SAVING *MIRANDA*

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Together with my former colleagues and students at USC, I have served as co-counsel for the plaintiffs in *California Attorneys for Criminal Justice v. Butts*, CV 95-8634-ER (C.D. Cal.), and for *amicus curiae* in *People v. Peevy*, 953 P.2d 1212 (Cal.), *cert. denied*, 119 S. Ct. 595 (1998). This Article discusses both of these cases. The views I express here are mine, though they were shaped by our work in these cases.

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> *Today, then, there can be no doubt that the Fifth Amendment privilege [against self-incrimination] is available outside of criminal court proceedings and serves to protect persons . . . from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.*
>
> *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).
>
> *When you violate* Miranda, *you're not violating the Constitution.* Miranda *is not in the Constitution. It's a court-created decision that affects the admissibility of testimonial evidence and that's all it is. So you don't violate any law. There's no law says you can't question people [after they have asserted their]* Miranda *[rights]. You don't violate the Constitution. The Constitution doesn't say you have to do that. It's a court decision. So all you're violating is a court decision controlling admissibility of evidence. So you're not doing anything unlawful, you're not doing anything illegal, you're not violating anybody's civil rights, you're doing nothing improper.*
>
> Videotape: Questioning: "Outside *Miranda*" (Greg Gulen Productions 1990).

INTRODUCTION

Miranda v. Arizona[1] may be the United States Supreme Court's best-known decision. Anyone who has watched a television police drama during the last thirty years undoubtedly has heard the famous warnings that *Miranda* established and that have come to bear its name. *Miranda* is a strong pronouncement by the Court about the primacy of Fifth Amendment values and about the conduct that ought to occur in the station house. In explaining what conduct ought to occur, the Court described a set of procedures that it considered necessary to protect suspects' ability to assert the Fifth Amendment privilege against self-incrimination.[2] The Court linked *Miranda*'s rules directly to the Constitution.

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1 384 U.S. 436 (1966).
2 *See id.* at 478-79.

But *Miranda* is not the last word on *Miranda*; much has been written since. In the years since *Miranda*, the Supreme Court periodically has revisited parts of its holding, creating significant incentives for police to violate its strictures. Although the Court has never retracted its stated expectation of how police should behave during a custodial interrogation, it has termed *Miranda*'s warnings and its requirement that interrogation cease after a suspect asserts his or her rights as mere "prophylactic" rules that are not required by the Constitution.[3] In addition to driving this wedge between *Miranda* and the Fifth Amendment, the Court has held that a prosecutor may impeach the testimony of an accused with statements that police took without administering the warnings or without honoring a request for counsel.[4] In a final stroke, the Court has ruled that if police obtain statements in violation of *Miranda*, but use them to uncover other evidence and other witnesses, then the prosecution, under some circumstances, may introduce that evidence and call those witnesses.[5] In light of these decisions, some have come to view *Miranda* not as a strong statement about the constitutional dimensions of custodial interrogation but, rather, as a weak, non-constitutional rule of evidence that should not affect what happens in the station house. As this interpretation of *Miranda* has spread, officers in a number of jurisdictions have been trained that it is permissible to continue to question a suspect who has asserted the right either to counsel or to remain silent. Under this view, violating *Miranda* is not inherently wrong, but any statement or evidence that police so obtain may have only a limited use at trial.

This Article asks whether the Supreme Court's original vision of *Miranda* has vanished and, if so, whether we should attempt to recapture that vision. Part I examines the history, values, and principles of the original vision and explores its transformation into a modest rule of evidence. That Part also discusses the drafting of the *Miranda* opinion and demonstrates that the Justices intended to link *Miranda*'s rules directly to the Constitution. Part II investigates the growing practice of questioning suspects in direct violation of *Miranda*, a practice that many often dub questioning "outside *Miranda*." Questioning "outside *Miranda*" stems naturally from the Supreme Court's decisions that both pull *Miranda* from its constitutional base and provide of-

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3 *E.g.*, Duckworth v. Eagan, 492 U.S. 195, 203 (1989); Michigan v. Tucker, 417 U.S. 433, 446 (1974).

4 *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 723-24 (1975) (holding that a voluntary statement occurring after invocation of the right to counsel is admissible for impeachment); Harris v. New York, 401 U.S. 222, 226 (1971) (holding that a prosecutor may impeach credibility with a statement that police took without warnings).

5 *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 318 (1985) (holding that a defendant's second statement is not tainted as a fruit of an initial *Miranda*-violative statement); *Tucker*, 417 U.S. at 450-52 (ruling that a witness's testimony was admissible, even though police learned about this witness through a statement they took in violation of *Miranda*).

ficers an incentive to disobey *Miranda*'s rules. This Article presents the first substantial evidence that police officers in some jurisdictions are systematically trained to violate *Miranda*. Part III addresses the two competing views of *Miranda* and concludes that we ought to retain the original vision. Only the original vision adequately protects Fifth Amendment values by providing clear guidance to both courts and police and by relieving some of the compelling pressures that are inherent in a station house interrogation. Only the original vision fits with our Fifth Amendment jurisprudence and maintains respect for our law. Part IV contends that the Court should "re-constitutionalize" *Miranda* and—at the same time—should re-examine *Miranda*'s exclusionary rule. Courts should exclude from evidence, for all purposes, statements that police have taken in violation of *Miranda*, as well as evidence that has derived from these statements, when officers objectively have acted in bad faith. This exclusionary calculus would restore *Miranda*'s original purpose: protecting the privilege against self-incrimination and its underlying values by influencing police behavior during custodial interrogations. The Court should address these two visions and the exclusionary rule sooner rather than later, given the mounting evidence of police non-compliance with *Miranda*.[6]

I
VISIONS OF *MIRANDA*

A. Due Process, Psychological Coercion, and the Search for Bright-Line Rules

Miranda v. Arizona combines several distinct holdings. The Court primarily ruled that a suspect may invoke the Fifth Amendment in the station house and that a custodial interrogation applies "inherently compelling pressures" that undermine a suspect's ability to exercise his or her Fifth Amendment rights.[7] Over time, other portions of the decision, namely those requiring warnings and waiver[8] and those mandating that officers cease questioning when a suspect asserts Fifth Amendment rights, have overshadowed these parts of *Miranda*.[9] Unless officers give warnings and obtain a waiver, the Court held, any resulting statement by the suspect was presumably obtained in violation of the Fifth Amendment.[10] Similarly, *Miranda* deemed as compelled any statement that police take after the invocation of rights.[11]

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6 Given the increased number of interrogations that violate *Miranda*, as described *infra* Part II, the Court should have an opportunity to address the issue in the near future.

7 *Miranda*, 384 U.S. at 467.

8 *See id.* at 467-79.

9 *See id.* at 473-74.

10 *See id.* at 476-77.

11 *See id.* at 474.

The Supreme Court fashioned these bright-line rules to protect the ability of suspects to invoke their Fifth Amendment rights and to provide clear guidance to both the courts and the police. Although the Supreme Court long had barred the prosecution from obtaining a conviction based upon a coerced or involuntary statement, pre-*Miranda* decisions set out a soft, value-laden standard that the courts and the police found difficult to apply. Clear rules were needed.

Beginning in 1936 with the seminal case of *Brown v. Mississippi*,[12] the Supreme Court used the Due Process Clause of the Fourteenth Amendment to overturn a series of convictions obtained with confessions deemed involuntary because of brutality, torture, extended interrogation, threats, or other unsavory methods of questioning, or because the accused was somehow incapacitated.[13] Although the Court invoked the Fifth Amendment as early as 1897 to overturn a conviction that had rested upon a coerced confession,[14] the Due Process Clause of the Fourteenth Amendment provided the primary mechanism to review police interrogations until *Malloy v. Hogan*[15] applied the Fifth Amendment to the states in 1964.[16]

The Court's early voluntariness cases seemed to turn on the fear that coerced statements were unreliable,[17] though later decisions established more clearly that courts would not admit even trustworthy

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12 297 U.S. 278 (1936).

13 *See id.* at 286-87 (ruling that a statement that police obtained through brutality and torture violated the Fourteenth Amendment); *see also* Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (holding that police coerced a statement from defendant by telling her that the state would end aid for her children and take them from her unless she cooperated); Townsend v. Sain, 372 U.S. 293, 307-09, 322 (1963) (remanding for a hearing to determine whether defendant received a "truth serum," which would have rendered statements involuntary); Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (finding that a statement was involuntary because police questioned a suspect for 36 hours by relays of officers); Ward v. Texas, 316 U.S. 547, 555 (1942) (holding that police violated due process by obtaining a confession by moving the suspect at night, by "telling him of threats of mob violence," and by "questioning him continuously"); Chambers v. Florida, 309 U.S. 227, 238-41 (1940) (determining that a statement police took after five days of interrogation violated the Due Process Clause).

14 In *Bram v. United States*, 168 U.S. 532 (1897), the Supreme Court overturned a federal conviction, where the police had suggested to a defendant during an interrogation that he would benefit by confessing. *See id.* at 564-65. Finding a violation of the Fifth Amendment privilege against self-incrimination, the Court affirmed that a confession "'must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'" *Id.* at 542-43 (quoting 3 WM. OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (6th ed. 1896)).

15 378 U.S. 1 (1964).

16 *See id.* at 3.

17 *See, e.g., Ward*, 316 U.S. at 555 (noting that the accused "was willing to make any statement that the officers wanted him to make"); *Chambers*, 309 U.S. at 238-39 (discussing officers' tactics, which were "calculated to break the strongest nerves and the stoutest resistance").

statements if police had violated the Constitution in obtaining them.[18] The Court eventually adopted a "totality of the circumstances" approach that required trial judges to examine both the conduct of the police and its impact on the accused.[19] In assessing police conduct under the Fourteenth Amendment, the Court essentially equated Fifth Amendment "coercion" with Fourteenth Amendment "involuntariness."[20] In examining the impact of police questioning upon the suspect, the Court required lower courts to determine whether a confession was "the product of a rational intellect and a free will"[21] or whether the accused's "will was overborne"[22] by police tactics.

Despite this shift in focus from weighing the overall reliability of a statement to scrutinizing police conduct, the Supreme Court did not articulate the "totality of the circumstances" standard with any real specificity. Unhelpful declarations, such as "[t]here is no guide to the decision of cases such as this, except the totality of circumstances"[23] and "[t]he limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing,"[24] riddled the Court's opinions. Because this inquiry into police conduct necessarily included value-laden judgments about the type of behavior that our society would tolerate, the Court could hardly avoid imprecision. An increased awareness that police could

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18 *See, e.g.*, Rogers v. Richmond, 365 U.S. 534, 540-41 (1961) ("[T]he admission into evidence of confessions which are involuntary . . . cannot stand . . . because the methods used to extract them offend an underlying principle in the enforcement of our criminal law. . . . To be sure, confessions cruelly extorted may be . . . found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration." (citations omitted)); Spano v. New York, 360 U.S. 315, 320 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . . .").

For a full discussion of the development of the voluntariness test and, particularly, the decreased emphasis on reliability, see Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 936-41 (1995).

19 *E.g.*, Fikes v. Alabama, 352 U.S. 191, 197 (1957) ("The totality of the circumstances that preceded the confessions in this case goes beyond the allowable limits.").

20 The Court's later decisions combine the Fifth and Fourteenth Amendment standards by applying its Fifth Amendment "coercion" case to voluntariness determinations. *See, e.g., Malloy*, 378 U.S. at 6-7 (holding expressly that *Bram v. United States*, 168 U.S. 532 (1897), applies in state and federal prosecutions); Ashcraft v. Tennessee, 322 U.S. 143, 154 n.9 (1944) (applying *Bram* and noting that *Bram* and a Fourteenth Amendment case together "hold that a coerced or compelled confession cannot be used to convict a defendant in any state or federal court"). Stephen Schulhofer roundly criticizes the Court for conflating the Fifth Amendment's concept of compulsion with the Due Process Clause's concept of involuntariness, explaining that this combination has led to confusion about the actual holding in *Miranda*. *See* Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 440-46 (1987).

21 Blackburn v. Alabama, 361 U.S. 199, 208 (1960).

22 Reck v. Pate, 367 U.S. 433, 440 (1961).

23 Gallegos v. Colorado, 370 U.S. 49, 55 (1962).

24 Stein v. New York, 346 U.S. 156, 185 (1953).

obtain statements through psychological as well as physical coercion, coupled with a growing concern about police treatment of minorities and the poor, perhaps also contributed to the Justices' inability to express a more precise test. As the Court acknowledged in 1964, just two years before deciding *Miranda*, "Expanded concepts of fairness in obtaining confessions have been accompanied by a correspondingly greater complexity in determining whether an accused's will has been overborne. . . ."[25]

Of course, courts universally condemned acts such as torture and physical beatings. But as even the Supreme Court acknowledged, courts found the generalized "totality of the circumstances" test difficult to apply, especially "where it [was] necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused."[26] The Court eventually conceded that "as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made."[27] These "delicate judgments" included, for example, assessing whether a "mentally dull 19-year-old Negro" had made voluntary statements to the police after the police arrested him without a warrant, did not advise him of his rights, gave him just two sandwiches over forty hours, and told him that people wanted to "get him" (held: involuntary);[28] whether a thirty-one year-old college graduate had made voluntary statements after police denied his request for counsel and then interrogated him for fourteen hours, giving him only coffee, milk, and a sandwich soon after his arrest (held: voluntary);[29] and whether a "foreign-born young man" with only some high school education had made voluntary statements after police denied his request to speak with his attorney, which resulted in a confession after eight hours of questioning by prosecutors, police, and a childhood friend (held: involuntary).[30] If these cases challenged the members of the Supreme Court, one only can imagine the daunting task facing trial judges and police officers, required to glean the permissible limits of interrogation from the Court's imprecise balancing approach and from each Justice's particular sense of equity and fair play.

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25 Jackson v. Denno, 378 U.S. 368, 390 (1964).

26 Haynes v. Washington, 373 U.S. 503, 515 (1963).

27 Spano v. New York, 360 U.S. 315, 321 (1959).

28 Payne v. Arkansas, 356 U.S. 560, 564, 567 (1958) (internal quotation marks omitted).

29 *See* Crooker v. California, 357 U.S. 433, 435, 437-40 (1958).

30 *Spano*, 360 U.S. at 317-20, 321-23.

Apart from its voluntariness cases, the Supreme Court, prior to *Miranda*, made another highly significant attempt to influence conduct in the station house.[31] In the 1964 case of *Escobedo v. Illinois*,[32] the Court held that police had violated the Sixth Amendment by taking a suspect into custody and denying him the opportunity to consult with his retained counsel.[33] The Court ruled that when the police focus their investigation on a particular suspect in custody and when "the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent," then they violate the suspect's Sixth Amendment rights.[34] As a result, "no statement elicited by the police during the interrogation may be used against him at a criminal trial."[35] As a Sixth Amendment decision, however, *Escobedo* created problems. The Supreme Court never before had indicated that a suspect could invoke his or her Sixth Amendment right to counsel prior to formal criminal charges.[36] Moreover, the *Escobedo* Court relied on the police's failure to warn the suspect of the right to remain silent.[37] Yet prior to *Escobedo*, the Sixth Amendment had never

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31 In addition to the Sixth Amendment decisions discussed here, the Court also formulated what has come to be called the "*McNabb-Mallory* Rule," deriving from *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957). These cases together hold that courts should exclude statements from evidence if there was unnecessary delay in arraigning the accused. *See Mallory*, 354 U.S. at 454-55; *McNabb*, 318 U.S. at 341-42, 344-45. This Article does not discuss *McNabb* and *Mallory* further because they arise from the Supreme Court's supervisory power over federal prosecutions and are not constitutional holdings applicable to the states. A federal statute applicable in federal criminal cases, 18 U.S.C. § 3501(c) (1994), subsequently superceded the *McNabb-Mallory* Rule.

32 378 U.S. 478 (1964).

33 *See id.* at 490-91.

34 *Id.*

35 *Id.* at 491.

36 In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court applied the Sixth Amendment to the states through the Fourteenth Amendment by finding that the right to counsel was fundamental for "one charged with crime." *Id.* at 344. In earlier decisions, the Court had overturned state capital convictions under the Fourteenth Amendment when defendants lacked counsel at "critical stages" of the proceedings. *See, e.g.*, White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam) (overturning the conviction because no counsel was present at preliminary hearing); Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (overturning the conviction because no counsel was present at arraignment); Powell v. Alabama, 287 U.S. 45, 52-53, 73 (1932) (overturning the conviction because the defendants had no real opportunity to secure counsel after arrest and prior to trial); *cf.* Massiah v. United States, 377 U.S. 201, 205-06 (1964) (finding a Sixth Amendment violation when agents elicited statements from the defendant after indictment, in absence of his attorney). No case had held that a "critical stage" could predate even a formal accusation. After *Escobedo*, the Supreme Court made clear that the Sixth Amendment right to counsel attached at the first formal court proceeding against the accused. *See* Moran v. Burbine, 475 U.S. 412, 428 (1986); United States v. Gouveia, 467 U.S. 180, 187-89 (1984).

37 *See Escobedo*, 378 U.S. at 491.

guaranteed such a right.[38] Further, as the Supreme Court itself noted in *Escobedo*, *Gideon v. Wainwright*[39] only recently had made the Sixth Amendment obligatory upon the states.[40] Thus, just as states were wrestling with their Sixth Amendment obligations, *Escobedo*'s holding raised several additional issues. How would the states implement and the courts interpret *Escobedo*? Danny Escobedo had a retained attorney, but what about an indigent suspect who could not afford to hire a lawyer? When did these Sixth Amendment rights inhere? What did it mean for an investigation to "focus" on a suspect?[41] These questions needed answers and, thus, *Escobedo* set the stage for *Miranda*.

B. The Original Vision of *Miranda*

At the start of the 1965 Term, the Justices culled from hundreds of petitions for writs of certiorari that raised interrogation issues, seeking to identify those most suitable for review.[42] On November 22,

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38 For these reasons, even lawyers supporting the defendants in *Miranda* acknowledged that *Escobedo* was difficult to maintain solely on Sixth Amendment grounds. *See* Brief of the American Civil Liberties Union, Amicus Curiae at 8 n.2, *Miranda* (No. 759) (discussing *Escobedo* and noting that "[p]ut on a straight right to counsel approach, it might well be doubtful that police interrogation would constitute a 'critical stage' absent the self-incrimination privilege" (citation omitted)). Judge Henry Friendly also predicted that most eventually would see *Escobedo* as a Fifth and not a Sixth Amendment decision. *See* HENRY J. FRIENDLY, *A Postscript on* Miranda, *in* BENCHMARKS 266, 266-67 (1967).

39 372 U.S. 335 (1963).

40 *See Escobedo*, 378 U.S. at 487, 491.

41 These were not easy questions for lower courts to resolve in the wake of Escobedo. *Compare, e.g.*, United States *ex rel.* Russo v. New Jersey, 351 F.2d 429, 436-37 (3d Cir. 1965) (holding that police violated the right to counsel when "focus" shifted from a general inquiry into an accusatory process and stating that right to counsel did not depend upon a request for a lawyer), *vacated*, 384 U.S. 889 (1966), *and* People v. Dorado, 398 P.2d 361, 369-71 (Cal. 1965) (stating that police violated the right to counsel when investigation focused on the accused and there were no warnings of right to counsel or right to remain silent), *overruled by* People v. Cahill, 853 P.2d 1037 (Cal. 1993), *with* United States v. Cone, 354 F.2d 119, 123 (2d Cir. 1965) (en banc) (rejecting *Russo* approach of dividing officers' actions into "investigatory" and "accusatory" phases).

42 Chief Justice Earl Warren directed his law clerks to segregate all of the *Escobedo* cases on the docket and to suggest a few that best raised the relevant issues. *See* Memorandum [from Chief Justice Earl Warren] to the Conference 1-2 (Oct. 27, 1965) (on file with the Library of Congress in the Papers of Earl Warren, Container 286, File "O.T. 1965, Misc.-*Escobedo* Cases" [hereinafter EW Papers 1]); *see also* Memorandum from Law Clerks to the Chief Justice (Oct. 25, 1965) (on file with the Library of Congress in EW Papers I, *supra*) (suggesting cases that raised *Escobedo* issues); Memorandum from Michael Smith to the Chief Justice (Oct. 1, 1965) (on file with the Library of Congress in EW Papers I, *supra*) (same); Memorandum from Michael Smith to the Chief Justice (Sept. 30, 1965) (on file with the Library of Congress in EW Papers I, *supra*) (same). Justices Harlan, Douglas, Brennan and White also helped identify petitions that raised *Escobedo* claims. *See* Letter from Justice William O. Douglas to Chief Justice Earl Warren (Oct. 6, 1965) (on file with the Library of Congress in EW Papers I, *supra*); Letter from Justice Byron R. White to Justice William J. Brennan (Sept. 30, 1965) (on file with the Library of Congress in EW Papers I, *supra*); Letter from Justice John M. Harlan to Justice William J. Brennan (Sept. 28, 1965) (on file with the Library of Congress in EW Papers 1, *supra*); Letter from Justice William J. Brennan to Chief Justice Earl Warren (Sept. 23, 1965) (on file with the Library

1965, the Court held a conference to consider 101 "*Escobedo* cases."[43] The Justices granted review in four separate cases—now known collectively as *Miranda v. Arizona*—to decide whether the Fifth Amendment required police officers to advise suspects of their rights before proceeding with a custodial interrogation.[44] Not surprisingly, in their merits briefs the defendants' lawyers sought to follow *Escobedo* and relied primarily upon the Sixth Amendment.[45] Instead of relying on

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of Congress in EW Papers I, *supra*). Forwarding White's list of cases to Warren, Brennan noted, "There ain't no end to them!" Letter from Justice Byron R. White to Justice William J. Brennan, *supra*.

43 *See* [Docket List] For Conference, Monday, November 22, 1965 (Nov. 15, 1965) (on file with the Library of Congress in EW Papers I, *supra* note 42). Even after the November conference, the Justices continued to collect "*Escobedo* cases." *See Escobedo* Cases Distributed Since November 22 Conference (undated) (on file with the Library of Congress in EW Papers I, *supra* note 42) (listing 25 additional cases).

44 Phoenix police officers questioned Ernesto Miranda at the station, but did not advise him that he had a right to counsel. *See Miranda*, 384 U.S. at 491-92. New York City police interrogated Michael Vignera in custody, but did not warn him of his right to counsel or right to remain silent. *See id.* at 493-94. Kansas City police arrested Carl Westover and interrogated him for 14 hours without advising of any rights. Westover did not make a statement to the local police, but he was then turned over to FBI agents. The agents did advise him of his rights, though they did not obtain a waiver. After several hours of interrogation, Westover confessed. *See id.* at 494-96. Los Angeles police arrested Roy Allen Stewart and did not advise him of any rights. Stewart confessed during his ninth interrogation session. *See id.* at 497-99. The four cases were *Westover v. United States*, No. 761 (Oct. Term, 1965), *Vignera v. New York*, No. 760 (Oct. Term, 1965), *Miranda v. Arizona*, No. 759 (Oct. Term, 1965), and *California v. Stewart*, No. 584 (Oct. Term, 1965). The Court took a fifth case, *Johnson v. New Jersey*, No. 762 (Oct. Term, 1965), on certiorari with these four and set it for argument with them, *see* 34 U.S.L.W. 3183 (Nov. 23, 1965), but the Court decided it separately. *See* Johnson v. New Jersey, 384 U.S. 719 (1966).

45 *See* Opening Brief for the Petitioner at 16-37, Westover v. United States, 384 U.S. 436 (1966) (No. 761) (decided with *Miranda*) (raising both Fifth and Sixth Amendment claims, but leading with a discussion of *Escobedo* and focusing on the right to counsel); Brief for the Petitioner at 12-37, Vignera v. New York, 384 U.S. 436 (1966) (No. 760) (decided with *Miranda*) (arguing that interrogation was unconstitutional under both the Fifth and Sixth Amendments, but raising the Sixth Amendment as the lead argnment); Brief for Petitioner at 33, *Miranda* (No. 759) (stating that "[t]he issue is whether, under the Sixth Amendment . . . , there is the same right to counsel at interrogation of an arrested suspect as there is at arraignment," without discussing the Fifth Amendment at all); Respondent's Brief and Motion to Dismiss Writ of Certiorari at 20-50, California v. Stewart, 384 U.S. 436 (1965) (No. 584) (decided with *Miranda*) (contending that the interrogation violated the Sixth Amendment, as construed in *Escobedo*, and also that Stewart's five-day detention made his statements involuntary under the Due Process Clause).

The parties and amici curiae were represented by able and experienced counsel. John Frank and John Flynn, lawyers with national reputations, represented Ernesto Miranda. William Norris was counsel for Roy Stewart. Norris had clerked for Justice Douglas and later served with distinction on the U.S. Court of Appeals for the Ninth Circuit. Solicitor General Thurgood Marshall argned for the United States. Telford Taylor, a Columbia University law professor and former counsel at Nuremberg, filed a brief for 29 states as amicus curiae. Anthony Amsterdam and Paul Mishkin, who were both then on the faculty of the University of Pennsylvania Law School, filed a brief for the American Civil Liberties Union as amicus curiae. *See* Brief of the American Civil Liberties Union, Amicus Curiae, *Miranda* (No. 759). Other than Amsterdam and Mishkin, the lawyers placed primary reliance upon the Sixth Amendment. The Court had decided *Escobedo* a mere two terms

this ground, however, the Court followed the basic approach of the amicus curiae brief for the American Civil Liberties Union, and concluded that *Escobedo*'s right to counsel simply effected the accused's Fifth Amendment privilege against self-incrimination.[46]

In the majority opinion by Chief Justice Earl Warren, the Court ruled that the Fifth Amendment privilege against self-incrimination is available to a suspect during a custodial interrogation.[47] The opinion reviews police interrogation manuals[48] and discusses the nature of in-custody interrogation. Custodial interrogations, the Court deter-

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before, making it a natural point of departure. Further, a number of contemporary commentators had discussed confession problems in terms of when the right to counsel would attach under the Sixth Amendment. *See* Yale Kamisar, Miranda: *The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1080 n.26 (1984) (reviewing LIVA BAKER, *Miranda*: Crime, Law and Politics (1983)) (describing several commentators). During oral argument, it quickly became clear that the Court was beginning to focus on the Fifth Amendment aspects of custodial interrogations, and counsel adroitly shifted their arguments. For an excellent account of the oral arguments, see BAKER, *supra*, at 131-48.

John Flynn, who argued on behalf of Ernesto Miranda, had a sense of humor about the Court's eventual reliance on the Fifth Amendment. As he told the Ninth Circuit Judicial Conference in 1972:

> When cert. was granted and we were asked by the American Civil Liberties Union to prepare and file the brief, we had a meeting in our law office in which we agreed that the briefs should be written with entire focus on the Sixth Amendment . . . because that is where the [C]ourt was headed after Escobedo, and, as you are all aware, in the very first paragraph [of the *Miranda* opinion] Chief Justice Warren said, "It is the Fifth Amendment to the Constitution that is at issue today."
>
> (Laughter)
>
> That was Miranda's effective use of counsel.
>
> (Laughter)

Panel Discussion, *The Exclusionary Rule*, 61 F.R.D. 259, 278 (1972) (remarks of John Flynn).

