sup>68</sup> *Id.* at 2184.

<sup>69</sup> *See id.*

<sup>70</sup> The plurality wrote that invocation of the privilege enables the government to “argue that the testimony sought could not be self-incriminating or [to] cure any potential self-incrimination through a grant of immunity.” *Id.* at 2179 (citation omitted). Interrogating officers, however, have no authority to approve immunity grants or to rule on the validity of a claim of privilege. Moreover, unlike a judge, an officer who found a suspect's claim of privilege invalid could not order him to answer. A suspect not in custody may walk away from an interview for any reason, just as a suspect who is in custody may decline to answer for any reason.

<sup>71</sup> *See* Tracey Maclin, *The Right to Silence v. The Fifth Amendment*, 2016 U. CHI. LEGAL F. 255, 281-82.

<sup>72</sup> *See Salinas*, 133 S. Ct. at 2184 (Thomas, J., concurring).

<sup>73</sup> *See id.* at 2185 (Breyer, J., dissenting).

<sup>74</sup> The probative value of silence varies greatly from one situation to another. A refusal to respond to fishing-expedition inquiries—inquiries about one's activities or whereabouts posed without a showing of probable cause—may reflect only the belief that the answers are none of the questioner's business. Similarly, a refusal to submit at all to stationhouse interrogation may not be very incriminating when this interrogation is likely to be prolonged and deceptive, when it can easily produce inconsistencies that can be made to look suspicious, and when even police officers tell their children to avoid it. Following a finding of probable cause, however, a refusal to provide an account to a magistrate whose duty is to

dissenters propose to treat this conduct differently?

Proclaiming that the suspect had a right to remain silent does not distinguish his silence from his speech, for the suspect also had a right to speak. His right to speak was in fact protected by the Constitution; prohibiting people from admitting their crimes would violate the First Amendment. Would the dissenters (or anyone else) argue that all confessions to the authorities must be excluded because exercise of the right to speak cannot be made costly?

The *Salinas* dissenters said that, when asked about the shotgun and shells, the suspect “fell silent.”<sup>75</sup> People can confess, however, by using gestures or American Sign Language, and looking to the floor, biting one’s lip, and refusing to answer can look a lot like a confession too. Under some circumstances, suddenly falling silent can communicate much the same message as the statement, “I’m sunk.” Especially when a refusal to answer is accompanied by a revealing change in facial expression or body language or by a sigh or a groan, no basis for drawing a line between silence and speech is apparent. Why draw it?<sup>76</sup> What reason can there be for not treating all communication—verbal and nonverbal—alike?

One may sympathize to a degree with the suspect in *Salinas*. If he had understood his situation, he would not have submitted to stationhouse interrogation at all. Although the police apparently did not lie to him, they exploited his ignorance. Moreover, the suspect’s psychological state probably was not greatly different from that of a suspect deemed by *Miranda* to have been subjected to the inherently compelling pressures of in-custody

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record but not challenge it is likely to be incriminating. And submitting to interrogation but balking at a particular question may be highly incriminating. Of course, in almost every situation, one can imagine reasons why an innocent suspect might decline to answer. In at least some situations, however, the most likely explanation is that the sonofabitch is guilty. Determining what weight, if any, to give to possibly incriminating circumstances is the role of the jury.

<sup>75</sup> *Salinas*, 133 S. Ct. at 2185 (Breyer, J., dissenting).

<sup>76</sup> Although *Griffin* forbids prosecutors from commenting on a defendant’s failure to testify at trial, courts generally allow prosecutors to comment on a nontestifying defendant’s demeanor. See, e.g., *Borodine v. Douzanis*, 592 F.2d 1202, 1210 (1st Cir. 1979) (“These comments, when considered as a whole, were probably intended and understood as a reflection on the defendant’s expressionless courtroom demeanor rather than on his right not to take the stand.”); *Bishop v. Wainright*, 511 F.2d 644, 668 (5th Cir. 1975) (“We have carefully reviewed prosecutor’s closing statements and understand them to be a comment upon Bishop’s expressionless courtroom demeanor rather than upon his failure to take the stand.” (footnote omitted)); *Basora v. Mitchell*, 803 F. Supp. 897, 898 (S.D.N.Y. 1992) (“[A]ny facial expressions one chooses to exhibit at trial are voluntary . . . .”); Brett H. McGurk, *Prosecutorial Comment on a Defendant’s Presence at Trial: Will Griffin Play in a Sixth Amendment Arena*, 31 UWLA L. REV. 207, 245-49 (2000); see also Emily Rebekkah Hanks, *Body Language: Should Physical Responses to Interrogation Be Admissible Under Miranda?*, 11 VA. J. SOC. POL’Y & L. 89, 96-97 & n.34 (2003) (describing conflicting rulings on the admissibility of body language and facial expressions when suspects decline to answer).

interrogation. Applying entirely different legal rules to his interrogation and, especially, to his silence<sup>77</sup> gives too much weight to the magic words “under arrest.” Any unfairness, however, would have been as great if the suspect had expressed his distress verbally as it was when he expressed this distress through nonverbal signs.

Admitting incriminating statements while excluding incriminating silence does not remain neutral between silence and speech. It does not merely afford suspects “a free choice to admit, to deny, or to refuse to answer.”<sup>78</sup> It treats suspects who remain silent more favorably than suspects who speak. Only a glorification of noncooperation with the government can explain this tilt, and glorifying noncooperation with a justified governmental inquiry is backwards.<sup>79</sup>

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<sup>77</sup> The *Salinas* plurality recognized that a suspect’s failure to answer an incriminating question during custodial interrogation could not be received in evidence. In this situation, whether the suspect had invoked his privilege against self-incrimination would not matter. *Salinas*, 133 S. Ct. at 2180 (plurality opinion). The reason, the plurality explained, is that a suspect in custody “is subjected to the ‘inherently compelling pressures’ of an unwarned custodial interrogation.” *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 467-68 & n.37 (1966)). A suspect who declines to answer, however, does not yield to the pressures of custodial interrogation. He successfully resists these pressures. It is difficult to see why his silence should be treated differently from that of the suspect in *Salinas*. See James J. Duane, *The Extraordinary Trajectory of Griffin v. California: The Aftermath of Playing Fifty Years of Scrabble with the Fifth Amendment*, 3 STAN. J. CRIM. L. & POL’Y 1, 10 n.52 (2015).

<sup>78</sup> See *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967) (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)).

<sup>79</sup> A possible doctrinal response to the analysis in text is suggested by the alternate rationale for the ruling in *Griffin* set forth *supra* in note 15. The Supreme Court might have held in *Griffin* that using a suspect’s incriminating silence against him leaves him with no way to avoid incriminating himself and thereby compels him to incriminate himself. A suspect must speak or not speak, and either choice produces evidence that the prosecutor may use to convict him. On this view, even if incriminating silence and incriminating speech are indistinguishable, one or the other must be excluded. (Of course, if the privilege demands only that a suspect have some way to avoid incriminating himself, the plurality opinion in *Salinas* may supply it by allowing him to plead the Fifth Amendment privilege.)

This possible response focuses on doctrine, not on any normative issue. It rests on a plausible reading of the word “compulsion,” but it does not suggest that tilting the scales in favor of silence can be ethically justified. And when a plausible interpretation of the constitutional text departs from both the Framers’ understanding of this text and ordinary morality, it is probably not the best interpretation of this text. The Fifth Amendment exempts people from criminal punishment and other harsh sanctions for refusing to incriminate themselves because confession is difficult and cannot be expected. It does not exempt them from punishment because silence is difficult. In fact, remaining silent is not difficult; even dead people do it. The Framers of the Fifth Amendment meant to save people from improper pressures to confess—pressures exerted by human beings. They did not mean to save people from the “compulsion” to speak or not speak that arises simply from the fact that speaking and not speaking are mutually exclusive.

When legal doctrine departs from ordinary morality and forbids encouraging the person who knows the most about his guilt or innocence to tell what he knows, this doctrine is likely to be subverted. Police officers may use deceptive or intimidating methods, and judges may wink. The flawed morality of the expansive right to remain silent endorsed by *Griffin* and *Miranda* may produce inexcusable mendacity in practice.

### III. MIRANDA'S SECOND DOCTRINAL FAILURE: HYPERTECHNICAL NONSENSE LAW

*Salinas* was only the most recent of many Supreme Court decisions to reject the flawed morality of the right to silence in some situations while leaving this flawed morality as the governing principle in other situations. As James Duane has noted, fifty years of post-*Miranda* scrimmage among the Justices has produced "a spectacularly chaotic farrago of opinions of such complexity that only one practicing attorney in a thousand can accurately summarize them off the top of her head."<sup>80</sup> Seeking to harmonize these opinions "is as futile as trying to make sense of the 'story' written in the words on a Scrabble board."<sup>81</sup>

Whether a suspect's silence can be used now depends on whether he was or was not in custody when he declined to speak,<sup>82</sup> whether he had or had not received the *Miranda* warnings,<sup>83</sup> whether he did or did not invoke the privilege against self-incrimination,<sup>84</sup> and whether the government seeks to use his silence to establish his guilt,<sup>85</sup> impeach his testimony,<sup>86</sup> determine his sentence,<sup>87</sup> or impose prison discipline.<sup>88</sup> Displaying the interaction of these variables would require a chart with many boxes, a significant number of which would remain blank.

