George C. Thomas III and Richard A. Leo

The Effects of *Miranda v. Arizona:* "Embedded" in Our National Culture?

> You have the right to remain silent. Anything you say can be used against you in court. You have the right to the presence of an attorney. If you cannot afford an attorney, one will be appointed for you prior to any questioning. (*Miranda v. Arizona*, 384 U.S. 436 [1966])

ABSTRACT

Miranda v. Arizona required that police inform suspects, prior to custodial interrogation, of their constitutional rights to silence and appointed counsel. It also required that suspects voluntarily, knowingly, and intelligently waive these rights in order for any resulting confession to be admitted into evidence at trial. The rationale of *Miranda* as elaborated by the Supreme Court has evolved from encouraging suspects to resist police interrogation to informing suspects that they have a right to resist. Reflecting a fundamental tenet in American culture and law, *Miranda* today seeks to protect the "free choice" of a suspect to decide whether to answer police questions during interrogation. Two generations of empirical scholarship on *Miranda* suggest that the *Miranda* requirements have exerted a negligible effect on the ability of the police to elicit confessions and on the ability of prosecutors to win convictions. There is no good evidence that *Miranda* has substantially depressed confession rates or imposed significant costs on the American criminal justice system. The practical benefits of *Miranda* to custodial suspects may also be negligible. Police have developed multiple strategies to avoid, circumvent, nullify, or simply violate *Miranda* and its invocation rules.

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In 1966, the Supreme Court sought to revolutionize the judicial oversight of police interrogation. Prior to *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court had typically examined the facts of individual cases to determine whether police pressure had rendered the confession "involuntary" and thus inadmissible as a violation of the Fourteenth Amendment Due Process Clause. A confession was deemed involuntary when the "will" of the suspect was "overborne" by police interrogators' use of coercion or compulsion. The classic example is the deputy sheriff in *Brown v. Mississippi*, 297 U.S. 278 (1936), who used physical torture (beatings with studded belts, hanging one suspect from a tree) to obtain confessions. But coercion analysis is more difficult when the pressure is simply the length and intensity of the interrogation. Does thirty-two hours of sustained interrogation, followed a few days later by another ten hours, coerce the defendant's confession as a matter of law? No, the Court held in *Lisenba v. California*, 314 U.S. 219 (1941). But three years later in *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), the Court held that thirty-six continuous hours of interrogation did coerce the confession in that case. A thin distinction can be made between the facts of the two cases, but drawing such a fine line does not provide much guidance for lower courts faced with a steady stream of confession cases, each of which has facts at least a little different from all the others.[1]

Eschewing this case-by-case method, *Miranda* created a presumption of compulsion that can be dispelled only if the suspect receives a set of warnings, as set out above. *Miranda* was a bold stroke, one that sent shock waves throughout the United States. Police and prosecutors claimed that few would confess in the face of these warnings and that many crimes would go unsolved (Baker 1983, pp. 243–44). As a result, dangerous criminals would be freed to prey upon the innocent. Congress viewed the crime rate in 1966 as already too high, and the prospect of *Miranda* pushing it higher caused grave concern (Kamisar 2000, pp. 894–99). On the floor of the United States Senate, Senator John McClellan pointed to a graph of the crime rate and said, "Look at it and weep for your country" (Cong. Rec. 114:14,146 [1968]). Even normally staid Supreme Court Justices came close to outrage in their dissenting opinions in *Miranda*. For example, Justice Byron White wrote near the end of his dissent: "In some unknown number of cases the

[1] Indeed, a distinction between internal preferences and external acts that seek to shape preferences might always be elusive (Seidman 1990), suggesting that legal coercion may almost be impossible to discern in many individual cases.

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. As a consequence, there will not be a gain, but a loss, in human dignity. . . . There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case" (*Miranda*, pp. 542–43 [White, J., dissenting]).

The political reaction was swift and clear. By the spring of 1968, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. sec. 3501 *et seq.* [1968]). Robert Burt characterized this legislation as "a gesture of defiance at a Court which protected criminals and Communists, and attacked traditional religious, political, and social institutions" (Burt 1969, p. 127). Part of the act, section 3501, created a protocol for federal judges to use to evaluate the admissibility of confessions. The statute, explained in more detail in Section V of this essay, required judges to admit all voluntary confessions and set out a series of factors to use in deciding whether a confession is voluntary. While providing *Miranda*-like warnings is one way to show that the suspect voluntarily answered questions, the statute is clear that the absence of warnings "need not be conclusive on the issue of voluntariness" (18 U.S.C. sec. 3501[b]). The net effect of section 3501 was to abrogate *Miranda*'s conclusive presumption by congressional action.

The bill became law on June 19, 1968. Thirty-two years would pass before the Supreme Court ruled on its constitutionality in *Dickerson v. United States*, 120 S.Ct. 2326 (2000). The case was on appeal from a decision of the Fourth Circuit Court of Appeals holding that the prescribed warnings were not themselves required by the Constitution. In effect, the Fourth Circuit held, the Constitution does not specify precisely how a suspect is protected from being compelled to be a witness against himself, and *Miranda* simply filled that gap in the Constitution. But this kind of gap filling might be simply a placeholder until Congress acts (Monaghan 1975). Indeed, one paragraph in the *Miranda* opinion "encourage[d] 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" (*Miranda*, p. 467). As section 3501 was a specific regime for evaluating the admissibility of confessions, the Fourth Circuit held that Congress had rendered unnecessary *Miranda*'s remedy for the interrogation gap in the Constitution.

Dickerson rejected this distinction between what is specifically in the Constitution and what might be viewed as filling a gap in the Constitu-

tion. The Court noted that *Miranda*'s core holding was to require a procedure "that will warn a suspect of his right to remain silent and which will assure the suspect that the exercise of that right will be honored" (*Dickerson*, p. 2335). Because section 3501 does not require warnings, but makes them only one factor in the analysis, it failed to meet *Miranda*'s minimum requirement. And because *Miranda* is based on the Constitution, the Court held that Congress lacked the authority to prescribe a remedy that fell below the *Miranda* threshold. It reversed the Fourth Circuit and held section 3501 unconstitutional.

The Supreme Court itself, of course, has the authority to overrule *Miranda*. Though the Court dislikes overruling precedent, it has done so many times.[2] It was not impossible that the current Court would overrule *Miranda*. The Court invited Paul Cassell, a zealous critic of *Miranda* (Cassell 1996*a*, 1996*b*, 1996*c*, 1997; Cassell and Fowles 1998), to write a brief supporting the Fourth Circuit's decision. Chief Justice Rehnquist had written several opinions that manifested a skeptical view of *Miranda* and had been joined on occasion by Justices O'Connor, Kennedy, Scalia, and Thomas.[3] Five votes would overrule *Miranda*, and those five looked plausible.

The Court explicitly considered whether to overrule *Miranda* but, by a vote of seven to two, "decline[d] to do so" (*Dickerson*, p. 2336). Chief Justice Rehnquist wrote the opinion for the Court, joined by Justices O'Connor and Kennedy (as well as by Justices Stevens, Souter, Breyer, and Ginsburg). Only Justices Scalia and Thomas dissented. What happened to the distaste of *Miranda* that often pervaded the opinions of Rehnquist and O'Connor? The Court's response to the re-

[2] In the three-year period from 1961 to 1964, e.g., the Court overruled three major criminal procedure precedents. Malloy v. Hogan, 378 U.S. 1 (1964), required states to follow the Fifth Amendment privilege against compelled self-incrimination, overruling Twining v. New Jersey, 211 U.S. 78 (1908). Gideon v. Wainwright, 372 U.S. 335 (1963) required states to make lawyers available to all indigent felony defendants, overruling Betts v. Brady, 316 U.S. 455 (1942). Mapp v. Ohio, 367 U.S. 643 (1961) required states to suppress evidence found in violation of the Fourth Amendment, overruling Wolf v. Colorado, 338 U.S. 25 (1949).

[3] Four members of the *Dickerson* Court—Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas—dissented in 1993 when the Court held that *Miranda* claims were constitutional for purposes of federal habeas review (Withrow v. Williams, 507 U.S. 680 [1993]). Though Justice Kennedy joined the *Withrow* majority, he has on occasion joined an opinion expressing a somewhat narrow view of *Miranda*. See, e.g., Davis v. United States, 512 U.S. 452 (1994) (rejecting the view that an ambiguous request for counsel triggers a duty for police to inquire into whether accused wants counsel); McNeil v. Wisconsin, 501 U.S. 171 (1991) (holding that an invocation of the right to counsel for Sixth Amendment counsel purposes is not, at the same time, an invocation of the right to counsel under *Miranda*).

quest to overrule *Miranda* is illuminating. Chief Justice Rehnquist wrote, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." Moreover, and perhaps more important, "our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling" (*Dickerson*, p. 2335).

Translated: *Miranda* does not cause much harm to "legitimate law enforcement," and the core ruling manifests important enough values to justify what harm it causes. In this essay, we investigate both halves of that claim. What are the values in the "core ruling" that justify even limited harm to law enforcement? And is it true that the Court's "subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement"? The latter claim has a doctrinal and empirical dimension. In Section I we discuss the original and subsequent doctrinal rationales for *Miranda*. After discussing the initial negative reaction to *Miranda* in Section II, we investigate in Section III the effect of subsequent cases on the *Miranda* doctrine and its underlying analytical foundation. In Section IV, we examine how *Miranda* has affected the police interrogation process and the rate at which police secure incriminating statements. Ultimately, in Section V, we ask whether *Miranda* is acceptable today because it has become, through television and the movies, "part of our national culture," or is it part of our national culture because it stands for something our society thinks important? Though this question is impossible to answer with certainty, it provides a useful framework within which to consider how the culture might understand *Miranda* today.

Today's *Miranda* is subtly but importantly different from the *Miranda* that the Supreme Court decided in 1966. The rationale has evolved from encouraging suspects to resist police interrogation to informing suspects that they have a right to resist. The Warren Court saw *Miranda* as an active participant in the interrogation room, a regime that changes the psychology of the encounter between suspect and interrogator. Today's version is closer to a passive administrative requirement to be gotten out of the way so that the suspect can "tell his side of the story" to the police. This evolution resulted in part from the Court tilting more toward the law enforcement side of the balance in the 1970s and 1980s, relaxing the *Miranda* doctrine in some key ways. In addition, the police adjusted to *Miranda* and learned how to comply in a way that minimizes the chance that the suspect will resist interrogation. As *Miranda* became increasingly passive, a piece of fur-

niture in the interrogation room, police became less hostile to its strictures. Though it is unclear why the *Dickerson* challenge arose when it did, the Court's ultimate judgment was unsurprising (Kamisar 2000; Thomas 2000): as it now exists, the *Miranda* rule does not seriously obstruct law enforcement interests. Indeed, in operation *Miranda* might further law enforcement interests more than it does the interests of suspects.

I. Doctrinal Puzzles

For a case that has been as thoroughly debated and discussed as *Miranda*, it remains curiously opaque as an opinion. The first step is easy enough. The Fifth Amendment forbids the government from compelling anyone to be a witness against himself. The paradigm application of this right is to prevent the prosecution from requiring a defendant to testify in his own criminal case. Consequently, the Fifth Amendment right is often called a privilege not to be compelled to incriminate oneself. The *Miranda* Court applied the Fifth Amendment privilege to the police interrogation room by presuming that all custodial interrogation is, in the absence of warnings, inherently compelling. The next step is trickier: Did the Court hold that all responses to the inherently compelling pressures of police interrogation are, as a result, compelled? Justice White in his *Miranda* dissent described the Court's holding along these lines. But he noted an alternative understanding—perhaps the Court held only that the risk of Fifth Amendment compulsion is unacceptably high unless warnings are given. This understanding of *Miranda*'s holding presupposes that there can be noncompelled responses to the inherently compelling pressures. How might this be? A suspect might have decided to confess prior to the beginning of interrogation or might decide to confess during interrogation to gain some perceived advantage rather than in response to the compelling pressures. To say that compelling pressures exist is not to entail that every response is compelled.

But the more likely reading of *Miranda*'s holding is that "any answers to any interrogation [are] compelled regardless of the content and course of examination" (*Miranda*, p. 536 [White, J., dissenting]). The Court spoke about the "cherished" principle "that the individual may not be compelled to incriminate himself" and then said: "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can be the product of his free choice" (*Miranda*, p. 458). Here,

"free choice" seems to operate as "noncompelled," thus allowing the following "translation": "no statement . . . is anything but compelled" if taken without "adequate protective devices."

This understanding of *Miranda*'s holding provoked much criticism, on the ground that it was ahistorical, bad philosophy, and bad policy. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." This language strongly implies a protection intended to be limited to formal hearings, a protection that might be out of place in the context of police interrogation. Moreover, it is not easy to defend the philosophical premise that every response to custodial police interrogation is compelled. Imagine a guilt-ridden husband who is asked by a police detective why he is sobbing into his hands. He responds, "I killed my wife." Compelled? Only on an exquisite account of compulsion,[4] or on Seidman's account of *Miranda* that denies the individualism implicit in the whole notion of voluntary acts of confession (Seidman 1992).

The policy question concerns the social value of police interrogation. The Due Process Clause protects against coerced confessions. As long as the police do not use coercion to get confessions, we should not discourage them from attempting to persuade guilty suspects to confess. After all, a freely given confession from a guilty suspect has two significant benefits—it helps convict the guilty person and reduces the risk that an innocent person will be arrested or convicted. But whether *Miranda*'s conclusive presumption of Fifth Amendment compulsion is good history, good philosophy, or good policy, it was a coherent interpretation of the Fifth Amendment.

As we describe in more detail in Section III, the Court soon began to seek ways to permit limited use of evidence taken in violation of *Miranda*. The conceptual mechanism to accomplish this goal was to view the rights created in *Miranda* as "not themselves rights protected by the Constitution but . . . instead measures to insure that the right

[4] Stephen Schulhofer offers the best defense of this premise, drawing on cases applying the Fifth Amendment privilege in contexts different from police interrogation (Schulhofer 1987). On Seidman's account, *Miranda* was concerned with the compulsion of preferences, that the police by clever use of various strategies could "change what the suspect wanted, at least for a brief period" (Seidman 1990, p. 174). *Miranda* thus rejected atomistic individualized choice in favor of "a contextual and communal idea of choice" that resulted from the social interaction of custodial police interrogation (Seidman 1992, p. 739). "Statements resulting from such interrogation were never the product of isolated choice. It was always true that statements were preceded by a form of social interaction with the police" (Seidman 1992, p. 739). This interaction that compels preferences is, on Seidman's account, *Miranda*-style compulsion.

against compulsory self-incrimination was protected" (*Michigan v. Tucker*, 417 U.S. 433 [1974], p. 444). This is consistent with Justice White's alternative interpretation that requires warnings to reduce the risk that police interrogation might compel a response. A prophylactic understanding is different from claiming that every answer to every question is compelled unless the suspect is warned.

Understood as a prophylaxis that protects the Fifth Amendment privilege, *Miranda* is a coherent approach to the problem of police interrogation. An earlier Supreme Court doctrine, limited to federal cases, presumed the involuntariness of any confession made after the police failed to take the suspect before a magistrate as required by the federal rules of evidence.[5] This presumption freed federal courts from having to inquire into the voluntariness of confessions when the police isolated the suspect and deprived him of the warnings that the judge is required to give. Similarly, *Miranda* presumes that a statement is compelled if no warnings are given prior to custodial interrogation as a way of simplifying the task of determining voluntariness. Implicit in both of these presumptions is that sometimes courts will suppress statements that are not compelled. The Court has explicitly admitted as much when limiting the extent to which *Miranda* causes the prosecution to lose evidence.[6]

For decades, *Miranda* has been caught between two fires represented by these conflicting justifications for its holding. On the one hand, *Miranda* needs to be seen as a straightforward application of the Fifth Amendment privilege to justify the basic holding that excludes all statements taken without warnings. On the other hand, it needs to be seen as not quite the same as the Fifth Amendment to justify the rules qualifying and limiting the original doctrine that we describe in Section III. The hydraulic tension produced by these conflicting doctrinal imperatives has produced a doctrine that is broader than the Fifth Amendment privilege, because it sometimes suppresses statements that

[5] See Mallory v. United States, 378 U.S. 1 (1964); McNabb v. United States, 318 U.S. 332 (1943). The key difference between these presumptions is that *McNabb-Mallory* is a nonconstitutional rule that applies only in federal court, while *Miranda* applies in federal and state courts. While the Court has no authority to impose nonconstitutional rules like *McNabb-Mallory* on the states, *Dickerson* makes plain that the Court views the *Miranda* prophylactic presumption as a constitutional rule.

[6] In Oregon v. Elstad, 470 U.S. 298 (1985), p. 307, the Court said that "unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."

are not compelled, and yet narrower than the privilege, because it does not apply in some contexts when the privilege would suppress a statement.