46 *See* Brief of the American Civil Liberties Union, Amicus Curiae at 6-9, *Miranda* (No. 759). The brief also contends that the privilege against self-incrimination is central to the holding in *Escobedo*. *See id.* at 8-9.

47 *See Miranda*, 384 U.S. at 467.

48 *See id.* at 448-55; *see also* Brief of the American Civil Liberties Union, Amicus Curiae at 22-31, *Miranda* (No. 759) (describing interrogation manuals used by police and arguing that, given these tactics, the actual presence of counsel is necessary to protect suspects' Fifth Amendment rights). Before including a discussion of the manuals in his opinion, Warren had the Supreme Court Librarian contact the publishers of two of the manuals, inquiring about the total distribution of the books and the extent of their use among the police. *See* Memorandum from Kenneth Ziffren to Chief Justice (May 2, 1966) (on file with the Library of Congress in the Papers of Earl Warren, Container 617, File "Nos. 759-761 & 584—*Miranda* Folder No. 3" [hereinafter EW Papers II]) (enclosing copies of letters inquiring about police manuals); *see also* Letter from Charles Hallam, Librarian, to C.O. Reville, Jr., Executive Vice President, Williams and Wilkins Co. (May 9, 1966) (on file with the Library of Congress in EW Papers II, *supra*) (replying to Reville's response to May 2 letter); Letter from Charles Hallam, Librarian, to Charles C. Thomas, Publisher (May 2, 1966) (on file with Library of Congress in EW Papers II, *supra*) (requesting information regarding CHARLES O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1959)); Letter from Charles Hallam, Librarian, to Williams and Wilkins Co. (May 2, 1966) (on file with Library of Congress in EW Papers II, *supra*) (requesting information regarding FRED E. INBAU & JOHN E. REID, LIE DETECTION AND CRIMINAL INTERROGATION (1953) and FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962)).

mined, contain "inherently compelling pressures" that undermine the ability of a suspect to remain silent.[49] The opinion takes care to indicate the particular impact of these pressures upon minorities and the poor.[50] To ensure a full opportunity to exercise the Fifth Amendment privilege, the Court fashioned its famous warnings: police must inform a suspect of the right to remain silent and warn him or her that anything said may be used against them;[51] the police also must inform a suspect of the right to speak with an attorney and have the attorney present during questioning,[52] and that an attorney will be appointed if the person is indigent.[53] If a suspect then indicates "in any manner" that he or she wishes to speak with an attorney or remain silent, "the interrogation must cease."[54] If the police fail to comply with these procedures, whether or not a suspect already is aware of his or her rights,[55] a strong exclusionary rule will apply: "no evidence obtained as a result of [the] interrogation can be used."[56]

The Court expressly tied to the Fifth Amendment the mandatory warnings and the requirement that interrogation cease.[57] To exercise the Fifth Amendment privilege intelligently, the Court reasoned, a suspect must be "aware not only of the privilege, but also of the consequences of forgoing it."[58] Furthermore, the Court deemed the right to counsel "indispensable to the protection of the Fifth Amendment privilege."[59] Finally, the Court insisted that interrogation cease upon an invocation of either the Fifth Amendment right to counsel or right to remain silent because "[w]ithout the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."[60] As the Court concluded, "The principles announced today deal with the protection which must be given to the privilege against self-incrimination . . . ."[61] By holding that the Fifth

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49 *Miranda*, 384 U.S. at 467.

50 *See id.* at 457 ("The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade.").

51 *See id.* at 467-69.

52 *See id.* at 471.

53 *See id.* at 473.

54 *Id.* at 473-74.

55 *See id.* at 468-69.

56 *Id.* at 479; *see also id.* at 476-77 (drawing no distinction between direct confessions and statements that the prosecution may use to impeach, deeming both "incriminating" and inadmissible).

57 *See id.* at 476.

58 *Id.* at 469.

59 *Id.*

60 *Id.* at 474.

61 *Id.* at 477.

Amendment protects a suspect during a custodial interrogation, that any such interrogation inherently coerces the suspect, and that only particular procedures can dispel this inherent coercion, the Court established an irrebuttable presumption: unless police properly follow *Miranda*'s procedures, they violate the Fifth Amendment.[62]

Miranda expressly represents a preference for Fifth Amendment values over the interests of law enforcement officers in obtaining incriminating statements. The majority noted and rejected the "recurrent argument . . . that society's need for interrogation outweighs the privilege."[63] Furthermore, in the Fifth Amendment "the Constitution has prescribed the rights of the individual when confronted with the power of government," and "[t]hat right cannot be abridged."[64]

By the same token, *Miranda* was something of a compromise.[65] The Court did not forbid all interrogations without counsel,[66] as some had invited it to do[67] and as others had feared it might hold in the wake of *Escobedo.* Interrogations still could continue, but within set procedures that would protect Fifth Amendment rights. Nor did the Court prohibit police officers from questioning people who possess relevant information, but are not suspects of any crime. By limiting its application to custodial interrogations, the Justices narrowed *Miranda*'s bite to situations in which suspects legitimately need Fifth Amendment protections because custodial questioning aims to elicit incriminating information.[68] The Court also clearly stated that although the procedures set forth in *Miranda* were the minimum necessary to protect the Fifth Amendment, the states could implement

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62 *See id.* at 467-69, 476-77; *see also* New York v. Quarles, 467 U.S. 649, 662 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part) (stating that without the warnings or a waiver, a presumption of coerciveness renders any statement inadmissible).

63 *Miranda,* 384 U.S. at 479.

64 *Id.*

65 For discussions of *Miranda* as a compromise, see Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation,* 48 OHIO ST. L.J. 733, 735-36 (1987), Susan R. Klein, Miranda *Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide,* 143 U. PA. L. REV. 417, 423-26 (1994), and Schulhofer, *supra* note 20, at 460-61.

66 *See Miranda,* 384 U.S. at 474 ("This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners.").

67 *See* Opening Brief for the Petitioner at 35-37, Westover v. United States, 384 U.S. 436 (1966) (No. 761) (decided with *Miranda*) (contending that a confession is coerced as a matter of law if police obtain it in the absence of counsel or other outside aid); Brief of the American Civil Liberties Union, Amicus Curiae at 22-31, *Miranda* (No. 759) (arguing that the actual presence of counsel is required to protect a suspect's Fifth Amendment rights).

68 The Court clearly was concerned with the interrogations of potential defendants and not informal questioning of witnesses. In describing the "custody" aspect of *Miranda,* the opinion states that "[t]his is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." *Miranda,* 384 U.S. at 444 n.4.

other procedures "so long as they are fully as effective . . . in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."[69] The Constitution does not require a "particular solution" to ameliorate the compelling pressures that are inherent in custodial interrogations, the Court concluded, but any proposed replacement for *Miranda*'s rules must afford at least equally effective protection of Fifth Amendment rights.[70]

The Introduction to this Article posits that later decisions of the Supreme Court undermined *Miranda* so severely that some scholars and enforcement officers have abandoned the "original vision" of *Miranda* as a constitutional rule mandating appropriate conduct in the station house and firmly protecting a suspect's Fifth Amendment rights.[71] Rather, these scholars and officials now view *Miranda* as a weak rule of evidence, divorced from the Constitution.[72] In light of these alternate formulations, one must ask whether this Article's characterization of the Court's "original vision" is fair. Did the Justices ever consider *Miranda* to be anything more than a relatively narrow holding about the admissibility of evidence at trial? The remainder of this section examines the Justices' opinions and personal papers, concluding that the Court specifically intended to establish *Miranda*'s procedures as a constitutional mandate.

First, some have argued that *Miranda* merely established the inadmissibility of certain evidence at trial and did not articulate a greater Fifth Amendment rule.[73] Although the Court in *Miranda* (and in *Escobedo* as well) held that unless the police follow set procedures, a court cannot admit the defendants' statements at trial,[74] exclusion of evidence and reversal due to the erroneous use of evidence comprise the Court's sole sanction in the context of a criminal appeal. One cannot disregard *Miranda*'s constitutional basis simply because of the context in which the case was decided. As already noted, the Court directly tied *Miranda*'s rules to the Fifth Amendment. The opinion reaffirms that the Fifth Amendment is essential to the maintenance of the proper allocation of authority to the government. The Court held that the values embodied within the Fifth Amendment outrank the

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69 *Id.* at 490.

70 *Id.* at 467.

71 *See supra* text accompanying notes 3-5.

72 *See supra* text accompanying note 5.

73 *See, e.g.*, Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 917 (1989) (arguing that *Miranda* is solely a "trial-rights" and not a "police-practices" case); Videotape: Questioning: "Outside *Miranda*," (Greg Gulen Productious 1990) (on file with author) [hereinafter *Miranda* Videotape] (arguing that *Miranda* only affects admissibility of testimonial evidence). For excerpts from the transcript of the videotape, see the Appendix to this Article.

74 *See Miranda*, 384 U.S. at 476, 479; Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964).

prosecution's desire to obtain an admission of guilt from a suspect in custody.[75] One cannot read the majority opinion in *Miranda* to describe anything other than a normative vision about the constitutional limits on a custodial interrogation. The Court included in *Miranda* the long, didactic passages about the history of the Fifth Amendment, about interrogation techniques, about evolving police practices, about the impact of questioning upon minorities, and about the role of counsel[76] not only to support the Court's legal conclusions, but also to persuade the police and the public.[77]

Second, the Justices must have intended *Miranda*'s procedures to apply in the station house, whether or not *Miranda* made a statement inadmissible under the Fifth Amendment. *Miranda*'s bright-line rules intended to ensure that compliance largely would avert the need to negotiate the Court's prior Fourteenth Amendment involuntariness standard. Through *Miranda*, the Court offered every suspect iron-clad protection against coercive interrogation: a person need only ask for counsel or state that he or she does not wish to speak with police. If police properly administer *Miranda*'s warnings and an accused fails to take advantage of *Miranda*'s protections, the accused will have difficulty arguing that his or her will was overborne. Thus, if police determine to violate *Miranda*, they frustrate a primary purpose for the ruling.

Third, although Chief Justice Warren's opinion for the Court acknowledges that legislatures are free to promulgate substitutes for *Miranda*'s procedures, the Justices themselves concluded that the Constitution requires either *Miranda*'s specific procedures *or other equally effective safeguards.* An exchange between Chief Justice Warren and Justice William Brennan exemplifies this point. Warren solicited Brennan's views on an early draft before circulating his opinion to the other Justices.[78] Brennan responded with a lengthy memorandum, suggesting a major revision:

> You may recall that at the initial conference to select the cases for argument, I offered the following: that the extension of the privilege against the states by *Malloy* v. *Hogan* inevitably required that we consider whether police interrogation should be hedged

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75 *See Miranda*, 384 U.S. at 479-81.

76 David Strauss has written that *Miranda* "reads more like a legislative committee report with an accompanying statute." David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988); *see also* FRIENDLY, *supra* note 38, at 278 (criticizing the Court for "utilizing the Bill of Rights to prescribe a detailed code of criminal procedure").

77 *See infra* note 84 and accompanying text.

78 *See* Draft Opinion, *Miranda* (No. 759) (May 9, 1966) (on file with the Library of Congress in the Papers of William J. Brennan, Container 145, File "*Miranda*, Folder #3" [hereinafter WJB Papers]). The Chief Justice inscribed the draft, "Bill: This is not in circulation but I would appreciate your views. EW." *Id.* at 1.

about with procedural safeguards effective to secure the privilege . . . . This is not the first time the Court has had to consider the imposition of a requirement that the states provide procedural safeguards effective to secure a specific of the Bill of Rights extended against the states. A familiar recent example is in the obscenity area. In *Marcus*,[79] *Quantity of Books*[80] and *Freedman* v. *Maryland*[,][81] we held that the states were constitutionally required to provide procedures effective to safeguard non-obscene expression from suppression. In the Fourth Amendment area, our imposition of the exclusionary rule in *Mapp* v. *Ohio*[82] is of the same order.

Before *Malloy*, when the problem was only that of federal interrogation, we fashioned the safeguards ourselves, through the criminal rules and the exercise of our supervisory power. We went pretty far. . . . Here, however, our powers are more limited. We cannot prescribe rigid rules for the same reason that we did not do so in *Freedman* v. *Maryland*: we are justified in policing interrogation practices only to the extent required to prevent denial of the right against compelled self-incrimination as we defined that right in *Malloy*. I therefore do not think, as your draft seems to suggest, that there is only a single constitutionally required solution to the problems of testimonial compulsion inherent in custodial interrogation. I agree that, largely for the reasons you have stated, all four cases must be reversed for lack of any safeguards against denial of the right. I also agree that warnings and the help of counsel are appropriate. But should we not leave Congress and the States latitude to devise other means (if they can) which might also create an interrogation climate which has the similar effect of preventing the fettering of a person's own will? . . .

I agree fully that the opinion must demonstrate . . . the dangers necessarily inherent in custodial questioning. . . . We may thus establish that safeguards against those effects are constitutionally required to give substance to the [Fifth Amendment] right.[83]

Brennan urged that the Court allow the states a modicum of flexibility, in part because he believed that this allowance might appease some critics of the Court and make the opinion more acceptable to the general public.[84] Although Brennan openly confessed to Warren

79 Marcus v. Search Warrant of Property, 367 U.S. 717 (1961).

80 Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964).

81 380 U.S. 51 (1965).

82 367 U.S. 643 (1961).

83 Letter from Justice William J. Brennan to Chief Justice Earl Warren 2-4 (May 11, 1966) (on file with the Library of Congress in WJB Papers, *supra* note 78) (citation omitted and footnotes added).

84 Brennan wrote,

I think that to allow some latitude accomplishes very desirable results: it will make it very difficult to criticize our action as outside the scope of judicial responsibility and authority, and like *Brown* v. *Board of Education*, 347 U.S. 483 (1954), it has an appeal to the conscience of our society, gaining

that he could not "think of other procedures that [would] serve the purpose,"[85] he would not rule out the possibility that either Congress or the states might fashion other safeguards. Nevertheless, Brennan was careful to make clear that the Fifth Amendment required at least *some* safeguards. Of any proposed replacement procedures, "none will be deemed sufficient if any less effective than those provided by full warning of rights to silence and counsel, scrupulously recorded and observed."[86] Warren reworked his draft to accommodate Brennan's suggestions.[87] Their exchange leaves no doubt that the principal authors of *Miranda* considered its procedures the minimum required by the Fifth Amendment.

The original vision of *Miranda*, then, was one of transformation. Police practices would change. Officers would issue warnings to each suspect, and each suspect, by uttering a few simple words, could prevent the authorities from obtaining information and evidence from his or her own mouth. *Miranda* would protect those suspects who were the most vulnerable in police interrogations—minorities and the poor—by informing them of their rights and empowering them against coercive tactics. These simple procedures simultaneously would advance Fifth Amendment values and would avert the need for courts to decide the voluntariness of statements in an infinite variety of circumstances. The *Miranda* Court had utter confidence that its own pronouncements about the legitimacy of certain police practices, together with a rule of exclusion, would in fact protect Fifth Amendment rights and cause officers to change their conduct in the station house.

> on that account social acceptance of its necessity. I repeat that what we must get the public to understand is that the courts are duty bound to satisfy themselves that responses to custodial questioning are indeed the product of the person's "unfettered choice."

Id. at 5 (citation added).

85 *Id.*

86 *Id.* at 9.

87 *See* Memorandum from Jim Hale, Mike Smith and Ken Ziffren to the Chief Justice (May 13, 1966) (on file with the Library of Congress in the Papers of Earl Warren, Container 616, File "Nos. 759-761 & 584—*Miranda* Folder #2") (describing new draft sections of the opinion in light of Brennan's suggestions). Brennan nevertheless prepared a concurrence to emphasize this point. *See* [Draft Concurrence,] Nos. 759, 760, 761 & 584-*Miranda*, etc. (undated) (on file with the Library of Congress in EW Papers II, *supra* note 48). Warren again redrafted the opinion to note that the states could promulgate equally effective alternatives. *See Miranda*, 384 U.S. at 467. He did not want Brennan to write separately; a concurrence might have led some to conclude that Warren's majority opinion did not even command five votes. *See* Memorandum from Jim Hale, Mike Smith and Ken Ziffren to the Chief Justice (June 10, 1966) (on file with the Library of Congress in EW Papers II, *supra* note 48). Brennan relented and did not file a separate opinion.

C. Seeds of a New Vision

In the decades since *Miranda*, the Court has tinkered with its application in the margins,[88] but only once has excused officers for failing to administer warnings or to cease questioning a suspect who has asserted Fifth Amendment rights.[89] The Justices have never retracted the requirement that officers give warnings and honor invocations in the core situation that *Miranda* addresses: questioning at the station house. Indeed, in *Edwards v. Arizona*[90] they reinforced the rule by holding that police, without counsel present, may not reinterrogate a suspect who invokes the right to counsel, unless the suspect initiates contact with the police.[91] Although the Justices are unlikely to overrule *Miranda* in the foreseeable future, one can say fairly that the Court has retreated from the holding of *Miranda* in several significant respects. Principally, the Court has separated the warnings and waiver requirement from its constitutional underpinning, consequently diminishing respect for the values embodied in the Fifth Amendment. If the original vision of *Miranda* has been lost, this is why.

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88 The warnings are necessary only for a suspect in "custody." *Miranda*, 384 U.S. at 444. The Justices have adopted a somewhat narrow definition of "custody," which has constricted the universe of situations in which warnings are necessary. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (holding that roadside questioning during traffic stop is not custodial interrogation). The warnings are necessary only if the police intend to ask incriminating questions. *See* Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). Thus, four Justices have allowed officers to ask suspects "routine booking" information without a warning because those questions generally will not elicit an incriminating response. Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990) (opinion of Brennan, J.). Further, there is no inherent coercion in questioning by a person whom the suspect does not know is a police agent. *See* Illinois v. Perkins, 496 U.S. 292, 296 (1990).

The Justices also have placed the burden on the suspect to articulate an unambiguous invocation of rights. *See, e.g.*, Davis v. United States, 512 U.S. 452, 459 (1994) (ruling that only an unambiguous request for counsel triggers the duty to cease questioning); McNeil v. Wisconsin, 501 U.S. 171, 178-79 (1991) (ruling that the appointment of counsel at a court proceeding is not an invocation of the Fifth Amendment right to counsel on an unrelated charge); Connecticut v. Barrett, 479 U.S. 523, 529 (1987) (stating that a request for counsel prior to giving written statement is a limited invocation of the Fifth Amendment that does not prevent officers from obtaining an oral statement); Moran v. Burbine, 475 U.S. 412, 426 (1986) (stating that *Miranda* gives the defendant—not his or her lawyer—some control over the course of the interrogation). The Court, however, has never retreated from the requirement that police give warnings and honor a clear invocation in the interrogation room.

89 *See* New York v. Quarles, 467 U.S. 649, 657 (1984) (finding a limited "public safety" exception to *Miranda*'s warning requirements).

90 451 U.S. 477 (1981).

91 *See id.* at 485 (stating that "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel"); *see also* Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (holding that under *Edwards*, police may not reinitiate interrogation even after the accused has consulted with counsel).

The first wedge between *Miranda* and the Constitution came in *Harris v. New York*.[92] In this case the Court characterized as dicta *Miranda*'s absolute rule of exclusion and held that prosecutors can use for impeachment purposes a statement from a suspect in custody who did not receive *Miranda* warnings so long as "the trustworthiness of the evidence satisfies legal standards,"[93] meaning that it was voluntary under the totality of the circumstances. As the Court also noted, Harris "ma[de] no claim that the statements made to the police were coerced or involuntary."[94] By the same token, however, *Harris*'s facts did not rebut the presumption of a Fifth Amendment violation due to the failure to comply with *Miranda*. Because Harris's statements were neither the result of coercion nor involuntary under Fourteenth Amendment standards, the Court considered the police conduct to represent only a "mere" *Miranda* violation.[95] By distinguishing a mere *Miranda* violation from a traditional claim of coercion or involuntariness, the majority tore *Miranda* loose from the Fifth Amendment. Although the majority did not state expressly that a mere *Miranda* violation does not transgress the Constitution, that was surely the implication.

The Court extended *Harris* in *Oregon v. Hass*.[96] In *Hass* a suspect initially waived his rights after receiving proper warnings.[97] Later, on the way to the station, Hass said that he wanted to telephone an attorney.[98] Following this invocation of the right to counsel, Hass pointed out the location of a stolen bicycle.[99] The majority saw no reason to distinguish the case from *Harris*; like the defendant in *Harris*, Hass made no allegation that his statements had been involuntary or coerced under traditional standards.[100] Yet as in *Harris*, no facts rebutted the presumption of unconstitutionality stemming from the *Miranda* violation. *Hass*, in tandem with *Harris*, pulled the *Miranda* rule further from its constitutional roots. Indeed, *Hass* does not cohere even with *Escobedo*, because both William Hass and Danny Escobedo asked to contact their respective attorneys while in custody.[101] To add insult to injury, the majority also noted and dismissed as "spec-

92 401 U.S. 222 (1971).

93 *Id.* at 224.

94 *Id.*

95 *See id.*

96 420 U.S. 714 (1975).

97 *See id.* at 715.

98 *See id.*

99 *See id.* at 716.

100 *See id.* at 722.

101 This fact may be one reason why Justice Brennan wrote in dissent that he was "unwilling to join this fundamental erosion of Fifth *and Sixth* Amendment rights." *Id.* at 725 (Brennan, J., dissenting) (emphasis added).

ulative" the possibility that it was giving officers an incentive to disregard the requirements of *Miranda*:

> One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in *Harris*, and we are not disposed to change it now.[102]

What the Court implied in *Harris* and *Hass*, it stated expressly in *Michigan v. Tucker*.[103] In *Tucker* the Supreme Court declined to suppress the testimony of a witness as the "fruit" of a *Miranda* violation, where the police learned the identity of the witness because of the violation.[104] In discussing the scope of *Miranda*'s exclusionary rule, Justice Rehnquist wrote for the Court that *Miranda*'s "safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."[105] Further, "the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the *prophylactic standards* later laid down by this Court in *Miranda* to safeguard that privilege."[106]

In characterizing *Miranda*'s rules as not constitutionally required, Justice Rehnquist relied upon the portion of *Miranda* that Chief Justice Warren had added at Justice Brennan's request, indicating that the Constitution did not require "adherence to any particular solution" to cure the inherently compelling pressures of custodial interrogation.[107] Yet Rehnquist omitted the remainder of the quoted passage from *Miranda*, which permitted a variance from *Miranda*'s rules *only if* they were replaced by alternatives that were equally as ef-

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102 *Id.* at 723.

103 417 U.S. 433 (1974).

104 *See id.* at 450.

105 *Id.* at 444.

106 *Id.* at 445-46 (emphasis added). Geoffrey Stone has called this conclusion in *Tucker* "an outright rejection of the core premises of *Miranda*." Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 118. Yale Kamisar agrees. *See* Yale Kamisar, *The Warren Court and Criminal Justice*, *in* THE WARREN COURT 116, 126 (Bernard Schwartz ed., 1996). This refrain, describing *Miranda* as a non-constitutional prophylactic rule, has been repeated time and again. *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 176 (1991); Oregon v. Elstad, 470 U.S. 298, 308 (1985) (quoting *Tucker*, 417 U.S. at 446); Doyle v. Ohio, 426 U.S. 610, 617 (1976).

107 *Tucker*, 417 U.S. at 444 (quoting *Miranda*, 384 U.S. at 467) (internal quotation marks omitted).

fective in protecting Fifth Amendment rights.[108] *Tucker* was subsequently extended in *Oregon v. Elstad*,[109] in which the Justices relied upon this notion of *Miranda* as a non-constitutional "prophylactic" rule and determined that a statement given after proper warnings cannot be suppressed as the "fruit" of an earlier unwarned statement.[110]

The characterization of *Miranda* as non-constitutional and "prophylactic" also helped the Court create a wholesale exception to the warning requirement. In *New York v. Quarles*,[111] the Justices held that warnings are not necessary when officers ask a suspect questions arising from a reasonable concern for public safety.[112] The majority applied a simple cost-benefit analysis: "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[113] Although *Quarles* struck at the Court's original vision of *Miranda* in several respects,[114] it did not—as it turns out—open the door to other large exceptions to the *Miranda* rule. In the fourteen years since *Quarles* was decided, the Supreme Court has not approved any other instances of custodial interrogations in which warnings need not be given.

These cases planted the seeds of a new vision of *Miranda*. By allowing prosecutors to use for impeachment and for the collection of other evidence statements that police take in violation of *Miranda*, the

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108 *See id.* (omitting portions of *Miranda*, 384 U.S. at 467). Justice Brennan also has pointed out this serious omission in *Tucker*. *See* Oregon v. Elstad, 470 U.S. 298, 349 (1985) (Brennan, J., dissenting); *see also* Kamisar, *supra* note 106, at 126 (discussing this passage in *Tucker*); Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 553-54 (1996) (same).

109 470 U.S. 298 (1985).

110 *See id.* at 309.

111 467 U.S. 649 (1984).

112 *See id.* at 656.

113 *Id.* at 657.

114 First, as with prior decisions, *Quarles* reinforced the notion that the warning requirement was divorced from the Fifth Amendment. Second, as Justice O'Connor indicated sharply in dissent, the majority's cost-benefit analysis represents a wholly different view of the value of the Fifth Amendment than was expressed in *Miranda*. According to Justice O'Connor, *Miranda* already ranked the relative importance of a suspect's Fifth Amendment rights and the government's need for information. *See id.* at 662 (O'Connor, J., concurring in the judgment in part and dissenting in part). Thus, "since there is nothing about an exigency that makes custodial interrogation any less compelling, a principled application of *Miranda* requires that [Quarles's] statement be suppressed." *Id.* at 665 (O'Connor, J., concurring in the judgment in part and dissenting in part). Third, by creating a vague and ill-defined exception to the warning requirement, the Court reduced the efficacy of *Miranda*'s bright-line rules. Indeed, the majority recognized this point, "acknowledg[ing] that to some degree we lessen the desirable clarity of that rule." *Id.* at 658; *see also id.* at 663 (O'Connor, J., concurring in the judgment in part and dissenting in part) (stating that the "'public safety' exception unnecessarily blurs the edges of the clear line heretofore established").

Court has created an incentive for police to disregard *Miranda*.[115] By alienating *Miranda*'s rule from the Fifth Amendment, the Justices have undermined its legitimacy. After all, the Supreme Court cannot promulgate non-constitutional rules of evidence for the state courts because Article III expressly limits federal judicial power.[116] For this reason, the "deconstitutionalization" of *Miranda* has led some public officials to call for its abolition.[117]

One should not, however, paint too dark a picture. The Supreme Court last spoke on the constitutional status of *Miranda* not in *Quarles*, but in *Withrow v. Williams*.[118] In this case Robert Williams brought a federal habeas corpus petition because the police took a statement from him without giving *Miranda* warnings.[119] Williams did not claim that his statement had been involuntary under the Due Process Clause.[120] The federal habeas corpus statute permits relief only when the state obtains a conviction in violation of the Constitution or laws of the United States.[121] The Court in *Withrow* held that *Miranda* violations could be reviewed on federal habeas corpus, stating that "'[p]rophylactic' though it may be," *Miranda* protects an important right.[122] If the Court had viewed *Miranda* as truly non-constitutional,

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115 *See infra* Part III.C.