Almost thirty years ago, Justice Holmes's "bad man of the law"<sup>89</sup> and I co-

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<sup>80</sup> Duane, *supra* note 77, at 5.

<sup>81</sup> *Id.* at 14.

<sup>82</sup> *See Salinas*, 133 S. Ct. at 2180 (plurality opinion).

<sup>83</sup> *See Doyle v. Ohio*, 426 U.S. 610, 611 (1976).

<sup>84</sup> *See Salinas*, 133 S. Ct. at 2184 (plurality opinion).

<sup>85</sup> *See id.* at 2179.

<sup>86</sup> *See, e.g., Fletcher v. Weir*, 455 U.S. 603, 607 (1982).

<sup>87</sup> *See Mitchell v. United States*, 526 U.S. 314, 327-30 (1999) (holding that a defendant's silence may not be used at sentencing to draw an inference about his conduct but reserving the question whether a defendant's silence "bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in [sentencing guidelines]").

<sup>88</sup> *See Baxter v. Palmigiano*, 425 U.S. 308, 316-19 (1976) (holding that silence may be considered at a prison disciplinary hearing because this hearing is civil in nature).

<sup>89</sup> *See Oliver Wendell Holmes, The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct . . . in the vaguer sanctions of conscience.").

authored a police training manual.<sup>90</sup> It is time for a second edition:

When you have probable cause to arrest a suspect and wish to interrogate him, do not arrest him. Ask him instead to accompany you to the stationhouse for an interview.<sup>91</sup> If he agrees, you may question him without providing warnings, and his answers will be admissible. His failure to answer specific questions will also be admissible—unless he invokes the privilege against self-incrimination. If the suspect refuses your invitation, this refusal itself can be used as evidence of his guilt—that is, unless he invokes the privilege against self-incrimination (which he won't).<sup>92</sup>

If the suspect does not immediately agree to your proposal, tell him that his refusal to speak with you may be treated as evidence of his guilt. The controlling opinion in *Salinas* declared, “Petitioner worries that officers could unduly pressure suspects into talking by telling them that their silence could be used in a future prosecution. But as petitioner himself concedes, police officers ‘have done nothing wrong’ when they ‘accurately stat[e] the law.’”<sup>93</sup>

One possible difficulty with offering this advice is that a full and accurate statement of the law would say more than the one the Supreme Court appeared to approve. This statement would mention that the Court has held a suspect's silence admissible only if he fails to invoke the privilege against self-incrimination. You do not want to tip your suspect off to the possibility of invoking the privilege, but perhaps, as *Salinas* implies, you can leave that detail out. The issue is murky enough that you might want to consult your department's legal advisor.

If, despite your accurate (though incomplete) legal advice, the suspect still refuses an interview, place him under arrest. Do not, however, give him the *Miranda* warnings. When the public safety requires it, you may question him without warnings, and his answers will be admissible.<sup>94</sup> In the absence of a special public need, however, you should not question your arrested, unwarned suspect. (You need not be concerned that

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For criticism of this view of the law, see ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 132-80 (2000).

<sup>90</sup> See Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442-43 (1987).

<sup>91</sup> Of course, if the suspect poses an immediate danger, it may be necessary to place him under arrest. Before doing so, however, consider a possible alternative—asking him to agree voluntarily to a search of his person and to being handcuffed voluntarily while you transport him voluntarily to his voluntary interrogation. Cf. *United States v. Mendenhall*, 446 U.S. 544, 558-59 (1980) (concluding that an airline passenger transporting drugs in her underwear consented voluntarily to a strip search).

<sup>92</sup> See *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013) (plurality opinion).

<sup>93</sup> *Id.* at 2183 (alteration in original).

<sup>94</sup> See *New York v. Quarles*, 467 U.S. 649, 651 (1984).

omitting the warnings might be unlawful. *Miranda* requires warnings only when “a person in custody is to be subjected to interrogation.”<sup>95</sup>) Your suspect probably will continue to remain silent, in which case you will gain another piece of potentially useful evidence. Unlike the suspect’s prearrest silence, his postarrest silence probably cannot be introduced to show his guilt.<sup>96</sup> His silence will, however, be admissible to impeach any defense he offers at trial.<sup>97</sup> Note that, if you had advised your suspect of his rights, his postarrest silence would not be admissible at all.<sup>98</sup> If your suspect does make a statement before you question him, it will be a “volunteered” statement of the sort *Miranda* makes admissible.<sup>99</sup>

After an hour or two (during which your suspect will have provided either a statement or another potentially useful period of silence), advise him of his rights. If the suspect waives these rights, his statement will be admissible. If he indicates that he wishes to remain silent, you may, if you like, cease your interrogation, repeat the *Miranda* warnings at a later time, and try again. Although *Miranda* says that all interrogation must cease when a suspect invokes the right to remain silent,<sup>100</sup> it does not say that questioning must cease forever.<sup>101</sup> If the suspect tells you that he wishes to consult a lawyer, however, the Supreme Court forbids trying again. Interrogation must cease until counsel has been made available or the suspect himself initiates a conversation without prompting.<sup>102</sup>

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<sup>95</sup> *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

<sup>96</sup> A dictum in *Salinas* seems to say so. *See Salinas*, 133 S. Ct. at 2180 (plurality opinion). Before *Salinas*, however, the issue was unsettled. *Compare* *United States v. Frazier*, 394 F.3d 612, 619-20 (8th Cir. 2005) (holding postarrest, prewarning silence admissible as part of the prosecutor’s case-in-chief but recognizing that the authorities were conflicting and that the Supreme Court had not addressed the issue), *with* *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997) (holding that postarrest, prewarning silence cannot be received as part of the prosecutor’s case-in-chief).

<sup>97</sup> *See Fletcher v. Weir*, 455 U.S. 603, 607 (1982).

<sup>98</sup> *See Doyle v. Ohio*, 426 U.S. 610, 611 (1976).

<sup>99</sup> *See Miranda*, 384 U.S. at 478 (“Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.”).

<sup>100</sup> *See id.* at 473-74 (“If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.” (footnote omitted)).

<sup>101</sup> *See Michigan v. Mosley*, 423 U.S. 96, 102-03 (1975).

<sup>102</sup> *See Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *see also Arizona v. Robertson*, 486 U.S. 675, 683-85 (1988) (holding renewed interrogation impermissible even when the interrogating officer does not know that the suspect has requested counsel and when this officer is investigating a crime other than the one investigated at the time of the suspect’s request for counsel).

Providing a lawyer would shut down questioning, however, so disregard both the Supreme Court's ruling and your suspect's request. Continue to question him in the absence of counsel. Although the prosecutor will be unable to introduce as part of the state's case-in-chief any statement the suspect makes, his statement will become admissible to impeach his testimony if he later takes the witness stand to say something different from what he told you.<sup>103</sup> Indeed, if the suspect's testimony on direct examination fails to contradict his earlier statement, the prosecutor may cross-examine him about the facts reported in the earlier statement and may introduce this statement if the suspect fails to confirm what he said to you.<sup>104</sup> Moreover, if the suspect says something that leads to the discovery of incriminating physical evidence, this evidence will be admissible, not only for purposes of impeachment, but also to prove the suspect's guilt.<sup>105</sup>

Do not, however, place too much pressure on your suspect. If a court holds his statement involuntary under pre-*Miranda* standards, it will be inadmissible for any purpose. In addition, whatever physical evidence you uncover by questioning the suspect will be excluded. The Supreme Court has said that pre-*Miranda* voluntariness standards are part of the "real" Constitution; *Miranda* is part of the "just pretend" Constitution.<sup>106</sup>

Litigation following *Miranda* has focused not only on the issues noted in the *Bad Man Training Manual* but also on linguistic questions—how warnings of rights, waivers of rights, and invocations of rights must be phrased. The Supreme Court has concluded that, although warnings of rights may depart from the formula set forth in *Miranda*<sup>107</sup> and although waivers of rights can be implied,<sup>108</sup> invocations of rights must be unambiguous.<sup>109</sup>

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<sup>103</sup> See *Oregon v. Hass*, 420 U.S. 714, 722-24 (1975).

<sup>104</sup> See *United States v. Havens*, 446 U.S. 620, 626-28 (1980).