To justify this somewhat oddly shaped rule, the Court needs an account of how and why the *Miranda* rule is different from the Fifth Amendment privilege. What the Court has offered instead of an explanation is a series of ad hoc cases usually limiting, though sometimes expanding, the original *Miranda* holding. When the *Miranda* opinion is read in light of these later cases, an account of the relationship between *Miranda* and the Constitution emerges. Moreover, the empirical data on the effect of *Miranda* suggests that the rule operates to achieve at least a formal version of what this account contemplates.

In sum, our view is that *Miranda* sought a mechanism to protect the "free choice" of the suspect to decide whether to answer police questions during interrogation. The use of the Fifth Amendment privilege against compelled self-incrimination was just a convenient doctrinal "home" for a right that, the Court must have hoped, would produce self-regulating interrogations (Stuntz 2001). If the suspect was afraid of the police, or nervous, or drunk, or guilty, he would (in most cases) simply invoke the right to silence and the interrogation would be over before it began. If he agreed to answer questions, and the police applied too much pressure, the suspect could terminate the interrogation at any time and without giving a reason. Providing a mechanism to protect this free choice must have seemed to the Court like a tidy solution to the very difficult problem of regulating police interrogation.

The concern with "free choice" can be seen in the due process confession cases that preceded *Miranda.* As Kamisar put it, "There is nothing very new or unusual about the problem which confronted the Court in *Miranda;* there is nothing really startling or inventive about the solution" (Kamisar 1966, p. 66). In 1961, the Court found a due process violation and suppressed a confession because the particular police interrogation did not permit the suspect to act on "a rational intellect and a free will" (*Blackburn v. Alabama*, 361 U.S. 199, 201 [1960]). In 1963, the Court noted the "effect of psychologically coercive pressures and inducements on the mind and will of an accused" created by police interrogation in general and not just the one in the case before the Court (*Haynes v. Washington*, 373 U.S. 503, 514 [1963]). The Court found the confession inadmissible on due process grounds largely because of this background coercive pressure; the police made no threats except to keep the suspect from talking to his

wife until he answered their questions. Thus, nothing much turns on whether the "free choice" protected by *Miranda* is found in the Fifth Amendment privilege or in the more spacious protections of the Due Process Clause.

We want to be clear about our claim. To say that *Miranda* protects "free choice" is not the end of our task, because different kinds of choice exist in the police interrogation room. Moreover, we are not claiming that the Supreme Court created a general right to a fully informed choice whenever the government seeks information, or even a right to a fully informed choice every time the police seek information or evidence from a suspect in a criminal case. For example, the Court has permitted the police to put an undercover agent in a cell and question an inmate without providing the quite relevant information that the "cell mate" is an agent (*Illinois v. Perkins*, 496 U.S. 292 [1990]). The Court has also held that a consent search is constitutional even if the suspect does not know that he has the right to refuse consent. (*Schneckloth v. Bustamonte*, 412 U.S. 218 [1973]).[7] We do not suggest that the Court should reevaluate those cases based on our understanding of *Miranda*. The only free choice that *Miranda* protects is the choice to decide whether to answer police questions posed in a custodial setting by those known to be police officers.

Narrow though our claim is, it manifests a fundamentally important choice. Understood as a right to relevant information when faced with compelling pressures in the interrogation room, *Miranda* reflects a fundamental tenet in American culture and law—that individuals should receive notice that they have certain rights before they face official pressure that causes the rights to be lost. This obvious, yet profound, principle is the best explanation of *Miranda* and also best explains its staying power. The original decision could marshal only five votes on the Court that invented it as a solution to a perplexing problem,[8] while the reaffirmation of *Miranda* garnered seven votes on the

[7] The defendant in Schneckloth v. Bustamonte relied on *Miranda* to support his claim that he had a right to notice, but the Court rejected the analogy.

[8] Justice Clark dissented in *Miranda* even though he had earlier written the majority opinion in Mapp v. Ohio, 367 U.S. 643 (1961), forcing the states to suppress evidence found in violation of the Fourth Amendment. Justice Stewart dissented in *Miranda* even though he had earlier written the majority opinion in *Massiah v. United States*, 377 U.S. 201 (1964), requiring suppression of confessions taken after indictment and without a lawyer present. Justices White and Harlan dissented in *Miranda* even though both joined the Court's opinion in Gideon v. Wainwright, 372 U.S. 335 (1963), forcing the states to provide free lawyers for indigent defendants. It seems clear that *Miranda* was among the Court's most controversial criminal procedure cases. That controversy is far more muted in *Dickerson*, though Scalia's dissent is, as usual, quite barbed.

Court that has cut back on *Miranda*'s scope. This says something quite remarkable about *Miranda*'s staying power. That Chief Justice Rehnquist, an early critic of *Miranda*,[9] wrote the opinion in *Dickerson* perhaps says even more.

But while *Miranda* seems like a safe middle-of-the-road solution to police interrogation today (Seidman 1992, p. 743), it was not always perceived in that way. The next section discusses what seemed so dangerous about *Miranda* in 1966.

II. In the Early Days: Storm and Fury

Detailing the negative reaction to *Miranda* in the first months and years after it was decided is beyond the scope of this essay,[10] though we attempt to provide a taste. During the debates on the confessions provision in the Omnibus Crime Control Act, Senator Sam Ervin accused the *Miranda* majority of ruling the land as a "judicial oligarchy." He said that a vote against the act expressed a belief "that self-confessed murderers, rapists, robbers, arsonists, burglars, and thieves ought to go unpunished," while a vote for the act expressed a belief "that something ought to be done for those who do not wish to be murdered or raped or robbed" (114 Cong. Rec. 14,155 [1968]). Senator McClellan said, "If this confessions provision . . . is defeated, every gangster and overlord of the underworld; every syndicate chief, racketeer, captain, lieutenant, sergeant, private, punk, and hoodlum in organized crime; every murderer, rapist, robber, burglar, arsonist, thief, and conman will have cause to rejoice and celebrate [but] every innocent, law-abiding, and God-fearing citizen in this land will have cause to weep and despair" (114 Cong. Rec. 14,155 [1968]).

Both Republican Richard Nixon and independent candidate George Wallace ran against the Warren Court in the 1968 presidential election. Wallace said the Supreme Court was a "sorry, lousy, no-account outfit," and he promised that if he were elected president "you wouldn't get raped or stabbed in the shadow of the White House even if we had to call out 30,000 troops and equip them with two-foot-long bayonets and station them every few feet apart" (Baker 1983, p. 243). Richard Nixon campaigned on a "law and order" theme during the 1968 election, offering a velvet glove alternative to George Wallace's

[9] He wrote the Court's opinion in Michigan v. Tucker, 417 U.S. 433 (1974), that first characterized *Miranda* as a prophylactic protection, rather than one firmly anchored in the Fifth Amendment.

[10] Liva Baker's excellent book provides a thorough, engrossing account (Baker 1983).

mailed fist (Baker 1983, p. 244). Not even Democratic presidential candidate Hubert Humphrey defended the Supreme Court's criminal procedure decisions, the most controversial of which was *Miranda* (Graham 1970, p. 158).

The Omnibus Crime Control and Safe Streets Act of 1968 had already passed and been signed into law by the time the presidential campaigns began. One mystery is why President Lyndon Johnson, a liberal, signed the bill. Johnson had declined to run for a second term and thus was insulated from any political fallout that would have accompanied vetoing the bill. In signing the bill, he expressed his view that it did not overrule *Miranda* (Baker 1983, pp. 207–8; Dallek 1998, pp. 516–17), but it is very difficult to read section 3501 any other way, as the Supreme Court concluded in *Dickerson.* Perhaps Johnson chose not to veto the legislation to deprive Nixon of an additional weapon to use against Humphrey, Johnson's vice president.

Miranda was controversial because of what it did instrumentally and also for what it said about society and criminals. The instrumental fear was that warning suspects of a "right to remain silent" and then promising a free lawyer to stand between them and the police would cause the rate of successful interrogations to plummet and the crime rate to soar. Any Court decision that portended more crime was a natural target of conservatives and moderates, the "law and order" constituency that Nixon sought to build. Why would the Court create a doctrine that seemed to have, as its most likely effect, an increase in the crime rate?

At one level, that of doctrine and the Court's responsibility to set standards for lower courts to follow, the answer is easy. The "voluntariness" test used for centuries to determine whether to admit confessions required inquiry into metaphysical states of mind that, by the 1960s, were believed to be inherently unknowable. Consider *Lisenba v. California*, 314 U.S. 219 (1941). The police interrogated Lisenba for about forty hours over two sessions, separated by several days. Prior to the second session, police confronted him with the confession of his alleged partner in crime. After a midnight dinner and cigars in a café with a group that included two deputy sheriffs, Lisenba discussed the crime, shifting much of the blame to the "partner." Was he confessing because of the relentless interrogation, or because he knew that his partner's confession would hurt his case and it was thus his "will" to offer his own, more exculpatory, version of events? Or did he confess because of some complex combination of those reasons along with

guilt and other deeply hidden psychological forces acting on him? How would a court—indeed how would anyone, including the suspect—know the "thick" answer to that question?[11]

While this is a metaphysical conundrum of the first order, the law had already "solved" the problem of locating human "will" in this context. If a suspect confessed without the police using or threatening force, or making promises, there was a strong presumption that it was his will. In *Lisenba*, the Court held, seven to two, that the confession was admissible, noting that the defendant "exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer" (*Lisenba*, p. 241). Lower courts followed the Supreme Court's robust view of human will, admitting confessions routinely in the absence of physical coercion or promises of leniency.[12] This stable judicial doctrine indicates that the law had a solution to the problem of locating human will in the interrogation room. But the *Miranda* majority did not think the *Lisenba* solution fully captured the ways in which police interrogation sapped the will of the suspect. Indeed, the two Justices who dissented in *Lisenba* in 1941 (Justices Hugo Black and William O. Douglas) were still on the Court in 1966 and constituted two-fifths of the *Miranda* majority.

The road from the *Lisenba* presumption of voluntariness to *Miranda*'s concern with free choice was not completely smooth, but it did lead only in one direction. Through the 1950s and early 1960s, the Court began to change its mind about how much pressure would turn a confession from voluntary to involuntary. The lower courts did not change as quickly, leading to a series of cases in which the Supreme Court reviewed, and reversed, state court decisions to admit confessions (Leo and Thomas 1998, p. 24, n. 61). In these cases, the Court seemed to be trying to send a message to the lower courts that they should be more discerning in their review of confessions, that involun-

[11] We do not doubt that humans offer reasons for their acts, but these accounts are likely to be a "thin" description of complex human motivation that can never be fully described.

[12] See, e.g., Davis v. North Carolina, 384 U.S. 737 (1966), in which two state courts and two federal courts had held voluntary a confession obtained after sixteen days of incommunicado interrogation. The Supreme Court reversed, noting that it "had never sustained the use of a confession obtained after such a lengthy period of detention and interrogation" (*Davis*, p. 752).

tariness can result from fatigue and the relentless pressure of the interrogation as well as from threats and promises. In reversing one state court, the Supreme Court pointedly remarked that "the blood of the accused is not the only hallmark of an unconstitutional inquisition" (*Blackburn v. Alabama*, 361 U.S. 199, 206 [1960]).

The message did not get through to the state courts. The Supreme Court hears only about 120 cases a year, involving a wide range of issues. The Court interprets federal statutes and regulations in areas as disparate as patents, employment discrimination, and environmental law. It also reviews cases from state and federal courts involving myriad constitutional issues, choosing from among thousands of petitions. The Court simply lacks the resources to review all, or even an appreciable fraction, of state cases on the single issue of confessions.[13] To get the state courts to change their ways would take a bold, new approach. *Miranda* was that approach. The concern with official pressure, fatigue, and various techniques designed to persuade or cajole the suspect into confessing could be addressed by letting the suspect control the interrogation. To accomplish that goal, why not simply require the police to tell the suspect that he can refuse to answer and that he can insert a lawyer (paid for by the state) between himself and the interrogators? In short, the *Miranda* solution was to require notice that the suspect has "rights" against the police with the purpose of ensuring that any decision he makes is his free choice.

Why did the Court change its attitude toward confessions? What was wrong with the approach in *Lisenba* that presumed suspects confessed because they saw an advantage in confessing? The answer is found in the deep premise of the *Miranda* opinion—that the suspect deserves at least some measure of sympathy when faced with relentless police interrogation. The *Miranda* Court seemed to see the police as the ones engaged in a morally dubious endeavor when trying to trick, cajole, or persuade suspects to incriminate themselves. The Court in *Lisenba* described in great detail the crime for which the defendant was convicted. He plotted to kill his wife for the double indemnity insurance proceeds and first attempted to kill her by tying her to a table and letting a poisonous snake bite her. Her leg swelled horribly but she did not die from the snakebite. After she had suffered for hours, Lisenba took her to a pond in the back yard and drowned her. He then filed

[13] A Westlaw search of state cases for the year 1999 that mentioned "*Miranda*" produced 1,843 cases.

for the insurance proceeds. It is difficult to feel sympathy for Lisenba when he faced his interrogators.

In *Miranda*, by contrast, the Court barely mentions the crimes that the four defendants committed (the Court had granted review in four different cases, consolidated for purposes of the oral argument and decision; it is merely coincidental that *Miranda*'s name came first). The crimes are not mentioned until more than fifty pages into the majority opinion. Instead, the Court discusses at length how police trickery, deception, and manipulation act to deprive suspects of their "free choice" (a locution that, with its variants, appears several times in the *Miranda* opinion) to decide whether to answer police questions.[14] Somehow, suspects gained a measure of the Court's sympathy between *Lisenba* and *Miranda*. Somehow, the police had become authoritarian rather than simply overzealous. How did this happen?

Identifying the causes of human conduct or attitudes risks reductionism. It is wise to remember Kant's view that our causal knowledge of the world is structured by the human mind: the concept of causality is imposed on experience by thought (Kant 1998, p. 115). We nonetheless note some ways the society was changing. The United States in the 1950s and 1960s grew more concerned about incipient racism. One manifestation of racism was in police practices, especially in the South. And one flagrant form of racism was when white police used their power and authority to intimidate black suspects into confessing. Rather than a cocky, self-assured Lisenba facing police interrogators in California, the cases from the 1950s often had poor black suspects facing white police in a Southern police station.[15]

The 1960s also brought a heightened concern about fairness and distributive justice. A few suspects knew they did not have to answer questions and routinely insisted on seeing their lawyers (Kamisar 1965). This group, probably disproportionately white and middle class, was privileged compared to the rest of the suspects. Why not level the playing field by providing that information to all suspects? Yale Kami-

[14] See 384 U.S. at 457 ("free choice"), id. at 458 ("free choice"), id. at 474 ("free choice"), id. at 465 ("free and rational choice"), id. at 467 ("compel him to speak where he would not otherwise do so freely"), id. at 478 (statements are admissible when "given freely and voluntarily without any compelling influences"), id. at 460 ("unfettered exercise of his own will").

[15] The Court reversed state convictions in cases involving a claim of coercive police interrogation in five cases from 1954–60. The suspect was black in three of the cases, and all cases took place in the South (Blackburn v. Alabama, 361 U.S. 199 [1960]; Payne v. Arkansas, 356 U.S. 560 [1958]); Fikes v. Alabama, 352 U.S. 191 [1957]).

sar's classic study of confession law paved the way for *Miranda* and drew heavily on this principle of equal treatment (Kamisar 1965, pp. 4–11 and 64–81).[16] He argued that "respect for the individual and securing equal treatment in law enforcement" require the state to make counsel available to suspects who face police interrogation and to warn them that they need not answer (Kamisar 1965, pp. 79–80). He concluded: "To the extent the Constitution permits the wealthy and educated to 'defeat justice,' if you will, *why shouldn't* all defendants be given a like opportunity?" (Kamisar 1965, p. 80).

At a more general level, 1960s thinking about the causes of crime and delinquency minimized the individual's responsibility for his actions. Was crime really the fault of the lower class citizen or a failure of the larger society to provide him the right environment, education, and job opportunities? President Johnson's War on Poverty was "fought" not just because poverty is bad but also because providing education and jobs to lower class citizens will reduce crime rates. If the war on poverty has not been won, whose fault is that? It is certainly not the fault of the inner city resident huddled in the interrogation room being badgered by police officers. Gerald Caplan put it this way: "When *Miranda* was decided in 1966, it was popular to see the criminal as a type of victim; he was caught in the role assigned to persons in his circumstances, a member of the underclass. One spoke not of volition but of status or condition. The idea of individual guilt and remorse for wrongful deeds was out of fashion. The causal factors of criminality were thought to lie outside the individual, in the deeper, corrupt foundations of society—the so-called root causes" (Caplan 1985, p. 1472).

Some combination of these cultural changes might explain *Miranda*'s sympathy for the suspect who is undergoing interrogation. The Court portrayed the police officer as manipulative, as taking advantage of a frightened, confused individual. In describing some of the cases decided in the 1963 term under the old voluntariness analysis, the *Miranda* Court remarked, "In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed" (*Miranda*, p. 456). In the next paragraph, the Court described the four cases it was deciding: "In each of the cases, the defendant was thrust into an unfamiliar atmo-

[16] Kamisar's paper laid out the theory that the privilege against self-incrimination should apply to the police interrogation room and that notions of equal protection required providing suspects notice that they did not have to answer questions.

sphere and run through menacing police interrogation" (*Miranda*, p. 457). A few lines below, the Court remarked: "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation" (*Miranda*, p. 457).