116 *See, e.g.*, Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (explaining that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) (stating that the authority of the Supreme Court in deciding voir dire issues in state criminal case "is limited to enforcing the commands of the United States Constitution"); Spencer v. Texas, 385 U.S. 554, 569 (1967) (ruling that states have the power "to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution").

117 Edwin Meese, who served as President Reagan's Attorney General from 1985 to 1988, perhaps has been the most visible public official in recent decades seeking to abolish *Miranda*. He supported a report of a Justice Department office that urged the Court to overrule *Miranda*. That report cites the "deconstitutionalization" of *Miranda* as a reason to abrogate it. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION (1986), *reprinted in* 22 U. MICH. J.L. REFORM 437, 523-27, 542 (1989) [hereinafter OLP REPORT]. For descriptions of Meese's efforts to challenge *Miranda*, see Jonathan I.Z. Agronsky, *Meese v.* Miranda*: The Final Countdown*, A.B.A. J., Nov. 1, 1987, at 86; Herman, *supra* note 65, at 740-42; Schulhofer, *supra* note 20, at 435.

Meese has not been, of course, the only public official to attack *Miranda*. Richard Nixon made *Miranda* one of the centerpieces of his 1968 "law and order" campaign for the Presidency. *See* Richard M. Nixon, Toward Freedom from Fear, Statement in New York, N.Y. 17 (May 8, 1968) (transcript available from the Richard M. Nixon Library & Birthplace and on file with author) (arguing that *Miranda* and *Escobedo* "have had the effect of seriously ham-stringing the peace forces in our society and strengthening the criminal forces"). His assault on *Miranda* occurred prior to the decisions in *Harris*, *Hass*, and *Tucker*.

118 507 U.S. 680 (1993).

119 *See id.* at 683-84.

120 *See id.* at 696.

121 *See* 28 U.S.C. § 2254(a) (1994).

122 *Withrow*, 507 U.S. at 691.

then it had little reason to refuse *Withrow*'s invitation to take mere *Miranda* violations out of federal habeas corpus. The Court in *Withrow* thus kept the universe of *Miranda* claims within the Constitution.

Withrow stands as the most significant counterweight to the cases upon which the new vision rests. *Withrow* places *Miranda* firmly alongside other Supreme Court decisions that establish prophylactic rules to protect constitutional rights.[123] In addition to the obscenity cases that Justice Brennan referenced in his memorandum to Chief Justice Warren,[124] constitutional law harbors at least two other familiar prophylactic rules in *North Carolina v. Pearce*[125] and *New York Times Co. v. Sullivan*.[126] In *Pearce* two defendants successfully challenged their original convictions, but received more severe sentences following retrial.[127] The Court held that under the Due Process Clause, vindictiveness "must play no part" at a resentencing and, further, that the defendant must "be freed of apprehension of such a retaliatory motivation."[128] To assure the absence of any such motivation, the Court prescribed a preventative measure: whether or not there exists *actual* proof of an improper motivation, the imposition of a more severe sentence following a retrial presumptively violates the Due Process Clause.[129]

Similarly, in *Sullivan* a city commissioner brought a libel action, complaining that the *New York Times* had printed a false advertisement about him.[130] The Court held that the First and Fourteenth Amendments safeguard the ability of citizens to criticize public officials:[131] "The[se] constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice. . . .'"[132] Though *Pearce* and

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123 For discussions of *Miranda* and the use of "prophylactic" rules in constitutional decisionmaking, see, for example, Strauss, *supra* note 76, at 195 (arguing that in constitutional law "'[p]rophylactic' rules are . . . the norm, not the exception") and Wayne R. LaFave, *Constitutional Rules for Police: A Matter of Style*, 41 SYRACUSE L. REV. 849, 856-60 (1990) (contending that *Miranda*'s prophylactic rules are appropriate and that the Fifth Amendment would be "meaningless" without *Miranda*). For criticism of *Miranda*'s prophylactic rule, see Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. REV. 100, 154-56 (1985) (contending that *Miranda*'s prophylactic rule is overbroad because it establishes an irrebuttable presumption).

124 *See supra* notes 79-81 and accompanying text.

125 395 U.S. 711 (1969).

126 376 U.S. 254 (1964).

127 *See Pearce*, 395 U.S. at 713-14.

128 *Id.* at 725.

129 *See id.* at 726. The presumption would apply unless the higher sentence rested upon information in the record showing "identifiable conduct on the part of the defendant" that occurred after the date of the original sentencing. *Id.*

130 *See Sullivan*, 376 U.S. at 256-58.

131 *See id.* at 269-70.

132 *Id.* at 279-80.

Sullivan establish rules that one fairly may call "prophylactic," no one disputes the constitutional authority of these decisions. Similarly, by keeping *Miranda* violations within the scope of federal habeas corpus, *Withrow* clearly affirms that even though *Miranda* may establish a "prophylactic" rule, that rule contains a *constitutional* command.[133]

II
QUESTIONING "OUTSIDE *MIRANDA*" AND THE NEW VISION

A new vision of *Miranda*—encouraged by *Harris*, *Hass*, and *Elstad* and nourished by *Tucker* and *Quarles*—has begun to take root. Many law enforcement officials in California have openly embraced this new vision, and evidence indicates its existence in other states as well. This new vision teaches that it is perfectly acceptable to violate *Miranda* because *Miranda*, as only a mere non-constitutional rule of evidence, has no application except to bar certain statements from the prosecution's case-in-chief. Proponents of the new vision tell police that they need not cease interrogating a suspect who has asserted his or her Fifth Amendment rights. Ten years ago, Albert Alschuler hypothesized about the advice that "Justice Holmes' 'bad man of the law'" might offer in a training manual.[134] Alschuler thought that a bad officer, one who cared only about the material consequences of and not the reasons for his conduct, might author a manual advising police to continue to interrogate a suspect who asked for counsel or wished to remain silent.[135] Alschuler's writings proved prescient. In deciding *Harris*, *Hass*, and *Tucker*, the Court could not have intended to give police grounds to disobey this portion of *Miranda* deliberately, but this disregard is the natural consequence of these decisions. *Harris*, *Hass*, and *Tucker* together provide an unfortunate opening for the quintessential "bad man of the law."

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133 Since *Withrow*, the Clinton Administration has taken the position that *Miranda* was a constitutionally based rule. In August 1997 the Justice Department filed a brief in an appeal in the Fourth Circuit that relied in part upon *Withrow* and argued that in *Miranda* "the Court . . . announced a constitutional rule based on its authority to explicate the Constitution." Supplemental Brief for the United States at 24, United States v. Leong, 1997 WL 351214 (4th Cir. June 26, 1997) (No. 96-4876) (on file with author). At issue was the constitutionality of 18 U.S.C. § 3501(a) (1994), which seemingly required a federal court to admit into evidence any voluntary confession, even if the police obtained the confession in violation of *Miranda*. The Justice Department refused to argue that the statute required a court to admit a *Miranda*-violative statement. *See* Supplemental Brief for the United States at 23-24. This position is in marked contrast to the views of the Department of Justice in the Reagan Administration. *See* sources cited *supra* note 117.

134 Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442 (1987) (quoting O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897)).

135 *See id.* at 1442-43.

In 1995, several plaintiffs brought a lawsuit, *California Attorneys for Criminal Justice v. Butts*,[136] seeking to stop officers in two California police departments from questioning suspects after the assertion of Fifth Amendment rights. The litigation uncovered training materials for law enforcement officials, teaching officers that it is permissible to question suspects who have invoked the right to counsel or the right to remain silent.[137] Police officers commonly refer to this technique as questioning "outside *Miranda*." The remainder of this Part of this Article offers excerpts from these training materials, which starkly reflect this new vision of *Miranda*.

A training bulletin, which the California District Attorneys Association published, expresses this new vision of *Miranda* by encouraging officers to continue questioning a suspect who has invoked his or her rights. According to the bulletin:

> Despite having been on the books for twenty-nine years, *Miranda* is still widely misunderstood by cops and lawyers, and misconstrued by trial and appellate courts, who keep treating it as a constitutional imperative, the deliberate "violation" of which would be improper, unlawful, unconstitutional and poisonous to call [sic] resulting evidence. In fact, however, the warning and waiver components of *Miranda* were simply a court-created "series of recommended 'procedural safeguards' that were not themselves rights protected by the Constitution."[138]

The bulletin concludes:

> As long as officers avoid overbearing tactics that offend Fourteenth Amendment due process, the mere fact of deliberate noncompliance with *Miranda* does not affect admissibility for impeachment . . . . And since *Miranda* is not of constitutional dimension, officers risk no civil liability for "benign" questioning

136 CV 95-8634-ER (C.D. Cal.).

137 Although officers receive training on questioning outside *Miranda* by agencies and organizations that operate statewide, not all law enforcement officials necessarily agree with the practice. For example, the Marin County District Attorney has written that "Miranda protections serve important community interests which this office fully and unequivocally supports. Officers should *not* attempt to intentionally violate a suspect's *Miranda* rights." Jerry R. Herman, *Using Statements Obtained in Violation of* Miranda, MARIN L. ENFORCEMENT NEWSL. (Marin County Dist. Attorney, Marin County, Cal.), Jan./Feb. 1997, at 2 (on file with author).

138 Devallis Rutledge, *Questioning "Outside* Miranda," DID YOU KNOW . . . (California Dist. Attorney's Ass'n, Sacramento, Cal.), June 1995, at 4 (on file with author) (quoting Davis v. United States, 512 U.S. 452, 457 (1994) (quoting Michigan v. Tucker, 417 U.S. 433, 443-44 (1974))). Devallis Rutledge is an Orange County Deputy District Attorney, and Governor Pete Wilson appointed him to the California Commission on Peace Officer Standards and Training, which is part of the California Department of Justice.

outside *Miranda*. Instead, they have "little to lose and perhaps something to gain . . . ."[139]

A training manual that the California Department of Justice issued to law enforcement *instructors*[140] contains an entire section entitled "Statements Obtained Outside of Miranda."[141] The manual teaches:

> Voluntary statements obtained in non-compliance with Miranda's guidelines ("outside" Miranda) statements [sic] can . . . be used:
> a. To impeach a defendant . . . .
> b. As a basis for obtaining physical evidence.
> c. For other investigative purposes, such as locating contraband, locating the crime scene, identifying co-suspects, locating witnesses, clearing cases in order to re-prioritize investigative time, and putting to rest community fears.[142]

The manual tells officers that "[n]on-coercive" questioning in violation of *Miranda* does not violate a suspect's civil or Fifth Amendment rights and "is not itself unlawful."[143] Further, "[w]hile the courts can decide that police compliance with Miranda is prerequisite to confession admissibility, the courts have no authority to declare that non-compliance is 'unlawful,' nor to direct the manner in which police investigate crimes."[144]

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139 *Id.* (citations omitted and second omission in original). The last quoted phrase is directly from *Hass*. The Court termed "speculative" the possibility that officers would violate *Miranda* even if the *Harris-Hass* rule gave them "little to lose and perhaps something to gain." Oregon v. Hass, 420 U.S. 714, 723 (1975).

At least one jurisdiction has adopted the training bulletin formally. The Chief of Police in Santa Monica, California issued a training bulletin that reproduced, almost verbatim, the bulletin that the California District Attorneys Association previously had published. *See* James T. Butts, Jr., *Questioning "Outside"* Miranda, TRAINING BULL. (Santa Monica Police Dep't, Santa Monica, Cal.), Sept. 7, 1995, at 1-2 (on file with author).

140 *See* COMMISSION ON PEACE OFFICER STANDARDS & TRAINING, CAL. DEP'T OF JUSTICE, INTERROGATION LAW INSTRUCTORS' OUTLINE (1996) (on file with author) [hereinafter CALIFORNIA INTERROGATION OUTLINE]. The manual was issued by the California Commission on Peace Officer Standards and Training ("POST"). POST derives its authority from the state legislature, pursuant to CAL. PENAL CODE § 13500 (West Supp. 1998). POST operates as a commission within the Califoruia Department of Justice. *See id.* The *California Penal Code* sets forth POST's powers and duties, which include the following: developing training programs for law enforcement officers, *see id.* § 13503(e) (West 1992); adopting minimum standards for the "physical, mental, and moral fitness" of officers, *id.* § 13510(a) (West Supp. 1998); establishing minimum standards for training of peace officers, *see id.*; and making available advanced training programs for criminal investigators through a special institute, *see id.* § 13511 (West 1992).

141 CALIFORNIA INTERROGATION OUTLINE, *supra* note 140, at 20.

142 *Id.* at 20-21 (citations omitted).

143 *Id.* at 21 (internal quotation marks omitted).

144 *Id.* Another government publication is the *California Peace Officers Legal Sourcebook*. The *Sourcebook* has an entire section—four pages—under the heading "Deliberately Ignoring an Invocation." CALIFORNIA DEP'T OF JUSTICE, CALIFORNIA POLICE OFFICERS LEGAL SOURCEBOOK § 7.40a (Rev. Mar. 1997) (on file with author) [hereinafter SOURCEBOOK]. According to the *Sourcebook*, when police intentionally fail to comply with *Miranda*, the law

A training videotape, featuring the same deputy district attorney who authored the California District Attorneys Association training bulletin, is more explicit. Here are some excerpts:

> What if you've got a guy [in custody] that you've only got one shot at? This is it, it's now or never because you're gonna lose him—he's gonna bail out or a lawyer's on the way down there, or you're gonna have to take him over and give him over to some other officials—you're never gonna have another chance at this guy, this is it. And you Mirandize him and he invokes. What you can do—legally do—in that instance is go outside *Miranda* and continue to talk to him because you've got other legitimate purposes in talking to him other than obtaining an admission of guilt that can be used in his trial. . . .
>
> . . . [Y]ou may want to go outside *Miranda* and get information to help you clear cases. . . .
>
> Or maybe it will help you recover a dead body or missing person. . . .
>
> You may be able to recover stolen property. . . .
>
> Maybe his statement "outside *Miranda*" will reveal methods—his methods of operation. . . .
>
> Maybe his statement will identify other criminals that are capering in your community. . . .
>
> Or, his statements might reveal the existence and location of physical evidence. You've got him, but you'd kinda like to have the gun that he used or the knife that he used . . . . [Y]ou go "outside *Miranda*" and take a statement and then he tells you where the stuff is, we can go and get all that evidence.
>
> And it forces the defendant to commit to a statement that will prevent him from pulling out some defense and using it at trial—that he's cooked up with some defense lawyer—that wasn't true. So if you get a statement "outside *Miranda*" and he tells you that he did it and how he did it or if he gives you a denial of some sort, he's tied to that, he is married to that. . . . [P]erfectly legitimate said both the California and U.S. Supreme Courts to use non-Mirandized statement[s] if they're otherwise voluntary. I mean we can't use them for any purpose if you beat them out of him, but if they're voluntary statements, . . . [we can] use them to impeach or rebut. So you see

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should still permit prosecutors to use a statement to impeach the suspect at trial, as long as the statement is voluntary. *See id.* The *Sourcebook* reviews the cases on admissibility of a statement that police take in violation of *Miranda* and characterizes *Miranda*'s warning and waiver requirements as mere "'suggested guidelines.'" *Id.* § 7.40b (Rev. Mar. 1997). An updated version of the *Sourcebook* still contains this section, "Deliberately Ignoring an Invocation," though the section was somewhat modified in the wake of *People v. Peevy*, 953 P.2d 1212 (Cal.), *cert. denied*, 119 S. Ct. 595 (1998). *See infra* notes 396-98.

> you've got all those legitimate purposes that could be served by statements taken "outside *Miranda*."[145]

Does questioning "outside *Miranda*" truly spell the end of *Miranda* or at least of its original vision? As a practical matter, part of the answer to that question depends upon how pervasive the practice has become.

There can be no doubt that the practice of questioning "outside *Miranda*" has spread throughout California. The training materials were distributed statewide. Confirming that officers in California have followed this training, a substantial number of appellate decisions have reported deliberate *Miranda* violations in interrogations in counties all around the state.[146] Further, the Los Angeles Police Department ("LAPD")—the nation's third largest[147]—is involved in *California Attorneys for Criminal Justice v. Butts.* In that litigation, the City of

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145 *Miranda* Videotape, *supra* note 73. The videotape features Devallis Rutledge, Deputy District Attorney, Orange County, California and Member, California Department of Justice, Commission on Peace Officer Standards and Training, but was produced and sold to law enforcement subscribers by a private company.

The Appendix to this Article contains a larger excerpt from the videotape transcript to establish the context in which Mr. Rutledge describes the advantages of questioning "outside *Miranda*." This context is particularly important because Mr. Rutledge has denied that he actually advises law enforcement officials to question "outside *Miranda*." *See* Devallis Rutledge, *Letter to the Editor*, L.A. DAILY J., Nov. 10, 1997, at 7 ("To say that I teach police about the evidentiary implications of questioning without *Miranda* compliance is not to say that I advise them to do it. I do not.") However, a fair reading of the larger excerpt shows that Mr. Rutledge affirmatively encourages officers to question "outside *Miranda*," though he also tells police that whether they ultimately decide to question "outside *Miranda*" is up to them.

146 *See, e.g.*, People v. Vasila, 45 Cal. Rptr. 2d 355 (Ct. App. 1995) (Sonoma County); *In re* Gilbert E., 38 Cal. Rptr. 2d 866 (Ct. App. 1995) (Ventura County); People v. Bey, 27 Cal. Rptr. 2d 28 (Ct. App. 1993) (Los Angeles County); People v. Montano, 277 Cal. Rptr. 327 (Ct. App. 1991) (Contra Costa County); People v. Baker, 269 Cal. Rptr. 475 (Ct. App. 1990) (San Diego County); People v. McCarthy, 227 Cal. Rptr. 457 (Ct. App. 1986) (Riverside County) (opinion subsequently withdrawn); People v. Felix, 139 Cal. Rptr. 366 (Ct. App. 1977) (Los Angeles County); People v. Rising Sun, 128 Cal. Rptr. 281 (Ct. App. 1976) (Ventura County) (opinion subsequently withdrawn).

In *Peevy*, the California Supreme Court addressed a case in which a San Bernardino County Deputy Sheriff questioned a suspect over the unambiguous assertion of the right to counsel. According to the officer, he continued to question "for impeachment purposes." *Id.* at 1215. The California Supreme Court was supplied with "outside *Miranda*" training materials, but declined to take judicial notice of them because the issue of the officer's training was not raised in the trial court and no effort was made to present the training materials there. *See id.* at 1226-28 & n.4.

147 The Los Angeles Police Department, with 7,662 sworn officers in 1993, has the third largest number of sworn officers of any state or local law enforcement organization in the United States. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, 1993: DATA FOR INDIVIDUAL STATE AND LOCAL AGENCIES WITH 100 OR MORE OFFICERS at vii tbl.B (1995) (reporting that the LAPD is third behind the New York City Police Department (28,079 sworn officers) and the Chicago Police Department (12,368 sworn officers)). By December 31, 1996, the LAPD ranks increased to 9,204 sworn officers. *See* INFORMATION RESOURCES DEV. STATISTICAL UNIT, LOS ANGELES POLICE DEP'T, STATISTICAL DIGEST 7.7 (1996). During 1996, LAPD officers made

Los Angeles admitted that it trains officers that they may engage in "non-coercive questioning" of suspects who have asserted either the right to remain silent or the right to counsel during a custodial interrogation.[148] Counsel for the plaintiffs in the case also have obtained LAPD reports of individual interrogations in which the interrogating officers themselves describe questioning suspects after the invocation of Fifth Amendment rights; two LAPD interrogation forms even have a box for officers to check if they questioned "outside *Miranda*."[149]

The practice of questioning "outside *Miranda*" may pervade other states as well. Although a study of 129 interrogations in Salt Lake County in 1994 reported no evidence of police interrogation after the invocation of Fifth Amendment rights,[150] one finds court decisions from Arizona, Colorado, and the District of Columbia in which officers have admitted that they deliberately violated *Miranda* to obtain impeachment evidence or in which they deliberately refrained from giving warnings until they already had obtained a statement from a suspect.[151] These cases stand apart from most other appellate decisions, which merely record the fact of a *Miranda* violation without discussing the officers' motivations. In addition, decisions from thirty-eight additional states report circumstances in which questioning continued after the suspect had asserted the right to remain silent or the

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166,398 adult arrests, including 35,211 arrests for "Part I offenses" (homicide, rape, robbery, aggravated assault, burglary, larceny and vehicle theft). *Id.* at 3.2.

148 Answer of Defendants City of Los Angeles, Raymond Bennett and Michael Crosby to Plaintiffs' Second Amended Complaint at 4, 5-7, California Attorneys for Criminal Justice v. Butts, No. CV 95-8634-ER (C.D. Cal. 1996) (on file with author). The City admitted that

> the Los Angeles Police Department has trained its officers that it is legally permissible to continue non-coercive questioning of suspects who have asserted their right to remain silent [during a custodial interrogation] and that prior to arraignment or indictment of a suspect, it is legally permissible to continue non-coercive questioning of suspects who have asserted their right to counsel.

Id.

149 *See* Los Angeles Police Dep't, Continuation Sheet (Sept. 9, 1991) (on file with author); Los Angeles Police Dep't, Defendant's Statement (May 31, 1995) (on file with author).

150 *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 860-61 (1996).

151 *See* Cooper v. Dupnik, 963 F.2d 1220, 1224-27, 1249 (9th Cir. 1992) (en banc) (explaining that Arizona officers decided, in advance of their interrogation of a rape suspect, that they would not honor any invocation of his rights and that they would continue to question him, in part to gain impeachment information and keep him off the stand at trial); People v. Lowe, 616 P.2d 118, 122 (Colo. 1980) (stating that officer testified "that he had no intention of advising the defendant of his rights until the defendant made a statement to him"); Simpson v. United States, 632 A.2d 374, 379 (D.C. 1993) (finding that officer interrogated suspect after the appointment of counsel and without advising of *Miranda* rights and stating that the court found that the officer had talked with the suspect "knowing . . . or at least thinking that [statements] could be used for impeachment" (quoting the trial court)).

right to counsel or in which police questioned a suspect without giving warnings.[152] None of these cases involved any question of whether the suspect was truly in custody or unambiguously had invoked his or her Fifth Amendment rights; hence, these cases appear to describe deliberate violations of *Miranda*.

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152 *See, e.g.*, Jenkins v. Leonardo, 1992 WL 176665 (S.D.N.Y. 1992) (violation of right to remain silent), *aff'd*, 991 F.2d 1033 (2d Cir. 1993); Blanco v. Dugger, 691 F. Supp. 308, 320 (S.D. Fla. 1988) (violation of right to counsel); *Ex Parte* Comer, 591 So. 2d 13, 14 (Ala. 1991) (violation of right to remain silent); Wilson v. State, 318 So. 2d 753, 757-59 (Ala. Crim. App. 1975) (violation of right to counsel); D.P. v. State, 556 P.2d 1256, 1256 (Alaska 1976) (violation of right to remain silent); Hughes v. State, 712 S.W.2d 308, 309 (Ark. 1986) (violation of right to counsel); Webb v. State, 522 S.W.2d 406, 407-08 (Ark. 1975) (violation of right to counsel); State v. Graham, 441 A.2d 857, 859-60 (Conn. 1982) (violation of right to remain silent); Tucker v. State, 411 A.2d 603, 604-05 (Del. 1980) (violation of right to remain silent); Holmes v. State, 300 A.2d 6, 7 (Del. 1972) (violation of right to remain silent); Nowlin v. State, 346 So. 2d 1020, 1022 (Fla. 1977) (no warnings given); Linares v. State, 471 S.E.2d 208, 211 (Ga. 1996) (violation of right to counsel); State v. Monroe, 645 P.2d 363, 364 (Idaho 1982) (violation of right to counsel); People v. Winsett, 606 N.E.2d 1186, 1190 (Ill. 1992) (violation of right to counsel); People v. Jackson, 535 N.E.2d 1086, 1093 (Ill. App. Ct. 1989) (violation of right to remain silent); Wall v. State, 441 N.E.2d 682, 683 (Ind. 1982) (violation of right to counsel); State v. Deases, 518 N.W.2d 784, 788-89 (Iowa 1994) (violation of right to remain silent); State v. Hilpipre, 242 N.W.2d 306, 309-10 (Iowa 1976) (violation of right to counsel); State v. Boone, 556 P.2d 864, 872 (Kan. 1976) (violation of right to counsel); Baril v. Commonwealth, 612 S.W.2d 739, 742-43 (Ky. 1981) (violation of right to counsel); State v. McCarty, 421 So. 2d 213, 214 (La. 1982) (violation of right to counsel); State v. Durepo, 472 A.2d 919, 920-21 (Me. 1984) (violation of right to remain silent); Bryant v. State, 431 A.2d 714, 719-20 (Md. Ct. Spec. App. 1981) (violation of right to counsel); Commonwealth v. Vincente, 540 N.E.2d 669, 670 (Mass. 1989) (violation of right to counsel); State v. Southern, 304 N.W.2d 329, 330 (Minn. 1981) (violation of right to counsel); McDougle v. State, 355 So. 2d 1386, 1388 (Miss. 1978) (violation of right to remain silent); State v. Wood, 559 S.W.2d 268, 270-72 (Mo. Ct. App. 1977) (violation of right to counsel and right to remain silent); State v. Favero, 331 N.W.2d 259, 260-61 (Neb. 1983) (violation of right to counsel); State v. Smith, 774 P.2d 1037, 1039 (Nev. 1989) (no warning given and violation of right to counsel); State v. Omar-Muhammad, 737 P.2d 1165, 1169-70 (N.M. 1987) (violation of right to counsel); State v. Toms, 221 S.E.2d 94, 96 (N.C. Ct. App. 1976) (violation of right to remain silent); State v. Knuckles, 605 N.E.2d 54, 55-56 (Ohio 1992) (violation of right to counsel); State v. Williams, 452 N.E.2d 1323, 1332-33 (Ohio 1983) (violation of right to counsel); White v. State, 674 P.2d 31, 36 (Okla. Crim. App. 1983) (violation of right to counsel); State v. Mills, 710 P.2d 148, 149 (Or. Ct. App. 1985) (en banc) (violation of right to counsel); Commonwealth v. Carbaugh, 514 A.2d 133, 134 (Pa. Super. Ct. 1986) (violation of right to remain silent); State v. Iovino, 524 A.2d 556, 560-61 (R.I. 1987) (violation of right to remain silent and right to counsel); State v. Cody, 293 N.W.2d 440, 445 (S.D. 1980) (violation of right to counsel); State v. Tidwell, 775 S.W.2d 379, 383-85 (Tenn. Crim. App. 1989) (violation of right to counsel); Pyburn v. State, 539 S.W.2d 835, 841 (Tenn. Crim. App. 1976) (violation of right to counsel); Reed v. State, 518 S.W.2d 817, 820-21 (Tex. Crim. App. 1975) (violation of right to counsel); State v. Brunelle, 534 A.2d 198, 199 (Vt. 1987) (no warnings given); Hines v. Commonwealth, 450 S.E.2d 403, 404-05 (Va. Ct. App. 1994) (violation of right to counsel); State v. Marcum, 601 P.2d 975, 977-78 (Wash. Ct. App. 1979) (violation of right to counsel); State v. Randle, 366 S.E.2d 750, 752 & n.1 (W. Va. 1988) (violation of right to remain silent); State v. Harris, 544 N.W.2d 545, 547 (Wis. 1996) (violation of right to counsel); *see also* State v. Conner, 786 P.2d 948, 953 (Ariz. 1990) (violation of right to remain silent); People v. Evans, 630 P.2d 94, 95 (Colo. Ct. App. 1981) (violation of right to counsel); Wilkes v. United States, 631 A.2d 880, 881-82 (D.C. 1993) (no warnings given).