<sup>105</sup> See *United States v. Patane*, 542 U.S. 630, 643 (2004) ("Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self-Incrimination Clause."). The *testimonial* fruit of a voluntary statement obtained in violation of *Miranda*, however, sometimes must be excluded. See *Missouri v. Seibert*, 542 U.S. 600, 617 (2004).

<sup>106</sup> Compare *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . may be triggered even in the absence of a Fifth Amendment violation."), and *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (finding that *Miranda*'s safeguards are "not themselves rights protected by the Constitution"), with *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 . . .").

<sup>107</sup> See *Duckworth v. Eagan*, 492 U.S. 195, 202-04 (1989) (upholding a revised version of the *Miranda* warnings five-to-four).

<sup>108</sup> See *North Carolina v. Butler*, 441 U.S. 369, 373-76 (1979).

<sup>109</sup> See *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) ("There is good reason to require an accused who wants to invoke his or her right to remain silent to do so

Litigation also has focused on what constitutes custody<sup>110</sup> and what constitutes interrogation. According to the Court, the applicable definition of interrogation depends on whether the suspect has appeared before a magistrate. Before his appearance, the standard is objective—whether an officer either asked an express question or used words or actions “reasonably likely to elicit an incriminating response.”<sup>111</sup> After a suspect’s appearance, the standard becomes subjective—whether the officer “deliberately elicited” an incriminating response.<sup>112</sup> The reason for the shift is that a suspect’s right to counsel during interrogation before his first appearance in court is derived from the Fifth Amendment, while his right to counsel during any interrogation that occurs thereafter is afforded by the Sixth Amendment. According to the Court, “the policies underlying the two constitutional protections are quite distinct.”<sup>113</sup>

*Miranda*’s defenders attribute fifty years of Dickensian distinctions to the failure of the Burger, Rehnquist, and Roberts Courts to follow *Miranda* faithfully, and they view every departure from the broadest reading of *Miranda* as faithlessness. Much of their criticism is in fact justified, but it was *Miranda* that began the elaboration of today’s Ptolemaic system. Whatever its defects, the law of confessions that preceded *Miranda* focused on ethically salient issues. *Miranda*’s artificial rules invited artificial limitations. Nonsense yields nonsense.

#### IV. *MIRANDA*’S THIRD DOCTRINAL FAILURE: THE RIGHT TO COUNSEL THAT WASN’T

*Miranda* declares that a suspect in custody “must be warned prior to any questioning . . . that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”<sup>114</sup> Although a suspect who hears this warning may request counsel, he will not get one. The reason is not that officers follow the *Bad Man Training Manual* and interrogate suspects who have requested counsel in the absence of counsel. The reason is instead that, rather than provide counsel, interrogating officers surrender. They cease their efforts to

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unambiguously.”); *Davis v. United States*, 512 U.S. 452, 459 (1994) (“[T]he suspect must unambiguously request counsel.”).

<sup>110</sup> *See, e.g., J.D.B. v. North Carolina*, 564 U.S. 261, 265 (2011) (holding five-to-four that a suspect’s youth may be considered in deciding whether a reasonable person in his situation would have believed himself free to depart).

<sup>111</sup> *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

<sup>112</sup> *See Massiah v. United States*, 377 U.S. 201, 206 (1964); *see also Brewer v. Williams*, 430 U.S. 387, 400 (1977).

<sup>113</sup> *Innis*, 446 U.S. at 300 n.4. Unfortunately, the Court did not explain how the policies differ or why they require two definitions of interrogation.

<sup>114</sup> *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

question suspects and thereby comply fully with *Miranda*.<sup>115</sup> Almost every police officer in America understands that providing a lawyer for a suspect simply so that the lawyer can tell the suspect to shut up is pointless. It is easier for the officer to shut down interrogation himself. A suspect who hopes to see a lawyer and to answer questions is in for a surprise.<sup>116</sup>

Supreme Court Justices, however, are not as smart as police officers. The *Miranda* Court described the interrogations of the future just as though lawyers were going to be there. After observing that counsel's presence would protect the Fifth Amendment privilege, it declared:

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.<sup>117</sup>

The right to counsel afforded by *Miranda* is not a right to counsel. It is an incantation that suspects can use to shut down questioning.<sup>118</sup> Most suspects,

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<sup>115</sup> Within ill-defined limits, the police may discourage a suspect who has not yet requested counsel unambiguously from making the request. See Welsh S. White, *Deflecting a Suspect from Requesting an Attorney*, 68 U. PITT. L. REV. 29, 31 (2006) (noting that federal decisions appear to give the police "extraordinarily wide leeway to employ interrogation tactics that deflect suspects from requesting an attorney during a custodial interrogation").

<sup>116</sup> The revised *Miranda* warning the Supreme Court upheld five-to-four in *Duckworth v. Eagan*, 492 U.S. 195 (1989), was less misleading than the warning prescribed by *Miranda* itself:

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. *You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.

*Id.* at 198.

<sup>117</sup> *Miranda*, 384 U.S. at 470.

<sup>118</sup> Of course *Miranda* previously had given suspects another incantation they could use to shut down questioning. They could say that they wished to shut down questioning. There was no reason for the Court to provide a second incantation to do the same thing. ("If you do not wish to answer questions, you may say either 'I wish to remain silent' or 'Alakazam.'") The *Miranda* majority evidently believed that the second incantation would be more than a device for shutting down questioning. They believed it would cause a lawyer

however, do not say the magic words. As noted above, more than three-quarters of all suspects under police interrogation waive their *Miranda* rights.<sup>119</sup>

The *Miranda* Court's discussion of the ability of warnings to safeguard constitutional rights was contradictory. For people who wondered why lawyers were needed to advise suspects of the right to remain silent after the warnings themselves had advised suspects of this right, the Court had an answer: "Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights."<sup>120</sup> Under *Miranda*, however, the only advice suspects receive before waiving both the right to remain silent and the right to counsel is a "once-stated warning, delivered by those who will conduct the interrogation." The Court gave suspects no other protection despite its acknowledgement that a once-stated warning is ineffective.

Charles Ogletree proposed to remedy this deficiency by allowing suspects to waive counsel only after consulting counsel.<sup>121</sup> The question that ought to precede any discussion of the existence or scope of the right to counsel, however, is what task one wants counsel to perform. Both Ogletree and the *Miranda* majority presumably wanted lawyers to do what Justice Jackson said any lawyer worth his salt would do—"tell the suspect in no uncertain terms to make no statement to police under any circumstances."<sup>122</sup> As just about every

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to appear, as if from an old oil lamp. Why the majority imagined the police would go to the trouble of providing lawyers to halt questioning when the police could halt questioning themselves is a mystery. Although the two incantations provided by the Court are identical in function, the Court has elaborated supposed differences between them. It seems that the words "I wish to see a lawyer" say "Please do not question me" much more forcefully than the words "I wish to remain silent." Compare *Michigan v. Mosley*, 423 U.S. 96 (1975), with *Edwards v. Arizona*, 451 U.S. 477 (1981).

<sup>119</sup> See *supra* note 32 and accompanying text.

<sup>120</sup> *Miranda*, 384 U.S. at 469.

<sup>121</sup> Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842 (1987); see also Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENV. L.J. 1, 46-51 (1970) (proposing a nonwaivable right to counsel during interrogation). Shortly after *Miranda*, officers of the ACLU objected that "a person must have the advice of counsel in order to intelligently waive the assistance of counsel." See Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the New Fifth Amendment and the Old Voluntariness Test*, 65 MICH. L. REV. 59, 67 n.47 (1966); see also Brief for the American Civil Liberties Union as Amicus Curiae at 3, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 759) ("A police warning of the suspect's right to remain silent is not adequate. Neither is the granting of prior access to counsel, as distinguished from the presence of counsel. . . . Effectuation of the privilege against self-incrimination, in these circumstances, requires the providing of counsel to all.").

<sup>122</sup> *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and

police officer in America understands, however, the government can shut down interrogation without bringing lawyers to the stationhouse to do it.

*Miranda*'s defenders should recognize that the goals of ensuring that foolish suspects do not talk and of ending police interrogation go hand in hand, for only foolish suspects do talk. There are more efficient ways of accomplishing these goals than employing professionals with graduate degrees to say "shut up and I mean it" to millions of suspects one by one.<sup>123</sup>

#### V. *MIRANDA*'S JURISPRUDENTIAL FAILURE: ABANDONING THE JUDICIAL ROLE

The principal mission of courts is the rectification of past wrongs—what Aristotle called corrective justice.<sup>124</sup> Someone who alleges a legal wrong can go to court, and the court will listen. It will decide whether the allegation is true and, if it is, what should be done about it. Courts focus on disputes about the past.

The principal mission of legislatures is to enact rules for the future. Where courts look backwards, legislatures look forward. The line between the past and the future marks the basic division of labor between the judicial and legislative branches of government.