This is a seismic shift from the attitude the Court displayed toward the suspect in *Lisenba* when the opinion stressed his "self-possession," his "coolness," his "acumen." Instead of assessing the individual's capacity to resist police interrogators, *Miranda* "opted for a theory of group rather than individual rights . . . subsum[ing] the claims of individuals in an effort to restructure the police-citizen interaction" (Seidman 1992, p. 738). The Court's new view of interrogation also explains why it created the remedy it did—warnings that, in theory at least, gave control of the interrogation to the suspect. Because the Court relied on the Fifth Amendment privilege to justify its holding, it could have created greater rights in suspects. It could have made the suspect's situation more analogous to that of defendants in court. The prosecutor is not permitted to ask the defendant at trial whether he wants to answer questions. The defendant must affirmatively put himself on the stand and tell his story, aided by his lawyer. If the Court was serious about making the privilege not to testify applicable to the police interrogation room, it could have forbidden police interrogation unless the suspect stated, through his lawyer, that he wanted to make a statement. That remedy was not only politically more risky but also, given *Miranda*'s premises, excessive. If the problem was the unfair advantage in knowledge and power possessed by the police, the remedy should be to turn control of the interrogation over to the suspect. The solution should be to give the suspect the free choice to answer or to refuse to answer.

The Court's change in attitude, perhaps as much as the pragmatic concern about the rise in crime rates, outraged *Miranda*'s critics. No longer did the Court talk about criminals as evil actors who are responsible for the consequences of their actions, whatever their other misfortunes in life. No longer did the Court seem concerned about victims. Miranda's rape victim did not get the Court's sympathy. Instead, the Court worried about the plight of her rapist. Custodial interrogation, the Court tells the reader, "exacts a heavy toll on individual liberty and trades on the weakness of individuals" (*Miranda*, p. 454). Custodial interrogation fails to accord sufficient weight "to the dignity and integrity" of citizens, fails "to respect the inviolability of the human

personality" (*Miranda*, p. 460). Finding the right balance between rights of suspects and the protection of victims has divided philosophers, criminologists, and politicians for centuries. Anger flared in the post-*Miranda* period because rarely does one side "win" quite so decisively or obviously as did the view of the sympathetic criminal suspect in *Miranda*.

The seismic shift in the Court's attitude toward suspects is the most satisfying explanation of the Court's opinion in *Miranda*. The Court could have justified giving control of the interrogation to the suspect by focusing on the formal presumption of innocence and the state's burden of proving defendants guilty. While the opinion mentions these coolly logical principles (*Miranda*, pp. 460–61), it spends much more time and energy describing the strategies in the interrogation manuals for inducing reluctant suspects to answer questions (*Miranda*, pp. 448–55). This discussion, as well as the Court's oft-repeated conclusion that police interrogation is inherently compelling and destructive of human dignity, humanizes the suspect in a way that a reliance on a presumption of innocence could never achieve.

Nor is *Miranda* about police manipulating innocent people to confess. There is a single reference in the opinion, in a footnote, to the problem of innocent suspects being coerced to confess (*Miranda*, p. 455, n. 24). The Court cites as authority three stories in the *New York Times*. Nor is *Miranda* about police denying a request to talk to counsel, as was true two years earlier in a landmark case that foreshadowed *Miranda* (*Escobedo v. Illinois*, 378 U.S. 478 [1964]). None of the four defendants in *Miranda* had asked to speak to a lawyer.

Nor is *Miranda* really about police using the third degree to coerce confessions from unwilling suspects. There is a reference early in the opinion to the role a "proper limitation upon custodial interrogation" might play in eradicating the third degree (*Miranda*, p. 447), but a warnings requirement plays this role only if the police respect an invocation of the *Miranda* rights. It is not clear why police willing to use the third degree would be deterred by a suspect asking for interrogation to stop, or that these police would even give the warnings in the first place. Police willing to use coercion could always lie in court about whether they gave warnings and about what the suspect said. Justice Harlan made this point in his *Miranda* dissent: "The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and

deny them in court are equally able and destined to lie as skillfully about warnings and waiver" (*Miranda*, p. 505 [Harlan, J., dissenting]).

No, *Miranda* was simply about police taking advantage of suspects who were poor, ignorant, frightened, and thus no match for police interrogators. They talked to police without making a robust choice to do so. Part of their lack of robust choice, *Miranda* seemed to say, resulted from a belief that they had a formal or informal duty to answer police questions. The warnings, which include a right to consult with a lawyer, should dispel that notion. After *Miranda*, the playing field appeared more level. The suspects were, in theory at least, more in control of the interrogation.

But as *Miranda* critics liked to ask in the aftermath—What is wrong with an uneven playing field against guilty suspects? Joseph Grano made this critique forcefully and often (Grano 1979*a*, 1979*b*, 1986, 1988, 1989, 1992, 1993, 1996). What is wrong with taking advantage of whatever the police need to use (short of coercion or threats of coercion) to get confessions from guilty suspects? As a society, let us do what it takes to improve the conditions in the cities, eradicate poverty, provide jobs, and protect innocent defendants from conviction, but what do those goals have to do with whether Ernest Miranda raped his victim? If he did, why should we care that he was not told of a right to remain silent or to have a lawyer present before he confessed? That has always been the ethical Achilles heel of *Miranda*. As long as a guilty suspect makes a choice to answer police questions, even if it is not the robust choice made by a defendant to take the witness stand, it might be that society is better served by using that statement against him.

To be sure, that ethical balance is inconsistent with what appears to be *Miranda*'s core value of enhancing the "free choice"—the autonomy—of suspects. But, as the Court began to tinker with *Miranda* in the 1970s and 1980s, the core value shifted to protecting a different kind of choice. Various kinds of choice are available in the interrogation room, some more free than others (Thomas 1993). Wigmore's famous aphorism on this point captures an important truth: "As between the rack and a false confession, the latter would usually be considered the less disagreeable; but it is nonetheless voluntary" (Wigmore 1923, sec. 824).[17] To say that the suspect knew, at some level of cognition,

[17] Wigmore used this truism to demonstrate what he believed to be the unhelpful nature of the voluntary test. He preferred a test that asked whether the interrogation methods were likely to produce an unreliable confession.

that he had no obligation to answer police questions is not necessarily to say that he made the kind of robust "free choice" that *Miranda* seems to contemplate.

The current version of *Miranda* choice seems to require only that the suspect understand the warnings and that the police do not use coercion. It does not matter if the suspect fails to understand why he might be better off not to confess or why he should consult a lawyer or how the state might use his statement. In effect, the Court has clarified and diminished what *Miranda* seemed to mean by "free choice." The "free choice" that the *Miranda* Court had in mind turned into a formalized, devalued choice that the state can easily show by merely showing the fact of the warnings. Devaluing the choice that is at stake was, in effect, a response to the ethical critique of *Miranda*. Ironically, by devaluing the relevant choice, the Court made *Miranda* a more difficult target for those who wanted it overruled. The current version of *Miranda* no longer limits the police the way the original version seemed likely to do. Indeed, the new *Miranda* might not limit police in any meaningful way. Perhaps *Miranda* "traded the promise of substantial reform implicit in prior doctrine for a political symbol" (Seidman 1992, p. 746).

III. The Middle Period: Refining *Miranda*

By 1971, two members of the *Miranda* majority had resigned from the Court, and President Nixon had replaced them with judges thought to be conservative on criminal justice issues. In 1969, Warren Burger took the seat of Chief Justice Earl Warren, author of *Miranda*, and in 1970 Harry Blackmun took the seat of Justice Abe Fortas. On the other side of the ledger, before leaving office, President Johnson appointed Thurgood Marshall to take the seat of Justice Tom Clark, who dissented in *Miranda*.[18] The net effect was to leave the *Miranda* majority one vote short. And the vote in the next *Miranda* case was indeed five to four against applying *Miranda*. But it was not a vote to overrule *Miranda*. Instead, in *Harris v. New York*, 401 U.S. 222 (1971), the Court limited the reach of the original decision and, we think, shifted its conceptual foundation.

Harris represents the intersection of *Miranda* with the law of evidence. Under the standard law of evidence, a party can introduce evi-

[18] Clark concurred in this result in one of the cases but used the traditional voluntariness test to reach that result. He dissented from the holding in *Miranda* that substituted warnings and waiver for the voluntariness test.

dence of prior inconsistent statements made by a witness to impeach his credibility. The point is not to show that the impeaching statements are true but, rather, to show that the witness has told more than one story and may not be completely credible in his in-court testimony. Could prosecutors use statements taken in violation of *Miranda* for this purpose? On the robust view of *Miranda*'s holding—that custodial police interrogation unmediated by warnings always produces compelled statements—Harris should have won. Compelled statements cannot be used in court for any purpose.[19] But the purpose of *Miranda* might be narrower than its apparent doctrinal reach. If the purpose is to equalize the suspect with his crafty interrogators, to enhance the suspect's autonomy, the calculus perhaps shifts when we realize that the suspect is now insisting on his right to tell an exculpatory story in court and have *Miranda* hide his inconsistent statements from the jury. The Court held the statements admissible, albeit only to impeach the defendant's credibility.

The Court offered little explanation for its holding in *Harris*. It first explained that, having taken the witness stand, Harris had an obligation to speak truthfully. Then the Court claimed that had Harris made inconsistent statements to third persons (not the police), "it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment" (*Harris*, p. 226). But the analogy to statements made outside police interrogation ignores *Miranda*'s premise that custodial police interrogation compels all responses. The Court ultimately retreated to metaphor: "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances" (*Harris*, p. 226).

Limiting the use to impeachment might seem to manifest a rather fanciful notion of how juries make decisions. If a jury hears the defendant's confession, it will likely consider it directly on the issue of guilt despite the judge's admonition to consider it only on credibility. Indeed, three years prior to *Harris*, the Court had taken that very approach to jury decision making in the context of joint trials. In *Bruton v. United States*, 391 U.S. 123 (1968), two defendants were tried together. One had confessed, implicating the other. The issue was whether the confession could be introduced in the joint trial if the

[19] That proposition had yet to be decided when *Harris* reached the Court, but it was ultimately decided in favor of defendants. See Portash v. New Jersey, 440 U.S. 450 (1979); Mincey v. Arizona, 437 U.S. 385 (1978).

judge instructed the jury to disregard the confession as to the guilt of the nonconfessing defendant.[20] The Court held that this instruction was insufficient to "cleanse" the mind of the jury: "Too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors" (*Bruton*, p. 129, quoting *Delli Paoli v. United States*, 352 U.S. 232, 247 [1957] [Frankfurter, J., dissenting]). This is true even though juries are likely to be somewhat skeptical of the confession of one defendant that shifts most or all of the blame to the other defendant.

But if an already skeptical jury cannot follow the judge's instruction to ignore a codefendant's confession, why would the Court assume that the jury would follow the judge's instructions to disregard, as to guilt, the defendant's very own confession? Juries presumably know that suspects have no incentive to lie in ways that make them seem more culpable, unlike codefendants who have plenty of incentive to lie to shift blame to someone else. The *Harris* Court not only did not follow *Bruton*, it did not even mention the case. The Court mentioned, but disregarded, language in the *Miranda* opinion forbidding the impeachment use of statements taken in violation of *Miranda*.[21] *Miranda* was already shrinking in 1971, only five years after it was decided.

In 1979, the Court made clear that the Fifth Amendment privilege is not as easily ignored as the *Miranda* prophylaxis. In *Portash v. New Jersey*, 440 U.S. 450 (1979), the defendant claimed the privilege not to testify but was compelled to testify by the threat of contempt of court. This, the Court held, was a violation of the Fifth Amendment privilege, and Portash's testimony could not be used to impeach his later testimony. The Court distinguished *Harris* on the ground that it involved a violation of the Fifth Amendment privilege presumed by failure to follow *Miranda*, rather than a violation of the privilege in its "most pristine form" (*Portash*, p. 459). In the latter situation "a defendant's compelled statements, as opposed to statements taken in viola-

[20] The case was decided under the Confrontation Clause right for defendants to be confronted with the witnesses against them. U.S. Const., amend. VI. *Bruton* involved a case where the confessing defendant did not testify. Had he testified, then the confession could be introduced because the other defendant would have a chance to confront the confessor.

[21] See *Miranda*, pp. 476–77: "Statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial. . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement."

tion of *Miranda*, may not be put to any testimonial use against him in a criminal trial" (*Portash*, p. 459). The net effect of *Harris* and *Portash* is that the prophylaxis purportedly designed to protect the Fifth Amendment privilege sometimes does not apply when the privilege itself would suppress evidence. Nor is the same analytical structure used to analyze "real" violations of the Fifth Amendment privilege as opposed to *Miranda* violations. In distinguishing *Harris*, the Court in *Portash* wrote: "Balancing of interests was thought to be necessary in *Harris* . . . when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible" (*Portash*, p. 459).

Portash makes clear that *Miranda* is not necessarily connected to the Fifth Amendment privilege. *Miranda* does not protect the same set of choices that the privilege protects but, instead, creates a right to notice that can be balanced against other worthy goals and thus sometimes lost. Perhaps the Court full well realized that impeachment use effectively means that the jury will consider the statement on guilt but found this use permissible as long as the defendant is trying to turn his lack of choice about answering police questions into a wedge that facilitates perjury. By telling an exculpatory story on the witness stand that is different from what he told the police, Harris lost his right to complain that he did not know he could keep quiet in the interrogation room.

If *Harris* is best viewed as balancing the interest in making an informed choice to answer police questions, rather than the interest in not being compelled to answer questions, it fits neatly with *New York v. Quarles*, 467 U.S. 649 (1984). There, the police arrested a rape suspect in a store late at night and, without providing warnings, asked him where the gun was that he had used to commit the rape. On the traditional view of *Miranda* as required to rebut the compulsion of custodial interrogation, the answer to that question should be inadmissible. As Justice Marshall's dissent pointed out, Quarles was in the presence of four police officers, at least one of whom had drawn his weapon and ordered Quarles to stop just prior to asking him the location of the gun. This situation creates far more compulsion to answer than typical police interrogation.

The Court explained *Quarles* as a broad-gauged exception to the original *Miranda* rule based on a balancing of the interests at stake. But

the balance is pretty close if one uses the traditional understanding of *Miranda* as presuming compulsion. Four members of the *Quarles* Court dissented, including Justice O'Connor, who often takes conservative positions in criminal cases but who here accused the Court of an unprincipled application of *Miranda*. The *Quarles* balance is ostensibly between public safety and the interest of the suspect in not being compelled to answer questions. *Harris* implicitly used the same kind of balancing: the interest of the criminal justice system in accurate fact finding goes on one side of the balance, and the interest in not being compelled to answer police questions on the other. But if we are really serious that the *Miranda* prophylaxis presumes compulsion, it is not clear how this balance comes out. Our whole criminal law system, after all, is premised on autonomous actors making noncompelled choices.

It is easier to justify *Quarles* and *Harris* if one views *Miranda* as permitting choice in the police interrogation room, rather than as presuming compulsion. One can recognize the pressure of police interrogation, and the necessity to give the suspect information that he need not answer, without at the same time finding every answer compelled and always inadmissible. To say that choice is valuable is not to say that it is equally valuable in every case. The value of choice can be balanced against other goals of the justice system. So Quarles did not make a free choice? Perhaps he forfeited that right when he hid the gun in a public place. So Harris did not make a free choice? Perhaps he forfeited the right to suppress his statements when he took the witness stand and told a different story.

One could explain *Harris* and *Quarles* by asserting that *Miranda* conclusively presumes that every answer is compelled but that the Court should sometimes admit into evidence compelled confessions. It is not a very satisfying explanation. Why would a system of justice rely on compelled testimony in any context? Our system does not use compelled testimony at all when the compulsion is "real" as opposed to "presumed" *Miranda* compulsion. It is thus more satisfying to say that *Miranda* enhances choice but that sometimes the value of that choice is outweighed by other goals. Without using the "choice" locution, the Court effectively adopted this analytical structure in *Harris* and *Quarles*.

But the *Miranda* evolution toward protecting choice did not always reduce the scope of the protection against police interrogation. In *Arizona v. Edwards*, 451 U.S. 477 (1981), the police gave warnings and the suspect requested counsel. The police followed the letter of *Miranda*

and ceased interrogation. The next day, without counsel present, the police again gave warnings and asked Edwards if he was willing to waive his *Miranda* rights. He agreed. The issue was whether the second set of warnings and the waiver satisfied *Miranda*—did the waiver permit the police to continue even though they had not provided counsel as Edwards had requested? The outcome, in the conservative Burger Court, did not seem automatic. One could quite plausibly take the position that Edwards had simply changed his mind. Asking for a waiver again the next day hardly seems the kind of abusive interrogation that should create a presumption of compulsion.[22]

But the Court followed *Miranda*'s "choice" purpose and ruled, unanimously, that the statement had to be suppressed.[23] If the goal of *Miranda* is to prevent police from taking advantage of suspects who lack the information and skills to make free choices in the interrogation room, the suspect who admits his disadvantage by requesting counsel perhaps should be absolutely protected from further pressure to answer police questions. The "waiver" that the police got in the second attempt must therefore be ignored because it came from someone who had already admitted that, without counsel, he was not able to make robust choices about whether to answer police questions.