The fact that these cases exist and that officers in some jurisdictions receive training on questioning "outside *Miranda*" demonstrates that *Harris, Hass, Tucker,* and *Elstad* indeed influence the police. These state court cases and the California training materials, however, do not establish the extent of this practice within each jurisdiction. They do not establish how frequently officers continue to question suspects following a suspect's invocation of Fifth Amendment rights in states that train police to continue interrogation. One study, however, provides some limited data. In 1992-1993, Richard Leo observed 182 interrogations conducted by three police departments in northern California.[153] According to Leo, suspects invoked their rights in thirty-eight of the interrogations, but officers ignored the invocations and continued to question in seven of these thirty-eight cases (18%).[154] Officers did not question "outside *Miranda*" in every instance, but they did so in almost one of every five interrogations during which suspects had asserted their rights.

In 1990 the Supreme Court decided *Michigan v. Harvey*,[155] extending the rule in *Harris* and *Hass* to Sixth Amendment violations. Holding that prosecutors may impeach with evidence that they obtained in violation of the Sixth Amendment, the Court said that *Hass* had determined that the search for the truth outweighs the possibility that admitting evidence that police obtained in violation of the Constitution might give officers an incentive to ignore *Miranda*'s strictures:[156] "*Hass* was decided 15 years ago, and no new information has come to our attention which should lead us to think otherwise now."[157] This Article presents sufficient "new information" to think otherwise. No longer the mere "speculative possibility" noted in *Hass* and *Harvey*, deliberate disregard for *Miranda* threatens its core holdings. Facing this burgeoning practice, the current rule of exclusion

153 He personally observed 122 interrogations and watched videotapes of 60 additional interrogations conducted by three police departments in northern California. According to Leo, *Miranda* warnings were required in 175 of these 182 interrogations. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268, 275 (1996). Leo observed the 122 interrogations between late 1992 and mid-1993. He watched the videotapes during the same period, though they were undated and had been recorded earlier. Leo believes that most of the videotaped interrogations occurred within a few years prior to 1993. *See* Telephone Interview with Richard A. Leo, Assistant Professor of Criminology, Law, and Society, University of California, Irvine (Aug. 26, 1997).

154 *See* Leo, *supra* note 153, at 276.

155 494 U.S. 344 (1990).

156 *See id.* at 351-52.

157 *Id.* at 352. In *Withrow v. Williams*, 507 U.S. 680 (1993), the Court also noted "that *Miranda* came down some 27 years ago. In that time, law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements." *Id.* at 695.

does not carry sufficient authority to lead officers to adhere to the requirements of *Miranda*.

III
REASONS TO RESTORE THE ORIGINAL VISION

The Court in *Miranda* expressly ranked a suspect's Fifth Amendment privilege against self-incrimination during a custodial interrogation above society's need for an inculpatory statement.[158] *Miranda* asserts a clear constitutional imperative: if the privilege against self-incrimination exists in the station house, then officers acting pursuant to a lesser authority may not abridge it. As part of the original vision of *Miranda*, the Court linked *Miranda*'s rules directly to the Constitution. Because the Court established these procedures as the minimum necessary to protect the Fifth Amendment privilege, compliance with *Miranda*'s rules ranked above the desire of law enforcement officers to obtain a statement or other evidence.

The new vision of *Miranda* complicates this calculus. If *Miranda*'s rules merely protect the Fifth Amendment, but are not required by it, as advocates of the new vision claim, then proponents of *Miranda*'s procedures cannot simply argue that a suspect's assertion of the Fifth Amendment privilege per se trumps the desire of police to obtain a statement. One instead must consider the values and interests that *Miranda*'s rules further and, ultimately, determine whether those values and interests should prevail over the needs of law enforcement. This Part of the Article begins this inquiry and contends that we must recapture *Miranda*'s original vision.

A. The Original Vision Best Protects Fifth Amendment Values

The Court in *Miranda* described the privilege against self-incrimination as "founded on a complex of values."[159] Justice Goldberg cataloged some of these values in *Murphy v. Waterfront Commission*,[160] including the following: "our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play . . . ; our respect for the inviolability of the human personality . . . ; [and] our distrust of self-deprecatory statements."[161] In a later decision, the Court underscored the notion

158 *See Miranda*, 384 U.S. at 479 (holding that government cannot abridge an individual's Fifth Amendment right); *see also* New York v. Quarles, 467 U.S. 649, 662 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part) (noting the express ranking in *Miranda*).

159 *Miranda*, 384 U.S. at 460.

160 378 U.S. 52 (1964).

161 *Id.* at 55 (citations omitted). According to one commentator, Justice Goldberg's statement in *Murphy* "invests the constitutional privilege with all of the values and interests

that the Fifth Amendment protects the right to autonomy, stating that the privilege against self-incrimination secures "values reflecting the concern of our society for the right of each individual to be left alone."[162] The importance that our criminal justice system places upon these values only has increased in the decades since the Court decided *Miranda*. The original vision of *Miranda* provides the minimum level of protection necessary to preserve these still-vital values.

1. Miranda *and Our Accusatorial System*

Miranda and its progeny are sometimes said to be required by a system that is "accusatorial," not "inquisitorial."[163] Language in *Miranda* itself supports this view.[164] Without further explication, this argument clouds more than it clarifies. After all, labeling a system "accusatorial" or "adversarial" does little to reveal its specific, inherent attributes.[165] Furthermore, the American criminal justice process is

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that underlay the common law privilege: the values of autonomy, dignity, privacy, and reliability, and the interests in bodily and mental integrity." Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497, 513 (1992).

The Supreme Court revisited *Murphy* in *United States v. Balsys*, 118 S. Ct. 2218 (1998). The Justices reaffirmed *Murphy*'s holding—that a witness given immunity by state authorities still could assert the privilege due to fear of a future federal prosecution—but did so on the basis of *Malloy v. Hogan*, 378 U.S. 1 (1964), which applied the Fifth Amendment to the states. *See Balsys*, 118 S. Ct. at 2226-30. In the context of Balsys' claim, the policies and values that *Murphy* had described were insufficient to support an extension of the Fifth Amendment privilege to the circumstance in which the witness feared a foreign prosecution. *See id.* at 2231-35. The Supreme Court, however, did not question that *Murphy* accurately had described the policies and values that underlie the privilege against self-incrimination. *See id.*

162 Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966).

163 *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 434, 468 (1986) (Stevens, J., dissenting) (criticizing the majority's holding as a "startling departure" from the insight that our system is "'accusatorial'" and not "'inquisitorial'" and stating that the majority's view of the lawyer "as a nettlesome obstacle to the pursuit of wrongdoers" is more compatible with an inquisitorial system).

164 *See Miranda*, 384 U.S. at 460 (stating that the Fifth Amendment is "the essential mainstay of our adversary system" and that "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth"); *id.* at 477 (noting that the principles announced deal with the protections given to the Fifth Amendment during custodial interrogation and that "[i]t is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries").

165 *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 46-52 (1993) (arguing that this rhetoric is imprecise and obscures the Court's balancing, whatever the label); PHILLIP E. JOHNSON, CASES AND MATERIALS ON CRIMINAL PROCEDURE 381-85 (2d ed. 1994) (describing the attributes of an "inquisitorial" system).

Moreover, features of an inquisitorial system provide significant protections for a criminal defendant. For example, continental judges will not hear evidence of uncharged crimes, even when this evidence probably would be admitted in common law courts (such as when the evidence is relevant to modus operandi or intent). *See* Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121

not purely adversarial. One year before the Court decided *Miranda*, Yale Kamisar wrote his justly famous essay, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*,[166] contrasting the few rights of suspects in the police station (the "gatehouse") with the full panoply of protections for the accused at trial (the "mansion"). A pure adversarial model of criminal justice surely would not allow an uncounseled suspect to surrender so much in the station house. It instead would require, as some continue to advocate today, the state to provide counsel for the accused during a custodial interrogation, rather than merely offer advice of the right to counsel.[167] Though we may not have an absolute adversarial system, one must acknowledge that the Fifth Amendment privilege against self-incrimination constitutes an important and critical component of our *predominantly* adversarial system. It is a critical part of *our* system. The virtue our society places upon the adversary system, if anything, has become fixed more firmly in the decades since *Miranda*. The Court decided *Miranda* just three years after *Gideon v. Wainwright*, which guarantees state criminal defendants the right to counsel.[168] In the wake of *Gideon* and *Miranda*, all jurisdictions have established assigned counsel programs. The efforts of an expanded indigent defense bar, which receives funding from the public, have ensured that the adversarial nature of our criminal justice system continues.

The history of the privilege against self-incrimination illustrates its tie to the advent of counsel and to our predominantly adversarial system. For example, in England, from where our adversarial system derives, the modern privilege did not become firmly established until the mid-nineteenth century.[169] John Langbein forcefully argues that

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U. PA. L. REV. 506, 518-19 (1973). Further, in most continental systems, though the accused may refuse to answer questions, but may not refuse to take the stand, the defendant is not placed under oath and there are no adverse legal consequences even if the accused's testimony is proven to be false. *See id.* at 527-28. In the United States, a defendant who testifies falsely may face perjury charges. In federal prosecutions, a defendant may receive a harsher sentence, based upon "obstruction of justice," when the judge concludes that he or she has testified falsely, even without a formal criminal charge of perjury. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (1996) (providing an enhancement for "obstruction of justice"); *see also* United States v. Dunnigan, 507 U.S. 87, 98 (1993) (upholding this enhancement). Italy's revised code of criminal procedure, which adopts many aspects of adversarial systems, provides another example: only statements given by an accused to a prosecutor or judge may be used as evidence-in-chief at trial. *See* Lawrence J. Fassler, Note, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 COLUM. J. TRANSNAT'L L. 245, 254-55, 274-75 (1991).

166 YALE KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in* POLICE INTERROGATION AND CONFESSIONS 27 (1980).

167 *See* Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1842-45 (1987).

168 *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

169 This point is not without controversy. Until relatively recently, the common wisdom has held that the privilege against self-incrimination became established in Englisb

the "accused speaks" trial—that is, a trial in which the defendant effectively cannot decline to testify—was the norm in England until the late eighteenth or early nineteenth century.[170] At that time, the modern form of criminal trials, which permit the defendant to test the prosecution's evidence, began to displace the existing system.[171]

Langbein contends that at least several developments secured the privilege against self-incrimination. First, in 1848 Parliament passed Sir John Jervis' Act,[172] which allowed the accused to refuse to answer questions during the pretrial inquiry and required a judicial officer to advise the defendant that any answers might appear as evidence at trial.[173] Given that a trial is a forum to consider evidence that the parties already have gathered, a legal system cannot ensure the privilege against self-incrimination until an accused can exercise the privilege in pretrial proceedings.[174] Second, defense counsel began to appear more regularly in criminal cases in the late eighteenth century.[175] A defendant could not invoke the privilege against self-incrimination meaningfully until he or she could speak by proxy.[176] Finally, the late eighteenth and early nineteenth centuries saw the development of other formal attributes of a modern criminal trial—such as the burden of production of evidence, burden of proof, presumption of innocence, and the law of evidence—that helped create a setting in which an accused could assert more readily the privilege and

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law in the mid-seventeenth century. Leonard Levy writes that the privilege was secured largely as a reaction to the abusive oath *ex officio* and to the Crown's excesses during the political prosecutions of John Lilburne. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 277-83, 313-14 (1968); *see also* John H. Wigmore, *The Privilege Against Self-Crimination; Its History*, 15 HARV. L. REV. 610, 633-36 (1902) (discussing the development of the privilege against self-incrimination in the English courts). Yet even Levy acknowledges that it was not until the mid-nineteenth century that the privilege was respected during pretrial proceedings. *See* LEVY, *supra*, at 329.

170 *See* John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION 82, 91-92 (R.H. Helmholz et al. eds., 1997) [hereinafter Langbein, *The Privilege*]; John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 123-34 (1983) [hereinafter Langbein, *Shaping*].

171 *See* Langbein, *The Privilege*, *supra* note 170, at 91-92; Langbein, *Shaping*, *supra* note 170, at 83-84, 123-34.

172 11 & 12 Vict., ch. 42.

173 The Act provided that during a pretrial examination before a justice of the peace, the justice shall read the accused the depositions (statements) of other witnesses,

> and shall say to him these Words, or Words to the like Effect: "Having heard the Evidence, do you wish to say any thing in answer to the Charge? you are not obliged to say any thing unless you desire to do so, but whatever you say will be taken down in Writing, and may be given in Evidence against you upon your Trial."

Id. § XVIII.

174 *See* Langbein, *The Privilege*, *supra* note 170, at 90-92.

175 *See id.* at 82-83, 96-97.

176 *See id.*

test the prosecution's case.[177] In this country, the Fifth Amendment contains the privilege against compelled self-incrimination, and a number of states adopted some form of the privilege in their early constitutions.[178] Even so, the privilege developed in America much as in England; the assertion of the right remained largely attendant upon the expansion of the defense bar and its concomitant efforts on behalf of those accused of crime.[179]

This history demonstrates that the privilege is bound up with other core modern features of our criminal justice system, particularly the right to counsel. The privilege not to speak has little value without an advocate who will speak. Of course, a defendant not represented by counsel may choose to stay off the stand, yet still examine other witnesses and participate in the trial. But it surely would puzzle a jury if the defendant did everything at trial except give his or her side of the story; the jury probably would find it difficult not to penalize the accused in some way for declining to take the stand. Furthermore, the modern theory of the criminal process, which permits the defendant to stay off the stand and test the prosecution's evidence, breaks down unless the defendant can prevent the prosecution from using his or her pretrial statement to convict. With respect to rebutting the prosecution's case, an accused more likely will waive the privilege and testify if he or she needs to explain a statement or its fruits. The Court in *Michigan v. Tucker* reiterated the concern of many Fifth Amendment decisions—"that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage."[180] Thus, "a defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury."[181] In this light, the privilege against self-incrimination stands as one cornerstone of our modern adversarial system.

The original vision of *Miranda* advances this Fifth Amendment value and preserves our preference for an adversarial system. By re-

177 *See id.* at 97-100.

178 *See* Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment, in* THE PRIVILEGE AGAINST SELF-INCRIMINATION, *supra* note 170, at 109, 133-38.

179 *See id.* at 138-44.

180 Michigan v. Tucker, 417 U.S. 433, 440-41 (1974).

181 *Id.* at 441. The Court also has held consistently that the prosecution may not comment at trial upon the accused's postarrest assertion of *Miranda* rights. *See, e.g.*, Wainwright v. Greenfield, 474 U.S. 284, 295 (1986) (finding the use of an assertion of the right to counsel to rebut an insanity defense fundamentally unfair); Doyle v. Ohio, 426 U.S. 610, 618-19 (1976) (concluding the use of postarrest silence to impeach fundamentally unfair). Although these cases rest on Fourteenth and not Fifth Amendment grounds, they work to preserve the ability of defendants to decide whether or not to testify at trial, without suffering any penalty for the exercise of their rights prior to the trial.

quiring police to inform suspects of their privilege against self-incrimination and to allow suspects to assert this privilege effectively in the station house, the original vision of *Miranda* protects the ability of defendants to invoke the privilege later—just as Sir Jervis' Act helped to ensure the vitality of the privilege in England[182] and just as the Court noted in *Michigan v. Tucker.* Furthermore, the *Miranda* Court held that by requesting counsel a suspect asserts Fifth Amendment rights. The history of the privilege demonstrates that the right to remain silent and the right to counsel are inextricably intertwined. Indeed, *Miranda* came just two years after *Malloy v. Hogan,* which applied the Fifth Amendment to the states;[183] the Court decided *Malloy,* in turn, just one year after *Gideon v. Wainwright.*

2. Miranda *and Individual Autonomy*

Miranda also protects individual autonomy, another Fifth Amendment value. In *Connecticut v. Barrett,*[184] Chief Justice Rehnquist, writing for the Court, stated that "[t]he fundamental purpose of the Court's decision in *Miranda* was 'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.'"[185] Other Supreme Court decisions carefully restrict the amount of information that a suspect must receive before he or she chooses between speech and silence.[186] By both limiting the amount of mandatory police disclosure and, at the same time, requiring officers to cease interrogation once a suspect determines not to talk, *Miranda* affords absolute respect for a small but vital zone of individual autonomy in the station house. Put another way, *Miranda* cre-

182 *See supra* notes 172-74 and accompanying text.

183 *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964).

184 479 U.S. 523 (1987).

185 *Id.* at 528 (quoting *Miranda,* 384 U.S. at 469).

186 While a premise of *Miranda*'s warning requirement may be that any waiver of the Fifth Amendment should be informed, many have interpreted this requirement to mean something much different than "informed consent." Officers, for example, do not have to reveal the subject matter of the interrogation prior to obtaining a waiver. *See* Colorado v. Spring, 479 U.S. 564, 577 (1987). In *Moran v. Burbine,* 475 U.S. 412 (1986), the Court ruled that officers need not disclose that a suspect's lawyer is trying to talk with him, although a person surely would find this information useful in choosing whether to speak with the police. *See id.* at 427. *Burbine,* perhaps more than any other case, demonstrates the Justices' views about the extent of autonomy in the station house. According to the Court, "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422. In refusing to find that officers are required to tell a suspect of his attorney's efforts to speak with him, the Justices noted that in *Miranda* they had rejected the claim that a custodial interrogation requires the actual presence of a lawyer. *See id.* at 426. Thus, while the warning requirement seeks in part to make a suspect aware "that he is not in the presence of persons acting solely in his interest," *Miranda,* 384 U.S. at 469, full disclosure might prove fatal to the process of custodial interrogation, and the Court has not gone that far.

ates a minimum, but not an optimum, condition in which an accused may exercise autonomy.

It is difficult to overstate the extent to which our criminal system relies upon respect for autonomy. Students of the Constitution no doubt can name a panoply of rights that inhere to a person accused of a crime, such as the right to a speedy and a public trial before an impartial jury, the ability to confront witnesses, and the right to use compulsory process to obtain the testimony of witnesses.[187] In spite of these rights, if someone unfamiliar with our Constitution were to observe our criminal justice system in practice, that person might conclude that our system primarily affords defendants the simple ability to make informed decisions at critical points in his or her case.

For example, most criminal defendants whose cases are not dismissed plead guilty rather than go to trial. In the most recently reported year, 91.8% of these defendants in federal court pleaded guilty.[188] A person monitoring their prosecutions might watch bail and motion hearings and then see a strange proceeding in which the defendant pleads guilty and waives, rather than asserts, all of his or her highly touted constitutional rights. At that hearing, the court primarily considers whether the defendant knows of the charges and penalties and whether he or she enters a plea freely and voluntarily. At a plea proceeding, the judge generally is not concerned with whether a plea agreement is a *good* choice; rather, the judge primarily is concerned with whether the plea is a *permissible* choice.[189] Defendants also assert or waive their constitutional rights at various other stages of the proceedings—they may waive, for example, the right to counsel or the right to jury trial—and the court only will inquire about whether the waiver is informed and voluntary, rather than question its wisdom.[190] Even in the case of a well-represented defendant

187 *See* U.S. CONST. amend. VI.

188 In the 12-month period ending September 30, 1997, there were 56,541 criminal defendants in federal district court whose cases were not dismissed. Of those, 51,918 (91.8%) pleaded guilty or nolo contendere. *See* STATISTICS DIV., ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1997 REPORT OF THE DIRECTOR 224 tbl.D-7 (1997).

189 FED. R. CRIM. P. 11(c), for example, requires that a judge taking a guilty plea from a federal criminal defendant advise the accused of his or her rights. FED. R. CRIM. P. 11(d) requires that the judge ensure that the plea is "voluntary, and not the result of force or threats or of promises apart from a plea agreement." *Id.* While the court may accept or reject the plea agreement, *see id.* 11(e), the procedures do not require the court to determine whether the agreement is a "good deal" for either party. *See id.*

190 An accused has the absolute right to conduct his or her own defense. *See* Faretta v. California, 422 U.S. 806, 807 (1975). More recently, the Court declined to adopt a different standard for competency to waive the right to counsel than for competency to stand trial. *See* Godinez v. Moran, 509 U.S. 389, 396-97 (1993). Most in the criminal justice system regard a defendant's assertion of *Faretta* to be a disastrous choice. Likewise, *Moran* represents an elevation of autonomy over many other values; other than furthering the

who goes to trial, certain decisions belong solely to the client, not the lawyer. The client decides whether or not to testify and thereby whether to give up the protections of the Fifth Amendment.[191] In sum, courts do not engage in a colloquy with the accused over whether the decision to testify or not amounts to a wise tactical choice so long as the decision is informed and voluntary.

With the Supreme Court's institutionalization of the practice of plea-bargaining and other procedures that rely upon the defendant's formal election,[192] the extent to which our system depends upon respect for the accused's informed choices only has increased since *Miranda* was announced.[193] The original vision of *Miranda* fits with and fosters this view of the criminal justice system. Under this theory, *Miranda* seeks to create a "time-out" from the pressures of a custodial interrogation. At one particular moment in a station house, the police provide a suspect with a modicum of information and ask whether, in light of that information, he or she wishes to speak with them. The Fifth Amendment protects the accused who chooses not to speak; it does not protect one who agrees to answer questions. A suspect who waives the Fifth Amendment may be questioned at length and may even be subjected to some fairly extreme tactics, such as lies

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accused's right to autonomy, little else is served by allowing a marginally competent defendant conduct his or her own defense.

191 *See* Rock v. Arkansas, 483 U.S. 44, 52 (1987) (holding that the Sixth Amendment includes the right of the defendant to testify "should he decide it is in his favor to do so"); ABA CRIMINAL JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE standard 4-5.2(a) (3d ed. 1993) ("Control and Direction of the Case") ("The decisions which are to be made by the accused after full consultation with counsel include: (i) what pleas to enter; (ii) whether to accept a plea agreement; (iii) whether to waive jury trial; (iv) whether to testify in his or her own behalf; and (v) whether to appeal.").

192 *See, e.g.*, Santobello v. New York, 404 U.S. 257, 262 (1971) (holding that when a guilty plea is induced by a promise, that promise must be fulfilled); Brady v. United States, 397 U.S. 742, 758 (1970) (deeming guilty plea voluntary even though motivated by fear of the death penalty); *see also supra* note 190 (discussing Faretta v. California, 422 U.S. 806 (1975)).

193 This is not to say that our criminal justice system absolutely respects all claims of autonomy. Thus, for example, physical evidence, such as blood samples, may be taken from suspects over their objection. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 771-72 (1966). The government also may force an accused to testify over a claim of privilege, so long as an order of immunity is obtained. *See* Kastigar v. United States, 406 U.S. 441, 453 (1972). Finally, witnesses are subpoenaed to court daily and are forced to testify against their will. In *Balsys*, the Court noted that absolute protection of "personal inviolability" would seem to prohibit uninvited questioning altogether, and the law has not gone that far. United States v. Balsys, 118 S. Ct. 2218, 2232 (1998). Of course, acknowledging that our system will afford only limited protection to principles of autonomy does not establish those limits. In these situations the state neither refuses to honor a critical choice that the law affords to an accused, nor seeks to use a suspect's actual words against him or her at trial.

and trickery,[194] though *Miranda* also gives the suspect the right to curtail the interrogation if these tactics prove too discomforting.

3. *The New Vision and Fifth Amendment Values*

In addition to preserving our predominantly adversarial system and protecting autonomy, other Fifth Amendment values include curtailing police misconduct, avoiding false confessions, and complying with our sense of fair play. Some suggest that the *Miranda-Edwards* rule serves these values by decreasing the use of coercive tactics; indeed, it gives officers an incentive not to make the interrogation so difficult that suspects will ask for a lawyer.[195] Furthermore, as explained below, to the extent that the original vision of *Miranda* contemplates a set of bright-line rules that prevent the police from obtaining an involuntary statement, *Miranda* directly furthers these values.[196]

By contrast, the new vision of *Miranda* does not even minimally protect these Fifth Amendment values. The new vision transforms the duty of officers to cease interrogation into a weak rule of exclusion: officers may continue to question, but courts will only exclude resulting statements from the prosecution's case-in-chief. Denying suspects the effective ability to assert the privilege against self-incrimination during a custodial interrogation lessens the adversarial nature of our system. Excluding statements from the prosecution's case-in-chief does not protect the privilege adequately. The police still may gather, and the prosecution still may introduce, evidence that results from a statement. This use of evidence may influence the ability of a suspect to assert the privilege and stay off the stand at trial, thereby keeping the focus of the case on the sufficiency of the prosecution's evidence.

Perhaps more significantly, the new vision does not respect individual autonomy at all. If *Miranda* and our voluntariness jurisprudence rest even in part upon the notion that the law must permit a

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194 *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding that under the "totality of the circumstances" a factual misrepresentation did not make confession involuntary); United States v. Velasquez, 885 F.2d 1076, 1087-89 (3d Cir. 1989) (finding that a statement was not involuntary even though officer stated falsely that the codefendant was being released because he cooperated against the accused); United States v. Petary, 857 F.2d 458, 460-61 (8th Cir. 1988) (holding that a statement was not involuntary when officers falsely stated that a codefendant was giving a full statement); United States v. Castaneda-Castaneda, 729 F.2d 1360, 1362-63 (11th Cir. 1984) (ruling that a confession was not involuntary even though officers falsely stated that the defendant's wife confessed). For an overview of cases in which the police have used trickery or deception during interrogations, see Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 427-32 (1996).

195 *See* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 820-21 (1989).

196 *See infra* Part III.D.

suspect to elect whether to speak or to remain silent, then the law must honor the suspect's choice.[197] A system built on the premise that defendants are entitled to make choices, even foolish ones, must respect those choices. The new vision of *Miranda* does not afford this respect and thus demonstrates a fundamental disregard for an individual's autonomy.

The original vision of *Miranda*, then, seeks to establish a minimum level of respect for the values that underlie the Fifth Amendment. The new vision upsets this approach and significantly reduces the protections for the Fifth Amendment's "complex of values." Unless we truly believe that it is time to recalibrate the rights of the citizen and the power of the state, the original vision of *Miranda* best protects our Fifth Amendment values and is consonant with the attributes of our modern criminal justice system.