The Framers of the Constitution understood this distribution of responsibilities. They forbade Congress from enacting *ex post facto* laws,<sup>125</sup> bills of attainder,<sup>126</sup> and other retrospective measures<sup>127</sup> while limiting federal courts to the resolution of cases and controversies—disputes about past events.<sup>128</sup>

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dissenting in part).

<sup>123</sup> One possibility might be to revise the *Miranda* warnings to say: "You have a right to remain silent, and, if you hope for a favorable resolution of your case, it would be very foolish for you to say anything about your past conduct to me, any other law enforcement officer, or anyone with whom you may speak in jail. I'll say it again: It would be very dumb for you to talk. If, however, you are remorseful about a past wrong and wish to accept whatever punishment a court may impose, I will be happy to listen and take down whatever you have to say." Reading the Constitution to require this warning or to require a direct shutdown of interrogation, however, might be difficult. Affording a nonwaivable right to counsel would be a strange and wasteful way of bringing about the same end, but it might be less of a doctrinal stretch.

<sup>124</sup> ARISTOTLE, *THE NICOMACHEAN ETHICS* bk. V, ch. 4, at 111, 114-17 (David Ross trans., Oxford University Press rev. ed. 1925) (c. 384 B.C.E.).

<sup>125</sup> See U.S. CONST. art. I, § 9, cl. 3.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* art. I, § 10 (Contracts Clause); *id.* amend. V (Due Process and Takings Clauses).

<sup>128</sup> *Id.* art. III, § 2, cl. 1.

Of course the division of responsibility between courts and legislatures is inexact, and a court need not turn a blind eye to how its resolution of disputes about the past will affect future conduct. In a commercial case, for example, it may favor a clear rule in order to facilitate future transactions. Although no formula marks the extent to which courts should

Impatient reformers and moral skeptics have been uncomfortable with this traditional allocation of duties. Some skeptics in fact reject the very concept of corrective justice. Judge Posner wrote this about Justice Cardozo:

Legal rules should be viewed in instrumental terms. [In Cardozo's words:] "Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end." The instrumental concept of law breaks with Aristotle's influential theory of corrective justice. The function of law as corrective justice is to restore an equilibrium, while in Cardozo's account "not the origin, but the goal, is the main thing. There can be no wisdom in the choice of a path unless we know where it will lead. . . . The final principle of selection for judges . . . is one of fitness to an end."<sup>129</sup>

From a pragmatic or utilitarian perspective, the measure of a judicial decision appears to be how it will affect the entire world (or perhaps just a single nation or society) for good or ill. This viewpoint makes the litigants before the court unimportant, for these litigants constitute a small portion of the world. The pragmatic perspective also wipes out the core distinction between courts and legislatures.

The decline of corrective justice (or, if you prefer, the fading of the idea of courts) preceded *Miranda* and persisted after this decision.<sup>130</sup> *Miranda*, however, remains history's most stunning example of legislative opinion writing.<sup>131</sup>

Most of the *Miranda* opinion was devoted to "delineating" a "system" for protecting the privilege against self-incrimination.<sup>132</sup> When judges delineate a system rather than decide a case, the distinction between dictum and holding does not seem to matter,<sup>133</sup> and the facts of the cases before the court do not seem to matter either. In *Miranda*, the Court mentioned these facts almost as an afterthought—at the end of its opinion and only briefly. Only one fact counted, and it was one that all four of the cases before the Court had in common: no police officer in any of these cases had read the mind of Chief Justice Warren and complied with the rules the Court brought into existence a

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consider the future as well as the past, a court's primary responsibility is always to render justice to the parties before it. A court that concentrates only on governing the future should no longer be called a court.

<sup>129</sup> RICHARD A. POSNER, *OVERCOMING LAW* 391 (1995) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98, 102-03 (1921)).

<sup>130</sup> See ALSCHULER, *supra* note 89, at 100-03.

<sup>131</sup> See generally Henry J. Friendly, *A Postscript on Miranda*, in 1 HENRY J. FRIENDLY, *BENCHMARKS* 266 (1967); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

<sup>132</sup> See *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) (referring to "the system we delineate today").

<sup>133</sup> For example, *Miranda* proclaimed a suspect's silence inadmissible although none of the defendants in the cases before the Court had remained silent. See *id.*

few pages before it set the defendants' convictions aside.<sup>134</sup>

A court that sees its job as providing retrospective justice should rarely have occasion to apply a ruling only prospectively.<sup>135</sup> One week after *Miranda*, however, the Supreme Court announced that its decision would apply prospectively in the same way most statutes do.<sup>136</sup> *Miranda* ordered the convictions of the four defendants whose cases were before the Court set aside, but the seventy-five or so other defendants who had sought the Court's review of apparently identical issues were out of luck. They not only were denied Supreme Court review but also could not obtain relief elsewhere.<sup>137</sup>

Not long after *Miranda*, the Court said that its failure to treat like cases alike was

an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying [the parties before the Court] the benefit of [the Court's] decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard

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<sup>134</sup> Note that, unlike Joseph Grano, I do not contend that the Constitution prohibits federal courts from articulating prophylactic rules applicable in state courts—rules forbidding conduct by state officers that does not itself violate the Constitution in order to make more effective the Constitution's prohibition of other conduct. See Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 N.W. U. L. REV. 100, 123-29 (1985). In my view, David Strauss offered a convincing reply to Grano. See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 191-95 (1988); see also David A. Strauss, *Miranda, the Constitution, and Congress*, 99 MICH. L. REV. 958, 961-66 (2001).

<sup>135</sup> For an illustration of a prospective ruling that I regard as appropriate, see *State v. Hobson*, 577 N.W.2d 825, 838 (Wis. 1998) (recognizing the unfairness of denying the common law privilege to use force to resist an unlawful arrest to a defendant who might have relied on this privilege, but abrogating the privilege prospectively because an unlawful arrest was no longer likely to lead to lengthy confinement in unhealthy conditions and because less violent means of challenging the legality of an arrest had become available).

<sup>136</sup> See *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966). It was only a year before *Miranda* that the Court first announced that one of its decisions would apply only prospectively. See *Linkletter v. Walker*, 381 U.S. 618, 640 (1965) (declaring that the ruling in *Mapp v. Ohio*, 367 U.S. 643 (1961), would apply only prospectively); see also *Tehan v. Shott*, 382 U.S. 406, 419 (1966) (declaring that the ruling in *Griffin v. California*, 380 U.S. 609 (1965), would apply only prospectively).

<sup>137</sup> See *Desist v. United States*, 394 U.S. 244, 255 (Douglas, J., dissenting) (“[I]t was sheer coincidence that those precise four were chosen. Any other single case in the group or any other four would have been sufficient for our purposes.”).

the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.<sup>138</sup>

For the *Miranda* Court, sound principles of decision-making did not require the even-handed administration of corrective justice. They required selecting a few litigants at random to provide trimmings for the Court's legislative rulings. Denying relief to other, similarly situated defendants did not deprive these other defendants of anything to which they were entitled, for even the defendants whose convictions were set aside had no claim to this relief as a matter of corrective justice. The reversal of their convictions was simply a payoff to them for bringing legislative issues before the Court. Undeserved payoffs for a few "chance beneficiaries" were in fact required by the Constitution. In *Miranda* itself, setting aside the convictions of one rapist (Ernesto Miranda), two robbers (Michael Vignera and Carl Calvin Westover), and one murderer (Roy Allen Stewart) was "an insignificant cost for adherence to sound principles of decision-making."<sup>139</sup>

A court that assumes the legislative role is unlikely to do it well. Apart from its inability to gather information independently, its lack of authority to order expenditures from the public treasury, and other institutional limitations, a court is constrained by the need to pretend to be a court. Tying solutions to legal doctrine limits its options and is likely to produce clunky, second-best reforms—for example, providing lawyers to say "shut up and I mean it" to millions of suspects one by one.

The *Miranda* Court underscored the legislative character of its ruling by inviting real legislatures, state and federal, to amend or abandon it:

It is impossible for us 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

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<sup>138</sup> *Stovall v. Denno*, 388 U.S. 293, 301 (1967).

<sup>139</sup> *Id.* Justice Harlan protested that the Court could free a convicted criminal only when "the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently." *Desist*, 394 U.S. at 258 (Harlan, J., dissenting). Justice Harlan recognized, however, that whether a prisoner may invoke the equitable remedy of habeas corpus to obtain relief on the basis of a recently announced rule is a different question from whether the new rule must be applied retroactively. *Id.* at 260-69.