It is instructive to compare *Edwards* with *Michigan v. Mosley*, 423 U.S. 96 (1975), a case decided six years earlier. *Mosley* presented the analogous question of whether a suspect who has invoked the *Miranda* right to silence can be asked later if he wishes to talk. The Court reached the opposite answer here. If a suspect indicates that he wishes to remain silent, this does not insulate him from all later efforts to get him to waive his rights. The police must respect the invocation but can reapproach the suspect later and provide the warnings again. The difference between invoking the right to silence and the right to counsel makes sense, understood as a manifestation of choice. If you say you

[22] The facts of *Edwards* suggest more compulsion than we described in the text. When approached the next day, Edwards told the jail guard he did not want to talk to the detectives, but the guard told him he had to talk. Moreover, Edwards waived his *Miranda* rights only after listening to a tape recording of his accomplice that implicated him. The Court could have issued a narrow ruling, holding that on these facts the waiver was no good. It instead issued a very broad ruling—that once a request for counsel has been made, no further interrogation can occur unless counsel has been provided or the suspect "himself initiates further communications, exchanges, or conversations with the police" (*Edwards*, pp. 484–85). Indeed, it was the breadth of the ruling that caused Justices Powell and Rehnquist to concur in the judgment rather than join the majority opinion.

[23] Justices Powell and Rehnquist concurred in the result because they were concerned about the scope of the majority opinion but they, too, were in favor of suppressing the statement in the case before the Court.

do not want to talk to me, it does not mean you never want to talk to me, and I can ask again later without denying your free choice to say "no" again. The request for a lawyer is different because it admits a structural disadvantage, the very disadvantage at the heart of *Miranda*'s desire for a level playing field that permits free choices in the interrogation room. In short, the suspect's autonomy is undermined more when the right to counsel is ignored. *Mosley* makes less sense if the role of the warnings is to rebut compulsion. The suspect who has had his request to remain silent ignored seems likely to perceive as much compulsion as the suspect who has had his request for counsel ignored.

By the 1980s it was clear that the presumption of compulsion no longer answered all questions about how best to apply *Miranda*. The post-*Miranda* Court has consistently rejected a mechanical application based on a doctrinal presumption of compulsion in favor of tailoring *Miranda* to fit the purpose of promoting suspect choice about whether to answer police questions. As the doctrine evolved toward protecting choice, the choice being protected also changed. This can be seen most clearly in the waiver standard that the Court adopted. *Miranda* seemed to require a high standard for waiver. "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 and his right to retained or appointed counsel" (*Miranda*, p. 475). But the Court ultimately held that waiver requires only that the suspect state that he understands the warnings and is willing to answer police questions (*North Carolina v. Butler*, 441 U.S. 369 [1979]).

That holding makes little sense if the point of *Miranda* is to protect the suspect from the inherent compulsion of the police interrogation room. To ameliorate inherent compulsion would seem to require more than just the suspect's agreement to talk to the creators of that inherent compulsion. Similarly, if *Miranda* is best understood as empowering suspects by giving them a robust "free choice," a court might want to require more than a mere statement from the suspect that he understands the warnings and is willing to talk. Part of the "heavy burden" of demonstrating waiver that *Miranda* contemplated could be to require a specific waiver of each right, perhaps in writing, rather than permitting a single statement to waive everything. This might seem like an inconsequential difference, but in practice it is probably very important. A more involved waiver process, particularly one that re-

quires writing, would be more likely to impress upon the suspect the gravity of the rights he is surrendering.

If this process were followed, it would increase the likelihood that the choice being protected manifested the suspect's autonomy. It would increase the likelihood that the suspect would refuse to waive his rights. Under the Court's current standard, however, a formalized, legalistic choice is all that is necessary. This is clear under the facts of *Butler*. When asked if he understood his rights, Butler said that he did. But he refused to sign the waiver form. The agents told him he did not have to sign the waiver form or talk to them. He responded, "I will talk to you but I am not signing any form" (*Butler*, p. 371). Was Butler making a fully informed free choice to talk to the agents? It seems unlikely that he would talk to the agents after refusing to sign the form if he truly understood the consequences of what he was doing. He did make a choice, of sorts, after hearing the warnings and stating that he understood them, and this choice is enough to satisfy the Court. The *Butler* waiver standard makes the life of the interrogator much easier.

Miranda's choice rationale is consistent with the way the Court has analyzed the *Miranda* "poisoned fruit" issue—whether evidence found because of a *Miranda* violation should also be suppressed. To take a classic example from another context, if a search violates the Fourth Amendment and leads police to other evidence, this "derivative" evidence is presumed to be fruit of the poisonous tree (the Fourth Amendment violation) and thus generally cannot be admitted into evidence.[24] Should a *Miranda* violation also be viewed as a poisoned tree? Perhaps not. To correct a Fourth Amendment violation, courts can do little but to pretend that the search or seizure did not take place. How else can a court put the defendant back in the position he was in prior to the violation?

But a violation of *Miranda* does not produce evidence in the same way that a Fourth Amendment violation produces evidence. Rather than the police putting their hands on the evidence by virtue of an un-

[24] The Court has carved out three exceptions to the Fourth Amendment derivative evidence rule. Evidence is not suppressed when the taint is attenuated by passage of time or an exercise of volition by the person who surrenders the evidence (Wong Sun v. United States, 371 U.S. 471 [1963]), when the evidence is not really derivative because found from an independent source (Murray v. United States, 487 U.S. 533 [1988]), or when the evidence would have been discovered anyway by lawful means (Nix v. Williams, 467 U.S. 431 [1984]).

constitutional search, the harm in the *Miranda* violation is that the suspect did not have a sufficient choice to decide whether to answer police questions. But the causal link between the violation—the lack of choice—and the evidence is weaker than in the Fourth Amendment context. The answer that the suspect gives, the Court has now told us clearly, is not actually compelled, and the suspect might have given the same statement had the police complied with *Miranda.*

Because the causal link between the violation and the statement is more tenuous in the *Miranda* context, the violation might be sufficiently remedied by suppressing, at trial, the statement that we presume was taken without adequate choice. Courts need not, on this view, suppress the other evidence found by means of the statement. Once again, this doctrinal move is better explained if *Miranda* is viewed as protecting choice and not as presuming compulsion. The causal link between a presumptively compelled statement and derivative evidence is more solid than the link between a denial of choice in the interrogation room and derivative evidence.

The current *Miranda* doctrine contemplates that choice in the interrogation room is a valuable goal that is subject to being outweighed by other goals in a justice system. A statement taken without warnings is suppressed except when the police are protecting public safety (*Quarles*) or when the defendant tells a different story at trial (*Harris*). In addition, the *Miranda* violation is fully remedied by suppressing the statement. There is no need to suppress other evidence found by means of the statement, such as other witnesses (*Michigan v. Tucker*, 417 U.S. 433 [1974]) or later statements that the suspect makes after receiving warnings (*Oregon v. Elstad*, 470 U.S. 298 [1985]). Suspects waive *Miranda* by agreeing to talk to police (*Butler*). While this is not the only coherent doctrine that could have evolved from *Miranda*, it is the one the Supreme Court developed during the 1970s and 1980s.

In a sense, then, later Courts were creating, and endorsing, a slimmed-down *Miranda.* If *Miranda* in 1966 had the potential to change the psychology of the interaction between the suspect and the interrogator, if the warnings ever had the power to "restructure preferences" to make cooperation less likely (Seidman 1990, p. 174), that possibility was undermined by the cases in the 1970s and 1980s. *Miranda* was still about leveling the playing field in the interrogation room, but the leveling was limited to providing suspects with information about their rights, rather than empowering them to resist the police interrogation. Refining *Miranda* in the 1970s and 1980s meant be-

ing true to this narrower purpose of *Miranda*, rather than simply indulging a knee-jerk application of the doctrinal rule that *Miranda* violations presume compulsion.

If these later Courts saw themselves as continually rewriting *Miranda*, it should come as no surprise that in the year 2000, the current Court refused to overrule its own creation. *Miranda* in the year 2000 was perhaps seen more as the product of thirty-four years of moderate-to-conservative Court labor than that of the Warren Court of 1966. That seems the import of the statement in *Dickerson* that "our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief" (*Dickerson*, p. 2335).

Davis v. United States, 512 U.S. 452 (1994), is an example of the reduced impact on "legitimate law enforcement" and the narrowing of the relevant choice from autonomy enhancing to formal. Davis waived his *Miranda* rights but about an hour and a half into the interview said, "Maybe I should talk to a lawyer." Is this an invocation of the right to counsel that should terminate the interview? It is not a wholly unambiguous invocation, as the Court concluded. But is it close enough to create an obligation for police to inquire into what the accused meant? A Court concerned with the substance of "free choice," with enhancing the suspect's autonomy, would have adopted that rule. A bright line rule could require police to respond to any statement with the word "lawyer" in it by asking whether the accused wanted to speak with a lawyer. That is not a difficult burden. But five members of the *Davis* Court refused to go that far, insisting that if the suspect's words fall short of an unambiguous request for counsel, police can simply disregard what was said and continue the interrogation. Choice is still protected here, perhaps, but it is a formalized kind of choice that lawyers, but few others, would recognize.

Protecting only a formal choice in the interrogation room accomplishes less than *Miranda* seemed to contemplate. Suspects who understand the warnings might nonetheless choose to talk to police, to persuade the police to release them, or to take advantage of a better "deal" than the prosecutor will offer later, or just because in other contexts in life one does not stand silent in the face of an accusation (Kamisar 1974, p. 35). That these suspects are almost always making a mistake does not, of course, diminish the formal freedom they have to talk or not. Even if one views police tactics that encourage these misapprehen-

sions as inappropriate—even if the tactics exert compelling pressure on suspects—it remains true that as a formal matter, the suspect who understands the warnings should know that he can talk or not as he sees fit. Perhaps the studies showing little *Miranda* effect on police interrogation (see, e.g., Wald et al. 1967; Witt 1973) are consistent with the way the Court has shaped *Miranda.* The crown jewel of the Warren Court's protection of suspects now provides formal notice of the right to control the interrogation and, after that notice is given, the suspect is pretty much on his own. The psychology of the encounter between interrogator and suspect is little changed.

IV. The *Miranda* Impact Studies

In the three decades prior to *Miranda,* there had been relatively little field research on police interrogation practices in America (see Leo [1996*b*] for a review). It was thus hardly surprising that the Warren Court in 1966 relied on police training manuals—rather than empirical studies—to describe the techniques and methods of police interrogation in America. Emphasizing the absence of firsthand knowledge of actual police interrogation practices at the time, the Warren Court in *Miranda* noted that "interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room" (*Miranda,* p. 448).

A. First Generation Studies, 1966–73

In the years immediately following the *Miranda* decision, scholars published approximately a dozen empirical studies that sought to fill this gap (Younger 1966*a,* 1966*b;* Griffiths and Ayres 1967; Seeburger and Wettick 1967; Wald et al. 1967; Medalie, Zeitz, and Alexander 1968; Robinson 1968; Leiken 1970; Milner 1971; Schaefer 1971; Stephens, Flanders, and Cannon 1972; Witt 1973; Neubauer 1974). Undertaken in a variety of locations (e.g., Pittsburgh; New Haven, Conn.; Washington, D.C.; Los Angeles; Denver; Madison, Wisc.; and elsewhere), these studies sought to identify and analyze police implementation of, and compliance with, the new *Miranda* requirements; police attitudes toward *Miranda;* the effect of the *Miranda* warning and waiver regime on police and suspect behavior during interrogation; and the impact of *Miranda* on confession, clearance, and conviction rates.

These first-generation *Miranda* impact studies relied on a variety of methodologies (participant observation, surveys, interviews, analysis of case files), each with its own strengths, weaknesses, and limitations.

One of the earliest and most widely cited studies was conducted by Yale law students, who observed 127 live interrogations inside the New Haven Police Department during the summer of 1966 (Wald et al. 1967) and then compared their observations to data they reviewed from approximately 200 cases from 1960 to 1965 in the New Haven Police Department. The researchers found that while the detectives failed to read all or part of the required warnings to custodial suspects in the immediate aftermath of *Miranda*, they eventually began to comply with the letter (but not the spirit) of the new *Miranda* requirements. The quality of the warnings varied inversely with the strength of the evidence (the stronger the evidence, the worse the warnings) and directly with the seriousness of the offense, suggesting that detectives delivered more adequate warnings when failure to do so might jeopardize the admissibility of a highly valued confession.

Most of the suspects appeared unable to grasp the significance of their *Miranda* rights, thus undermining *Miranda*'s effect on a suspect's decision to answer police questions. Only a few suspects refused to speak to police or requested counsel prior to questioning, and in only 5 percent of the cases did the *Miranda* requirements adversely affect the ability of police to obtain a confession that the researchers judged necessary for conviction. In addition, the researchers noted that *Miranda* appeared to have little impact on police behavior during interrogation, since detectives continued to employ many of the psychological tactics of persuasion and manipulation that the Warren Court had deplored in *Miranda*. Wald and colleagues (1967) concluded that the interrogation process had become "considerably less hostile" from 1960 to 1966 and that *Miranda* does not substantially impede successful law enforcement.

In addition to participant observation, several of the early *Miranda* researchers relied on broad surveys of existing police practices to assess the impact of *Miranda* on the apprehension and prosecution of criminal suspects. Less than a month after *Miranda* was decided, Evelle Younger (1966*a*, 1966*b*) administered a survey to the members of the Los Angeles County District Attorneys' Office. In the previous year (1965), the same office had compiled a similar survey to gauge the effect of *People v. Dorado*, 398 P.2d 361 (Cal. 1965), a California Supreme Court case that anticipated *Miranda* because it required California law enforcement officers to warn custodial suspects of their rights to counsel and to remain silent. Comparing the results of these two surveys, Younger concluded that police officers began complying with *Miranda*

immediately after it became law; that the required warnings did not reduce the percentage of admissions and confessions made to officers in cases that reached the complaint stage; and that *Miranda* requirements did not decrease the percentage of felony complaints issued by prosecutors or their success in prosecuting cases at the preliminary stage. As Younger pointed out, the confession rate—in cases in which police requested that felony complaints be issued—rose approximately 10 percent (from 40 percent to 50 percent) after *Miranda*!

In addition to participant observation, field research, and surveys of police practices, some early researchers attempted to study *Miranda*'s impact on the processes and outcomes of custodial interrogation by interviewing custodial suspects, detectives, and lawyers. In one such study, Lawrence Leiken (1970) interviewed fifty suspects inside the Denver County jail in 1968. Leiken found that Denver police typically read the *Miranda* warnings to each suspect from a standard advisement form that the suspect was then asked to sign twice (to acknowledge that he understood his rights and to indicate the he wished to waive them). Nevertheless, Leiken argued that a large percentage of the suspects in his sample inadequately understood their rights because they could not recall the right to silence or counsel warnings and did not know that oral statements could be used against them in court or that their signatures on waiver forms had any legal effect in their cases. Paradoxically, however, those suspects who best understood their rights were most likely to speak to detectives. In addition, Leiken reported that the Denver police used the very psychological pressures deplored by the *Miranda* Court (including the use of promises and threats to obtain waivers and to elicit statements and confessions). Leiken concluded that the *Miranda* rights did not effectively achieve the Supreme Court's goal of dispelling the inherent pressures of interrogation because suspects could not make a meaningful, knowing waiver of their rights. Instead, police interrogators used the warnings to their advantage to create the appearance that a voluntary statement had been obtained.