B. The Original Vision Provides the Closest Fit with Existing Law and Practice

The *Miranda* Court held that a suspect's request for counsel or statement that he or she wishes to remain silent per se invokes the Fifth Amendment privilege against self-incrimination. The new vision of *Miranda* permits the police to continue to question over the invocation of this privilege. In so doing, the new vision directly conflicts with existing law and practice.

The law currently provides a mechanism through which the State can obtain a statement over a claim of privilege. When a person asserts the privilege against self-incrimination before an administrative, legislative, or judicial body,[198] the government may request an order of immunity and then compel that person to talk. The government must arrange a grant of immunity before it may compel any testimony. Although a court in a later prosecution must exclude evidence

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197 In *Balsys*, the Court reaffirmed that principles of autonomy are relevant to the preservation of the privilege within our domestic tradition. *See Balsys*, 118 S. Ct. at 2232. At the same time, the Justices declined to accept autonomy as a prima facie justification to extend the Fifth Amendment privilege when a person feared the use of his compelled statement in a foreign prosecution. *See id.* at 2231-35.

198 One may assert the privilege against self-incrimination in either civil or criminal contexts, so long as there is a risk that the witness' testimony or statement may later be used in a criminal proceeding. *See, e.g.*, Pillsbury Co. v. Conboy, 459 U.S. 248, 256-57 (1983) (allowing privilege in civil deposition); Lefkowitz v. Cunningham, 431 U.S. 801, 803-04, 809 (1977) (allowing privilege in election law investigation); *In re* Gault, 387 U.S. 1, 49-50 (1967) (allowing privilege in juvenile proceeding); Garrity v. New Jersey, 385 U.S. 493, 496-500 (1967) (allowing privilege in investigation into police corruption); Malloy v. Hogan, 378 U.S. 1, 6-12 (1964) (allowing privilege in state gambling investigation); Watkins v. United States, 354 U.S. 178, 187-88 (1957) (allowing privilege in congressional hearing); McCarthy v. Arndstein, 266 U.S. 34, 38-40 (1924) (allowing privilege in civil bankruptcy proceeding); Counselman v. Hitchcock, 142 U.S. 547, 562-64 (1892) (allowing privilege in grand jury proceeding).

that derives from nonimmunized, compelled testimony, the prediction that a court subsequently would have to exclude the evidence "is not enough to satisfy the privilege against compelled self-incrimination."[199] The most common forms of immunity consist of "transactional" and "use" immunity. The former protects a person from prosecution for any act relating to his or her testimony; the latter prevents prosecution by means of the immunized testimony.[200] An order of immunity at least must provide protection coextensive with the privilege.[201]

For example, in *Kastigar v. United States*[202] the Supreme Court held that use immunity affords the minimum protection required by the Fifth Amendment and prevents both direct and derivative ("fruits") use of the immunized testimony.[203] *Kastigar* was followed by *New Jersey v. Portash*,[204] in which the Justices ruled that the prosecution cannot use immunized testimony even for impeachment.[205] If the prosecution grants use immunity to a person who later faces criminal prosecution, the State bears the burden of establishing that its evidence derived from a source that was "wholly independent" of the immunized testimony.[206] Purging the "*Kastigar* taint" often proves difficult for the prosecution.[207] Due to the significant consequences of granting immunity, prosecutors typically decide to seek these orders only after careful reflection.[208] Thus, apart from the rather limited

199 *Balsys*, 118 S. Ct. at 2228 n.8.

200 *See* Kastigar v. United States, 406 U.S. 441, 449, 453 (1972).

201 *See id.* at 449; *McCarthy*, 266 U.S. at 42.

202 406 U.S. 441 (1972).

203 *See id.* at 453; *see also* Braswell v. United States, 487 U.S. 99, 117 (1988) (explaining that the government may not prosecute with immunized testimony, either directly or derivatively).

204 440 U.S. 450 (1979).

205 *See id.* at 458-59.

206 *Kastigar*, 406 U.S. at 460.

207 The high-profile criminal prosecution of Lt. Colonel Oliver North provides an extreme example of the difficulty of purging the "*Kastigar* taint." North received use immunity and testified before the Iran-Contra congressional committees. He later faced prosecution by an independent counsel and was convicted on criminal charges. Though the independent counsel exercised extraordinary efforts to keep witnesses from making use of the immunized testimony, the court of appeals reversed North's conviction and remanded for a full *Kastigar* hearing to decide whether any use whatsoever was made of the immunized testimony. The Court of Appeals instructed the district court, on remand, to review the trial record "witness-by-witness; if necessary, . . . line-by-line and item-by-item." United States v. North, 910 F.2d 843, 872 (D.C. Cir. 1990), *modified and reh'g denied in part*, 920 F.2d 940 (D.C. Cir. 1990). During the *Kastigar* hearing on remand, former National Security Advisor Robert McFarlane stated that North's appearance before the congressional committees had influenced his testimony deeply. The independent counsel determined that he could not purge the *Kastigar* taint. On the prosecution's motion, the court dismissed the charges against North. *See* David Johnston, *Judge in Iran-Contra Trial Drops Case Against North After Prosecutor Gives Up*, N.Y. TIMES, Sept. 17, 1991, at A1.

208 Thus, in upholding the ability of a witness to assert his Fifth Amendment rights in a civil deposition, even though federal prosecutors previously had afforded the witness use

public safety exception to *Miranda* that was announced in *Quarles*, the Supreme Court has held that the assertion of Fifth Amendment privilege is an absolute barrier to further questioning and information gathering and that prosecutors can overcome that barrier only by affording the suspect a form of protection equal to the privilege itself.

The new vision, with its practice of questioning "outside *Miranda*," contravenes these fundamental principles. The practice of questioning "outside *Miranda*" allows officers—not courts or prosecutors—to obtain a statement over a clear assertion of Fifth Amendment rights. More importantly, it does not provide the accused with protection that is fully coextensive with the privilege. Officers who question "outside *Miranda*" seek statements for impeachment, or they attempt to discover other evidence that prosecutors may use at trial. Yet *Kastigar* and *Portash* forbid both direct and derivative use of statements taken over a claim of privilege. Consequently, the original vision, which requires officers to respect a claim of privilege, provides the best fit with *Kastigar*, *Portash*, and Fifth Amendment doctrine.

As long as *Kastigar* and *Portash* stand, the new vision is difficult to maintain. One thoughtful writer, Akhil Amar, contends that *Kastigar* conflicts with other Fifth Amendment decisions, so the Court should overturn it.[209] Arguing that the Fifth Amendment only prohibits compelled *testimony*, he asserts that it does not bar the use of the fruits of a forced statement.[210] Amar proposes a new and elaborate procedure that in his view restores consistency to Fifth Amendment jurisprudence and adheres closely to the text of the Constitution. He argues that the Fifth Amendment ought to permit the government to compel all suspects to testify truthfully prior to trial and that the fruits of their testimony, but not the testimony itself, may be admissible at trial.[211] Courts may hold in contempt those defendants who refuse to testify, and those who give a false statement may face prosecution for perjury.[212] Amar would require courts to provide lawyers for all defendants, and he would move the interrogations from police stations to hearing rooms, where they would resemble civil depositions.[213]

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immunity, the Supreme Court noted that "[i]f the Government is engaged in an ongoing investigation of the particular activity at issue, immunizing new information . . . may make it more difficult to show in a subsequent prosecution that similar information was obtained from wholly independent sources." Pillsbury Co. v. Cunboy, 459 U.S. 248, 260 (1983).

209 *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE (1997).

210 *See id.* at 61-65.

211 *See id.* at 70-71.

212 *See id.* at 70.

213 *See id.* at 76-77. Amar argues for his view of the Fifth Amendment in part by contending that *Miranda* has permitted courts to overlook uncivilized police tactics leading to "genuine out-of-court coercion." *Id.* at 56. Yet he is less than clear as to whether he would permit any interrogation in the station house. At one point he indicates that he might favor a rule prohibiting all questioning without a lawyer present, *see id.* at 76, though he

Amar's views have prompted much dispute. Yale Kamisar, for example, has delivered a powerful critique of Amar's construction of the relevant cases and of the implications of his proposals.[214]

But we need not visit such a sea change upon our criminal justice system[215] to bring consistency to our Fifth Amendment jurisprudence. Although Amar correctly notes that the Supreme Court has permitted the State to compel a suspect to produce physical evidence even when the evidence may prove incriminating,[216] the presence of physical evidence does not render the privilege against self-incrimination irrelevant. Compelled production of physical evidence implicates the Fifth Amendment when the act of production "testifies to the existence, possession, or authenticity of the things produced."[217] The Court has never gone so far as to require a suspect to *tell* officers about evidence that prosecutors may use against him or her at trial; forcing an accused to testify about the existence of physical evidence certainly amounts to a *testimonial* act of production. Thus, *Kastigar*, which prohibits the use of physical evidence that police obtain through a forced oral or written statement, can cohere with cases requiring the actual, though nontestimonial, production of physical evidence.[218]

There is a simpler answer for those who crave consistency in interrogation law and practice: restore the original vision of *Miranda*. Consider a station house assertion of the right to counsel or the right to remain silent to be an invocation of the Fifth Amendment privilege

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also professes to be open to a "more relaxed" scheme, *id.* at 77. If Amar truly believes that formal deposition-like procedures are necessary prior to trial because of uncivilized, coercive tactics by the police, one wonders why he would be willing to allow those tactics prior to the formal pretrial deposition.

214 *See* Kamisar, *supra* note 18.

215 It seems hardly necessary to point out the sort of radical revision of our predominantly adversarial system that Amar's proposals entail. Moreover, his suggestions present enormous practical difficulties. If some members of law enforcement dislike the restrictions of *Miranda*, they may rebel at the notion that suspects generally may face questioning only in the presence of judges and lawyers. Moreover, these proposals likely will not assist the State significantly, especially in serious cases. One can foresee, for example, that a defendant charged with murder would accept a sanction for civil contempt rather than give an under-oath statement that leads police to evidence that would secure a conviction. In such a circumstance, the most that the prosecution would gain by this process is the ability to tell the jury that the defendant has refused to testify.

216 *See* AMAR, *supra* note 209, at 61-65; *see also* United States v. Dionisio, 410 U.S. 1, 5-7 (1973) (holding that forced production of voice exemplars is non-testimonial); United States v. Wade, 388 U.S. 218, 221-24 (1967) (concluding that participation in a lineup is non-testimonial); Schmerber v. California, 384 U.S. 757, 764-65 (1966) (holding that compelled production of blood sample is non-testimonial).

217 Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 555 (1990) (citing Doe v. United States, 487 U.S. 201, 209 (1988)).

218 Amar's suggestions also contravene other well-established principles, such as those that prevent the prosecution from commenting upon the defendant's exercise of the Fifth Amendment privilege. *See, e.g.*, Doyle v. Ohio, 426 U.S. 610, 611 (1976); Griffin v. California, 380 U.S. 609, 615 (1965).

and treat as compelled any statement that police deliberately take over that assertion.

C. The New Vision Exacerbates the Compelling Pressures Present in Custodial Interrogations

The new vision teaches that compliance with *Miranda*'s rules is optional; officers only need to give warnings and cease questioning when seeking a statement for the prosecution's case-in-chief. Under the new vision, the police probably will still give the warnings because if warnings are given and a suspect waives his or her rights, a court will admit at trial any resulting statement for all purposes. In most instances, only after a suspect has invoked his or her rights, and an officer has failed to obtain a waiver, will questioning continue "outside *Miranda*" in an effort to obtain a statement that has a limited use at trial or that may lead to other evidence. The majority in *Miranda* examined training manuals and concluded that custodial interrogations contain "inherently compelling pressures."[219] A review of current manuals confirms that the majority's conclusion is still appropriate today. To be sure, police no longer conduct week-long incommunicado interrogations.[220] Likewise, physical abuse rarely occurs; as the *Miranda* Court noted, "the modern practice of in-custody interrogation is psychologically rather than physically oriented."[221] Nevertheless, as the following subsections discuss, the underlying psychology of police interrogation has not changed since 1966. The current literature demonstrates that interrogation has become ever more sophisticated and that the new vision and the tactic of questioning "outside *Miranda*" easily may lead to a compelled statement.[222] In addition, the new vision has spawned an innovative and uniquely pernicious interrogation tactic, and statements that police obtain through that tactic are particularly suspect.[223]

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219 *Miranda*, 384 U.S. at 467.

220 The Supreme Court has held that the Fourth Amendment requires that suspects in custody receive a judicial determination of probable cause to detain within 48 hours. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991).

221 *Miranda*, 384 U.S. at 448. Physical coercion still surfaces occasionally. *See, e.g.*, United States v. Jenkins, 938 F.2d 934, 939-41 (9th Cir. 1991) (holding confessions were involuntary when defendant was beaten and threatened with death); Cooper v. Scroggy, 845 F.2d 1385, 1391-92 (6th Cir. 1988) (holding statements were involuntary when police hit at least one defendant); Zuliani v. State, 903 S.W.2d 812, 818-19, 823 (Tex. App. 1995) (holding statements were involuntary when officer lifted defendant off ground, shoved him against the wall, and made threats to get his "attention"); *see also* Mincey v. Arizona, 437 U.S. 385, 399-402 (1978) (holding statements were involuntary when officers did not touch defendant, but continued to question him while he was in great pain in a hospital bed).

222 *See infra* Part III.C.1.

223 *See infra* Part III.C.2.

1. *Questioning "Outside* Miranda*" and the Psychology of Interrogation*

There are several theoretical constructs of police interrogation. John Reid and his colleagues in Chicago have developed the most influential model and have published the leading interrogation manual for law enforcement officers. The Reid Model conceives of interrogation as "the undoing of deception" and posits that avoidance behavior primarily motivates a suspect's attempts at deception.[224] To obtain a confession, officers must (1) weaken the accused's resistance to making a statement and (2) increase his or her desire to talk to the police.[225] Although confession may be good for the soul, it is lousy for the defense.[226] Thus, in a typical case, to obtain statements from unwilling suspects, officers themselves must employ some form of deception. The police succeed by minimizing the perceived consequences of giving a statement or by demonstrating the futility of denying guilt.[227] Moreover, they must give a suspect a reason to speak with them.[228] They do this "by strategically manipulating the suspect's analysis of his immediate situation, structuring the choices before him and dwelling on the likely consequences that attach to these choices."[229] In this light, Richard Leo has aptly described police interrogation as a "confidence game."[230] "The essence of the con . . . lies in convincing the suspect that he and the interrogator share a common interest, that their relationship is a symbiotic rather than an adversarial one."[231]

The majority's opinion in *Miranda* prominently features the first edition of Reid's interrogation manual (which Fred Inbau co-au-

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224 Brian C. Jayne, *The Psychological Principles of Criminal Interrogation reprinted in* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 327, 327 (3d ed. 1986). Brian Jayne is the Director of Reid College of Detection of Deception, John E. Reid and Associates, Chicago. *See id.* For descriptions of the Reid Model and of other psychological models of interrogation, see GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 62-72 (1992).

225 *See* Brian C. Jayne & Joseph P. Buckley, *Criminal Interrogation Techniques on Trial,* PROSECUTOR, Fall 1991, at 23, 26; *see also* Jayne, *supra* note 224, at 332 ("An individual will confess (tell the truth) when he perceives the consequences of a confession as more desirable than the continued anxiety of deception.").

226 For this reason, "[a]ll approaches to the analysis of human behavior that presume rationality would, if applied superficially, classify confession as an irrational act." Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions,* 16 STUD. L. POL. & SOC'Y 189, 194 (1997).

227 *See* Jayne & Buckley, *supra* note 225, at 26-28.

228 *See id.*

229 *See* Ofshe & Leo, *supra* note 226, at 194.

230 Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game,* 30 LAW & SOC'Y REV. 259, 260-61 (1996) (stating that "the process, sequence, and structure of contemporary police interrogation bears many of the essential hallmarks of a confidence game").

231 *Id.* at 266.

thored).[232] In the current third edition,[233] Reid and his co-authors, Fred Inbau and Joseph Buckley, advocate a "nine step" approach to the interrogation of a suspect whose guilt appears reasonably certain. Inbau, Reid, and Buckley's first step directs interrogators to initiate a "direct, positive confrontation" with the accused.[234] At the very beginning of the first step, "the interrogator should finger through the case folder to create the impression that it contains material of an incriminating nature."[235] In the second step, officers develop and maintain a theme.[236] Some themes soften up a suspect (suggesting, for example, that a crime was morally justified); other more contentious themes seek to convince the suspect that remaining silent merely postpones the inevitable.[237] Under the third step, an interrogator deals with the suspect's expected denials. The manual explains that an accused usually denies guilt initially, and it directs the interrogator to confront the suspect again. The interrogator should not permit the accused to continue to deny, for this will bring "psychological fortification."[238] "In some instances, . . . the interrogator [may need] to feign annoyance as a tactic to stop a guilty suspect from repeating [the] denial."[239] By following these steps, the interrogator hopes to weaken

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232 *See Miranda*, 384 U.S. at 449-55. As already noted, while drafting the opinion, Chief Justice Warren asked the Supreme Court Librarian to contact Inbau and Reid's publisher to confirm that the book was distributed widely among members of law enforcement. *See supra* note 48.

233 *See* INBAU ET AL., *supra* note 224. Three Supreme Court opinions cite the third edition. *See* Davis v. United States, 512 U.S. 452, 470 n.4 (1994) (Souter, J., concurring); Stansbury v. California, 511 U.S. 318, 324 (1994) (per curiam); Moran v. Burbine, 475 U.S. 412, 459 n.45 (1986) (Stevens, J., dissenting). As one expert has written, "[a]lthough many police interrogation manuals have been produced . . . , undoubtedly the most authoritative and influential manual is the one written hy Inbau, Reid and Buckley." GUDJONSSON, *supra* note 224, at 31; *see also* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 118 (1997) (stating it is "[t]he most widely used manual"); Young, *supra* note 194, at 431 n.31 (stating it "is the best known manual on police interrogations").

234 INBAU ET AL., *supra* note 224, at 84.

235 *Id.* at 84-85.

236 *See id.* at 93.

237 *See, e.g., id.* at 97-99 (sympathizing with the suspect); *id.* at 99-101 (reducing feelings of guilt by minimizing moral seriousness of the offense); *id.* at 102-06 (suggesting a less revolting and more acceptable motivation for the offense); *id.* at 106-18 (blaming the victim, accomplice, or anyone else); *id.* at 120-25 (suggesting that victim may have exaggerated, and the truth can only be learned from the suspect); *id.* at 126-27 (pointing out futility of continued criminal behavior); *id.* at 128-29 (getting an admission of lying about an incidental aspect of the offense and then using this lie against the suspect in the interrogation); *id.* at 130 (having the suspect place himself or herself at the scene); *id.* at 131 (convincing the suspect that the evidence is overwhelming and there is no point in denying involvement); *id.* at 132-36 (playing one suspect off against another).

238 *Id.* at 142-44.

239 *Id.* at 147.

the suspect's resistance.[240] Interrogators then must increase the person's desire to confess. According to followers of the Reid model:

> One way to accomplish this objective is to express a concern to the suspect that if he does not tell the truth people may make false assumptions about why he committed the crime. The technique culminates by asking the suspect "alternative questions" which offer two descriptions about some aspect of the crime. The alternative questions are phrased so that either choice is incriminating.[241]

Other interrogation manuals convey similar messages. One manual, for example, instructs officers to "[e]stablish a friendly atmosphere, but never let the suspect develop any doubt about your competence and your complete control of the interrogation."[242] The interrogator must "undermine [the accused's] confidence in escaping."[243] Then an officer may try to make submission seem "tolerable" and downplay the negative consequences of a confession.[244] According to another expert, "it is safe to say that modern practices of in-custody interrogation are psychologically based and similar in some respects to brainwashing techniques."[245] The same expert notes that the interrogation room should be free from distractions, emphasizing the invincibility of the police. In this unfamiliar environment and away from friends, the suspect becomes "dependent on the investigating officer."[246]

Richard Leo's study of police interrogations in three northern California cities confirms the use of these techniques. He tracked the tactics that officers employed during 182 interrogations and reported the percentage of interrogations in which police had used these tactics. Police frequently confronted the suspect with evidence of guilt (85% of interrogations); undermined the suspect's confidence in denial (43%); identified contradictions in the story (42%); offered moral justifications or excuses (34%); confronted the suspect with false evidence of guilt (30%); and minimized the moral seriousness of the offense (22%).[247] He notes that a common strategy was "to tell the suspect that they are here to discuss why, not whether, the suspect committed the crime."[248] Consistent with their training to avoid express promises of leniency, they effectively communicated these

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240 *See* Jayne & Buckley, *supra* note 225, at 26-27.

241 *Id.* at 28.

242 ROBERT F. ROYAL & STEVEN R. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION 119 (1976) (emphasis omitted).

243 *Id.* (emphasis omitted).

244 *Id.* at 122-28.

245 A. DANIEL YARMEY, UNDERSTANDING POLICE AND POLICE WORK 157 (1990).

246 *Id.* at 158.

247 *See* Leo, *supra* note 153, at 278.

248 Leo, *supra* note 230, at 274.

promises implicitly by inviting the suspect to imagine how prosecutors or juries would perceive the case if no statement was made.[249]

Several experimental psychologists have demonstrated the powerful impact of Inbau, Reid, and Buckley's techniques. Saul Kassin and Karlyn McNall tested subjects' reactions to interrogation transcripts that included "minimization" and "maximization" strategies.[250] In the "minimization" condition, the officer offered the suspect an excuse or moral justification for the crime; in the "maximization" condition, the officer used high-pressure tactics, such as "exaggerating the strength of the evidence and the seriousness of the offense."[251] Suspects who endure questioning with the maximization techniques, Kassin and McNall's subjects believed, would receive harsher sentences than a control group of suspects who were not interrogated.[252] Kassin and McNall also determined that although minimization techniques may appear non-coercive (at least under *legal* definitions of coercion), these techniques create expectations of leniency just as effectively as explicit promises of leniency.[253] More recently, Kassin and Katherine Kiechel constructed an experiment in which subjects were falsely accused of deleting data accidentally as they typed letters on a computer.[254] In a group of subjects that typed the letters rapidly (apparently increasing their willingness to believe that they could have deleted the data accidently with a wrong keystroke), 69% signed written confessions admitting that they had deleted the data and 12% internalized or came to believe that they in fact had committed the false act.[255] Kassin and Kiechel repeated the same experiment with another group of subjects, but modified it to include a common interrogation tactic: a witness claims to have seen the subjects hit the computer key that deleted the data. In this situation, every subject signed a written confession admitting the false allegation, and 65% internalized the false claim.[256] Other researchers have explored the varying impacts of these interrogation techniques upon suspects with different personality types, noting the danger of false confessions under generally noncoercive circumstances.[257]

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249 *See id.* at 275-79.

250 *See* Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233 (1991).

251 *Id.* at 236.

252 *See id.* at 237-38.

253 *See id.* at 241.

254 *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 126-27 (1996).

255 *See id.* at 127.

256 *See id.*

257 *See, e.g.*, Gisli H. Gudjonsson, *One Hundred Alleged False Confession Cases: Some Normative Data*, 29 BRIT. J. OF CLINICAL PSYCHOL. 249 (1990) (reporting highly significant differences in intelligence, suggestibility, and compliance among groups of subjects referred by

The Court justified *Miranda*'s rules on the grounds that the custodial interrogations of the time, such as those that Inbau and Reid's first edition addresses, contain inherently compelling pressures and that the Fifth Amendment must require certain procedures to dispel them. One now must ask whether the current interrogation techniques, such as those described in the third edition of Inbau, Reid, and Buckley's manual, still produce these influences and whether the conjunction of these techniques, and the strategy of questioning "outside *Miranda*," acts to relieve or intensify any of these pressures. The remainder of this subsection argues that the justification for *Miranda* holds today.

First, the current interrogation manuals, along with field and experimental research, show that station house interrogations remain inherently coercive.[258] Inbau, Reid, and Buckley's third step, for example, instructs officers not to allow a suspect to continue with his or her denials.[259] Surely conduct that prevents an accused from asserting innocence coerces the suspect.[260] Moreover, telling suspects that

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lawyers and courts as having allegedly confessed falsely, compared with other forensic referrals). Several articles offer overviews of interrogation tactics, personality types, and theories and descriptions of false confessions. *See, e.g.*, GUDJONSSON, *supra* note 224, at 205-59; Gisli H. Gudjonsson & Hannes Petursson, *Custodial Interrogation: Why Do Suspects Confess and How Does It Relate to Their Crime, Attitute and Personality?*, 12 PERSONALITY & INDIVIDUAL DIFFERENCES 295 (1991) (investigating offenders' stated reasons for confessing); Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221 (1997) (advocating further research to study risk of false confessions); Richard J. Ofshe and Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) (analyzing causes of false confession); White, *supra* note 233, at 121-35 (describing various examples of false confessions). *But see* Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123, 1125-26 (1997) (arguing that studies lack empirical evidence that false confessions occur with substantial frequency).

258 The second edition of Inbau and Reid's interrogation manual shows quite starkly how little *Miranda* changed overall interrogation tactics, apart from requiring police to administer warnings and obtain waivers. In the introduction to the second edition, published shortly after *Miranda*, the authors state:

> As we interpret the June, 1966, five to four decision of the Supreme Court of the United States in *Miranda v. Arizona*, all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used after the recently prescribed warnings have been given to the suspect under interrogation, and after he has waived his self-incrimination privilege and his right to counsel. The Court's critical comments about the procedures we advocated were, we believe, for the purpose of establishing the necessity for the warnings rather than as a condemnation of the procedures themselves.

FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (2d ed. 1967) (footnote omitted).

259 *See* INBAU ET AL., *supra* note 224, at 142-44.

260 In State v. Hermes, 904 P.2d 587 (Mont. 1995), the court upheld a finding that a statement was involuntary when the officer's "entire interrogation . . . was premised on [the officer's] belief" that the accused had committed the crime. *Id.* at 589. The officer structured his questions so that the defendant "could not effectively deny" his involvement.

silence will lead to "false assumptions" about their behavior coerces a suspect as well, arguably misleading him or her about the legal consequences of asserting the Fifth Amendment right. Even with proper *Miranda* warnings, this technique might lead a suspect to believe that asserting the right to remain silent will have negative repercussions at trial. Aside from whatever conclusions reasonable persons would draw from the interrogation manuals themselves, psychological studies show the powerful coercive impact of sophisticated interrogation techniques upon suspects—even upon those who have done nothing wrong.

Second, when coupled with these interrogation techniques, the practice of questioning "outside *Miranda*" exacerbates the pressures that are present in a custodial interrogation. Questioning "outside *Miranda*" precisely matches the modern psychology and strategy of interrogations. The interrogator strives to convince the accused that it is futile to deny culpability and that the interrogator has complete control. Nothing communicates that message more powerfully than an officer's express statement that the right to remain silent and the right to counsel exist only in theory and that the officer will not respect them. Suspects quickly discover the intentional implication: only those who give a statement may leave the interrogation room. Ironically, this practice may impact repeat offenders most harshly. Because of their greater experience with the law, they are more likely to appreciate the extreme nature of the officers' conduct and therefore have a greater reason to fear the worst.[261] Although "outside *Miranda*" training materials warn officers to avoid "coercion"[262] when questioning "outside *Miranda*," teaching officers that it is permissible to continue "non-coercive" questioning after the invocation of Fifth Amendment rights ignores the inherently coercive impact of such questioning and provides no useful guidance or limits. Thus, the practice of questioning "outside *Miranda*" significantly intensifies the pressures already inherent in a station house interrogation, for it takes away suspects' ability to cut off questioning and does so in a way that underscores the raw, seemingly unchecked, power of the interrogator.[263]

Id. While this was only one factor in the totality of the circumstances, it was a strong factor supporting the conclusion that the statement was involuntary. *See id.*

261 I am grateful to Richard Ofshe for this observation.

262 *See supra* notes 139, 143, 148 and accompanying text.