In 1989, the Supreme Court abandoned the view of retroactivity it took at the time of *Miranda* and endorsed Justice Harlan's position. *Teague v. Lane*, 489 U.S. 288, 303-10 (1989) (declaring that a new constitutional rule of criminal procedure must be applied to all untried cases and all cases on trial or direct review when the rule is announced but that, with rare exceptions, a new procedural rule does not entitle prisoners whose convictions were final at the time it was announced to habeas corpus relief).

presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.<sup>140</sup>

In the fifty years since *Miranda*, neither Congress nor any state legislature has accepted the Supreme Court's invitation to devise an alternate procedure for protecting the right to remain silent. Creating a procedure "at least as effective" as *Miranda's* would not take much. For example, a legislature could require a police officer to wave a wet noodle in the direction of Mecca.

#### VI. *MIRANDA'S* EMPIRICAL FAILURE: MISSION UN-ACCOMPLISHED

As noted above, more than three-quarters of the suspects advised of their *Miranda* rights waive them, and, when they do, the police question them just as they did before *Miranda*.<sup>141</sup> There is no reason to believe that *Miranda* has significantly changed the lives of these suspects or made the police less effective in securing incriminating statements from them. In Paul Cassell and Bret Hayman's study of felony cases screened by Salt Lake County prosecutors, fifty-four percent of the suspects who waived their *Miranda* rights gave incriminating statements to the police.<sup>142</sup> In Richard Leo's study of 182 directly observed or recorded interrogations in California, seventy-six percent of the suspects who waived their *Miranda* rights made incriminating statements.<sup>143</sup>

It seems doubtful that many of the suspects who invoke their *Miranda* rights would have provided incriminating statements in the absence of *Miranda*. In Leo's study, ninety-five percent of the suspects who invoked their rights had previously been convicted of crimes, and eighty-two percent had previously

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<sup>140</sup> *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

<sup>141</sup> See *supra* note 33 and accompanying text.

<sup>142</sup> Cassell and Hayman did not supply this figure directly. They reported, however, that 108 suspects waived their *Miranda* rights and that fifty-eight suspects subjected to custodial interrogation provided incriminating statements. Cassell & Hayman, *supra* note 32, at 860 tbl.3, 869 tbl.4. Five of the 108 suspects who initially waived their rights invoked them during interrogation, but two of these suspects already had made incriminating statements. *Id.* at 860. Whether the five suspects who withdrew their initial waivers are included or excluded from the calculus, the figure in text remains the same.

<sup>143</sup> See Leo, *supra* note 32, at 280-81 ("If we exclude from my sample those cases in which the police terminated questioning upon the invocation of a *Miranda* right (and thus the detective or detectives made no effort to incriminate the suspect), more than three-fourths (76%) of the interrogations I observed produced a successful result.")

been convicted of felonies.<sup>144</sup> It probably was not *Miranda* that made these tough, experienced suspects uncooperative.<sup>145</sup>

The *Miranda* dissenters accused the Supreme Court majority of “taking a real risk with society’s welfare.”<sup>146</sup> They declared that the Court’s decision would “measurably weaken the ability of the criminal law to perform [its basic] tasks,”<sup>147</sup> and they added, “In some unknown number of cases the Court’s rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him.”<sup>148</sup> Neither *Miranda* nor any other Warren Court decision, however, has kept the United States from imprisoning a higher proportion of its population than any other nation in the world except the Republic of Seychelles.<sup>149</sup> Contrary to Richard Nixon’s influential claim shortly after *Miranda*, neither *Miranda* nor any other Warren Court decision has notably weakened “the peace forces as against the criminal forces.”<sup>150</sup>

That the overwhelming majority of suspects advised of their rights waive them and submit to stationhouse interrogation tells you all you need to know about *Miranda*’s empirical effect. One scholar, however, Paul Cassell, has published several hundred law-review pages in an effort to show that “*Miranda* has significantly harmed law enforcement efforts in this country.”<sup>151</sup> He has

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<sup>144</sup> *Id.* at 287 tbl.9. Of the suspects who waived their rights, eighty-four percent had been convicted of crimes, and fifty-three percent had been convicted of felonies. *Id.* Viewing the data from a different perspective, Leo comments, “[A] suspect with a felony record in my sample was almost four times as likely to invoke his *Miranda* rights as a suspect with no prior record and almost three times as likely to invoke as a suspect with a misdemeanor record.” *Id.* at 286. If *Miranda* sought to redress the disparity between experienced, sophisticated suspects and naïve first-timers, it failed. *See* Cassell & Hayman, *supra* note 32, at 859.

<sup>145</sup> *See* 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, 469 (1999) (“Taken as a group, suspects who assert their *Miranda* rights may be unlikely to make incriminating statements to the police under any circumstances, because they have been hardened by exposure to the criminal justice system.”).

<sup>146</sup> *Miranda v. Arizona*, 384 U.S. 436, 517 (1966) (Harlan, J., joined by Stewart and White, JJ., dissenting).

<sup>147</sup> *Id.* at 541 (White, J., joined by Harlan and Stewart, JJ., dissenting).

<sup>148</sup> *Id.* at 542.

<sup>149</sup> *See* ROY WALMSLEY, *WORLD PRISON POPULATION LIST 2* (11th ed. 2015), [http://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_11th\\_edition\\_0.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf) [<https://perma.cc/GSD6-LKVP>] (“The countries with the highest prison population rate—that is, the number of prisoners per 100,000 of the national population—are Seychelles (799 per 100,000), followed by the United States (698), St. Kitts & Nevis (607), Turkmenistan (583), U.S. Virgin Islands (542), Cuba (510), El Salvador (492), Guam – U.S.A. (469), Thailand (461), Belize (449), Russian Federation (445), Rwanda (434) and British Virgin Islands (425).”).

<sup>150</sup> Richard Nixon, *What Has Happened to America?*, *READER’S DIG.*, Oct. 1967, at 50.

<sup>151</sup> Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L.

relied on three sets of data.<sup>152</sup>

In his first paper on the subject, Cassell reviewed before-and-after studies of *Miranda*'s impact. As Richard Leo has noted, all of these studies were "replete with methodological weaknesses."<sup>153</sup> Most but not all, however, indicated that the police obtained fewer confessions following *Miranda* than they did before. Averaging the confession-reduction rates shown by some of these studies and estimating on the basis of other studies how often a confession is needed to obtain a conviction, Cassell concluded that *Miranda* caused a loss of 3.8% of the convictions of the suspects whom the police interrogated prior to *Miranda*.<sup>154</sup>

Stephen Schulhofer responded in sixty-three pages to Cassell's 117-page analysis. He summarized his criticism this way:

[I]nconsistent . . . procedures are necessary to bring *Miranda*'s supposed attrition effect up to Cassell's 3.8% figure. . . . [A]t critical points in his analysis, data are cited selectively, sources are quoted out of context, weak studies showing negative impacts are uncritically accepted, and small methodological problems are invoked to discredit a no-harm conclusion when the same difficulties are present—to an even greater extent—in the negative-impact studies that Cassell chooses to feature. If we accept Cassell's premise that the old studies are relevant, . . . we find that the properly adjusted attrition rate is not 3.8% but *at most* only

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REV. 387, 390 (1996) [hereinafter Cassell, *Miranda's Social Costs*]; see also Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996) [hereinafter Cassell, *All Benefits, No Costs*]; Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After Miranda: Coincidence or Consequence*, 50 STAN. L. REV. 1181 (1998); 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 (1998) [hereinafter Cassell & Fowles, *Handcuffing the Cops*]; Paul G. Cassell, *Miranda's "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J. L. & PUB. POL'Y 327 (1997) [hereinafter Cassell, *Miranda's "Negligible" Effect on Law Enforcement*]; Cassell & Hayman, *supra* note 32; Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 B.U. L. REV. [PAGE] (2017) [hereinafter Cassell & Fowles, *Still Handcuffing*]; Paul G. Cassell, *The Costs of the Miranda Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299 (1996).

<sup>152</sup> Readers uninterested in empirical studies that appear to have persuaded few scholars other than their authors may wish to skip the remainder of this Ssection and proceed to the conclusion of this Article [at page \[PINCITE\]](#).

<sup>153</sup> Richard Angelo Leo, *Police Interrogation in America: A Study of Violence, Civility, and Social Change* 334 (1994) (unpublished Ph.D. dissertation, University of California, Berkeley), *quoted in* Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 507 (1996).

<sup>154</sup> Cassell, *Miranda's Social Costs*, *supra* note 151, at 437-38.

0.78%.<sup>155</sup>

Cassell replied to Schulhofer.<sup>156</sup> In my view, Schulhofer had the better of the argument on most points but not all.<sup>157</sup> The rate of lost convictions among

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<sup>155</sup> Schulhofer, *supra* note 153, at 502 (emphasis in original).

<sup>156</sup> Cassell, *All Benefits, No Costs*, *supra* note 151.