The fourth method used in the first-generation of *Miranda* impact research was the analysis of case files and documents. In one study, for example, Witt (1973) analyzed 478 felony case files from 1964 to 1968 in an unidentified Southern California police department in a city with over 80,000 residents, which he dubbed "Seaside City." Witt found that although police officers believed they were receiving far fewer admissions and confessions as a result of the *Miranda* requirements, their

confession rate declined only 2 percent, and the clearance rate only 3 percent, from the pre-*Miranda* period to the post-*Miranda* period. The conviction rate, however, declined almost 10 percent from the pre-*Miranda* to the post-*Miranda* period. Witt argued that *Miranda* had little impact on the effectiveness of police interrogations in the cases he studied, but that *Miranda* did have an impact on the collateral functions of interrogation: the police interrogated fewer suspects, implicated fewer accomplices, cleared fewer crimes, and recovered less stolen property through interrogation than prior to *Miranda.*

These four studies (Younger 1966*a*, 1966*b*; Wald et al. 1967; Leiken 1970; Witt 1973) exemplify the range, as well as the strengths and weaknesses, of the various methodologies employed in the first round of *Miranda* impact research. Wald et al.'s (1967) participant observation study broke new ground because these researchers directly witnessed and analyzed the interrogation process that, to that time, had been rarely observed. The downside of Wald et al.'s study, however, is that the researchers could never be certain whether their presence in the interrogation room altered the behavior of the detectives or the suspects, and, as with so many other *Miranda* impact studies, their focus on one jurisdiction limited the generalizability of their study. The *Miranda* impact studies that relied on interviews were able to ask probing questions to suspects, detectives, and other actors in the criminal justice system to better understand the perceptions, attitudes, and motivations of those who give and receive *Miranda* warnings. But these interview studies suffered from a different type of bias: the researcher never knew whether the subjects were distorting information—either intentionally or unintentionally—to portray themselves in a favorable light or to hide wrongdoing or perhaps simply due to ordinary errors of memory or recall. The problem of respondent bias inherent in the interviewing method is, of course, magnified by the adversarial context of American criminal justice. In the Leiken's study, for example, one may justifiably treat the statements of his incarcerated subjects with some skepticism (Thomas 1996*a*, pp. 828–29).

The two other methods of data gathering used in the first round of studies—surveys and documentary analysis—also provided researchers with useful information about *Miranda*'s impact on the process and outcomes of interrogation. The survey studies like Younger's allowed researchers to quantify and compare large numbers of case outcomes at different stages of the criminal process. The weakness of Younger's (and other survey studies of *Miranda*'s impact), of course, was that what

they gained in coverage they sacrificed in depth: survey studies may provide useful information about trends and outcomes but do not tell us the "why's" that lay behind those trends and outcomes. The analysis of documents and case files to assess the processes and outcomes of police interrogation, as in the Witt (1973) study, proved to be among the most useful methods in parsing out *Miranda*'s impact, especially where pre- and post-*Miranda* data were available. As with Witt's study, the strengths and weaknesses of any documentary analysis depend primarily on the quality of the documents themselves—which tell a story that cannot be distorted (since the documents have been memorialized), but which may be incomplete or inaccurate. Regrettably, the problem with Witt's study of *Miranda*'s impact—as with several other first-generation studies—was that he failed to employ even the most elementary statistical techniques to evaluate whether any of the pre-*Miranda* versus post-*Miranda* differences that he observed were statistically significant.

The methodological problem of inferring the precise causal effects of a judicial decision on case outcomes goes beyond any particular data-gathering approach. Impact studies have been premised on a quasi-experimental model in which the impact of a single decision is evaluated as if all other factors could be held constant. But this assumption is rarely achieved since controlled experimentation is rarely, if ever, possible in the study of naturally occurring data. As a result, social scientists have traditionally relied on two positive strategies to measure judicial impact: before/after studies, and comparison-with-excluded-jurisdiction designs. While the latter method suffers from a lack of statistical comparability among jurisdictions (and in the case of *Miranda* there are no excluded jurisdictions—since all jurisdictions are required to follow the *Miranda* rules), the former suffers from the problem of intervening factors. Thus, our inability to hold constant extraneous and potentially confounding (independent) variables undermines our ability to draw precise causal inferences in the study of judicial impact. Though often imperfect, the best research designs in the study of *Miranda*'s impact have employed multiple approaches so that the strengths of one method may compensate for the weaknesses of another and the findings from one method may be triangulated against (and better understood by) the findings from another.

Several scholars have cataloged and analyzed the findings of the first-generation *Miranda* studies (Cassell 1996*b;* Leo 1996*a;* Schulhofer 1996*b;* Thomas 1996*a*). Although an in-depth discussion of these stud-

ies is beyond the scope of this essay, several general patterns are worth noting. First, in the initial aftermath of *Miranda* some police immediately began complying with *Miranda* (Younger 1966*b*), while others ignored the decision or failed to recite part or all of the required warnings to suspects in custody (Wald et al. 1967). After a brief adjustment period, virtually all police began to comply regularly with the letter, though not always the spirit, of the fourfold warning and waiver requirements (Wald et al. 1967; Leiken 1970). Despite their compliance, however, many detectives resented the new *Miranda* requirements (Wald et al. 1967; Stephens, Flanders, and Cannon 1972).

Second, despite the fourfold warnings, suspects frequently waived their *Miranda* rights and chose to speak to their interrogators. Some researchers attributed this largely unexpected finding to the manner in which detectives delivered the *Miranda* warnings, while others attributed it to the failure of suspects to understand the meaning or significance of their *Miranda* rights (Wald et al. 1967; Medalie, Zeitz, and Alexander 1968; Leiken 1970).

Third, once a waiver of rights had been obtained, the tactics and techniques of police interrogation did not appear to change as a result of *Miranda*. For example, Wald et al. (1967) observed in New Haven that *Miranda* appeared to have little impact on police behavior during interrogation, since detectives continued to employ many of the psychological tactics of persuasion and manipulation that the Warren Court had deplored in *Miranda*. Stephens and colleagues (1972) reported that while most detectives in Knoxville, Tennessee, and Macon, Georgia, issued formalized warnings, *Miranda* did not change the nature and role of the interrogation process.

Fourth, suspects continued to provide detectives with confessions and incriminating statements. In some studies, however, researchers reported a lower rate of confession than prior to *Miranda*. For example, Seeburger and Wettick (1967) reported that in their study of Pittsburgh, the confession rate generally dropped from 54.4 percent prior to *Miranda* to 37.5 percent after *Miranda*, though the decline varied by the type of crime reported. Yet other researchers reported only a marginal decrease in the confession rate. For example, Witt (1973) reported that in "Seaside City" the confession rate dropped only 2 percent (from 69 percent before the *Miranda* decision to 67 percent after the *Miranda* decision). And one researcher even reported an increase in the confession rate of approximately 10 percent after *Miranda* (Younger 1966*b*).

Fifth, researchers reported that clearance and conviction rates had not been adversely affected by the new *Miranda* requirements. For example, even though Seeburger and Wettick (1967) found a 17 percent decline in the confession rate in Pittsburgh, they did not find a corresponding decline in the conviction rate. Other researchers reported significant, if temporary, declines in clearance rates, but conviction rates remained relatively constant (Milner 1971). To be sure, in some instances they too dropped, but not significantly. For example, in his study of "Seaside City," Witt (1973) reported a 3 percent decline in the clearance rate and a 9 percent decline in the conviction rate (from 92 percent to 83 percent) after *Miranda* became law. If there was a significant cost to *Miranda* according to first-generation impact researchers, it appeared to be that *Miranda* may have caused the interrogation rate to drop and may also have been responsible for lessening the effectiveness of the collateral functions of interrogation such as identifying accomplices, clearing crimes, and recovering stolen property (Witt 1973).

But the consensus that emerged from the first generation of *Miranda* impact studies was that the *Miranda* rules had only a marginal effect on the ability of the police to elicit confessions and on the ability of prosecutors to win convictions, despite the fact that some detectives continued to perceive a substantial *Miranda* impact (Witt 1973). The general view of these studies is not merely that *Miranda* failed to affect the ability of police to control crime, but also that, in practice, the requirement of standard *Miranda* warnings failed to achieve the Warren Court's goal of protecting the free choice of suspects to decide for themselves whether to answer police questions.

The generalizability and contemporary relevance of the first-generation *Miranda* impact studies are undermined by two key factors. First, these studies are largely outdated. The data in each of the first-generation *Miranda* impact studies was gathered during the first three years following the 1966 *Miranda* decision. More than three decades have now passed since that time. These studies likely captured only the initial effects of *Miranda* before police officers and detectives had fully adjusted to the new procedures (Schulhofer 1996*b*). Second, many of these studies are methodologically weak, perhaps because many were conducted by lawyers or law professors without any training in the research methods of social science (Leo 1996*a*).

B. Second-Generation Studies, 1996–Present

The first generation of *Miranda* impact studies had run their course by 1973. For the next two decades, the social science and legal commu-

nity, with few exceptions (Grisso 1980; Gruhl and Spohn 1981), appeared to lose interest in the empirical study of *Miranda*'s impact on criminal justice processes and outcomes. Gruhl and Spohn (1981) investigated the impact of *Miranda* (and post-*Miranda* rulings) on local prosecutors, while Grisso (1980) performed a couple of empirical studies of the legal and psychological capacities of juveniles and adults to waive their *Miranda* rights knowingly. Since the mid-1990s, however, there has been a second flurry of empirical *Miranda* impact studies. These studies might loosely be divided into two types: those that seek to assess the quantitative impact of *Miranda* on confession, clearance, and conviction rates; and those that qualitatively seek to assess *Miranda*'s real-world impact on police—whether they comply with or circumvent *Miranda*'s requirements, how they issue warnings and waivers, and how they approach interrogation after securing a waiver. Unlike their first-generation counterparts, however, the second-generation impact studies have generated considerable interpretive disagreement, debate, and commentary.

The best-known debate in the second-generation studies has been between Cassell and Schulhofer. Selectively reanalyzing first-generation impact studies, as well as unpublished surveys conducted by prosecutors' offices in several cities immediately prior to and after *Miranda*, Cassell speculated in 1996 that *Miranda* has caused a 16 percent reduction in the confession rate and that it is responsible for lost convictions in 3.8 percent of all serious criminal cases. Cassell arrived at these figures by reviewing the published and unpublished surveys, ignoring those that he claimed had major problems, and then averaging the change in confession rate in these studies before and after *Miranda.* Cassell did not always use the rate reported by the studies; he sometimes recalculated the rate, claiming that it was necessary to correct methodological errors or achieve comparability with other studies. Based on this selective reanalysis of some of these early published studies and unpublished surveys, Cassell posited that *Miranda* reduced confessions in approximately 16 percent of all cases. Cassell further posited that confessions are necessary for convictions in 24 percent of all cases. Multiplying the two figures (0.24×0.16), Cassell argued that *Miranda* is responsible for lost convictions in 3.8 percent of all serious criminal cases. Using the FBI's Uniform Crime Reports crime index for arrests (no figures are available for the number of individuals interrogated), Cassell concluded that approximately 28,000 violent crime and 79,000 property crime cases are lost each year as a result of *Miranda*, and that there are an equal number each year of more lenient

plea bargains attributable to evidence weakened by *Miranda* (Cassell 1996*b*). Shortly after publishing these figures, Cassell substantially revised them and argued that each year more than one hundred thousand violent criminals (who would otherwise be convicted and incarcerated) go free as a direct result of the *Miranda* requirements (Cassell 1996*c*).

Reanalyzing the first-generation studies, Schulhofer speculated that *Miranda* may have initially caused a 4.1 percent drop in the confession rate in the immediate post-*Miranda* period. Arguing that confessions were necessary for conviction in 19 percent of all cases, Schulhofer multiplied these two figures together (0.041 × 0.19) to speculate that *Miranda* caused a 0.78 percent (seventy-eight hundredths of one percent) drop in the conviction rate, a decline, Schulhofer argued, that had probably been reversed as police learned how to comply with *Miranda* and still get confessions (Schulhofer 1996*b*). Schulhofer arrived at these figures by employing the same general approach as Cassell: Schulhofer reanalyzed the early *Miranda* impact studies, counting only those studies that he regarded as methodologically sound, and then averaging out their assessments of *Miranda*'s effect on the confession rate. Based on his analysis of these studies (as well as other adjustments such as large-city effects, trends in policing since *Miranda*, and a reanalysis of the "confessions-necessity-for-conviction figure"), Schulhofer concluded that "for all practical purposes, *Miranda*'s empirically detectable net damage to law enforcement is zero" (Schulhofer 1996*b*, p. 547).[25]

Despite Schulhofer's decisive refutation of Cassell's reanalysis of the first generation studies, Cassell continued to argue that *Miranda* has substantially depressed the confession rate and imposed significant costs on society by allowing tens of thousands of guilty suspects to escape conviction. In a study of prosecutor screening sessions involving a sample of 219 suspects, Cassell and Hayman (1996) found that 42.2

[25] Calling Cassell's analysis even further into question, Schulhofer pointed out that the studies on which Cassell relied suffer from significant methodological flaws and that we cannot so easily infer causation from correlation in any complex time-series analysis. Instead, Schulhofer suggested several competing alternative explanations for any decline in confession and conviction rates post-*Miranda* (long-term trends such as increasing professionalization of American police; trial courts' more rigorous reading of the Fourteenth Amendment to exclude involuntary confessions; competing causal events such as the trial rights applied to the states in *Mapp. v. Ohio*, Fourth Amendment, 367 U.S. 643 (1961), and Gideon v. Waintwright, Sixth Amendment, 372 U.S. 375 (1963); instability or random fluctuation in confession rates (i.e., regression to the mean); and shifting baselines against which to measure the effect of *Miranda*.

percent of the suspects who were questioned gave incriminating statements, a confession rate that they argued is far lower than pre-*Miranda* confession rates that they estimated to be in the range of 55–60 percent. Analyzing the same studies as Cassell, Thomas (1996*b*) found that the best estimate of the pre-*Miranda* confession rate was in the range of 45–53 percent. Arguing that Cassell and Hayman miscategorized some suspect responses that should have been counted as incriminating, Thomas speculated that the true confession rate in Cassell and Hayman's study was 54 percent, a rate similar both to Cassell and Hayman's estimate of the pre-*Miranda* confession rate as well as to the confession rate found in post-*Miranda* studies (Feeney, Dill, and Weir 1983; Leo 1996*b*).

In a subsequent law review article, Cassell and Fowles (1998) collected FBI national crime clearance rate data for violent and property crimes from 1960 (when such data first became available) to 1995. In addition, they estimated the national clearance rate data from 1950–59, thus producing a database of estimated and reported national crime clearance rates for violent and property crimes from 1950 to 1995. Cassell and Fowles visually identified a decline in national crime clearance rates in the mid-to-late 1960s and, through multiple-regression analysis, sought to test whether a variable they would call "*Miranda*" was responsible for the decline in clearance rates. Using an interrupted time series design, Cassell and Fowles developed a regression model that included thirteen other criminal justice and socioeconomic variables: number of crimes, number of law enforcement employees per capita, dollars spent on police protection per capita by state and local governments, changes to law enforcement manpower and expenditures, the interaction between these variables and the overall number of crimes (what they called "capacity of the system"), the number of persons in the crime-prone years or juveniles from ages fifteen to twenty-four, labor force participation, unemployment rate, disposable per capita real income, live births to unmarried mothers, percent of the resident population residing in urban areas, percentage of violent crimes committed in small cities, and a standard time trend variable. Cassell and Fowles then identified a dummy variable for the years 1966–68 that they called "*Miranda*," and, using an interrupted time series analysis, Cassell and Fowles found that this "*Miranda*" variable showed a statistically significant effect on estimated and collected aggregate crime clearance rates for violent and property crimes from 1950 to 1995. Disaggregating "violent" and "property" crimes and

running separate regressions, Cassell and Fowles found that the only individual violent crime for which the "*Miranda*" variable showed a statistically significant effect was robbery,[26] and that the property crimes for which the "*Miranda*" variable showed a statistically significant effect were larceny, vehicle theft, and burglary.

Based on this interrupted time series, multiple-regression analysis, Cassell and Fowles argued that the *Miranda* requirements have, indeed, handcuffed law enforcement in the last thirty years. In particular, Cassell and Fowles stated that "our regression equations and accompanying causal analysis suggest that, without *Miranda*, the number of crimes cleared would be substantially higher—by as much as 6.6–29.7 percent for robbery, 6.2–28.9 percent for burglary, 0.4–11.9 percent for larceny, and 12.8–45.4 percent for vehicle theft. Moreover, applied to the vast numbers of cases passing through the criminal justice system, these percentages would produce large numbers of cleared crimes. As many as 36,000 robberies, 82,000 burglaries, 163,000 larcenies and 78,000 vehicle thefts remain uncleared each year as a result of *Miranda*" (1998, p. 1126).

Based on this analysis, Cassell and Fowles drew the more general conclusion that, "the clearance rate data collected in this study . . . strongly suggest that *Miranda* has seriously harmed society by hampering the ability of the police to solve crimes . . . *Miranda* may be the single most damaging blow inflicted on the nation's ability to fight crime in the last half century" (1998, p. 1132).

Yet as John Donahue (1998) has pointed out, there may be little relationship between *Miranda* and clearance rates since most crimes are cleared by arrest, and most interrogations occur after the arrest has been made. Moreover, Donahue cautioned that many other, unmeasured variables might be causing the effect that Cassell and Fowles attributed to *Miranda*.

> My sense is that there has been some drop in actual clearance rates owing to the dramatic changes in the nature of crime, drugs, and attitudes toward authority that emerged in the late 1960s, as well as to the changes in the criminal justice system ushered in by the

[26] In an earlier law review article analyzing national aggregate clearance data, Cassell has asserted that "about one out of every four violent crimes that was 'cleared' before *Miranda* was not 'cleared' after *Miranda*," arguing that *Miranda* was responsible for the trend of declining clearance rates (Cassell 1997).