263 The Supreme Court has acknowledged that continuing to question over an invocation of the Fifth Amendment intensifies these coercive pressures. In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court ruled that after a suspect invokes the Fifth Amendment, officers may not reinterrogate the suspect even if the interrogation concerns a different offense. *See id.* at 677-78. The majority noted that "to a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any

2. *The Newest Tactic*

Taken to its logical extreme, the new vision allows aggressive misuse of *Miranda* to help convince suspects to talk to police. Because officers who subscribe to the new vision believe that violating *Miranda* produces only limited evidentiary consequences, some officers assure defendants that they cannot incriminate themselves because they have invoked their Fifth Amendment rights. Richard Leo reports this practice in the interrogations he observed. In each of the interrogations in which officers questioned an accused who had invoked the Fifth Amendment, "the detective(s) informed the suspect that any information the suspect provided to the detective could not and therefore would not be used against him in a court of law. The detective told the suspect that the sole purpose of questioning was to learn 'what really happened.'"[264] Appellate courts in Nebraska, Georgia, and California also have noted this tactic.[265]

The interrogation of James McNally, one of the plaintiffs in *California Attorneys for Criminal Justice v. Butts*, shows the impact of questioning "outside *Miranda*" and the power of this new, aggressive technique. Police arrested McNally for a homicide, and detectives from the Santa Monica Police Department questioned him. He initially waived his rights and made a statement.[266] After detectives said that they did not believe his story, however, McNally told them that he did not want to make a further statement and that he wanted to talk with a lawyer.[267] The questioning continued:

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further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." *Id.* at 686.

264 Leo, *supra* note 153, at 276. As Leo pointed out:

> Of course, what the detectives knew and did not tell the suspect was that although the prosecution could not use such evidence as part of its case-in-chief, any information the suspect provided to the detective could be used in a court of law to impeach the suspect's credibility, and indirectly incriminate the suspect if he chose to testify at trial.

Id. (footnote omitted).

265 *See* People v. Bey, 27 Cal. Rptr. 2d 28, 30 (Ct. App. 1993) (reporting that officers told suspect, "you realize you didn't waive your rights. That means we can't use 'em [statements] in court," and asked the suspect if he was familiar with "outside Miranda" (internal quotation marks omitted)); Linares v. State, 471 S.E.2d 208, 211 (Ga. 1996) (noting that officer continued to question after the assertion of the right to counsel, telling the defendant "'that any information that he may give could not be used against him'"); State v. Favero, 331 N.W.2d 259, 261 (Neb. 1983) (noting that officer continued to question after invocation of right to counsel "and stated that as long as an attorney was not present, any statement made could not be used as an admission in court, so the defendant could tell him 'off the record' what his side of the story was"); State v. Harper, 304 N.W.2d 663, 668 (Neb. 1981) (finding that after accused invoked right to counsel, "the police promised the defendant that any statement made would never be used against him").

266 *See* Transcript of Interview of James McNally at 2-5, People v. McNally (No. SA-013191) (Mar. 2, 1993) (on file with author).

267 *Id.* at 42-46, 53-54.

Det. Talbot: Okay, now, let me, let me explain to you what's happened. You've basically invoked your Right to have an attorney . . .

McNally: Right.

Det. Talbot: . . . okay? At this point, nothing that you say can be used against you in Court . . . in California because you have invoked your Right to have an attorney.

McNally: Right.

Det. Talbot: I still would like to know what happened now because—well, I'll tell you where I come from. I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either.[268]

The officers persisted:

Det. Talbot: . . .[I]f you were in our place, would you trust something that somebody told you after they talked to an attorney? . . . [T]he deal is here. It's up to them . . . to talk about it. The only thing is, everything that falls after this—we'll go in one direction based on the physical evidence and the statements that we have. If we don't have anything to the contrary, that's the direction we're gonna' go and we're gonna push it.

McNally: Right.

Det. Talbot: Okay, and fuck your attorney. It's just—I don't care about him anymore.

McNally: Yeah.

Det. Talbot: Okay. As far as I'm concerned, you know, they really mess up the system. I wanna' know now what you're gonna tell me later. It can't be used against you. We . . .

Det. Cooper: This is your opportunity.

Det. Talbot: . . . told you that.

Det. Cooper: And it's—this is your opportunity and it's not gonna' be used against you . . .

McNally: . . . Alright. I'll . . . and this can't be used against me.

Det. Cooper: No, absolutely . . . [W]e're promising you, it's not gonna' be used against you—in the case in chief—against you, okay? Just, this is for our edification of what happened.

McNally: Well, anyway, he picked me up outside, outside the Oar House, okay? He asked me if I wanted to go have some beers . . . .[269]

At its logical conclusion, the new vision transforms *Miranda* from a decision that protects a suspect into a new and aggressive tool for

268 *Id.* at 54-55.
269 *Id.* at 56-58.

law enforcement. Under this practice, officers comply with the warning requirements of *Miranda*, but then represent that the suspect's assertion of rights makes a full statement perfectly safe. Of course, given the current use of the statements to impeach and to discover other evidence, the officers' assurances at best mislead the suspect and at worst directly deceive him or her regarding the true state of the law. In the interrogation of James McNally, the officers subtly added that the prosecutor could not use any statement against him "in the case in chief." This statement may correctly represent their interpretation of the law, but it deliberately revises *Miranda*'s warnings in a manner that suspects will not likely understand. This interrogation tactic represents the unappealing endgame of the new vision. If it ever pervades our system, we inevitably will realize that half a *Miranda* rule is worse by far than no rule at all.

D. We Still Need Bright-Line Rules

Although the Supreme Court intended *Miranda*'s bright-line rules to prevent police from using coercive tactics and to decrease the number of due process challenges to the admission of statements, *Miranda* does not displace the Fourteenth Amendment entirely. An accused may move to suppress custodial statements under both *Miranda* and the Fourteenth Amendment.[270] Decisions such as *Harris v. New York*, *Oregon v. Hass*, and *Michigan v. Tucker*, by undermining *Miranda*, give defendants a real incentive to raise Fourteenth Amendment claims in addition to those under *Miranda* because an involuntary statement is inadmissible for any purpose, including impeachment.[271]

The Court has refined the test for voluntariness under the Fourteenth Amendment in the years since it decided *Miranda*, but it still has not articulated a precise standard. The Supreme Court has ruled that courts cannot suppress a statement as involuntary absent some action by the police, for without state action there can be no "coercion."[272] For example, the fact that a suspect is mentally ill and that his or her statement is something other than the product of a "free will"[273] does not qualify the statement as involuntary under the Fourteenth Amendment; police conduct must contribute to eliciting the

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270 An accused who has made a statement under circumstances in which officers do not need to give *Miranda* warnings, such as when a defendant is not in custody, cannot raise *Miranda*, but still may move to suppress the statement as involuntary. *See, e.g.*, United States v. Walton, 10 F.3d 1024, 1028-32 (3d Cir. 1993) (finding that a statement made by an out-of-custody defendant was involuntary when agent promised that the conversation was "off the cuff").

271 *See* Mincey v. Arizona, 437 U.S. 385, 397-98 (1978) (finding that involuntary statements made while defendant was hospitalized could not be used in court).

272 Colorado v. Connelly, 479 U.S. 157, 165-67 (1986).

273 *Id.* at 169-70. Albert Alschuler contends that the pre-*Connelly* efforts to assess whether a confession was the product of a free will were misguided, and he forcefully

statement. Nevertheless, the test remains soft and value-laden. In *Miller v. Fenton*[274] the Court refused to treat a state court determination of voluntariness as a finding of fact that would be presumed correct on federal habeas corpus review.[275] The question of voluntariness, Justice O'Connor wrote for the Court, "has always had a uniquely legal dimension," turning on whether the officers' techniques comport with our accusatorial system.[276] Once again, the Court noted that the Fourteenth Amendment provides no precise standard and concluded that the "hybrid quality of the voluntariness inquiry" subsumes "a 'complex of values.'"[277]

The Court may have revisited the traditional test for voluntariness since *Miranda*, but the essential character of this test remains unchanged. It draws upon and reflects the values of an ever-shifting judiciary and an ever-changing society. Admittedly, certain forms of police conduct, such as threats of physical violence[278] and threats concerning the custody of children,[279] usually will lead to a finding of involuntariness—even under a totality of the circumstances approach. Yet apart from these plain cases, appellate decisions fail to give police and trial courts adequate guidance on what conduct will make a statement involuntary, particularly when a suspect claims that police used psychological coercion.[280] In these circumstances, the voluntariness

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argues that the shift in focus to police conduct is entirely appropriate. *See* Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 958-60 (1997).

274 474 U.S. 104 (1985).

275 *See id.* at 115-18.

276 *Id.* at. 116.

277 *Id.* (quoting Blackburn v. Alabama, 361 U.S. 199, 207 (1960)).

278 *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 287-88 (1991) (holding that statement was involuntary due to credible threat of physical violence).

279 *See, e.g.*, Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (holding confession involuntary because of oral threat that aid to children would be cut off and children would be taken away unless the accused cooperated); United States v. Tingle, 658 F.2d 1332, 1335-37 (9th Cir. 1981) (finding statement involuntary when officer's comments led the suspect to believe that unless she cooperated, she would not see her child for a long time).

280 *Compare, e.g.*, Thompson v. State, 768 P.2d 127, 131-32 (Alaska Ct. App. 1989) (statement not made involuntary by officer's suggestion that if the defendant talked, he might be guilty only of a lesser charge and serve only two to five years), McIntyre v. United States, 634 A.2d 940, 944-45 (D.C. 1993) (statement voluntary when officer lied about evidence implicating the accused), People v. Hardy, 391 N.W.2d 412, 413, 416-17 (Mich. Ct. App. 1986) (statement held voluntary despite officer's promise to talk to prosecutor and "possibly" get a reduction on criminal charges), State v. Marini, 638 A.2d 507, 512-13 (R.I. 1994) (statement not coerced by officer's comment that the defendant would be better off by confessing and even could get probation), *and* State v. Kelly, 603 S.W.2d 726, 729-30 (Tenn. 1980) (defendant's will not overborne by officer's promise to ask prosecutor not to oppose probation), *with* People v. Cahill, 28 Cal. Rptr. 2d 16 (Ct. App. 1994) (statement held involuntary when, among other things, officer impliedly promised that the defendant could avoid first degree murder by giving a confession that showed no premeditation), People v. Gordon, 149 Cal. Rptr. 91-94 (Ct. App. 1978) (statement held involuntary when parole officer told the defendant that the parole authorities might wonder why he had refused a polygraph and that the results of the polygraph would be made available to the

inquiry has not advanced much since 1963, when the Supreme Court noted that the line between permissible and impermissible police conduct "is, at best, a difficult one to draw."[281]

Given the inability of the courts to articulate a precise test for voluntariness, a primary virtue of *Miranda* remains its clarity, as the Supreme Court has stated repeatedly.[282] In *Tucker*, Justice Rehnquist wrote for the Court that *Miranda* seeks "to help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost."[283] For this reason, several Justices who initially had opposed *Miranda* later modified their views,[284] and the decision

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police), State v. Rhiner, 352 N.W.2d 258, 263 (Iowa 1984) (statement held involuntary when officers told the defendant that other charges might be filed against him unless he cooperated), State v. Grey, 907 P.2d 951, 954-55 (Mont. 1995) (statement held involuntary when officer lied about strength of prosecution's evidence and the extent of thefts), State v. Hermes, 904 P.2d 587, 588-90 (Mont. 1995) (statement held involuntary when officer asked questions in a way that assumed guilt and did not permit the defendant to effectively deny incident), Commonwealth v. Nester, 661 A.2d 3, 5-6 (Pa. Super. Ct. 1995) (statement coerced by caseworker's promise of counseling and claim that it would be harder to talk with the police), *and* State v. Strain, 779 P.2d 221, 225-27 (Utah 1989) (remand for hearing on voluntariness when officer told the suspect that if he talked, he could get second- instead of first-degree murder).

281 Haynes v. Washington, 373 U.S. 503, 515 (1963).

282 *See, e.g.*, Minnick v. Mississippi, 498 U.S. 146, 151 (1990) ("The merit[s] of the *Edwards* decision lies in the clarity of its command and the certainty of its application."); Arizona v. Roberson, 486 U.S. 675, 680 (1988) ("A major purpose of the Court's opinion in *Miranda* . . . was 'to give concrete constitutional guidelines for law enforcement agencies and courts to follow.'") (quoting *Miranda*, 384 U.S. at 441-42); Moran v. Burbine, 475 U.S. 412, 425 (1986) ("As we have stressed on numerous occasions, '[one] of the principal advantages' of *Miranda* is the ease and clarity of its application.") (quoting Berkemer v. McCarty, 468 U.S. 420, 430 (1984)); Fare v. Michael C., 442 U.S. 707, 718 (1979) ("*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.").

283 Michigan v. Tucker, 417 U.S. 433, 443 (1974).

284 Justice Tom Clark was one of the dissenting Justices in *Miranda*. He wrote that the majority's decision would impair, if not wholly frustrate, the ability of police to secure confessions. *See Miranda*, 384 U.S. at 499-503 (Clark, J., dissenting). Just two years later, however, he modified this opinion. *See* Tom C. Clark, *Observations: Criminal Justice in America*, 46 TEX. L. REV. 742, 745 (1968) (admitting that he erred in predicting that *Escobedo* and *Miranda* would have an adverse effect upon the investigation and prosecution of crimes).

Justice Byron White, another of the original dissenters, wrote a passionate opinion contending that the decision would weaken law enforcement measurably. *See Miranda*, 384 U.S. at 526, 541-42 (White, J., dissenting). A frequently quoted portion of his dissent states that "[i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets . . . to repeat his crime whenever it pleases him." *Id.* at 542. White never changed his view that *Miranda* was wrongly decided. *See* Clifford May, *On Judges and Justice: Byron White Reflects on Court and Critics*, ROCKY MOUNTAIN NEWS, June 30, 1996, at 69A ("I thought *Miranda* was wrong. I still do, but it's the law." (quoting Byron White)). Nevertheless, White would go on to write the majority opinion in *Edwards v. Arizona*, 451 U.S. 477 (1981), which adopted a bright-line rule to protect the ability of a suspect to invoke the right to counsel, and he joined the five-to-four majority in *Withrow v.*

subsequently has gained a large measure of support among members of the law enforcement community.[285]

Williams, 507 U.S. 680 (1993), which kept *Miranda* claims within the reach of federal habeas corpus.

Justice Harry Blackmun was not on the Court when it decided *Miranda*. He later described himself as "no great fan of that decision." Letter from Justice Harry A. Blackmun to Justice Byron White 1 (Dec. 23, 1980) (on file with the Library of Congress in the Papers of William J. Brennan, Container 568, File "*Edwards v. Arizona*, No. 79-5269"). Yet like White, Blackmun joined the majority opinions in *Edwards* and *Withrow*.

Justice Lewis Powell, Jr. also was not on the Court when it decided *Miranda*. He served on a Presidential Commission prior to his appointment to the bench, however, and issued a minority statement attacking *Miranda*. A separate statement he joined suggested that whatever could be done "to right the present imbalance through legislation or rule of court" should have priority; failing that, he suggested a constitutional amendment to overrule *Miranda*. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 679-80 (1967) (Additional Views of Messrs. Leon Jaworski, Ross L. Malone, Lewis F. Powell, Jr., and Robert G. Storey). Powell's opinions on *Miranda* and the Warren Court, among other things, brought him to the attention of the Nixon Administration and helped lead to his nomination to the Supreme Court. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 214 (1994). Once on the Court, however, Powell also moderated his views. Though he generally sided with the majority in cases that interpreted *Miranda* narrowly, he did not seek to overturn *Miranda*. *See id.* He even wrote the opinion for the Court in *Doyle v. Ohio*, 426 U.S. 610 (1976), which protected suspects' ability to invoke their Fifth Amendment rights by holding that prosecutors could not comment on defendants' postarrest silence. As Powell's biographer has noted, Powell opposed *Miranda* when it was announced, but "accepted it when he came to the Court several years later. By that time, much of the price for the reform of police practices had already been paid, and the benefits derived from the rule were more and more apparent." JEFFRIES, *supra*, at 403-04 (footnote omitted).

Chief Justice Warren Burger also joined the Court after it had decided *Miranda*. Yet his rulings while he served on the U.S. Court of Appeals for the D.C. Circuit, together with his writings and speeches prior to his appointment to the Supreme Court, made clear that he did not favor the ruling. *See* BAKER, *supra* note 45, at 194-97, 274-75. Shortly after Burger joined the Court, he told the other Justices that they should overrule a number of Warren Court decisions, including *Miranda*, and Burger looked carefully for the votes to do so. *See* WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 231-32 (1980). By 1980, Burger had come to an accomodation, writing that "[t]he meaning of *Miranda* has become reasonably clear . . . ; I would neither overrule *Miranda*, disparage it, nor extend it at this late date." Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring in the judgment).

285 Four police organizations (the Police Foundation, Police Executive Research Forum, International Union of Police Associations, and National Black Police Association) and 51 former prosecutors filed an amicus curiae brief in *Withrow v. Williams*, 507 U.S. 680 (1993). They asked the Court not to take *Miranda* claims out of the reach of federal habeas corpus in part because "[t]he law enforcement community has seen the enforcement of *Miranda* and its progeny lead to an increased professionalism within police and sheriff's departments throughout the country. *Miranda*'s bright-line rules have proved relatively easy to follow." Brief Amici Curiae of The Police Foundation et al. in Support of Respondent at 7, *Withrow* (No. 91-1030). Others in law enforcement share these views. *See, e.g.*, Conrad V. Hassell, *In Defense of Fairness: The Need for* Miranda, POLICE CHIEF, Dec. 1987, at 12 (defending *Miranda*, a former FBI section chief writes that "[r]ather than being anti-law enforcement, *Miranda* could be viewed as an heroic attempt by the Warren Court to rescue law enforcement from a situation that had become impossibly confused and difficult"); Eduardo Paz-Martinez, *Police Chiefs Defend* Miranda *Decision Against Meese Threats*, BOSTON GLOBE, Feb. 5, 1987, at 25 (stating that members of the Massachusetts Police Association felt that "the demise of *Miranda* would set civil rights in law enforcement back to

The years after *Miranda* have not diminished the need for bright-line rules. Abandoning the original vision of *Miranda* leaves courts and police to struggle with case-by-case determinations of voluntariness. In contrast, by complying with *Miranda*, officers largely avert the need for a voluntariness inquiry. In the overwhelming majority of cases, a court will find that a suspect who received proper warnings and waived his or her Fifth Amendment rights made a voluntary statement.[286] Furthermore, apart from the notion that a fully informed waiver usually negates a claim of coercion, *Miranda* has made it easier to resolve a motion to suppress a statement under the Fourteenth Amendment. Because courts typically view an officer's violation of *Miranda* as a significant indicator of a coerced statement under the totality of the circumstances analysis,[287] complying with *Miranda* bolsters a prosecutor's position under the Fourteenth Amendment.

Some critics of *Miranda*, however, argue that we do not need bright-line rules because other procedures adequately safeguard Fifth Amendment rights. For example, Paul Cassell, possibly *Miranda*'s most ardent critic today, proposes that the Court modify the warnings to dispense with the offer of counsel, and he suggests that courts no longer require officers to terminate the interrogation when a suspect invokes his or her rights.[288] He also argues that "[v]ideotaping interrogations would certainly be as effective as *Miranda* in preventing police coercion and probably more so."[289] But these proposals give no

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the gray days of the early 1960s"); Burt Solomon, *Meese Sets Ambitious Agenda That Challenges Fundamental Legal Beliefs*, 17 NAT'L J. 2640, 2641-42 (1985) ("'The *Miranda* warnings are simple and easy to give and are known by everyone. . . . There's real benefit in keeping things stable.'" (quoting former Associate Attorney General Rudolph Giuliani)); Benjamin Wittes, *DOJ Forced to Review Merits of* Miranda *Law*, RECORDER, Aug. 15, 1997, at 1 (quoting legislative assistant with the Fraternal Order of Police as stating that there "wouldn't be a movement among law enforcement organizations to change *Miranda*. . . . [A]nd our members are not telling us this needs to happen. It's been around for 30 years"). This commentary does not mean, of course, that this view predominates in the law enforcement community.

286 Even several experts who reject the premise of *Miranda*—that interrogations may be psychologically coercive—argue that "if the suspect has made no attempt to terminate the interrogation, he cannot legitimately claim that his confession was compelled." Jayne & Buckley, *supra* note 225, at 30.

287 *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 399 (1978); People v. Esqueda, 22 Cal. Rptr. 2d 126, 134-35 (Ct. App. 1993); Linares v. State, 471 S.E.2d 208, 212 (Ga. 1996); Hof v. State, 655 A.2d 370, 380 (Md. 1995); State v. Burris, 679 A.2d 121, 135-36 (N.J. 1996); State v. Taillon, 470 N.W.2d 226, 229 (N.D. 1991); Green v. State, 934 S.W.2d 92, 98-99 (Tex. Crim. App. 1996); State v. Mabe, 864 P.2d 890, 893 n.6 (Utah 1993).

288 *See* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 Nw. U. L. REV. 387, 496-97 (1996). These proposals also were made by the Justice Department's Office of Legal Policy in its 1986 report. *See* OLP REPORT, *supra* note 117, at 554-56, 560. Cassell served as Associate Deputy Attorney General under Edwin Meese from 1986-1988.

289 Cassell, *supra* note 288, at 487, 497; *accord* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 Nw. U. L. REV. 1084, 1118-24 (1996) (arguing that videotaping is an appropriate substitute for *Miranda*).

guidance at all to police and the trial courts.[290] Telling officers that they need not cease questioning when a suspect invokes his or her rights simply sends police and courts back into the Fourteenth Amendment morass of soft standards. Without a bright-line rule, how does an officer or a judge decide the point at which questioning overcomes a suspect's will? The number of times an accused asserts his or her rights certainly plays a role in the voluntariness inquiry. But must a suspect invoke several times to show that he or she is truly serious about remaining silent? *Miranda* simply presumes coercion when interrogation continues after a single invocation of the right to counsel or the right to remain silent. Will we eventually replace this clear rule with a three, five, or fifteen invocation rule?[291] Admittedly, videotaping would help resolve disputes about what was actually said and done during an interrogation; further, officers who know that they are on videotape also may refrain from clearly inappropriate conduct.[292] Yet, in the end, videotaping cannot replace *Miranda*. A judge may review the videotape to decide a suppression motion, but will still decide the motion under a soft and value-laden standard.

The Supreme Court fashioned *Miranda*'s rules in part to provide clear guidance for both law enforcement officials and trial judges. The Fourteenth Amendment voluntariness test may capture our society's notions of justice and fair play broadly, but it does not set precise limits for police. Our voluntariness jurisprudence has not advanced substantially in the years since *Miranda*. We still need bright-line rules in the station house.

E. The New Vision Fosters Disrespect for Government and the Law

For over thirty years, the Supreme Court has stated consistently that when a person in custody asserts his or her Fifth Amendment rights, all questioning must cease. Though the proponents of the new vision of *Miranda* argue that *Harris*, *Hass*, and *Tucker* together hold that officers may continue to question a suspect who has asserted Fifth Amendment rights, the Court has never expressly permitted police to persist in questioning for the limited purpose of collecting impeach-

290 For a more detailed critique of these proposals, see Schulhofer, *supra* note 108, at 556-60.

291 Even Cassell concedes that "[c]ontinued persistence to convince a suspect to change his mind will, at some point, render a confession involuntary and thus inadmissible under Fifth Amendment principles." Cassell, *supra* note 288, at 497 n.634. However, Cassell fails to indicate when an interrogation reaches this "point."

292 For these reasons, others (including supporters of *Miranda*) also have urged the taping of interrogations. *See, e.g.*, YALE KAMISAR, Brewer v. Williams—*A Hard Look at a Discomfiting Record*, *in* POLICE INTERROGATION AND CONFESSIONS, *supra* note 166, at 113, 132-37; Richard Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 681-92 (1996); Schulhofer, *supra* note 108, at 556-57; White, *supra* note 233, at 153-55.

ment or other evidence. Rather, apart from the *Quarles* "public safety" exception, the Court consistently and unequivocally has declared that *all* questioning must cease when a suspect invokes his or her rights.[293] The new vision of *Miranda* allows officers to treat this unambiguous command as nothing more than a hortatory sentiment, which fosters disrespect for both government and the law.

By providing police officers with no incentive to obey clear judicial commands, the new vision diminishes the authority of the Supreme Court and of the courts that have sought to implement *Miranda.* In several respects, the new vision bears more than a passing resemblance to our Fourth Amendment jurisprudence prior to *Mapp v. Ohio.* The Supreme Court determined in *Wolf v. Colorado* that the Fourth Amendment right to be free from unreasonable searches and seizures applied to the states through the Fourteenth Amendment, but held that the exclusionary rule was not an essential component of that right.[294] As a result, citizens held the right in theory, but not in practice.[295] The *Mapp* Court eventually applied the Fourth Amendment exclusionary rule to the states in part because of its belief that "[n]othing can destroy a government more quickly than its failure to observe its own laws."[296] Here, any wound to the Supreme Court's authority from allowing the practice of questioning "outside *Miranda*" is mostly self-inflicted. After all, the Supreme Court itself has encouraged the practice by driving a wedge between *Miranda* and the Fifth Amendment and by creating incentives to violate *Miranda.* Nev-

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293 *See, e.g.,* Davis v. United States, 512 U.S. 452, 458 (1994) ("If a suspect requests counsel at any time during the interview, he is not subject to further questioning."); McNeil v. Wisconsin, 501 U.S. 171, 176-77 (1991) ("Once a suspect asserts the right [to counsel], . . . the current interrogation [must] cease."); Minnick v. Mississippi, 498 U.S. 146, 153 (1990) ("[W]hen counsel is requested, interrogation must cease."); Arizona v. Roberson, 486 U.S. 675, 682 (1988) ("[A]fter a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation.'" (quoting Edwards v. Arizona, 451 U.S. 477, 484-85 (1980))); Connecticut v. Barrett, 479 U.S. 523, 528 (1987) ("[O]nce the accused 'states that he wants an attorney, the interrogation must cease.'" (quoting *Miranda,* 384 U.S. 436, 474 (1966))); *Edwards,* 451 U.S. at 485 (once the right to counsel is "exercised by the accused, 'the interrogation must cease'" (quoting *Miranda,* 384 U.S. at 474)); Fare v. Michael C., 442 U.S. 707, 719 (1979) ("[A]n accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease."); *Miranda,* 384 U.S. at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (footnote omitted)).