<sup>157</sup> Cassell gave no credence to a study by the Los Angeles District Attorney's Office indicating that confession rates did not fall after *Miranda* and in fact increased significantly. Cassell, *Miranda's Social Costs*, *supra* note 151, at 414-16 (describing the weaknesses of the Los Angeles study). Schulhofer gave no credence to a study by the Manhattan District Attorney's office indicating a substantially greater decline in confession rates than that reported by any other study. Schulhofer, *supra* note 153, at 517-24 (describing the weaknesses of the Manhattan study). The scholars' treatment of these two studies appeared to explain most of the difference in their conclusions, and, in my view, neither of the studies was useful. Cassell appropriately disregarded the Los Angeles study, and Schulhofer appropriately disregarded the Manhattan study.

The principal difficulty with the Los Angeles study was that it did not compare confession rates after *Miranda* with confession rates in the period before the police began to advise suspects of their right to remain silent and their right to counsel. One year before *Miranda*, in *People v. Dorado*, 398 P.2d 361 (Cal. 1965), the California Supreme Court required interrogating officers to give these warnings. *Id.* at 370-71. The Los Angeles study compared confession rates after *Dorado* with confession rates after *Miranda*. Cassell appropriately observed that the study was, not a "before-and-after" study, but an "after-and-after" study. Cassell, *Miranda's Social Costs*, *supra* note 151, at 416.

Schulhofer in fact acknowledged this deficiency. He nevertheless credited the study because Cassell himself proposed to provide some warnings to suspects rather than simply resurrect pre-*Miranda* law. Schulhofer maintained that the baseline for evaluating *Miranda's* costs should be the regime that Cassell would substitute for *Miranda* rather than the regime that preceded this decision. Schulhofer, *supra* note 153, at 534-35. When considering what costs, if any, *Miranda* generated historically, however, the Los Angeles study is unhelpful, as Schulhofer recognized.

A further defect of the Los Angeles study was that the questionnaire provided to assistant district attorneys about their pre-*Miranda* cases apparently asked about "confessions and admissions" while the questionnaire provided after *Miranda* asked about "confession[s], admission[s] or other statement[s]." Cassell, *Miranda's Social Costs*, *supra* note 151, at 415-16. Following his exchange with Schulhofer, Cassell discovered that Stephen Trott, a U.S. Circuit Judge, had compiled the Los Angeles data years earlier when he worked as a law clerk in the District Attorney's Office. Although Trott's superiors insisted on presenting the data he compiled, Trott's view was that these data "ended up measuring apples and oranges" and "prove[d] nothing." Cassell, *Miranda's "Negligible" Effect on Law Enforcement*, *supra* note 151, at 331-32.

The principal defect of the Manhattan study that Schulhofer disregarded was that it might have shown the effect of the Supreme Court's ruling on *Miranda's* retroactivity rather than the effect of *Miranda* itself. This study consisted of District Attorney Frank Hogan's testimony to Congress concerning confessions in nonhomicide felony cases presented to the grand jury in the six months before *Miranda* and the six months after. According to Hogan, confessions were noted in forty-nine percent of the cases presented during the pre-*Miranda* period but in only fifteen percent of the cases presented thereafter. *Controlling Crime*

interrogated suspects in the period immediately following *Miranda* probably was more than 0.78% but less than 3.8%.<sup>158</sup> A more precise number does not seem worth pursuing.

In a second paper, Cassell and a student co-author, Bret Hayman, examined the cases of 219 suspects screened by the district attorney in Salt Lake County.<sup>159</sup> These cases included cases in which suspects were not questioned, cases in which suspects were not under arrest and so were questioned without warnings, and even cases in which the suspects' whereabouts were unknown. Cassell and Hayman reported that 33.3% (73) of the 219 suspects provided incriminating statements.<sup>160</sup> According to the authors, the "evidence suggests that interrogations were successful, very roughly speaking, in about 55% to 60% of interrogations conducted before the *Miranda* decision."<sup>161</sup> Their conclusion was: "Our 33.3% overall success rate (and even our 42.2% questioning success rate) is well below the 55%-60% estimated pre-*Miranda* rate and, therefore, is consistent with the hypothesis that *Miranda* has harmed the confession rate."<sup>162</sup>

In his contribution to this Symposium, Cassell, writing with a different co-

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*Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong. 1120 (1967).

The Supreme Court held in *Johnson v. New Jersey*, 384 U.S. 719 (1966), that *Miranda* would apply only prospectively. *Id.* at 733. Defendants whose trials had begun on or before the day of the *Miranda* decision were entitled to no relief, but *Miranda*'s requirements would apply in trials that started after that date. The effect of this ruling was to make nearly all confessions obtained prior to *Miranda* inadmissible when the confessing suspects' trials had not begun. Lacking clairvoyant powers, police officers had not complied with the Supreme Court's warning and waiver requirements until the Court revealed what they were. Cases presented to the Manhattan grand jury in the six months after *Miranda* were likely to have included cases in which, although suspects had confessed, *Johnson* rendered their confessions inadmissible. Even at the time of the *Miranda* decision, New York allowed grand juries to consider only admissible evidence. *See People v. Cline*, 282 N.Y.S.2d 318, 321 (Rensselaer Cty. Ct. 1967) ("[T]he Grand Jury can receive none but legal evidence."); Schulhofer, *supra* note 153, at 517-24. *But see* Cassell, *All Benefits, No Costs*, *supra* note 151, at 1093-97 (replying to Schulhofer). The decline in admissible confessions reported by the district attorney probably was attributable in part (and perhaps entirely) to *Johnson* rather than to *Miranda*.

<sup>158</sup> Schulhofer, *supra* note 153, at 502.

<sup>159</sup> Cassell & Hayman, *supra* note 32, at 842.

<sup>160</sup> *Id.* at 868-69 tbl.4. George Thomas objected that Cassell and Hayman failed to include in this category many statements by suspects that, although nominally exculpatory, were likely to prove helpful to prosecutors and the police. He also noted that at least one of the pre-*Miranda* studies with which Cassell and Hayman compared their post-*Miranda* findings did include these statements. George C. Thomas, *Plain Talk About the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 949-50 (1996).

<sup>161</sup> Cassell & Hayman, *supra* note 32, at 871.

<sup>162</sup> *Id.* at 871-72.

author than Hayman, acknowledges his inability to specify either the numerator or the denominator of the supposed fifty-five to sixty percent pre-*Miranda* “successful interrogation” rate.<sup>163</sup> This rate was an amalgam of pre-*Miranda* statistics from jurisdictions other than Salt Lake County, and the numerators and denominators of these statistics apparently differed from one another. One would be surprised to learn that the denominators (or baselines) of any of the pre-*Miranda* statistics matched the one Cassell and Hayman employed in their post-*Miranda* study.

A drop in incriminating statements from 55% of 219 suspects to 33.3% of 219 suspects would in fact have meant a loss of forty-seven incriminating statements, yet only twenty-one of the suspects studied by Cassell and Hayman invoked their *Miranda* rights.<sup>164</sup> It is difficult to believe that *Miranda* caused the police to lose more than twice as many incriminating statements as the number of suspects who invoked their rights. Indeed, as suggested above, it seems doubtful that many of the twenty-one suspects who invoked their rights would have cooperated with the police in the absence of *Miranda*.

Cassell and Hayman observed that the police might have failed to obtain incriminating statements, not because a very small number of suspects who otherwise might have given incriminating statements invoked their *Miranda* rights, but because officers, sensing that some suspects would invoke their rights, did not attempt to question them.<sup>165</sup> The authors also suggested that officers resorted more frequently to noncustodial interrogation, which might have been less effective.<sup>166</sup> When only 21 of 219 suspects invoked their *Miranda* rights, however, and when there is no reason to believe that many (or any) of these suspects would have cooperated in the absence of *Miranda*, the most reasonable judgment is that *Miranda* had little or no effect on the administration of justice in Salt Lake County.<sup>167</sup>

In a third paper, Cassell and a co-author, economist Richard Fowles, reported that “crime clearances rates fell sharply all over the country immediately after *Miranda*.”<sup>168</sup> They presented a multiple regression analysis purporting to show that *Miranda* better accounted for this decline than other possible variables. Cassell and Fowles offered such statements as: “Our equations suggest . . . that between 8000 and 36,000 more robberies would have been solved in 1995 in the absence of the *Miranda* effect.”<sup>169</sup>

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<sup>163</sup> Cassell & Fowles, *Still Handcuffing*, *supra* note 151, at [PINCTE 12-13].

<sup>164</sup> Cassell & Hayman, *supra* note 32, at 869 tbl.4.

<sup>165</sup> *See id.* at 856.

<sup>166</sup> *See id.* at 873-75.

<sup>167</sup> George Thomas’s careful and detailed analysis of Cassell and Hayman’s study reached the same conclusion: “[M]y interpretation of their Salt Lake County data is that *Miranda* has had no effect on the overall confession rate, using ‘confession’ to include all incriminating statements.” Thomas, *supra* note 160, at 935.

<sup>168</sup> Cassell & Fowles, *Handcuffing the Cops*, *supra* note 151, at 1067-68.