> Warren Court's many decisions in this area, not just *Miranda*. Moreover, measured clearance rates have probably dropped also as a result of the improved quality and reliability of crime and clearance rate data. We must query how much of the measured deviation from trend found in the regressions would remain once we subtracted out the effect of these factors. (Donahue 1998, pp. 1171–72)

Floyd Feeney has systematically and exhaustively analyzed the Cassell-Fowles hypothesis about *Miranda*'s impact on clearance rates (Feeney 2000). Feeney begins by pointing out two serious errors in the Cassell-Fowles hypothesis that, he argues, render it completely defective. First, and most fundamentally, Feeney demonstrates that there was no "sharp fall" for clearance rates in 1966 or 1966–68, contrary to the assertion of Cassell and Fowles. Feeney demonstrates that Cassell and Fowles did not rely on national-level clearance data, despite their claims but, instead, relied on city-level clearance data (and only a fraction of the available city-level clearance data). When one properly analyzes all of the available city-level clearance data, argues Feeney, the "sharp fall" in clearance rates in 1966–68 (the starting point of Cassell and Fowles's analysis) quickly disappears. As Feeney demonstrates, the Cassell-Fowles contention that there was a sharp fall "in every region of the country" during this period is simply false (Feeney 2000, p. 40). Second, Feeney points out that even if the clearance rates had fallen from 1966–68, there would be no logial or empirical reason to attribute the fall to the *Miranda* decision. This is primarily because most primary clearances occur before any in-custody interrogation takes place (Feeney 2000, p. 41), and Cassell and Fowles fail to show how interrogation that takes place after a suspect has already been arrested (and thus the crime has already been cleared) leads to the initial identification and arrest itself. Clearances are driven by arrests, not the police interrogations that follow arrest. In addition, Feeney points out that other significant historical events—such as improved police management and police record keeping, a rising police workload, the 1965–68 race riots, and the heroin epidemic of the late 1960s—have been the major factors in the gradual decline in clearance rates in America, not court decisions. As a result of these logical and empirical errors in Cassell and Fowles's analysis, Feeney concludes that clearance rates are a "profoundly misleading and erroneous method" for measur-

ing the effect of the *Miranda* decision on the ability of the police to combat crime, and that Cassell and Fowles "fail at every critical point of their argument" (Feeney 2000, p. 113).

Though he has garnered considerable attention from some of the nation's top law reviews, as well as the media, Cassell's quantitative claims have not been generally accepted in either the legal or the social science community. Instead, numerous scholars have disputed Cassell's findings or inferences and criticized his objectivity, methodology, and conclusions (Schulhofer 1996*a*, 1996*b*, 1997; Thomas 1996*b*, 1996*c*; Arenella 1997; Donahue 1998; Garcia 1998; Leo and Ofshe 1998; Weisselberg 1998; White 1998; Leo and White 1999). Schulhofer (1996*a*, 1996*b*, 1996*c*, 1997) has repeatedly criticized Cassell for selectively citing data, presenting sources and quotes out of context, and advancing indefensibly partisan analyses. Schulhofer (1996*a*, 1996*b*, 1997) has also disputed some of Cassell's factual assertions, provided alternative explanations for patterns in Cassell's data, and continued to argue that there is no empirical support for Cassell's claim that *Miranda* has measurably reduced confession rates. Other scholars have argued that Cassell oversimplifies complicated issues, presents speculation as fact, fails to discuss contrary evidence and interpretations, and, ultimately, fails to demonstrate that *Miranda* has caused a decline in confession, clearance, or conviction rates (Thomas 1996*b*, 1996*c*; Arenella 1997; Donahue 1998; Garcia 1998; Leo and Ofshe 1998; Weisselberg 1998; White 1998; Leo and White 1999).

Despite the disagreements between Cassell and his many critics, there appears to be relatively little dispute among second-generation researchers on several aspects of *Miranda*'s real-world effects. First, police appear to issue and document *Miranda* warnings in virtually all cases (Leo 1996*a*). Second, police appear to have successfully "adapted" to the *Miranda* requirements. In practice, this means that police have developed strategies that are intended to induce *Miranda* waivers (Simon 1991; Leo 1996*a*; Leo and White 1999). Third, police appear to elicit waivers from suspects in 78–96 percent of their interrogations (Leo 1998), though suspects with criminal records appear disproportionately likely to invoke their rights and terminate interrogation (Simon 1991; Cassell and Hayman 1996; Leo 1996*a*). Fourth, in some jurisdictions police are systematically trained to violate *Miranda* by questioning "outside *Miranda*"—that is, by continuing to question suspects who have invoked the right to counsel or the right to remain silent (Weisselberg 1998; Leo and White 1999). Finally, some

researchers have argued that *Miranda* eradicated the last vestiges of third-degree interrogation present in the mid-1960s, increased the level of professionalism among interrogators, and raised public awareness of constitutional rights (Simon 1991; Leo 1996*a*).

The second generation of *Miranda* impact research has been far more spirited and engaging than the first round of studies. Yet despite the new energy that empirically oriented scholars have breathed into the *Miranda* debate and despite the renewed calls for more empirical research on *Miranda*'s real-world effects (Leo 1996*a*; Thomas 1996*a*; Meares and Harcourt 2001), the second generation of *Miranda* impact scholarship may be at a close. Now that the Supreme Court has resolved in *Dickerson* any question about *Miranda*'s constitutional status, it is highly unlikely that the Court will reconsider any constitutional challenges to *Miranda* for many years, if not decades, to come. As a result, there may be little incentive for either *Miranda*'s supporters or *Miranda*'s critics to continue the difficult task of gathering and interpreting data on *Miranda*'s measurable effects.

The *Dickerson* Court made its own empirical claim about *Miranda*'s impact when it stated that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture" (*Dickerson*, p. 2335). Yet it did so without considering any of the first- or second-generation research of *Miranda*'s real-world effects. This is particularly surprising in light of the fact that Paul Cassell litigated the challenge to *Miranda* before the Supreme Court in *Dickerson*. That the Court ignored even the *Miranda* impact research of one of the primary litigants might, understandably, dissuade scholars and advocates on both sides of the *Miranda* debate from pursuing another round of empirical research on *Miranda*'s real-world effects on the interrogation process, public attitudes, or confession and conviction rates. After all, *Miranda* appears to be here to stay for the foreseeable future, and the Court has made up its mind about its empirical effects.

C. Miranda *in Action: Suspects, Police, Prosecutors*

At the beginning of the twenty-first century, *Miranda*'s impact may be relatively inconsequential in practice and may have been overstated in much of the second-generation scholarship. Despite two dozen or so original studies on various aspects of *Miranda*'s impact in thirty-five years, in many ways we still lack fundamentally good data in this area (Cassell and Hayman 1996; Leo 1996*a*; Thomas 1996*a*). Nevertheless,

what the first-generation researchers suggested of their era may be true of ours: *Miranda*'s impact in practice may be virtually negligible. While *Miranda* may have initially exerted a substantial effect on police practices and public attitudes, this impact may have diminished as the criminal justice system adjusted to its dictates and *Miranda* became normalized among police, prosecutors, and the public.

If so, this may explain both why police and prosecutors, for the most part, no longer complain about *Miranda*, as well as why *Miranda* is perceived by many as no longer imposing serious costs on the criminal justice system. We suggest in this essay not only that *Miranda*'s costs in the twenty-first century may be negligible, but that its practical benefits—as a procedural safeguard against compulsion, coercion, false confessions, or any of the pernicious interrogation techniques that the Warren Court excoriated in the *Miranda* decision—may also be negligible. That *Miranda* protects, in a formalistic way, the "free choice" of the suspects who understand the warnings may also be a negligible benefit. Indeed, at the risk of being overly cynical, the Supreme Court's embrace of *Miranda* in *Dickerson* may be because *Miranda* delivers few benefits to suspects and many benefits to police and prosecutors.

1. *Suspects.* As many writers have pointed out (Baker 1983; Malone 1986; Simon 1991), the daily stream of detective shows seems to have educated everyone (in America and abroad) about the existence and content of the *Miranda* warning and waiver requirements. There has been a widespread diffusion of the *Miranda* litany in American culture not only through television programs but also through movies, detective fiction, and the popular press. It is therefore unlikely that many criminal suspects today hear the *Miranda* rights for the first time prior to police questioning; suspects are likely to have heard *Miranda* so many times on television that the *Miranda* warnings may have a familiar, numbing ring. A national poll in 1984 revealed that 93 percent of those surveyed knew they had a right to an attorney if arrested (Toobin 1987), and a national poll in 1991 revealed that 80 percent knew they had a right to remain silent if arrested (Walker 1993). With the infusion and popularity of even more detective shows in the last decade (such as *Homicide*, *N.Y.P.D. Blue*, and *Law and Order*), it is likely that these figures have only gone up. And it is because of these shows and the mass media more generally—not the police, the legal system, or Supreme Court doctrine—that *Miranda* has become so much a part of our national culture.

Despite this knowledge, however, the overwhelming majority of suspects (some 78 percent to 96 percent) waive their rights and thus appear to consent to interrogation (Leo 1998). This undisputed fact is enormously significant in evaluating *Miranda*'s contemporary real-world impact. As Malone (1986, p. 368) pointed out fifteen years ago, "*Miranda* warnings have little or no effect on a suspect's propensity to talk. Next to the warning label on cigarette packs, *Miranda* is the most widely ignored piece of official advice in our society." The same appears to be true today. This simple fact—which likely explains *Miranda*'s survival better than the doctrinal underpinnings of the Supreme Court's contorted post-*Miranda* jurisprudence—has, for years, baffled social scientists and legal scholars alike.

There are a number of theories (some suspect-centered, some police-centered) to account for why so high a percentage of suspects waive their rights and submit to police questioning. Perhaps the most obvious explanation is that some suspects—particularly juveniles, individuals of low intelligence, and the mentally handicapped or disordered—may not understand the content or the significance of the warnings. This may be due to a lack of cognitive capacity to understand, appreciate, or act on the abstract *Miranda* warning regime. For suspects with the capacity to understand the content of the warnings, the stresses of police custody and impending interrogation might cause them to fail to listen to, register, or process the meaning of the *Miranda* warnings.

Even if suspects have the cognitive capacity to understand the *Miranda* rights and register their significance, some suspects may feel that they have no choice but to comply with their interrogators. The pressures of police custody and questioning may cause suspects to perceive that they lack the power to terminate interrogation. As Ainsworth (1993, p. 261) has pointed out, "the suspect is situationally powerless inside the interrogation room because the interrogator controls the subject matter, tempo, progress of questioning and whether the suspect is permitted to interrupt questioning. The person questioned, on the other hand, has no right to question the interrogator, or even to question the propriety of the questions the interrogator has posed." Some suspects may feel as if they are under the control of their interrogator, who is trained to dominate the police-suspect encounter. Others may fear that by failing to cooperate they will anger their interrogators, who may thereby retaliate against them (Nguyen 2000). Innocent suspects may perceive that they will be prosecuted and even incarcerated

if they do not cooperate with authorities; guilty suspects may believe that they can successfully divert suspicion and talk their way out of trouble. Silence in the face of an inquiry implies guilt and thus naturally evokes suspicion (Greenawalt 1980; Malone 1986; Akerström 1991; Leo 1996*a*). Whether innocent or guilty, suspects may reasonably perceive that submitting to police questioning is the only immediate way to free themselves from police custody.

Several scholars have argued, somewhat counterintuitively, that despite its enunciation of rights and cutoff rules, *Miranda* affirmatively encourages suspects to cooperate with their interrogators. Malone has suggested that "skillfully presented, the *Miranda* warnings themselves sound chords of fairness and sympathy at the outset of the interrogation. The interrogator who advises, who cautions, who offers the suspect the gift of a free lawyer, becomes all the more persuasive by dint of his apparent candor and reasonableness" (Malone 1986, p. 371). Simon (1991) has argued that *Miranda*—particularly the *Miranda* formulation of the warnings—lulls suspects into compliance by co-opting them and making them part of the interrogation process, thereby diffusing the impact of the *Miranda* warning. Leo (1994) has argued that the ritualistic *Miranda* warnings create a felt sense of obligation among suspects to show respect to the police who question them. Thomas (1996*b*) has argued that *Miranda* warnings in effect tell the suspect that he will not be released until he persuades the police that he is not involved in the crime under investigation; this message encourages suspects to attempt to provide exculpatory answers.

Some suspects may intend to invoke their rights but fail to do so in the unequivocal way the Supreme Court requires (*Davis v. United States*, 512 U.S. 452 [1994]). As Ainsworth has noted, suspects who are members of racial minorities or who are poor find it difficult to demand from powerful police officers an end to interrogation or to have the help of counsel (Ainsworth 1993). These suspects, by far the majority, use indirect and equivocal modes of expression that both police and courts fail to recognize as invocations. All of this suggests that there may be multiple and overlapping reasons why so many custodial suspects ultimately waive their rights and submit to police questioning. It is important to appreciate that these explanations are not mutually exclusive and thus that many of these factors or pressures to comply with questioning may be simultaneously present in any given interrogation.

Regardless of why suspects submit to interrogation, however, *Mi-*

randa offers little, if any, meaningful protection once a suspect has waived his rights. *Miranda* rights can be invoked at any time, even after waiver, but few suspects invoke them after they have begun to answer police questions (Cassell and Hayman 1996; Leo 1996*a*). Thus, *Miranda*, once waived, does not restrict deceptive or suggestive police tactics, manipulative interrogation strategies, hostile or overbearing questioning styles, lengthy confinement, or any of the inherently stressful conditions of modern psychological interrogation (White 2001). In addition, *Miranda* offers little, if any, protection against the elicitation of false confessions from innocent suspects or the admission into evidence of these confessions (Leo 1998). While *Miranda* may prevent some suspects from speaking to police, and while it may offer a formalistic "free choice" to those with the cognitive capacity to understand the warnings, these limited protections typically evaporate as soon as an accusatory interrogation begins—which is exactly when a suspect is most likely to feel the inherently compelling pressures of police-dominated custodial questioning. As both White (2001) and Stuntz (2001) argue, once a suspect waives his rights, *Miranda* does virtually nothing to protect suspects against abusive tactics because it provides no restrictions on postwaiver interrogation methods beyond the minimal ones already established by the cases using due process to control interrogation methods.

2. *Police.* Law enforcement in America reacted to *Miranda* with anger (Baker 1983). Along with many others, police initially feared that *Miranda* would handcuff their investigative abilities, not only causing them to lose numerous essential confessions and convictions but also returning rapists and killers to the streets to prey again. Police chiefs predicted chaos, believing that the new *Miranda* requirements were the equivalent of a virtual ban on interrogation (Malone 1986). But police learned how to comply with *Miranda*, or at least how to create the appearance of compliance with *Miranda*, and still elicit a high percentage of incriminating statements, admissions, and confessions from criminal suspects. In this subsection, we show multiple police strategies to avoid, circumvent, nullify, or simply violate *Miranda* and its invocation rules. In sum, we will show, as one commentator has put it, that *Miranda* has become a "manageable annoyance" (Hoffman 1998).

a) *Avoiding* Miranda. One police strategy to negotiate *Miranda* is to exploit the very definitions, exceptions, and ambiguities in the doctrine itself, to use *Miranda* to avoid *Miranda*. For example, because *Miranda* warnings are only required when a suspect is in custody—under

formal arrest or the functional equivalent of formal arrest (*Berkemer v. McCarty*, 468 U.S. 420 [1984])—police can create circumstances in which the suspect is not in custody, and therefore *Miranda* warnings are not required. Police can recast what appears to be a custodial interrogation as a noncustodial interview by telling the suspect that he is not under arrest and that he is free to leave—even after detectives have arranged for the suspect to be questioned in the station house with the express purpose of eliciting incriminating information (*Oregon v. Mathiason*, 429 U.S. 492 [1977]). In this way, police do not have to issue *Miranda* warnings and thus lessen the risk that the suspect will terminate interrogation by exercising his right to silence or counsel (Skolnick and Leo 1992; Cassell and Hayman 1996; Greenwood and Brown 1998).