294 *See* 338 U.S. 25, 28-33 (1949).

295 *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961).

296 *Id.* at 659. More recently, the Court has stated:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.

City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997) (citation omitted).

ertheless, the Supreme Court's clear public rulings—that questioning *must* cease upon a proper invocation—diverge so greatly from actual police interrogation practices that, whatever the cause, this gap threatens the integrity of the law and its institutions.[297] Obviously aware of this gap between the language in court opinions and police practice, authors of "outside *Miranda*" training materials boldly tell officers that "the courts have no authority to declare that non-compliance [with *Miranda*] is 'unlawful,' nor to direct the manner in which police investigate crimes."[298]

Moreover, by permitting officers to question suspects in violation of *Miranda*, the new vision adds to the public's distrust of law enforcement and complicates the work of the police. President Johnson's Crime Commission noted in 1967 that the way in which a police officer exercises discretion may "have an immediate bearing on the peace and safety of an entire community, or a long-range bearing on the work of all policemen everywhere."[299] The police rely upon citizens to report crimes and to assist with criminal investigations.[300] Indeed, the current movement towards community-oriented policing aims mostly at fostering mutual trust and cooperation between law enforcement and the public, and it responds to the limitations of the isolating and reactive earlier model of policing.[301] To the extent that

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297 Proponents of the new vision might attempt to counter this point by arguing that the new vision does not promote disrespect for the law because it is the law, as articulated in *Harris* and its progeny, that permits officers to question an accused over the assertion of the Fifth Amendment. The Court, however, has never expressly sanctioned such questioning. Instead, the Court publicly and repeatedly has pronounced that all questioning must cease. If the Court in the future expressly sanctions this conduct, that holding would constitute a retreat from earlier rulings but would not promote disrespect for the law—at least not in the same sense argued in this Article.

298 CALIFORNIA INTERROGATION OUTLINE, *supra* note 140, at 21.

299 PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *supra* note 284, at 92.

300 *See, e.g., Police Brutality: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 219 (1991) (statement of Gerald I. Williams, Chief of Police, Aurora, Colo. and President, Police Executive Research Forum) ("In order to be effective, the police must enjoy a good working relationship with their communities, predicated on feelings of mutual trust and understanding."); CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 204-05 (1978) (noting that the more that members of the public know and trust police, the greater the chances of solving and reducing crime); Lee P. Brown, *Police-Community Power Sharing, in* POLICE LEADERSHIP IN AMERICA 70, 71-74 (William A. Geller ed., 1985) (advocating for police and community partnership because each possesses unique power and information that the other lacks).

301 *See, e.g.*, JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW 251-52 (1993) (describing community-oriented policing as a response to the recognition that riding in two-person patrol cars does not reduce public fear of crime or engender trust in the police); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION 15-16 (1994) ("Establisbing and maintaining mutual trust is the central goal of the first core component of community policing—community partnership.... This trust will enable the police to gain greater access to valuable information from the community that could lead to the solution and prevention of crimes....");

the public believes that officers do not play by the rules, the public may be more reluctant to work with the police.[302] At the extreme end of the spectrum, some of our nation's most pronounced recent periods of social unrest occurred when the public perceived that officers had acted above the law or that the law tolerated these actions.[303]

Miranda is fast becoming a rule that the courts will not enforce and the police will not obey. Maintaining an unenforced and highly visible rule fosters disrespect for the government and legal institutions. We might do far better to abrogate *Miranda* than to allow its rules to exist in theory but not in practice.

F. The Answer Is Not in the Numbers

If we accept the new vision's premise that *Miranda*'s rules are non-constitutional, we ought to ask whether the original vision properly ranks Fifth Amendment values and other interests over the needs of the police. As part of this inquiry, we should consider both *Miranda*'s costs and its benefits. First, one must concede that this is truly a difficult endeavor. A cost/benefit analysis is utterly unsuited to the task, for there is no single metric that can encompass *Miranda*'s costs and its benefits. No empirical measure can capture dignitarian and certain other values, such as *Miranda*'s respect for individual autonomy. Second, even if we could find some hypothetical yardstick to assess *Miranda*'s benefits and costs, a simple balancing would not determine whether *Miranda* stands or falls. *Miranda* is a powerful expression of societal norms. We ought not sacrifice our fundamental principles for reasons of cost and expediency. Finally, Paul Cassel's

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George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing*, PERSP. ON POLICING, Nov. 1988, at 12 ("Community policing relies on an intimate relationship between police and citizens."); George L. Kelling & James K. Stewart, *Neighborhoods and Police: The Maintenance of Civil Authority*, PERSP. ON POLICING, May 1989, at 7-9 (criticizing police for maintaining the metaphor of officers as a "thin blue line" because the metaphor continues to separate officers from their communities).

302 *See, e.g.*, Alschuler, *supra* note 273, at 974-75 (arguing that police deception during interrogation "may breed mistrust for the police, limiting their ability to secure the cooperation of suspects, other citizens, and jurors who may be tempted to 'send them a message'" (footnote omitted)).

303 *See, e.g.*, PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *supra* note 284, at 92 ("Most of the recent big-city riots were touched off by commonplace street encounters between policemen and citizens."); REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 116-23, 299-322 (1968) (describing triggering events of riots, which often included incidents involving the police, and making recommendations for reform); Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1461-88 (1993) (discussing police abuse in Los Angeles and the disorder that followed the Simi Valley trial of the officers who beat motorist Rodney King); Robert M. Press, *Miami Riots: Don't Blame the Cubans*, CHRISTIAN SCI. MONITOR, June 10, 1980, at 23 (describing the riots in Miami that followed not guilty verdicts in the trial of officers who beat to death an African American insurance salesman).

work has illustrated that any reliable reckoning of *Miranda*'s "costs" still remains unattainable.

With respect to the first point, we must acknowledge that one cannot establish empirically the ordering of Fifth Amendment values (as well as the other interests embedded in the original vision) and the needs of law enforcement. These values, interests, and needs are incommensurate; they cannot be measured along the same scale.[304] One may describe the advantages of a particular interpretation of *Miranda*. One similarly may attempt to describe the impact that the original vision of *Miranda* has upon law enforcement. Nevertheless, the study of *Miranda*'s costs and benefits is a qualitative, not a quantative, inquiry. A reliable "cost" estimate might inform this study, but would not determine it.

The benefits of *Miranda* defy empirical analysis. Even if it were possible to quantify the cases that *Miranda* renders "lost," or not subject to legitimate prosecution, one cannot measure empirically the Fifth Amendment value of respect for individual autonomy or the value of retaining the predominantly adversarial character of our criminal justice system. Likewise, how does one weigh the need for a consistent Fifth Amendment jurisprudence or determine the extent to which *Miranda* has deterred the police from overreaching, given the sophisticated, psychological interrogation techniques that officers now employ? Even more difficult, how does one measure the loss of respect for the rule of law when officers deliberately determine not to follow clear Supreme Court rulings? These shortcomings of the empirical method demonstrate that one cannot place Fifth Amendment values and police expedience together on the same scale.

With respect to the second point, the Court in *Miranda* carefully described the values and interests that the decision furthers. In prescribing procedures to secure the privilege against self-incrimination and its corresponding values, the Court also sought to ease the impact of those procedures upon law enforcement. That the Justices consid-

304 Different writers define "incommensurability" in different ways. *See, e.g.*, Matthew Adler, *Law and Incommensurability*, 146 U. PA. L. REV. 1169, 1170-84 (1998) (describing three distinct usages of the term "incommensurability" employed by contributors to a single law review symposium). In addition, there is some debate over whether values or choices can ever be deemed incommensurate. *See generally* Richard Craswell, *Incommensurability, Welfare Economics and the Law*, 146 U. PA. L. REV. 1419 (1998) (arguing that most writings on incommensurability focus on individual choice and are not necessarily extendable to governmental action); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994) (setting out a provisional definition of incommensurability and arguing that different kinds of valuation cannot be reconciled without significant loss). Without attempting to resolve these debates, this Article uses the term "incommensurability" to mean that Fifth Amendment values and the "costs" of *Miranda* may not be measured on a cardinal scale. No empirical method exists to compare the benefits and costs of the original and new visions of *Miranda*.

ered the effect of their decision upon the police does not mean, as some have suggested, that rulings in *Miranda* and subsequent cases represent "a purely pragmatic, cost-benefit assessment."[305] Given its determination that the Fifth Amendment requires safeguards, one cannot fault the Court for implementing safeguards that have the least deleterious effect on law enforcement efforts. The Court's decisions do not contain any indication that one can place the values and interests *Miranda* protects on a scale alongside an estimate of "costs" and simply discard whenever costs seem to outweigh *Miranda*'s procedures. As with any rule that provides fundamental protections to those accused of crime, law enforcement pays a cost. We tolerate those costs because doing so ensures that our legal processes rest on long-standing principles instead of ever-changing balance sheets; because it affords fair process to the accused in accord with our traditions and beliefs; and because doing so ennobles us as a society, giving us added confidence of a just outcome of the case. If the Constitution does not require us to place Fifth Amendment values and other interests above the needs of law enforcement, then we ultimately must determine their relative importance in light of our own preferences, traditions, and beliefs.[306]

Finally, none of those who have evaluated *Miranda*'s costs and benefits have established a reliable measure of its costs. Though many contemporary observers conclude that officers have adjusted to *Miranda* and that the ruling does not unduly interfere with law enforcement,[307] Paul Cassell has sought to demonstrate that *Miranda* significantly damages law enforcement efforts. This Article discusses his writing because it represents the most detailed and determined empirical effort to measure *Miranda*'s costs. Cassell argues that the Court should abandon *Miranda*'s rules in favor of less costly, less pro-

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305 Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1129 (1998).

306 Herbert Packer made much the same point 30 years ago, positing two models of the criminal justice system (the "Crime Control" and "Due Process" models), each resting upon different underlying values. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-73, 186-94 (1968).

307 *See, e.g.*, SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC'Y OF THE ABA CRIMINAL JUSTICE SECTION, CRIMINAL JUSTICE IN CRISIS 28-34 (1988) (reporting the results of committee hearings and a telephone survey and concluding that *Miranda* does not present serious problems for law enforcement); Leo, *supra* note 230, at 285 (writing that *Miranda* has "transform[ed] police power inside the interrogation room without undermining its effectiveness"); Schulhofer, *supra* note 20, at 455-60 (collecting studies and arguing that *Miranda* has not impaired law enforcement); Yale Kamisar, Editorial, *Landmark Ruling's Had No Detrimental Effect*, BOSTON GLOBE, Feb. 1, 1987, at A27 (quoting Senator Arlen Specter, who as a prosecuting attorney participated in one of the early "impact" studies of *Miranda*, as stating that "whatever the preliminary indications . . . I am now satisfied that law enforcement has become accomodated to *Miranda*"). *But see* OLP Report, *supra* note 117, at 543-49 (arguing that *Miranda* has impaired the prosecution function and has damaged public confidence in the law).

tective alternatives. Yet even after using highly uncertain methodologies to calculate *Miranda*'s costs, he cannot assess its "benefits," of course, by the same metric. Indeed, in arguing that *Miranda* costs too much to maintain, he largely avoids any analysis of *Miranda*'s virtues.[308]

Cassell has published a series of articles in which he attempts to show that *Miranda* has generated a significant number of lost confessions and cases. In one article, he draws upon a collection of studies and asserts that *Miranda* is responsible for a drop of 16.1% in the confession rate,[309] leading to a loss of 3.8% of all prosecutions.[310] In another article, Cassell and Bret Hayman report the results of a 1994 study of interrogations in Salt Lake City and infer that the current confession rate dropped after *Miranda* became effective.[311]

In these articles, Cassell seeks answers to cost questions that are more than merely difficult to research empirically; they may well be *unresearchable.* Legal and ethical considerations forbid the construction of a rigorous, controlled experiment in which some defendants face interrogation under *Miranda* and some do not. For that reason, Cassell's earliest articles revisit dated studies of pre- and post-*Miranda* confession rates or seek to compare current confession rates with the pre-*Miranda* rates of those studies. These data, however, cannot properly support his conclusions because pre-*Miranda* studies are difficult to synthesize and both our country and criminal justice system have changed since *Miranda.* Consequently, the old data do not establish a sure baseline.

Stephen Schulhofer and other scholars have challenged Cassell's methodology and the conclusions of his earliest articles in far more detail than may be discussed here.[312] Schulhofer reviews Cassell's findings and estimates that the correct rate of decrease in confessions of the earlier studies is 4.1%, with at most 0.78% of convictions "lost"

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308 At the conclusion of their Salt Lake City study, which focuses on costs and does not analyze benefits, Cassell and Hayman argue that "the benefits of *Miranda* seem slim while the costs seem substantial." Cassell & Hayman, *supra* note 150, at 921; *see also* Cassell, *supra* note 288, at 486-97 (arguing that *Miranda* imposes unnecessary costs, but not evaluating *Miranda*'s benefits); Cassell & Fowles, *supra* note 305, at 1126-32 (arguing again that *Miranda* imposes unnecessary costs given other possible alternatives, such as videotaping, but not analyzing whether Fifth Amendment values would be protected under those alternatives).

309 *See* Cassell, *supra* note 288, at 416-17.

310 *See id.* at 438.

311 *See* Cassell & Hayman, *supra* note 150, at 917-18.

312 *See* Schulhofer, *supra* note 108, at 506-15 (criticizing Cassell's reliance on the old studies); George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions,* 43 UCLA L. REV. 933, 944-57 (1996) (critiquing Cassell and Hayman's use of data in their Salt Lake City study); *see also* Cassell, *supra* note 289 (responding to Schulhofer's critique); Stephen J. Schulhofer, Miranda *and Clearance Rates,* 91 Nw. U. L. REV. 278, 278-79 (1996) (standing by his earlier critique of Cassell's work).

due to *Miranda*.[313] Cassell's methodology is problematic: he revisits certain older studies, disregards unfavorable data (including the results of a Los Angeles study that finds an *increase* in confessions after *Miranda*), and calculates an "average" pre-*Miranda* confession rate.[314] But most of the pre- and post-*Miranda* studies that Cassell uses occurred prior to 1970.[315] Thus, even if one accepts Cassell's questionable revisions to the original data, one cannot assume that the confession rates of 1966 bear any relationship to current confession rates. Without more, a drop in confession rates in the immediate wake of *Miranda* demonstrates nothing of continuing significance.

Our criminal justice system has changed since the 1960s. When the Supreme Court announced *Miranda* in 1966, *Gideon v. Wainwright* had been on the books for only three years. *Miranda* came in the midst of a criminal procedure revolution. Moreover, police-community relations in this country surely have evolved since 1966, and suspects give statements in light of a variety of factors, including their treatment from the police. One, therefore, must make a series of foolhardy assumptions to conclude that any purported decrease in confession rates is due to *Miranda*, rather than other factors. Further, some evidence indicates that the police have adjusted to *Miranda*'s requirements.[316] Even if one accepts Cassell's conclusion that *Miranda* has led to a decrease in statements to the police, *Miranda* still might accomplish its purposes efficiently. If *Miranda* significantly reduces the incidence of coerced or false confessions and leads police to respect Fifth Amendment values, it functions exactly as the Court intended, even if it reduces the number of cases that face prosecution.

Perhaps to compensate for these difficulties with his earlier work, Cassell has turned his attention to crime clearance data that the FBI collects from local agencies.[317] Cassell first published a simple chart, purportedly showing that the clearance rates for violent crimes fell sharply in the wake of *Miranda* and have not returned to pre-1966 levels.[318] When Schulhofer disparaged this effort for failing to ac-

313 *See* Schulhofer, *supra* note 108, at 544-47.

314 Cassell, *supra* note 288, at 416-17. Because the studies Cassell used reported drops in confession rates following *Miranda* that ranged from 6% to 34.5%, *see id.*, and further, because these studies were conducted in cities with quite different demographics, one wonders whether an "average" of rates has any meaning at all.

315 *See id.* at 459 tbl.3.

316 *See* sources cited *supra* note 307. To his critics who point to a "rebound" effect, Cassell initially responded that "[i]t seems appropriate to assign to those who take this view the burden of proof." Cassell, *supra* note 288, at 450. Why? Cassell, not *Miranda*'s supporters, seeks to abrogate *Miranda* and alter the status quo. Inasmuch as it may be impossible to demonstrate the impact of *Miranda* empirically, Cassell merely seeks to shift to *Miranda*'s supporters the burden of answering the unanswerable.

317 *See* Cassell & Fowles, *supra* note 305, at 1063.

318 *See* Cassell, *supra* note 289, at 1090.

count for crime rates and police resources,[319] Cassell teamed with economist Richard Fowles to produce a more nuanced analysis.[320] Cassell and Fowles conducted a multiple regression analysis of crime clearance rates from 1950 to 1995.[321] They assert that *Miranda* has had a statistically significant and long-term effect on clearance rates for total violent and total property crimes in general, as well as for the individual crimes of robbery, burglary, larceny, and vehicle theft, but has had no statistically significant effect on clearance rates for the crimes of murder, rape, and assault.[322] According to Cassell and Fowles, *Miranda* has caused the clearance rate for total violent crimes to drop 6.7% and the clearance rate for total property crimes to fall 2.3%.[323]

As with Cassell's earlier work, these claims also have drawn a withering critique. John Donohue has analyzed the Cassell and Fowles study closely.[324] As an initial matter, Donohue notes that FBI clearance data have proven unreliable because, in addition to the manipulation of clearance rates by local authorities, a perceived decline in clearance rates may reflect nothing more than the improved reporting of crime.[325] Donahue points out that murder is generally the most accurately reported crime, yet Cassell and Fowles show no statistically significant relationship between *Miranda* and the clearance rate for murder.[326] Donohue also doubts Cassell's and Fowles's conclusion that *Miranda* alone lies at the root of any perceived drop in clearance rates in the late 1960s.[327] Cassell's regression analysis establishes only the significance of a "post-1966" variable. The regression analysis itself does not identify *Miranda* as the event that led to a perceived decline in clearance rates within that time period.[328] Further, *Miranda* should not have a substantial impact upon clearance rates because solving a crime clears it whether or not an arrest or prosecution

319 *See generally* Schulhofer, *supra* note 312, at 280-90 (critiquing Cassell's work).

320 *See* Cassell & Fowles, *supra* note 305.

321 *See id.* at 1063.

322 *See id.* at 1086 tbl.II, 1088 tbl.III.

323 *See id.* They report a statistically significant "*Miranda* effect" on individual crimes as follows: robbery (5.3%); burglary (2.5%); larceny (2.4%), and vehicle theft (4.1%). *See id.*

324 *See* John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998).

325 *See id.* at 1152-55. If data for total crime were underreported, clearance rates would be artificially high, as crimes "cleared" would appear as an unduly high percentage of the underreported total number of crimes. *See id.* Gradual improvements in the reporting of crime might lead to a perceived declining trend in clearance rates because crimes cleared would be a smaller percentage of the increasing (but more accurate) total number of crimes. *See id.*

326 *See id.* at 1153-55.

327 *See id.* at 1155-56.

328 *See id.*; *see also* Cassell & Fowles, *supra* note 305, at 1107-1119 (arguing that *Miranda* is the cause of the perceived drop).

occurs, and *Miranda* only operates after a suspect is in custody.[329] Donohue's own regression model, using data from Cassell and Fowles, reveals a statistically significant post-1966 effect only for the clearance rates for total violent crime and for the individual crime of larceny.[330] After his careful study, Donohue could neither substantiate nor reject Cassell's and Fowles's claims.[331]

So where does Cassell's work fit in our comparison of the original and the new visions of *Miranda*? If we agree with the proponents of the new vision and believe that *Miranda*'s rules are truly non-constitutional, we should consider whether Fifth Amendment values and other interests should prevail over the needs of the police. While one may question Cassell's motives,[332] he deserves credit for suggesting a serious examination of the cost of *Miranda*, and all must agree that *Miranda* impacts law enforcement. If suspects assert their Fifth Amendment rights, a certain number of crimes will remain unsolved, and a certain number of cases will escape prosecution. Were we to overlook Cassell's flawed methodologies, we could assume that the new vision, and the practice of questioning "outside *Miranda*" would affect police conduct, though somewhat less than the more fulsome original vision of *Miranda*, which Cassell studied. In the end, however, Cassell provides the wrong answers to the wrong questions. The *Miranda* debate can have no empirical resolution. That *Miranda* has an

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329 *See* Donohue, *supra* note 324, at 1155-56. *Miranda* thus may have its only real impact upon clearance rates if it prevents a suspect already in custody from giving information that would allow officers to solve other crimes. *See id.*

330 *See id.* at 1162-65, 1170. Moreover, Donohue is not entirely confident of the results for the crime of larceny. *See id.* at 1170.

331 Donohue finds "some evidence that the *measured* violent crime clearance rate is 10-12% lower in the post-mid-1966 period than would have been expected." *Id.* at 1170. But this result is a "long way from proof of a statistically significant drop in actual clearance rates caused by the Supreme Court's *Miranda* decision." *Id.* at 1171. Due to difficulties with the data and with the model, Donohue admits to "unbridgeable uncertainty about how much confidence to repose in any of the statistical results." *Id.* at 1172.

332 *See* Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda*: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 575 (1998) (arguing that Cassell's empirical work is driven by his ideological commitments and that his resort to "quantitative guesswork . . . appears to be rooted in Cassell's long-standing contempt for *Miranda* and offers him yet another rhetorical weapon in his highly-charged anti-*Miranda* crusade"). In addition to whatever conclusions one might draw about Cassell from his law review articles, Cassell has presented his views as an advocate in litigation. He recently filed an amicus curiae brief in the United States Supreme Court, arguing that the Court should review a decision from California that called questioning "outside *Miranda*" "police misconduct" and "illegal." Brief of Amici Curiae Washington Legal Foundation, et al., in Support of Respondent's Response Concurring in Request for Certiorari at 2-3, Peevy v. California (No. 98-6125) (Nov. 12, 1998). In this brief, Cassell refers to his own work and argues that "[t]he mounting empirical evidence demonstrates that the *Miranda* rules lead to the release of tens of thousands of dangerous criminals every year." *Id.* at 17 (citing Cassell, *supra* note 288; Cassell & Fowles, *supra* note 305; Cassell & Hayman, *supra* note 150). Cassell does not cite to Schulhofer's or Donohue's critiques of his work or otherwise acknowledge that his empirical analyses are much disputed. *See id.*

impact may mean nothing more than it works as the Court intended. And even if we believe there ever could be an empirical resolution to this debate, Cassell's work, with its dubious methods, sets a poor benchmark from which to base a revision of *Miranda*'s settled rules.

Looking at the two visions of *Miranda* qualitatively—as we must—only the original vision provides substantial protection to Fifth Amendment values, fits with our constitutional jurisprudence, provides necessary bright-line rules for police and trial judges, and maintains public confidence in our courts and police. We still need the strong protections of the original vision of *Miranda*.

IV
SAVING *MIRANDA*

If we must reject the new vision of *Miranda*, how do we lead officers to adhere to the original vision? How do we protect Fifth Amendment values and craft an incentive for officers to follow *Miranda*'s rules without simultaneously creating new obstacles for them? This Part of the Article contrasts Fourth and Fifth Amendment exclusionary rules, revisits *Harris v. New York*, *Oregon v. Hass*, and *Michigan v. Tucker*, and concludes that *Miranda* should regain its status as a constitutional rule. Further, *Miranda* itself excludes for all purposes statements that police obtain in violation of its procedures, and it indicates that courts should exclude the fruits of those statements for all purposes.[333] *Harris*, *Hass*, and *Tucker* describe a narrower rule of exclusion that is served solely when officers act in good faith.[334] Only by returning to the more robust exclusionary rule when officers *deliberately* violate the law can we induce the police to follow *Miranda*.

A. Exclusionary Rules Compared

When the Supreme Court determined in *Harris* that prosecutors may impeach with statements that police have obtained without administering *Miranda* warnings, the Court stated that it merely was following *Walder v. United States*,[335] which had established a similar rule under the Fourth Amendment. The *Harris* Court asked why a different holding should result under the Fifth Amendment.[336] Following the Court's lead in *Harris*, this section compares the scope and purposes of the Fourth and Fifth Amendment exclusionary rules.

The Supreme Court first applied the Fourth Amendment exclusionary rule to federal prosecutions in *Weeks v. United States*.[337] The

333 *See Miranda*, 384 U.S. at 479.
334 *See supra* Part I.C.
335 347 U.S. 62 (1954).
336 *See* Harris v. New York, 401 U.S. 222, 225 (1971).
337 232 U.S. 383 (1914).

Supreme Court recognized that the exclusionary rule was necessary lest, as Justice Holmes wrote, the Fourth Amendment represent merely "a form of words."[338] The Court, however, did not extend the exclusionary rule to the states until *Mapp v. Ohio* in 1961. At that time, the Fourth Amendment exclusionary rule included the familiar "fruit of the poisonous tree" doctrine.[339] Under this doctrine, the exclusionary rule prohibits the prosecution's use of direct or derivative evidence that the police obtained in violation of the Fourth Amendment, unless the link between the violation and the evidence is "so attenuated as to dissipate the taint,"[340] unless the authorities inevitably would discover the evidence,[341] or unless the government can establish an independent source of the evidence.[342] As already noted, the Fourth Amendment exclusionary rule does not forbid using illegally obtained evidence for impeachment.[343] In 1984, the Court held in *United States v. Leon*[344] that the government may use in its case-in-chief evidence that police seized in reasonable reliance on a warrant that a neutral and detached magistrate had issued, even if the seizure violated the Fourth Amendment.[345] The Court further held that this "good faith" exception would operate only when the officers' conduct was objectively reasonable.[346]

The Supreme Court's justifications for the Fourth Amendment exclusionary rule have evolved since *Mapp*. In *Mapp*, the Court gave several reasons why the rule was an essential part of the Fourth Amendment and should thus apply to the states. In addition to deterring officers from conducting unreasonable searches and seizures,[347] the rule also preserves judicial integrity.[348] After *Mapp*, the Court decided a series of cases in which it limited and then ignored this second reason for the rule; the Court began to focus solely on the deterrence rationale.[349] In *United States v. Calandra*,[350] for example, the Court held that the Fourth Amendment exclusionary rule did not limit the

338 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

339 Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

340 *Id.*; *accord* Nardone v. United States, 308 U.S. 338, 341 (1939).

341 *See* Nix v. Williams, 467 U.S. 431, 443-44 (1984) (applying exception to Sixth Amendment exclusionary rule, but discussing it in the context of the Fourth Amendment).

342 *See* Segura v. United States, 468 U.S. 796, 805 (1984); *Nardone*, 308 U.S. at 341.

343 *See supra* text accompanying notes 294-96.

344 468 U.S. 897 (1984).

345 *See id.* at 913.

346 *Id.* at 922-25.

347 *See Mapp*, 367 U.S. at 656-58.

348 *See id.* at 659-60.

349 Commentators rightly have criticized the Court for overlooking the "judicial integrity" rationale for *Mapp*. *See, e.g.*, CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 24 (3d ed. 1993).