<sup>169</sup> *Id.* at 1107.

The authors appear to have given little thought to how the police clear crimes or to how *Miranda* could have produced the effect they attributed to it. In evaluating their claims, it seems helpful to distinguish between “primary” and “secondary” clearances. When the police clear the crime for which a suspect was arrested, this clearance is “primary.” When they clear other crimes the suspect acknowledges committing, these clearances are “secondary.”<sup>170</sup> Suspects often provide secondary clearances because they are unlikely to be charged with the “extra” crimes they confess and because they may in fact be rewarded for enabling the police to solve previously unsolved cases.<sup>171</sup> Jerome Skolnick described an Oakland suspect whom Skolnick suspected of faking some of the more than 400 burglary clearances he provided.<sup>172</sup>

Although Cassell and Fowles claimed that *Miranda* reduced the rate of both primary and secondary clearances,<sup>173</sup> *Miranda* could not have appreciably affected the primary clearance rate. *Miranda* limits only custodial interrogation; it restricts only what the police may do *after* arrest. Crimes are cleared *by* arrest, however. The police may lawfully arrest a suspect only upon probable cause to believe that he committed a crime, and, when they do, they record the crime for which he was arrested as cleared. The rate of primary clearances cannot be significantly affected by what happens later, including whether custodial interrogation produces a confession.<sup>174</sup> Even in the world of

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<sup>170</sup> See Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of Miranda on the Police*, 32 RUTGERS L.J. 1, 5 (2000).

<sup>171</sup> JOHN E. CONKLIN, ROBBERY AND THE CRIMINAL JUSTICE SYSTEM 147 (1972).

<sup>172</sup> JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 172 (3d ed. 1994).

<sup>173</sup> See Cassell & Fowles, *Handcuffing the Cops*, *supra* note 151, at 1123.

<sup>174</sup> The conclusion that *Miranda* could not have caused a significant drop in primary clearance rates requires one qualification and a few explanations:

First, statements that lead to the arrest of a suspect’s accomplices do not directly affect clearance rates. Regardless of how many accomplices are arrested, the police can clear a crime only once. A suspect’s statements, however, sometimes enable the police to arrest people for crimes other than the ones the suspect himself has cleared. These statements do improve clearance rates. It is inconceivable, however, that *Miranda* led to a loss of statements leading to arrests for crimes other than the suspect’s own crimes often enough to have affected clearance rates significantly.

Second, not all clearances are “clearances by arrest”; some are “clearances by exceptional means.” FBI Criminal Justice Info. Servs. Div., *Crime in the United States 2013*, U.S. DEP’T JUST., [https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/clearances/clearancetopic\\_final](https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/clearances/clearancetopic_final) [<https://perma.cc/C9GH-S8K9>] (last visited Jan. 24, 2017). The police may clear an offense by exceptional means, however, only when they have probable cause to arrest someone for this offense but cannot make the arrest for reasons beyond their control (for example, because the suspect has died or is already imprisoned for another crime). See *id.* “Clearance by exceptional means” means “clearance by virtual arrest.” Postarrest interrogation can no more affect clearances by exceptional means than it can clearances by arrest. See Cassell & Fowles, *Still Handcuffing*, *supra* note 151, at 95-96 n.405 (“Not only are exceptional clearances a relatively small fraction of all clearances, we have seen no developed argument that the proportion of exceptional

modern physics, interrogation that occurs after an arrest cannot make the arrest happen. It cannot make the clearance that the arrest generates happen either.

In their contribution to this Symposium, Cassell and Fowles persist in claiming the impossible. They write:

The clearance rate appears to be a reasonable (if understated) surrogate measure for the confession rate. Sometimes police officers, lacking evidence to clear a case, will bring a suspect in, deliver *Miranda* warnings, interrogate, and—if no confession results—release him, leaving them with insufficient evidence to clear the case. If *Miranda* prevented the confession, by discouraging the suspect from talking or otherwise, the crime may never be cleared . . . Field research on police interrogations found that “virtually every detective . . . insisted that more crimes are solved by police interviews and interrogations than by any other investigative method.”<sup>175</sup>

Every suspect questioned by the police, however, either has been arrested or has not been, and *Miranda* cannot cause a reduction in primary clearances in either situation. When a suspect has not been arrested, *Miranda* imposes no restrictions on interrogating him. The failure to record a clearance because an *un-arrested* suspect has not cooperated cannot possibly be attributed to *Miranda*. And when a suspect has been arrested, the police report the crime for which he was arrested as “cleared by arrest,” even when the suspect refuses to submit to interrogation and even when he cannot be prosecuted. Again, no reduction in primary clearances can conceivably be attributed to *Miranda*.

Cassell and Fowles strain to find an “in between” category of cases—cases in which suspects are in custody so that *Miranda*'s requirements apply but in which the suspects have not yet been arrested so that their suspected crimes

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clearances would have been significantly altered by *Miranda*.”).

Third, the F.B.I.'s definition of the term “cleared by arrest” indicates that it requires more than an arrest. This definition directs police departments to clear an offense only when a suspect has been arrested, charged with the commission of the offense, and turned over to the court for prosecution. *Crime in the United States 2013, supra*. But the terms “charged with the commission of the offense” and “turned over to the court for prosecution” do not mean what they seem to say. These terms date from an era when police officers rather than prosecutors filed nearly all charges in court. They were meant to distinguish bona fide arrests on probable cause from arrests “on suspicion.” See Feeney, *supra* 170, at 13-17. The F.B.I. now directs police departments to record an offense as cleared whenever a prosecutor has declined to prosecute for any reason other than a lack of probable cause for the arrest. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, SUMMARY REPORTING SYSTEM (SRS) USER MANUAL 116 (v.1.0 2013), <https://ucr.fbi.gov/nibrs/summary-reporting-system-srs-user-manual> [<https://perma.cc/4XXR-9VMJ>]. When the police have lawfully arrested a suspect, they are to treat his alleged offense as cleared even when they lack sufficient evidence to prosecute him. The F.B.I.'s dreadful verbiage leads in a circle, and, in the end, “cleared by arrest” does mean “cleared by arrest.”

<sup>175</sup> Cassell & Fowles, *Still Handcuffing, supra* note 151, at 18 (footnotes omitted) (quoting Leo, *supra* note 32, at 373).

may not be cleared unless they provide incriminating statements. The authors write, “[F]or cases in which a suspect is questioned in custody but never ultimately formally arrested, *Miranda* could have a harmful effect on the primary clearance rate—that is, a reduction in the ability of police to get information that they need to clear a crime in the first instance.”<sup>176</sup> But the category of cases to which they refer appears to be nonexistent; decisions subsequent to *Miranda* strongly indicate that only an arrest creates the kind of custody needed to trigger *Miranda*’s requirements.<sup>177</sup> Moreover, even if “in between” cases are conceivable as a matter of law, they must be virtually nonexistent in practice.<sup>178</sup> *Miranda* could not have reduced primary clearances appreciably.

*Miranda* conceivably might have reduced the number of secondary clearances, and secondary clearances can be useful. For example, when someone arrested for a traffic or other minor offense confesses to a serious crime, his confession may lead to prosecution and punishment,<sup>179</sup> and even when the prosecution of “secondary” crimes is unlikely, the knowledge that these crimes have been solved may give comfort to crime victims. Even if *Miranda* reduced the number of secondary clearances, however, it did not “handcuff” the police.

Cassell and Fowles reject Floyd Feeney’s suggestion that a decline in secondary clearances could have accounted for the entire decline in clearances they attribute to *Miranda*. They emphasize that secondary clearances constitute a small portion of all clearances—far too small a portion to account for a

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<sup>176</sup> *Id.* at 84.

<sup>177</sup> *See, e.g.,* *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (holding that interrogation following a traffic or street corner stop need not be preceded by warnings because, although the suspect is detained, he is not in custody “to a ‘degree associated with formal arrest’” (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (holding that warnings need not precede stationhouse interrogation when the suspect understands that he is free to leave); *Orozco v. Texas*, 394 U.S. 324, 326-27 (1969) (holding that a suspect arrested in his bedroom was in custody and entitled to warnings before the police interrogated him).

<sup>178</sup> To be sure, the police might place someone in custody (that is, arrest him) without probable cause to believe he committed a particular crime. They might then record a clearance only if the suspect confessed to a crime. In this situation, however, the suspect’s confession would be inadmissible not only because the police omitted the *Miranda* warnings (if they did) but also because the suspect’s confession would be the fruit of an unlawful arrest. *See Wong Sun v. United States*, 371 U.S. 471, 485 (1963). Moreover, the police probably would not be justified in recording a clearance following an unlawfully arrested suspect’s confession. Only a lawful arrest—an arrest based on probable cause to believe that a suspect committed a crime—allows the police to treat the crime as one “cleared by arrest.” *See U.S. DEP’T OF JUSTICE, supra* note 174, at 112.