Another way police exploit legal ambiguities to minimize the risk that a suspect will terminate interrogation is to claim waiver of *Miranda* if the suspect talks without invoking his rights. To elicit this so-called implicit waiver, interrogators read to the suspect his fourfold warnings to silence and appointed counsel but do not ask whether he understands these rights or wishes to act on them (what might be called the "two-fold invocation rules"). Instead, after reading the fourfold warnings, interrogators move directly to questioning without asking the suspect for an explicit waiver of the *Miranda* rights, in effect treating the suspect's waiver as a fait accompli. If a suspect hears his rights and responds to interrogation, he can be found to have implicitly waived his rights (*North Carolina v. Butler*, 441 U.S. 369 [1979]). This strategy highlights the difference between a *Miranda* doctrine that protects a formal "free choice" and one that seeks to provide substantive protection of choice. Though the *Miranda* Court surely intended the latter, current doctrine seems to provide only the former.

b) Negotiating Miranda. Even when police issue the fourfold *Miranda* warnings and use the two-fold invocation rules, they are enormously successful in moving past the *Miranda* moment to elicit signed waivers and control the interrogation process. Interrogators often elicit waivers by minimizing, downplaying, or deemphasizing the potential import or significance of the *Miranda* warnings (Leo 1996*a*; Leo and White 1999). One strategy is to suggest that the warnings are a mere formality to dispense with prior to questioning, a simple matter of routine, by delivering the warnings quickly in a perfunctory tone of voice or in a bureaucratic manner. Another is to engage in extensive rapport-building small talk prior to the reading of the warnings in an effort to

personalize the police-suspect interaction and establish a norm of friendly reciprocation with the expectation that the suspect will comply. The purpose of these strategies is to trivialize the legal significance of *Miranda*, create the appearance of a nonadversarial relationship between the interrogators and the suspect, and communicate that the interrogator expects the suspect to passively execute the waiver and respond to subsequent questioning. As Leo and White (1999, p. 435) have written, the interrogator's "hope is that the suspect will not come to see the *Miranda* warning and waiver requirements as a crucial transition point in the questioning or as an opportunity to terminate the interrogation, but as equivalent to other standard bureaucratic forms that one signs without reading or giving much thought."

Another strategy is to suggest that the suspect will receive a tangible benefit in exchange for talking to police. For example, detectives sometimes tell a suspect that he will only be able to tell his side of the story if he waives *Miranda*, implying that the suspect will not be able to clear things up unless he first answers their questions (Leo 1996*a*; Leo and White 1999). Detectives sometimes tell a suspect that they can only inform the suspect of the charges against him, or the likely outcome of his case, if he waives *Miranda* (Leo and White 1999). Detectives sometimes accuse a suspect of committing a crime, confront him with real or alleged evidence, and then suggest that the range of possible sentences and punishments depends upon how favorably the suspect's actions are portrayed (Simon 1991; Leo and White 1999). As Arenella (1997) has pointed out, the implication is clear: if suspects waive their *Miranda* rights, the police can help them (such as by talking to the prosecutor or testifying on the defendant's behalf); if the suspect invokes his right to silence or counsel, the police communicate the message that they cannot help him. Sometimes detectives explicitly tell the suspect that the criminal justice system will treat him more leniently if he first waives his rights; otherwise, he runs the risk of being treated more punitively (Leiken 1970; Simon 1991; Leo and White 1999). As Kamisar (1999) has pointed out, all of these persuasive strategies amount to interrogation before waiver in violation of both the letter and the spirit of *Miranda*.

c) *Questioning "Outside* Miranda*": Interrogation after Invocation.* If the interrogator fails to elicit an implicit or explicit waiver, he may seek to change the suspect's mind by persuading him to reconsider his decision, or he may simply continue to question the suspect in direct violation of *Miranda*. This can occur even when the suspect clearly invokes

one of his *Miranda* rights, as in California, where some police have been trained to question "outside *Miranda*" by suggesting that the suspect's answers will not be used against him (Weisselberg 1998). Police might, for example, falsely tell the suspect that anything he says is now off the record, that nothing he says can be used against him since he has invoked his constitutional rights, or that his answers will only be used to help the interrogator understand what happened (Weisselberg 1998, 2001; Leo and White 1999).

The purpose of questioning outside *Miranda* is to exploit the Supreme Court's ruling in *Harris v. New York* that established the impeachment exception to *Miranda.* As a result of *Harris*, police can use statements taken in violation of *Miranda* to obtain additional incriminating information against a suspect (such as the location of physical evidence, the names of witnesses, the identities of accomplices, or the suspect's modus operandi). Prosecutors can use statements taken in violation of *Miranda* to impeach the defendant at trial should he take the stand. Police question "outside *Miranda*" precisely because the Supreme Court created the incentive for them to do so. The practice of questioning "outside *Miranda*" has been extensive in the last decade, particularly in California (Weisselberg 1998, 2001; Leo and White 1999; Rosenfeld 2000).

d) The Police Advantage in Miranda. The lost convictions and system chaos feared by law enforcement in the immediate wake of *Miranda* have not materialized (American Bar Association 1988). Instead, American police have successfully adapted to *Miranda.* They can use legal strategies to avoid the reading of rights or the invocation rules. They can use psychological strategies that result in a surprisingly high percentage of waivers. And police and prosecutors can even use statements taken in violation of *Miranda* against defendants. These developments seem inconsistent with what the Warren Court intended when it created the *Miranda* rules. If the goal of *Miranda* was to reduce the kinds of interrogation techniques and custodial pressures that create station-house compulsion and thus undermine the suspect's free choice to decide whether to answer police questions, it appears to have failed. The reading of rights and taking of waivers has become largely an empty ritual, and American police continue to use the same psychological methods of persuasion, manipulation, and deception that the Warren Court roundly criticized in *Miranda* (Malone 1986; Simon 1991; Uviller 1996).

For the most part, *Miranda* has helped, not hurt, law enforcement,

and for the most part law enforcement supports *Miranda* (Leo 1996*a;* Arenella 1997). Numerous members of the law enforcement community have publicly expressed support for *Miranda* (Schulhofer 1987; Leo 1996*a;* Weisselberg 1998). As Schulhofer (1987) has pointed out, since the mid-1970s, police have consistently reported that complying with *Miranda* has not produced adverse effects for law enforcement. As others have pointed out, in the mid-1980s, none of the major police lobbying groups, such as the International Association of Police Chiefs, joined in then Attorney General Edwin Meese's call to overrule *Miranda.* In 1988, an American Bar Association survey found that an overwhelming majority of police agreed that compliance with *Miranda* did not present serious problems for law enforcement or hinder their ability to garner confessions (American Bar Association 1988). In 1993, several police organizations (the Police Foundation, Police Executive Research Forum, International Union of Police Associations, and the National Black Police Association) filed amicus curiae (friend of the court) briefs on behalf of *Miranda* in *Withrow v. Williams,* 507 U.S. 680 (1993). To be sure, a number of law enforcement organizations filed amicus curiae briefs opposing *Miranda* in *Dickerson v. United States,* but this appears to be the result of Paul Cassell's impressive lobbying and advocacy efforts, not the natural inclination of law enforcement, on its own, to abandon *Miranda.* If there is, in fact, widespread opposition to *Miranda,* police in the trenches have expressed surprisingly little desire to overrule it.

When police formally comply with *Miranda,* the existence of a waiver shields the interrogation from challenges, rendering admissible otherwise questionable or involuntary confessions (Garcia 1998; White 2001). *Miranda* not only fails to provide police with any guidelines about which police interrogation techniques are impermissible but, because it is seen as a symbol of professionalism, *Miranda* also shields police from pressures to reform their practices (Belsky 1994; Garcia 1998; Leo 1998). In sum, American police have taken the advantage in *Miranda* (Neubauer 1974).

3. *Prosecutors.* Surprisingly, the empirical study of *Miranda*'s impact has almost entirely neglected the ruling's effects on the practices, attitudes, and decision making of prosecutors. The prosecutor is probably the most powerful actor in the criminal justice system. Prosecutors decide whether to drop or file charges, the amount and type of charges to file, whether to recommend bail and at what amount, whether to engage in plea bargaining, and, if so, which charging and

sentencing outcomes to recommend to courts. Any failure to issue *Miranda* warnings properly, any violation of *Miranda*'s invocation rules, as well as any police misconduct or illegality during interrogation can be undone by the prosecutor with a stroke of a pen by, for example, dismissing charges or not filing them in the first place.

Yet, in the last thirty-five years, there has been only one academic study of prosecutorial attitudes toward *Miranda*. Gruhl and Spohn (1981) analyzed 195 questionnaires from local prosecutors in forty-three states. They found that local prosecutors overwhelmingly supported *Miranda*. Over 81 percent of the prosecutors surveyed agreed that police should be required to read suspects their rights. Gruhl and Spohn (1981) found that the primary influence on prosecuting attorneys' practices was the degree to which local judges required strict adherence to the *Miranda* guidelines, and 69 percent believed that courts should continue to reduce the strictness with which *Miranda* is applied.

Gruhl and Spohn's finding of overwhelming prosecutorial support for *Miranda* is consistent with other sources of data. The American Bar Association (1988) survey of criminal justice practitioners, for example, also found that prosecutors reported that *Miranda* was not a significant factor that impedes their ability to prosecute criminals successfully. On the contrary, as Thomas (2000) and others have pointed out, *Miranda* facilitates the prosecutor's task of getting statements admitted, gaining leverage during plea bargaining, and ultimately winning convictions (Garcia 1998; Rosenfeld 2000). Prosecutors like *Miranda* because it makes law enforcement appear more professional, causes juries to attach greater weight to confession evidence, and allows prosecutors to argue that an otherwise involuntary confession was constitutionally obtained (American Bar Association 1988; Garcia 1998). Perhaps above all, it is rare that an admission or confession will be suppressed in trial proceedings because of a *Miranda* violation (Nardulli 1983, 1987; Guy and Huckabee 1988; Cassell 1996*b*).

4. *The Bigger Picture.* Despite its influence on policing in the 1960s and 1970s, *Miranda*'s impact as we go into the twenty-first century will likely be limited (Garcia 1998). Police, prosecutors, and courts have adapted to and diluted *Miranda*, using it to advance their own objectives rather than to enforce the privilege against self-incrimination or the right to counsel (Kamisar 1996). Once feared to handcuff the police and wreak havoc on the criminal justice system, *Miranda* has become just another routine part of the status quo. Police have learned how to sidestep the necessity of *Miranda* or to use clever strategies to

elicit a high percentage of *Miranda* waivers. Prosecutors have learned to use *Miranda* to facilitate the admission of confession evidence, to add leverage to plea bargaining negotiations, and to buttress cases at trial. Trial judges have learned to use *Miranda* to simplify the decision to admit interrogation-induced statements and to sanitize confessions that might be deemed involuntary if analyzed solely under the Fourteenth Amendment due process standard of voluntariness (Garcia 1998; Thomas 2001).

Miranda imposes few, if any, serious costs on the individual actors of the criminal justice system or on the system as a whole. Contrary to the arguments of Cassell, there is no compelling evidence that *Miranda* causes a significant number of lost convictions—certainly not the tens or hundreds of thousands of convictions lost annually that Cassell imputes to *Miranda*. As Thomas (1996*b*), Weisselberg (1998), and Garcia (1998) have pointed out, the number of lost convictions attributable to *Miranda* is empirically unknowable because the very question presumes a counterfactual world that does not exist and therefore cannot be measured. It is empirically impossible to ascertain the frequency or number of "lost confessions" historically attributable to the *Miranda* warnings and cutoff rules in the manner that Cassell (1996*b*) has suggested and attempted. However, with an adequate sample size, it is possible—using chi square or multiple-regression analysis to control potentially confounding variables and statistical significance to infer probable causation—to test whether the *Miranda* warnings and cutoff rules depress, increase, or have no effect on conviction rates in a particular sample of cases. Only one study has statistically tested the effect of *Miranda* in this manner, and it found that the relationship between the suspect's response to *Miranda* warnings (waived vs. invoked) and the case outcome (convicted vs. not convicted) was not, in the sample studied, statistically significant (Leo 1996*a*). The best evidence suggests that this empirically unknowable figure is likely to be very low.

But there remains a powerful symmetry between costs and benefits. *Miranda* in 2001 imposes low costs on those whom it was intended to regulate and also offers few benefits for its intended recipients. While it might offer an impoverished, formal free choice to suspects who understand the warnings, it does not meaningfully dispel compulsion inside the interrogation room. *Miranda* has not changed the psychological interrogation process that it condemned but has only motivated police to develop more subtle and sophisticated—and perhaps more compelling—interrogation strategies. Police "work" *Miranda* in prac-

tice to undercut the original goal that a suspect be effectively apprised of his rights and have a continuous opportunity to exercise them. *Miranda* offers no protection against traditionally coercive interrogation techniques but may, instead, have weakened existing legal safeguards in this area. And *Miranda* offers suspects little, if any, protection against the elicitation, and admission into evidence, of false confessions. In short, the empirical evidence to date, though highly imperfect, suggests that as a safeguard, *Miranda* offers few tangible benefits to suspects.

The last piece of the *Miranda* puzzle has to do with the timing of the challenge to its legitimacy. Chapter 18 U.S.C. sec. 3501 had been on the books for thirty-one years before it gave rise to a challenge to *Miranda* that reached the Supreme Court. Why 1999 and not 1969 or 1979? And if no challenge issued within the first ten years of the statute's existence, why did a challenge arise at all? After having been neglected by federal prosecutors and judges for thirty years, why did section 3501 suddenly become the vehicle to challenge *Miranda* in 1999? The next section offers some thoughts about that question.

V. The Timing of the *Miranda* Challenge: Why 1999?

Miranda was decided in 1966. By 1968 it was clear that the Court was far ahead of the country in the amount, or kind, of protection of suspects' free choice that should exist in the interrogation room, perhaps too far ahead to be sustainable. Despite life tenure and the doctrine of judicial review that makes the Court the final word on constitutional issues, the Court draws its legitimacy in part from societal consensus. If the Court gets too far ahead, or falls too far behind, the developing consensus, self-correcting mechanisms come into play. One obvious self-correcting mechanism is the election of a president who promises to change the Court. Richard Nixon was that president.

It seems likely that *Miranda*'s first few years were peaceful precisely because enemies of *Miranda* were waiting for Nixon to appoint "law-and-order" judges to the Court. There would be no reason—indeed, it would be foolish—to seek review of the constitutionality of 18 U.S.C. sec. 3501 as long as the Court had a majority in support of *Miranda*. The appointment of Thurgood Marshall in 1967 to replace Tom Clark, who had dissented in *Miranda*, meant that there were six likely votes for *Miranda*. The appointment of Chief Justice Burger to replace Chief Justice Warren in 1969 brought the likely vote back to

five in favor. But it was not until Harry Blackmun was appointed to replace Abe Fortas in 1970 that the likely vote shifted against *Miranda.*

By 1973, Lewis Powell had replaced another *Miranda* supporter, Hugo Black, and William Rehnquist had replaced a *Miranda* dissenter, John Marshall Harlan II. So the likely vote was now six to three against *Miranda.* Two years later, President Gerald Ford appointed John Paul Stevens to take the seat of another *Miranda* supporter, William O. Douglas. Though Stevens has become the great liberal of the Rehnquist Court, he was widely perceived in the beginning as a moderate tending toward the conservative side on criminal justice issues, and the likely vote was now seven to two against *Miranda.* Indeed, the only member of the *Miranda* majority left on the Court by 1975 was William Brennan, though Marshall also took a robust view of *Miranda*'s protections.

Despite the steady infusion of more conservative judges onto the Court, and a congressional statute that seemed to overturn part of *Miranda*'s holding, only one serious effort to overrule *Miranda* reached the Supreme Court. In 1977, the Court heard *Brewer v. Williams,* 430 U.S. 387 (1977), a case that drew twenty-two amicus curiae briefs from states "strongly urg[ing] that" *Miranda* be reexamined (*Brewer,* p. 438). The lower federal courts had reversed Williams's conviction of raping and murdering a child, in part on *Miranda* grounds. If the Supreme Court affirmed, many would recall the dire prediction of Justice White in dissent in *Miranda* that the Court's rule would return killers and rapists to the street.

The child had been abducted in Des Moines, Iowa, on Christmas Eve. An abduction warrant was issued for Williams. Upon advice of his lawyer, he surrendered to police in Davenport, Iowa, about three hours by car from Des Moines. He was arraigned in Davenport on the abduction warrant. In the car on the way to Des Moines, the police detective engaged in a strategy to get Williams to disclose the location of the child's body, a strategy that was likely "interrogation" under *Miranda.* As Williams was isolated in the police car, and no warnings were given after he left his lawyer in Davenport, it looked like a pretty easy case against waiver. But would the Court apply *Miranda* to free a child rapist and killer?

The lower courts found a *Miranda* violation but also found a violation of the Sixth Amendment right to counsel in its pretrial form (*Massiah v. United States,* 377 U.S. 201 [1964]) on the ground that the police had elicited statements from Williams after he was arraigned but with-

out his lawyer present. The Supreme Court decided the case on that ground, five to four, in favor of Williams. Without a Sixth Amendment ground to support the lower courts' holdings, *Brewer* might have seen the overruling of *Miranda*. It seems likely that the Court chose to decide the case on Sixth Amendment grounds because it is easier to justify reversing the conviction of a child killer because he was deprived of his lawyer under the Sixth Amendment than because he was deprived of his right to remain silent. As the narrow vote shows, the Sixth Amendment waiver issue was a close one. Perhaps *Miranda* just barely escaped.

The best hope to overrule *Miranda* was always 18 U.S.C. sec. 3501. This was a considered judgment, by a coordinate branch of the federal government, that the *Miranda* remedy was too narrowly focused on the warnings. Section 3501 does not, on its face, contest *Miranda*'s central premise that police interrogation constitutes compelling pressure. It simply crafted a different procedure for determining when federal judges should find that pressure sufficient to suppress a confession. Subsection (b) provides:

> The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

Subsection (b) also provided that "the presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

If the Court wanted to overrule *Miranda*, it now had both "cover" and a principled justification—it could acknowledge the superior ability of Congress to find facts and craft remedies, and then defer to Con-

gress. Of course, section 3501 first had to be litigated. Only one appellate case reached the merits of the statute in the thirty years prior to *Dickerson.* That court held section 3501 constitutional, a decision that was not appealed to the Supreme Court.[27] It is difficult to know exactly why *Miranda* enjoyed this quiescent period. Perhaps it was implicit recognition that, as shown in Sections III and IV, its doctrinal and empirical effects could be sharply limited. It is not inconceivable that in the hands of a skilled interrogator, the *Miranda* warnings could actually increase the number of suspects willing to talk to police, by making them feel more at ease or even by creating subtle pressure to speak (Malone 1986; Simon 1991; Thomas 1993, 1996*b*). Without doubt, the task of prosecutors in getting confessions admitted into evidence was greatly facilitated by *Miranda.* The great protector of the rights of suspects had evolved into the prosecutor's safe harbor rule. If the police gave the warnings, admissibility was virtually assured. What prosecutor could be against that?

The criticism of *Miranda,* which had subsided in the late 1960s, began to resurface in the 1970s and 1980s, led principally by Joseph Grano's sustained scholarly attack on the doctrinal premises and ethical underpinnings of *Miranda* (Grano 1979*a*, 1979*b*, 1985, 1986, 1988, 1989).[28] A few other scholars also published scathing critiques (Graham 1970; Caplan 1985; Markman 1987, 1989). Grano's focus was on the value to the criminal process of discovering the truth. He noted the argument of some "that prosecution should be made difficult as an end in itself," that it is somehow unfair to make it easier to prove the defendant's guilt (Grano 1989, p. 404). Grano responded: "I would have thought that proving the defendant's guilt was precisely the goal [of the criminal process], at least absent a serious concern about convicting the innocent, condoning or encouraging official misconduct, countenancing violations of the defendant's dignity, or encouraging some other evil of comparable gravity" (Grano 1989, p. 404). To the extent that *Miranda* discourages guilty suspects from talking to police, it impedes the search for truth and the proving of guilt. Many weighed in to defend *Miranda* but none more forcefully than Yale Kamisar (1966, 1977*a*, 1977*b*, 1990, 1999, 2000). Kamisar argued that, though ascer-

[27] United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975) (alternative holding). For a thorough discussion of sec. 3501 and the history of various litigation strategies by a succession of attorneys general, see Cassell (1999*b*).

[28] Grano's scholarship on *Miranda* continued into the 1990s and produced an important book on the law of confessions (Grano 1993).

tainment of truth is important, the criminal process "must be made subsidiary to the values and principles found in the Bill of Rights as a way of making *those constitutional provisions* effective in action" (Kamisar 1990, p. 542).[29]

The concern with pursuing truth, kept alive by Grano, Caplan, and Markman, led to new trouble for *Miranda* during Edwin Meese's tenure as attorney general under Ronald Reagan. Stephen Markman headed the Office of Legal Policy, which issued the Truth in Criminal Justice Series as a report to Meese in 1986 (Report to the Attorney General 1986; see also Markman 1989). The report took direct aim at several of the Warren Court criminal procedure landmarks that valued process over truth. It concluded both that *Miranda* was vulnerable and that the Department of Justice should make overruling it a top priority. The vulnerability was thought to follow from the cases that we discussed in Section III refining, and limiting, *Miranda*. The report concluded that these decisions held, "in effect, that *Miranda* is unsound in principle" (Report to the Attorney General 1986, p. 565). Noting that section 3501 was "specifically designed to overrule" *Miranda*, the report concluded, "Overturning *Miranda* would . . . be among the most important achievements of this administration—indeed, of any administration—in restoring the power of self-government to the people of the United States in the suppression of crime" (Report to the Attorney General 1986, p. 565).[30]

The report brimmed with confidence, at one point noting: "It is difficult to see how we could fail in making our case" (Report to the Attorney General 1986, p. 565). Yet little was done to implement its strategy for overturning *Miranda* (Cassell 1999*b*). One difficulty was finding the "right" test case. A challenge to *Miranda* needed the "right" facts to increase the chances of succeeding. An old legal cliché is that "bad facts make bad law." When reversing precedent, the Court often picks cases that have facts that seem to call for a new rule.[31] A

[29] Schulhofer argued that the largely toothless protections of *Miranda* were insufficient to protect Fifth Amendment interests of suspects: "the proper critique of *Miranda* is not that it 'handcuffs' the police but that it does not go quite far enough" (Schulhofer 1987, p. 461). Lawrence Herman (1987) argued that whatever the flaws of the *Miranda* regime, a return to the voluntariness test was even worse.

[30] For two highly critical responses to the report, see Herman (1987); Schulhofer (1987).

[31] In Mapp. v. Ohio, 367 U.S. 643 (1961), e.g., the Court reversed a holding only twelve years old and required all states to suppress evidence taken in violation of the Fourth Amendment. The facts in *Mapp* were extraordinarily friendly to that task. When Mapp refused to let the police into her home without a warrant, the police responded hours later by breaking into her home. She demanded to see a copy of the warrant. An

good case for overruling *Miranda* would have a defendant obviously guilty of a very serious crime who confessed without much prodding from the police and after an unintentional, minor violation of *Miranda.* From the early 1980s until the end of the George Bush presidency in 1992, the Department of Justice looked for a test case. Perhaps they looked too hard for a perfect one. Paul Cassell had the responsibility of finding a test case from 1986 to 1988, but his superiors always found reasons to reject all but a few of the cases he picked (Cassell 2000, personal communication). The Bush Department of Justice had finally chosen a test case and had begun the litigation when Clinton won the 1992 election. The Clinton Department of Justice terminated the litigation.[32]

Section 3501 applied only in federal court, and part of the difficulty in finding the right test case undoubtedly, if ironically, was attributable to the professionalism of the United States Attorneys and the federal law enforcement agencies. Whether section 3501 was constitutional was an unknown fact. What federal agents and prosecutors did know for certain was that *Miranda* was a safe harbor rule. If winning cases and imprisoning criminals is the most important goal, federal agents would give warnings rather than seek a test case for section 3501, and no U.S. Attorney would ask the agents to omit the warnings, particularly in serious cases. Section 3501 was raised in several Courts of Appeal beginning in 1970 (Cassell 1999*b*, pp. 199–200), but in all but one case (*United States v. Crocker*, 510 F.2d 1129 [10th Cir. 1975]), the court refused to reach the issue because it found that the agents had complied with *Miranda.*

This brings us to the Clinton years. *Miranda* is now truly "part of our national culture." Repeated thousands of times on television and in the movies, it rarely is portrayed as keeping the police from "getting their man." A whole generation of police and detectives has now been trained to use *Miranda* and still get the "bad guys." A generation of prosecutors sees the value in *Miranda*'s safe harbor rule. Once *Miranda* got through the 1980s, it could easily have expected to live out the rest of its life in peace like any other aging baby boomer.

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officer held up a piece of paper and she snatched it from his hand. The police physically manhandled her to get the paper back. No warrant was introduced at trial. And what did they find for all this aggressive policing? Not the bombing suspect they sought but a few items of obscenity. It was an easy case to hold for the defendant.

[32] For more details on this history of the effort to challenge *Miranda*, see Cassell (1999*b*).

But it was not to be. What created a new *Miranda* controversy in the 1990s? Recalling Kant's theory that causal knowledge is structured by the mind, our observations here must be very tentative. One possibility is that the cultural climate changed sufficiently by the mid-1990s to make Joe Grano's and Paul Cassell's criticisms of *Miranda* more telling in the late 1990s than they were at any time since the early 1970s. We are not claiming that the social climate caused the issue of section 3501 to be litigated or even that it caused the Fourth Circuit to decide *Dickerson* in a particular way. We make no causal claim at all because we would not know how to prove it. That the section 3501 issue made it to the Supreme Court might be attributable to the writings of Grano and others, to the advocacy and persistence of Cassell, or to little more than random chance. What we do claim is that the climate was more fertile for *Miranda* critics.

Recall that the *Miranda* Court characterized the suspect as at least somewhat sympathetic—disadvantaged educationally and environmentally, unable to match wits (or skill) with professional police interrogators. As Gerald Caplan put it, "*Miranda* was a child of the racially troubled 1960s" (Caplan 1985, p. 1470), and of the 1960s philosophy that social forces were the root cause of crime and, more broadly, the root cause of much behavior, good and bad. This picture saw humans more or less trapped in a web of deterministic forces, unable to effect changes in the sweep of history.

Events in the 1970s reinforced this belief structure: the Nixon administration's retreat from Vietnam a step ahead of advancing North Vietnamese troops, the agonizing Watergate years, and the president's resignation. Next was the caretaker administration of Gerald Ford, followed by Jimmy Carter's plea for Americans to sacrifice more and expect less. In a much-noted address to the nation, Carter wore a sweater rather than a suit and asked Americans to turn down their thermostats so that we would not be hostage to OPEC. Then, ironically, we became literally hostage to the Iranian terrorists who held our embassy and its personnel for 444 days. In this climate, the radar screens of prosecutors might have lost sight of *Miranda*. Perhaps it had become an old piece of doctrinal furniture that had to be moved slightly every now and then for vacuuming but was a permanent part of their world.

Ronald Reagan campaigned in 1980 on the theme of "morning in America." The message of his campaign, delivered in many different ways, was that Americans are an energetic, resourceful people and that we control our destiny. We are not powerless before unknown forces.

We make our own fortune and our futures. We are able to act in the face of social pressures, including that of police interrogators.

Reagan's message that we create our own futures is, to some extent, antithetical to *Miranda*'s basic assumption that suspects are easily manipulated by police interrogators. It is perhaps no coincidence that the Reagan Department of Justice sketched the first plan for a serious sustained challenge to *Miranda*. Why it ran out of steam is a more difficult question. Perhaps the nation had not yet fully absorbed the Reagan message of optimism and free will. Perhaps there just were no good test cases. Simplest of all, perhaps Paul Cassell was not yet in position to lead the charge.

But the Reagan revolution did not stop when he left office. During the Bush presidency, despite some sour economic times, the national mood lightened, and our self-esteem was reinforced when we finally won a war (the Gulf War provided our first clear victory since 1945). Clinton defeated Bush in 1992 but quickly proved himself a centrist. During Clinton's presidency, we turned a perennial budget deficit into a large surplus, we saw a stock market boom of unprecedented proportions, we ended "welfare as we know it," and we saw the resurgence of American creativity and entrepreneurial activity in Silicon Valley and many other places. Microsoft Corporation showed the extent to which American ingenuity could dominate world markets—to the point, of course, that the Justice Department sought to put the brakes on Microsoft. Advertisements for on-line stock trading appeared on television showing twenty-somethings saying "we don't depend on the government for our retirement, we don't depend on our parents, we don't depend on anyone but ourselves." The 1990s, in sum, saw a rise in American individualism.

Whatever else *Miranda* might be, it is at heart a denial of robust individualism—at least among the population of suspects in police interrogation rooms. *Miranda* insisted that these less fortunate, relatively powerless individuals needed to be protected. This was not the message of the 1990s. So, in that sense, *Miranda* is an anachronism. The cultural context of the 1990s was less receptive to the image of the powerless suspect who surrenders his will to the powerful police interrogator. Instead, more like the 1940s and 1950s, the suspect is now likely to be seen as making a choice to engage in crime to the detriment of the innocent citizen. The "poster child" suspect once again is Lisenba torturing and murdering his helpless, hysterical wife, not a pathetic suspect cowering before relentless police interrogators. It is a

paradigm shift of the first magnitude and can be seen in many concrete manifestations, including laws locking up "sexual predators" for life even though they have already served their sentence for the crime that led to the civil commitment process (*Kansas v. Hendricks*, 521 U.S. 346 [1997]); the "three-strikes" laws that incarcerate for life without parole on a third conviction (California Penal Code, sec. 667 [2000]); proposals for victims' rights laws, and even constitutional amendments to create victims' rights (New Mexico Statute, sec. 31-26-4 [2000]; Mosteller 1997; Cassell 1999*a*). The victims' rights movement is perhaps the best illustration of the shift from seeing the criminal suspect as sympathetic to seeing the crime victim as the person who needs "rights" and deserves our sympathy (Grano 1996). In this paradigm, it is not Ernest Miranda who needs rights and sympathy. It is his rape victim.

If this speculation is roughly right, it would explain why Grano's arguments against *Miranda* and in favor of crime victims, contained in the 1986 Attorney General's Report, were especially resonant in the mid- to late-1990s. Moreover, it also explains why Cassell champions victims' rights with the same fervor that he displays when attacking *Miranda* (Cassell 1999*a*). The two issues are inextricably linked by their denotation of who is the victim and who is not.

There is no doubt that Cassell was a dedicated advocate of the constitutionality of section 3501. He clerked for Justice Scalia when he was on the D.C. Circuit Court of Appeals and for Chief Justice Burger. An associate deputy attorney general under Meese, Cassell helped with the latter stages of the Office of Legal Policy Report, including the task of publicizing the report. It is clear from Cassell's law review articles that he intensely dislikes both the message and (what he thinks is) the effect of *Miranda* (Cassell 1996*a*, 1996*b*, 1996*c*, 1997, 1999*b*; Cassell and Fowles 1998). Grano's work laid the groundwork for Cassell's later successes, but Cassell's zealous advocacy might have been crucial in getting the section 3501 issue before the Supreme Court.

On appeal from the federal district court to the Fourth Circuit in *Dickerson*, the government did not raise section 3501 in its brief (once again apparently seeking to avoid a decision on the constitutionality of section 3501). Without Cassell's amicus curiae brief, the issue would not have been before the Fourth Circuit (Cassell 1999*b*, p. 222). An amicus curiae is not a party to the case, and it is unusual for a court to decide a case based on an issue not raised by either party. The Fourth Circuit's decision to address the issue raised by an amicus brief could have been influenced by the changing times. Or, once again, it could

simply have been the determination of scholars and litigators (Grano, Caplan, Markman, Cassell) to keep raising the issue until some court somewhere reached the merits.

The latter explanation is perhaps most consistent with the final outcome. Cassell, after all, did not win in the Supreme Court. He did not even come close. The Court's general distaste for overruling precedent was part of the reason, as well as the perception (that the data assembled in Section IV tend to bear out) that *Miranda* does not significantly harm police while helping prosecutors get confessions admitted. We also suggested in Section III that the current Court sees itself as the author of the present somewhat narrower, though sometimes broader, *Miranda* rule and that it is particularly distasteful to overrule one's own creation.

But we suspect part of the reason *Miranda* lives is that it taps into a basic vein of fairness that transcends the opinion's assumptions about the diminished free will of suspects facing police interrogation. When the Court in *Dickerson* says that the "warnings have become part of our national culture," it does not explain why this has taken place (*Dickerson*, p. 2335). The implication is that the culture has echoed what the police say, and the police are echoing what the Court said they had to say. But the causal mechanism may be more complicated.

The right to be told one's basic rights before the government insists that they be relinquished is part of the fundamental belief structure underlying Anglo-American law. Our law assumes autonomous agents capable of acting in their own best interests. To exercise autonomy requires at least some level of information about the basic rights that we may assert against the government actor who insists we act in a certain way (Thomas 2001). Citizens, of course, have no right to full information about the consequences they face before being asked to make certain decisions, but knowing that no duty exists to answer police questions during custodial interrogation might be one piece of information that is crucial. It might not, as Sections III and IV suggest, provide suspects with much protection from police pressure, but it might be just enough to satisfy the current Court and society.

Academics and historians can debate endlessly whether there is, was, or should be a Fifth Amendment right against self-incrimination in the police interrogation room. But it might be that the culture believes, at some intuitive level, in precisely the kind of notice that *Miranda* requires. *Miranda* did not, after all, forbid police interrogation or require lawyers. It left the decision of whether to answer police questions up

to presumably autonomous agents who have been given a minimum, formalistic level of information about the consequences of answering. Perhaps the American people as well as the judges find this fair enough even though we now have a different view of who is the "victim" when the police set out to solve a crime.

It is possible that the changing conception of "victim" provided a sympathetic audience among the Fourth Circuit judges for the *Miranda* criticisms but that, upon reflection, the Supreme Court viewed the *Miranda* warnings as more a matter of basic fairness than a refuge for guilty criminals. That explanation is consistent with the *Miranda–Dickerson* story. Cassell, Grano, and the other *Miranda* critics got their day in a court of appeals known to be conservative. They lost in the moderate Supreme Court because whatever the *Miranda* Court claimed as a rationale, the real basis for requiring warnings ultimately derives from the essential fairness of telling a suspect he does not have to convict himself. Perhaps even guilty suspects deserve that small bow toward the Fifth Amendment privilege against compelled self-incrimination.

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