<sup>179</sup> Cassell and Fowles call this sort of secondary clearance a “more-serious-crime clearance” and treat it as a distinct category. Cassell & Fowles, *Still Handcuffing, supra* note 151, at 84.

decline of the magnitude they claim to have shown.<sup>180</sup> The authors infer that *Miranda* must have caused a significant reduction in primary clearances as well.<sup>181</sup> But *Miranda* simply could not have caused an appreciable decline in primary clearances. If secondary clearances do not account for the decline the authors attribute to *Miranda*, nothing else does either. The only reasonable inference is that *Miranda* did not have the impact that Cassell and Fowles claim.

The *Miranda* decision was not the only action taken by a court on June 13, 1966. On the same day, a Dallas jury found Jack Ruby legally sane.<sup>182</sup> The dummy variable that Cassell and Fowles used to separate cases that arose before *Miranda* from those that arose after also separates cases that arose before the Ruby verdict from those that arose after this verdict. The supposedly “robust” evidence that Cassell and Fowles presented no more demonstrates that *Miranda* produced a sharp decline in clearance rates than it demonstrates that the Ruby verdict did so.<sup>183</sup> Moreover, the claim that *Miranda* produced the decline in clearances that the authors attribute to it is barely more plausible than the claim that the Ruby verdict had this effect. Despite the fleet of quacking ducks launched by Cassell and Fowles in their contribution to this Symposium, *Miranda* essentially governs only *postclearance* policing.

That Cassell and Fowles purported to show with statistically significant evidence something that cannot be true is, to put it mildly, a defect of their study. Floyd Feeney’s review of the Cassell-Fowles study suggested other defects. Feeney in fact maintained that, when long-term trends and improvements in crime reporting were taken into account, the supposed sharp decline in clearance rates that Cassell and Fowles reported “all over the country immediately after *Miranda*”<sup>184</sup> was neither sharp nor uniform.<sup>185</sup> To some extent, F.B.I. clearance statistics reflected, not an increase in unsolved crimes, but the better reporting of these crimes in several jurisdictions.<sup>186</sup>

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<sup>180</sup> *Id.* at 62-106 (responding to Feeney).

<sup>181</sup> *Id.* at 84.

<sup>182</sup> See *Jack Ruby Found Sane After Trial*, BALT. SUN, June 14, 1966, at 1.

<sup>183</sup> See Cassell & Fowles, *Still Handcuffing*, *supra* note 151, at 106 (“Regression analysis can never establish causality.”).

<sup>184</sup> Cassell & Fowles, *Handcuffing the Cops*, *supra* note 151, at 1067-68.

<sup>185</sup> See Feeney, *supra* note 170, at 4.

<sup>186</sup> See *id.* at 9-42. But see Cassell & Fowles, *Still Handcuffing*, *supra* note 151, at 62-82 (responding to Feeney). Before the Cassell-Fowles study, Schulhofer responded forcefully to Cassell’s claim that declining clearance rates supplied “‘strong evidence’ that ‘law enforcement never recovered from the blow inflicted by *Miranda*.’” Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278, 279 (1996) (quoting Cassell, *All Benefits, No Costs*, *supra* note 151, at 1090-91); see also John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) (offering a mixed review of the Cassell-Fowles study).

Regression analyses on large data sets have become most common form law-related social science research. Few lawyers have the patience or the ability to understand these

Many of the scholars who concluded that *Miranda* had little effect on confession or conviction rates seem to believe that this conclusion says something nice about *Miranda*. Stephen Schulhofer, for example, entitled his response to Cassell “*Miranda*’s Practical Effect: Substantial Benefits and Vanishingly Small Costs.”<sup>187</sup> Although Schulhofer offered convincing evidence that *Miranda*’s costs were small, his paper offered no evidence that *Miranda* had produced “substantial benefits.”

If the police obtained confessions unfairly before *Miranda* and if *Miranda* reduced the frequency of their unfair practices, one would expect a reduction in the number of confessions and probably in the number of convictions. It seems unlikely that suspects who formerly confessed only after being subjected to unfair questioning responded to *Miranda* by providing an equal number of confessions out of the goodness of their hearts. A far more plausible hypothesis is that, in what Yale Kamisar called the gatehouses of American criminal procedure, very little changed.<sup>188</sup>

That the overwhelming majority of suspects who hear the *Miranda* warnings waive the right to remain silent may be attributable in part to police efforts to undercut the warnings and to decisions by the Burger, Rehnquist, and Roberts Courts limiting *Miranda*. But waivers of the right to remain silent may also be attributable to the flawed morality of the right itself. Unlike the Justices of the *Miranda* majority, criminal suspects may not believe that refusing to cooperate with a legitimate governmental inquiry is noble. They may not regard

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analyses, but legal scholars typically accept their bottom-line conclusions until, and sometimes even after, patient, thoughtful scholars like Feeney do the tough work of dissecting them. Most of these statistical analyses, however, seem to collapse as soon as one breathes on them. In particular, I have never seen any work by an econometrician that convinced me of anything. Life is too short to respond to more than a small portion of the mountain of unconvincing scholarship generated by number-crunching empiricists, but it is good occasionally to smash a study or two for deterrent reasons. See, e.g., Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 687-91 (2013) (criticizing David S. Abrams, *Is Pleading Really a Bargain?*, 8 J. EMPIRICAL LEGAL STUD. 200 (2011)); Albert W. Alschuler, *Limiting Political Contributions after McCutcheon, Citizens United, and SpeechNow*, 67 FLA. L. REV. 389, 488-92 (2015) (criticizing Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105 (2003)) [hereinafter Alschuler, *Limiting Political Contributions*]; Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1382-83 (2008) (criticizing Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157 (2003)); Albert W. Alschuler, *Two Guns, Four Guns, Six Guns, More Guns: Does Arming the Public Reduce Crime?*, 31 VAL. U. L. REV. 365, 366-71 (1997) (criticizing John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997)).

<sup>187</sup> See Schulhofer, *supra* note 153, at 500.

<sup>188</sup> See Kamisar, *supra* note 3; see also Alschuler, *supra* note 8, at 971 n.72 (“When *Miranda*, the housekeeper, arrived from the mansion, . . . [s]he did a little light dusting and moved an attractive rug over the dirt.”).

remaining silent as a fundamental human right. They may understand that silence in the face of a plausible accusation is unnatural and makes things look bad for them. They may yield to the basic human impulse to explain. Many of these suspects, however, may not know what awaits them once they waive their rights.

#### CONCLUSION

Fifty years' experience has confirmed the fourfold failure of the fourfold warnings. *Miranda* is a doctrinal failure, an ethical failure, a jurisprudential failure, and an empirical failure. The chance that the Supreme Court will reconsider this decision, however, is almost nonexistent. As the Court said when it declined to overrule *Miranda* seventeen years ago, this decision "has become part of our national culture."<sup>189</sup> In railing against *Miranda*, I have played the part of Don Quixote.

This Article, however, offers an object lesson—a caution against judicial activism, whether of the left or of the right.<sup>190</sup> It shows how badly a court is likely to botch the job when it abandons its duty to render corrective justice and pretends to be a legislature.

This Article also shows why lawyers, courts, and scholars should focus more on the substance of police interrogation practices than on the ritual dance that precedes them. Rather than fuss about how warnings, waivers, and invocations of rights should be phrased, courts should forbid altogether many forms of governmental force, fraud, threats, and promises. They might well start by condemning as coercive police claims to possess incriminating evidence they do not have—claims that are likely to terrify innocent suspects and that have produced many false confessions.<sup>191</sup>

Finally, this Article marks a path toward legislative reform. *Miranda*'s invitation to legislatures to provide better ways of safeguarding the privilege against self-incrimination remains open. Someday legislators may notice that the Fifth Amendment privilege—the real Fifth Amendment privilege—was more effectively implemented at the time it was written than it is today under

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<sup>189</sup> *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

Several years before the Court reaffirmed *Miranda*, Richard Leo wrote:

Even if the practical costs of *Miranda* seem to outweigh the mostly symbolic benefits it confers . . . , it would be neither viable nor desirable to overrule *Miranda* at this time in our history. For *Miranda* has become an institution in American society, thoroughly established within our culture and our consciousness . . . [And] the symbolic message that such a decision would seem to send—that the police can disregard constitutional rights when interrogating criminal suspects—would cause a backlash of resentment against, and more distrust of, American police.

Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 679-80 (1996).

<sup>190</sup> For some criticism of Roberts Court activism, see Alschuler, *Limiting Political Contributions*, *supra* note 186, at 410-17, 465-74.

<sup>191</sup> See Alschuler, *supra* note 8, at 974-77.

*Miranda*. A bold legislature might then forbid backroom interrogation and restore the civilized regime of questioning by a magistrate that preceded the development of professional police forces in both England and America.