350 414 U.S. 338 (1974).

grand jury's power to compel a witness to answer questions concerning evidence that police had seized in violation of the Fourth Amendment.[351] The Court determined that the Fourth Amendment violation had been "fully accomplished by" the unreasonable search or seizure.[352] *Calandra* provides that the purpose of the exclusionary rule is to deter future misconduct, rather than redress a past injury, and that the incremental deterrent effect of excluding evidence from the grand jury is minimal.[353] Following *Calandra*, *Stone v. Powell*[354] took Fourth Amendment claims out of the reach of federal habeas corpus for essentially the same reason. *Powell* expressly states that concerns about "judicial integrity" have "limited force" in framing the proper scope of the exclusionary rule.[355]

Leon represents the culmination of this shift in the Court's approach to the exclusionary rule. This opinion completes the Court's abandonment of the "judicial integrity" rationale for Fourth Amendment exclusion.[356] After rejecting out-of-hand, and somewhat disingenuously, *Mapp*'s central holding that the exclusionary rule is the necessary corollary of the Fourth Amendment,[357] the Court in *Leon* concluded that the costs of exclusion outweighed the benefits when police acted in good faith and attempted to obey the law.[358] *Calandra*, *Powell*, and *Leon* demonstrate the Court's willingness to consider the efficacy of exclusionary rules on their own terms, regardless of whether a remedy of exclusion exists within the Constitution itself, particularly when the purpose for exclusion is to deter future misconduct.

To compare Fourth Amendment and *Miranda*/Fifth Amendment exclusion, one must consider when a Fifth Amendment violation occurs. Several Supreme Court decisions build upon *Kastigar v. United States*,[359] which upholds the federal use immunity statute; these decisions characterize the Fifth Amendment as a "trial right" that the prosecution does not violate until it introduces evidence against the defendant in court.[360] Of course, if the prosecution can violate the

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351 *See id.* at 354-55.

352 *Id.* at 354.

353 *See id.* at 347-52.

354 428 U.S. 465 (1976).

355 *Id.* at 485.

356 *See* United States v. Leon, 468 U.S. 897, 906-08 (1984) (discussing the purposes of the exclusionary rule without mentioning the goal of preserving judicial integrity).

357 *See id.* at 905-06.

358 *See id.* at 922.

359 406 U.S. 441 (1972).

360 *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (citing *Kastigar* and stating that a Fourth Amendment violation is complete when the search is conducted, as opposed to a Fifth Amendment violation, which occurs at trial); *see also* United States v. Balsys, 118 S. Ct. 2218, 2232 n.12 (1998) (quoting *Verdugo-Urquidez*); Withrow v. Williams, 507 U.S. 680, 691 (1993) (same); Klein, *supra* note 65, at 439-43 (arguing that *Miranda*

Fifth Amendment only at trial, then a grant of use immunity by definition could not violate the Constitution because the prosecution cannot introduce the compelled testimony at trial. But the Court did not decide *Kastigar* on this theory. The Fifth Amendment does not prohibit all compelled testimony, only compelled *incriminating* testimony. Indeed, courts issue subpoenas to trial witnesses every day in this country, and these witnesses must appear in court and testify. Witnesses may assert the privilege only to avoid testifying if there is a real and substantial chance that the testimony will be incriminating.[361] *Kastigar* simply holds that use immunity does not violate the Fifth Amendment because the grant of immunity removes the "danger of incrimination."[362] Moreover, a number of cases have found Fifth Amendment violations in circumstances in which witnesses suffered penalties for asserting the privilege against self-incrimination, even though they faced no criminal charges and had no criminal trial.[363] These cases are impossible to square with the notion that Fifth Amendment violations occur only at trial.

If police question a suspect in violation of *Miranda*, and under *Miranda*, there is a presumption of a Fifth Amendment violation, when does the violation occur? Perhaps the best view is that the violation occurs at the station house, but continues or recurs at trial. The values that underlie the Fifth Amendment include preserving autonomy, maintaining our adversarial system, curtailing inhumane treatment and police misconduct, avoiding false confessions, and complying with our sense of fair play.[364] Custodial interrogation can undermine most of these values in the station house at the time that the questioning occurs. The exclusion of evidence at trial may ameliorate some of the damage, yet that does not prevent, for example, the harm to autonomy. Perhaps in recognition of the fact that a violation of the Fifth Amendment is complete at the time that an unlawful interrogation occurs, the Court in *Michigan v. Tucker* concluded that

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violations are difficult to raise in civil rights actions because the Fifth Amendment is only violated in court).

361 *See* United States v. Apfelbaum, 445 U.S. 115, 128-29 (1980); Marchetti v. United States, 390 U.S. 39, 53-54 (1968).

362 *Kastigar*, 406 U.S. at 459.

363 *See, e.g.*, Lefkowitz v. Cunningham, 431 U.S. 801, 804-08 (1977) (holding that grand jury witness cannot be divested of political office as a penalty for exercising Fifth Amendment privilege); Lefkowitz v. Turley, 414 U.S. 70, 77-84 (1973) (holding that architects called before grand jury cannot lose the right to enter into public contracts due to exercise of their Fifth Amendment privilege); Gardner v. Broderick, 392 U.S. 273, 276-79 (1968) (holding that police officer may not be discharged due to assertion of Fifth Amendment privilege before grand jury).

364 *See supra* notes 159-62 and accompanying text.

deterring future police misconduct is a primary purpose of the *Miranda*/Fifth Amendment exclusionary rule.[365]

By the same token, one cannot confine the violation to the interrogation room. The Fifth Amendment may be a trial right in that it is a right that the accused asserts or waives by deciding whether to testify at trial. The actions of the police in violating *Miranda* long before trial can impinge the exercise of the Fifth Amendment privilege greatly at trial. As already noted, an accused is less able to assert the privilege effectively at trial if police have forced him or her to give a statement prior to trial.[366] If the police violate a defendant's Fifth Amendment rights during a custodial interrogation, the violation occurs again when a court admits the statement or its fruits at trial.

With this background, a comparison of the Fourth and *Miranda*/Fifth Amendment exclusionary rules reveals something of a puzzle. A past constitutional violation triggers the Fourth Amendment exclusionary rule, which operates solely to deter future violations; a past violation triggers the Fifth Amendment exclusionary rule, which operates through *Miranda* both to deter future misconduct and also to prevent continuing violations. The deterrent effect of the Fourth Amendment rule is *stronger* than that of the *Miranda*/Fifth Amendment rule—the former also excludes "fruits"—even though the Fourth Amendment rule admits of a "good faith" exception. When officers intentionally violate the Fourth Amendment, they do not act in good faith, and courts also exclude the "fruits" of seized evidence. In excluding fruits of a violation, the Fourth Amendment rule does more to honor the underlying right than does the *Miranda*/Fifth Amendment rule, even though the *Miranda*/Fifth Amendment rule also seeks to prevent a continuing violation. It is difficult to rationalize these differences in the two exclusionary rules.

B. *Harris, Hass,* and *Tucker,* Revisited

As we have seen, the new vision of *Miranda* relies on language from *Harris v. New York, Oregon v. Hass,* and *Michigan v. Tucker* that undermines the legitimacy of *Miranda* by characterizing violations of *Miranda* as something other than violations of the Fifth Amendment.[367] Although exploring the Justices' unstated motives is always risky, this section asks why the Court uncoupled *Miranda* from the Constitution in these cases, in the hope of learning whether the same reasons for the Court's actions continue to apply.

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365 Michigan v. Tucker, 417 U.S. 433, 446-47 (1974); *see also* Oregon v. Hass, 420 U.S. 714, 721 (1975) (discussing the deterrent effect of exclusion); Harris v. New York, 401 U.S. 222, 225 (1971) (same).

366 *See supra* notes 180-81 and accompanying text.

367 *See supra* Part I.C.

At the time that the Supreme Court decided *Harris*, *Hass*, and *Tucker*, only one outcome could have followed a conclusion that a *Miranda* violation was a violation of the Fifth Amendment. In *Malloy v. Hogan* the Court had equated Fourteenth Amendment "voluntariness" with Fifth Amendment "compulsion." Hence, courts treated statements that police had taken in violation of the Fifth Amendment in exactly the same fashion as statements obtained in violation of the Fourteenth Amendment.[368] Accordingly, *Miranda* itself provides for complete exclusion of a compelled statement and its fruits.[369]

At that time our Fourteenth Amendment jurisprudence contained no room for any sanction other than exclusion of the statement for all purposes.[370] In fact, the courts viewed the admission of an involuntary statement as so great a denial of fundamental fairness that until the Court decided *Arizona v. Fulminante*[371] in 1991, the courts did not review the admission of these statements for harmless error.[372] But the Court decided *Harris*, *Hass*, and *Tucker* before it announced *Leon* and thereby completed its revision of the holding in *Mapp*. *Leon* looks at the exclusionary rule through a different lens than *Mapp*, showing a greater willingness to examine whether exclusion will deter unlawful conduct, even assuming that the government's conduct violates the Constitution. If the Justices believed that some remedy, rather than full exclusion, was appropriate in *Harris*, *Hass*, and *Tucker*, it may have been simpler for the Court at that time to pronounce the violations "non-constitutional," rather than to find constitutional violations and then to struggle to explain why the Fifth Amendment permitted some lesser remedy. In other words, separating the violations from the Fifth Amendment was the easiest way for the Court to limit *Miranda*'s exclusionary rule. Following the lessons of *Calandra*, *Powell*, and *Leon*, the Court now might confront the scope of exclusion on its own terms, even if the Court determines that failing to comply with *Miranda* violates the Fifth Amendment per se.

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368 *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964) (stating that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement").

369 *See Miranda*, 384 U.S. at 463, 479 (1965) (stating that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the accused]").

370 *See, e.g.*, Leyra v. Denno, 347 U.S. 556, 558 (1954) (holding that the Fourteenth Amendment forbids "[t]he use in a state criminal trial of a defendant's statement obtained by coercion"); *see also* Mincey v. Arizona, 437 U.S. 385, 396-402 (1976) (ruling, in a case postdating *Miranda*, that statements taken in violation of the Due Process Clause may not be introduced for any purpose at trial, including impeachment).

371 499 U.S. 279 (1991).

372 *See id.* at 306-12 (finding that the use of an involuntary confession may be reviewed for harmless error); *see also* Payne v. Arkansas, 356 U.S. 560, 567-68 (1956) (reversing a conviction due to use of coerced confession, even though there was sufficient other evidence to support the conviction).

Furthermore, revisiting *Harris*, *Hass*, and *Tucker*, particularly in the wake of *Leon*, requires us to consider what these cases do *not* hold. In none of these cases did officers set about to violate *Miranda*. None of these cases authorizes the police to violate *Miranda* deliberately.

Clearly, the officers in *Harris* and *Tucker* did not conduct interrogations in deliberate violation of *Miranda*. Police arrested and questioned Viven Harris on January 7, 1966.[373] Police arrested and interrogated Thomas Tucker on April 19, 1966.[374] Though officers did not question these defendants in compliance with *Miranda*'s rules, the Supreme Court did not decide *Miranda* until June 13, 1966, months after these two interrogations took place. We demand much of our police, but we cannot fault these officers for failing to predict *Miranda*.

Hass presents a closer question. William Hass allegedly stole bicycles from two garages, and the police arrested him for burglary.[375] An officer read Hass his *Miranda* warnings, and Hass initially waived his rights. On the way to the police station, Hass told Officer Bjorn Osterholme that he was "in a lot of trouble" and would like to telephone his attorney.[376] The officer told Hass that he could call a lawyer when they reached the police station.[377] On the way to the station, Hass asked whether he had to locate one of the bicycles. Osterholme replied that he would not force Hass to disclose the bicycle's location, but that Osterholme wanted to resolve the matter that night.[378] Hass then showed the officer where he had hidden the missing bicycle.[379]

Two points are worth noting. First, Officer Osterholme did not appear to violate *Miranda* deliberately. After Hass invoked his right to counsel, Osterholme did not ask Hass any additional questions until Hass himself spoke. Second, a court reviewing these facts today would probably not find a *Miranda* violation at all. Under *Duckworth v. Eagan*, a modern court would view Osterholme's statement that Hass could telephone an attorney at the police station to be a perfectly appropriate response to Hass's invocation.[380] Moreover, pursuant to *Edwards v. Arizona*, officers may speak freely with a suspect who has invoked the right to counsel when the suspect himself "initiates fur-

373 *See Harris*, 401 U.S. at 223.

374 *See Tucker*, 417 U.S. at 435-36.

375 *See Hass*, 420 U.S. at 715.

376 *Id.*

377 *See id.*

378 *See* Appendix at 21-23, Oregon v. Hass, 420 U.S. 714 (1975) (No. 73-1452).

379 *See id.* at 23-24.

380 In *Duckworth v. Eagan*, 492 U.S. 195 (1989), a suspect was told that a lawyer would be appointed "*if and when you go to court.*" *Id.* at 198. The Court determined that this truthfully represented the local procedures for appointment of counsel and did not violate *Miranda*. *See id.* at 203-04. "*Miranda* does not require that attorneys be produc[ed] on call." *Id.* at 204.

ther communication . . . with the police."[381] In this case Hass, not Osterholme, sought to continue their exchange.

Harris, Hass, and *Tucker* provide the primary authority for the new vision of *Miranda.* Those who claim that the Supreme Court has expressly approved the practice of questioning "outside *Miranda*" rely on these cases. But the facts of these cases do not support this claim. Quite simply, the officers in *Harris, Hass,* and *Tucker* did not violate *Miranda* deliberately. Consequently, these cases cannot establish the "bad faith" exception to the *Miranda* rule that lies at the heart of the new vision.

C. Reviving the Original Vision

Reviving the original vision of *Miranda* requires a simple prescription: the Court should restore the presumption that violations of *Miranda* are violations of the Fifth Amendment and should reaffirm that *Miranda*'s complete rule of exclusion applies when officers objectively act in bad faith.

The Court must reaffirm the constitutional underpinnings of *Miranda.* If the Court's pronouncement in *Miranda* is to receive the respect of law enforcement, it needs a legitimate foundation. Until the Court restores *Miranda*'s link to the Fifth Amendment, *Miranda* cannot escape the attack and evasion of those who claim that it describes merely optional procedures. Prophylactic or not, *Miranda*'s requirements stand firmly on the Fifth Amendment and epitomize our system's concern for the amendment's underlying values. *United States v. Leon* and *Withrow v. Williams* leave no doubt that the Constitution demands protections at least as effective as *Miranda*'s explicit rules. Unless a state substitutes *Miranda*'s procedures with other fully effective measures, the Constitution commands police officers to abide by *Miranda*'s safeguards.

Next, we need a rule of exclusion that does not tolerate deliberate transgressions. In addition to excluding *Miranda*-violative statements from the prosecution's case-in-chief, which prevents additional Fifth Amendment violations at trial, the Court must adopt a rule of exclusion that deters officers from deliberately breaching *Miranda.* For guidance, we may look to the Fourth Amendment exclusionary rule. This rule focuses on officers' objective good faith and thus leads the police to adhere to the law. In *Miranda,* the Court ruled that if a custodial interrogation occurs without counsel, "a heavy burden rests on the government" to demonstrate that the suspect "knowingly and intelligently waived" his or her rights.[382] If the government then seeks

381 Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

382 *Miranda,* 384 U.S. at 475.

to use a *Miranda*-violative statement or its fruits for impeachment, the government should bear the burden of showing that the officer's conduct is objectively reasonable. As under the Fourth Amendment, if the government fails to meet this burden, the Fifth Amendment should require the prosecution to establish that it derived its evidence from a source that is independent of the accused's statement.

This rule of exclusion should prove relatively simple to administer. The standard is objective, not subjective. Courts have clarified *Miranda*'s parameters during the last thirty years, so that a suspect must unequivocally assert Fifth Amendment rights for protection during a custodial interrogation. Consequently, courts should not experience any difficulty determining when an officer has acted in objective good or bad faith. Thus, when a court finds a genuine dispute whether the suspect was truly in custody or whether an officer's conduct amounted to interrogation, the prosecution may use the statement for impeachment, and the court may admit its fruits. But if an officer continues to question a suspect over the unambiguous invocation of Fifth Amendment rights, the court should not admit the statement or its fruits for any purpose.

This rule of exclusion also would restore some reason and consistency to the Court's Fifth and Fourteenth Amendment jurisprudence. In *Kastigar v. United States* and *New Jersey v. Portash,* the Supreme Court determined that any statement that authorities obtained pursuant to a grant of use immunity is inadmissible for all purposes, including impeachment, and that the courts also must exclude the fruits of that statement.[383] Applying the same rule for deliberate *Miranda* violations would establish parity when officers seek to obtain a statement over the express invocation of Fifth Amendment rights.

Determinations of the admissibility of evidence that authorities obtain independently of the accused's statement would follow the structure of hearings on "*Kastigar* taint"[384] and would remove the incentive for officers to circumvent the immunity process. Moreover, consistent with the social science literature, which acknowledges the coercive power of deliberate questioning in violation of *Miranda*,[385] this rule of exclusion essentially would equate bad faith *Miranda* violations with Fourteenth Amendment violations.

Finally, those who still doubt the necessity of this rule of exclusion should consider again the training of officers in California. In *People v. Bradford*[386] the California Supreme Court upheld a capital conviction despite the police's continued questioning of a suspect

383 *See supra* notes 202-08 and accompanying text.
384 *See supra* note 207 and accompanying text.
385 *See supra* text accompanying notes 261-63.
386 929 P.2d 544 (Cal. 1997).

who had asked for a lawyer.[387] The court criticized the officers, stating that their conduct "was unethical and it is strongly disapproved."[388] In a publication that postdates the *Bradford* decision, the California Attorney General's office notes that the court upheld Bradford's conviction and comments that the court "went on to *gratuitously observe* that the practice of intentionally disregarding a suspect's invocation of *Miranda* rights is 'unethical' and 'strongly disapproved.'"[389] The publication does not instruct officers to obey the "gratuitous" admonition of the state's highest court; rather, it reviews other cases and tells officers that "the question of what happens when police deliberately ignore a suspect's invocation of *Miranda* rights is very controversial and probably will not be settled for a long time to come."[390]

Recently, in *People v. Peevy*[391] the California Supreme Court held that a statement that police took in deliberate violation of *Miranda* was admissible for impeachment.[392] The court declined to reweigh the balance that *Harris* and *Hass* struck, in part because the California Constitution excludes *Miranda*-violative statements from evidence only to the extent that the federal Constitution requires.[393] The court, however, firmly rejected the argument that *Miranda* and *Edwards* are simply rules of evidence that do not regulate police conduct.[394] The California Supreme Court held that a statement is made inadmissible under *Miranda* "because the evidence [is] obtained illegally" and that "it is indeed police misconduct to interrogate a suspect in custody who has invoked the right to counsel."[395]

In rejecting the practice of questioning "outside *Miranda*" in *Peevy*, the California Supreme Court was much more specific and emphatic than in *Bradford*. One might think that *Peevy* would force police in California to cease questioning "outside *Miranda*." At the very least, one would expect that the California Attorney General's office—the leading state agency charged with enforcing the law—would advise officers not to engage in a practice that the state's highest court has declared to be illegal. Yet in the wake of *Peevy*, the Attorney General's office has not disavowed the practice of questioning "outside *Miranda*." In a publication issued after *Peevy*, the Attorney General's office discusses *Peevy*'s holding in detail, pointing out that the Court

387 *See id.* at 581.

388 *Id.* at 567.

389 SOURCEBOOK, *supra* note 144, at § 7.40d (Rev. Mar. 1997) (quoting *Bradford*) (emphasis added).

390 *Id.*

391 953 P.2d 1212 (Cal. 1998).

392 *See id.* at 1224.

393 *See id.* at 1214, 1219.

394 *See id.* at 1224-25.

395 *Id.* at 1225.

permitted evidence taken in deliberate violation of *Miranda* to be used for impeachment.[396] Acknowledging that *Peevy* held that officers who question "outside *Miranda*" act illegally, the Attorney General's office characterizes this holding as dicta and claims that the decision "is questionable on several fronts."[397] After describing the arguments against this part of *Peevy*, the Attorney General's office again concludes that "[i]t may take a decision from the United States Supreme Court to finally settle this question."[398] Thus, after the California Supreme Court's decision in *Bradford* and even after the clear ruling in *Peevy*, the California Attorney General's office has not instructed officers to stop questioning "outside *Miranda*."

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396 *See* SOURCEBOOK, *supra* note 144 § 7.40a (Rev. July 1998) (citing *Hass* and *Peevy* and asserting that an "outside *Miranda*" statement "may be used to impeach the defendant regardless of whether the police non-compliance with *Miranda*'s procedures was negligent (accidental) or *intentional*"); *see also id.* § 7.48b (Rev. July 1998) (stating that "if you fail to comply with the *Miranda* guidelines in a *non-coercive* way, although any statement you obtain will be inadmissible at trial to prove guilt (i.e., in the prosecution's 'case-in-chief'), that is the only 'penalty.' The statement will be admissible in rebuttal to impeach" and advising that "you can also use the statement for any other purpose") (citing *Harris*, *Hass*, and *Peevy*); *id.* § 7.83 (Rev. July 1998) (stating that if a suspect in custody invokes his rights, "you must cease all questioning" but then noting that "[o]f course, this rule . . . must be observed only if you are wanting anything the suspect may say later to be admissible against him at trial since the entire purpose behind the *Miranda* decision was to provide a means for police to obtain an *admissible* statement").

397 *Id.* § 7.40b (Rev. July 1998).

398 *Id.* The *Sourcebook* does indicate that *Peevy* could be taken to the United States Supreme Court. *See id.* Of course, the Attorney General would be within his rights to seek further review of *Peevy* if he disagreed with it. In that case, the Attorney General's office should tell officers to obey the ruling in *Peevy* and cease questioning "outside *Miranda*" pending any review by the United States Supreme Court. The Attorney General's training materials, however, contain no such clear instruction. *See id.*; *see also* CALIFORNIA COMM'N ON PEACE OFFICER STANDARDS AND TRAINING, BASIC COURSE WORKBOOK SERIES STUDENT MATERIALS: LEARNING DOMAIN # 30, PRELIMINARY INVESTIGATION, INTERROGATION 4-36 (1998) (on file with author) (describing the uses of an "outside *Miranda*" statement and then noting: "*Noncoercive* police questioning that departs from Miranda does not violate a suspect's civil rights or their Fifth Amendment rights. Nevertheless, the California Supreme Court recently stated that continued interrogation after a suspect has invoked his Miranda rights is 'illegal' and 'unlawful'").

Interestingly, the California Attorney General did not file a petition for writ of certiorari in *Peevy*. Counsel for Mr. Peevy sought Supreme Court review. *See* Petition for Writ of Certiorari to the California Supreme Court, *Peevy* (No. 98-6125) (docketed Sept. 23, 1998). The Attorney General initially waived his right to answer the petition but was requested by the Court to file a response. *See* Letter from William K. Suter, Clerk, to Sara Gros-Cloren, Office of the Attorney General (Oct. 13, 1998) (on file with author). The Attorney General then filed a response, asking the Supreme Court to take the case and "once and for all clarify that non-coercive non-compliance with *Miranda* does not constitute 'illegal' or 'unlawful' conduct." Response to Petition for Writ of Certiorari at 12, *Peevy* (No. 98-6125) (Nov. 6, 1998). On December 7, 1998, the Supreme Court denied the petition for writ of certiorari.

CONCLUSION

Since its 1936 decision in *Brown v. Mississippi*, the Supreme Court has struggled to balance the power of the State and the rights of the citizen in the interrogation room. The Court's initial case-by-case approach left law enforcement officers and trial courts with little real guidance and failed to curtail abusive police practices effectively. Eventually the Court decided *Miranda v. Arizona*, which prescribes bright-line rules rooted in the Fifth Amendment. *Miranda*'s safeguards protect Fifth Amendment values, end many abusive practices, and largely obviate the need for lower courts to decide whether statements are involuntary under traditional standards. To induce officers to observe the new procedures, *Miranda* excludes for all purposes evidence that police obtain without compliance.

But a series of decisions following *Miranda* does not apply *Miranda*'s rule of exclusion fully. In all of these decisions, the officers acted in good faith; they did not intend to violate *Miranda*. Perhaps to justify a more modest principle of exclusion, the Court characterized *Miranda*'s rule as merely "prophylactic." A number of law enforcement officials mistakenly have taken "prophylactic" to mean "non-constitutional" and "optional." Although the Court in the past has considered it a "speculative" possibility that officers might violate *Miranda* deliberately, the evidence now shows that many receive training to do just that. In California and to a certain extent in other states, police have developed the tactic of questioning "outside *Miranda*," or questioning over a suspect's direct and unambiguous assertion of Fifth Amendment rights. If the Court allows it to continue, this practice signifies the end of *Miranda*, or at least the original vision of *Miranda*. *Miranda* no longer will safeguard Fifth Amendment values, prevent coercive interrogations, or assist courts in avoiding more difficult determinations of voluntariness.

In light of this new tactic, the Supreme Court must revisit *Miranda* and restore its constitutional stature. It must establish a stronger rule of exclusion to deal with officers who act objectively in bad faith. Nothing less will deter officers from violating *Miranda*. Unless our courts respond to this open and direct defiance of *Miranda*, *Miranda* is untenable. When courts are unwilling to act in the face of open and direct defiance of a principle of law, that principle cannot survive.

APPENDIX
EXCERPT OF TRANSCRIPT OF TRAINING VIDEOTAPE

Excerpt of Transcript of Deputy District Attorney Devallis Rutledge, *in* Videotape: Questioning: "*Outside* Miranda" (Greg Gulen Productions 1990):

You guys wake up out there cuz we got something a little controversial this week. In fact, I'm gonna preface this one by suggesting that before you do anything based on what we're gonna talk about the next few minutes, you check with your command personnel and see what they wanna do. And they may wanna check with their civil legal advisor or your local prosecutor. Remember I don't set policy for you, I just wanna tell you what tools are out there—if you choose to use them in your jurisdiction—it's up to you.

This has to do with questioning "outside *Miranda*." Should you do it? When should you do it? What if you do? What if you don't? You've got somebody in custody and you Mirandize him and he invokes. Either way, he says "I want a lawyer" or "I want to remain silent"; whichever way he does it, he shuts you down. What should you do? Should you just stop, fold up your papers and walk away and say "well that's that"? Or should you say "well, okay, so you want a lawyer, you wanna stop talking. Let's go ahead and go off the record and talk anyway." Should you do that?

You probably should not do that if you're gonna be holding on to the guy for a while, because he may change his mind. He may change his mind. Before you go "outside *Miranda*" give him a chance to sit and stew in the cell for a little while and see if he changes his mind.

. . . .

Now, that's in those cases where you're gonna have a chance for him to reinitiate. What if you've got a guy that you've only got one shot at? This is it, it's now or never because you're gonna lose him—he's gonna bail out or a lawyer's on the way down there, or you're gonna have to take him over and give him over to some other officials—you're never gonna have another chance at this guy, this is it. And you Mirandize him and he invokes. What you can do—legally do—in that instance is go "outside *Miranda*" and continue to talk to him because you've got other legitimate purposes in talking to him other than obtaining an admission of guilt that can be used in his trial. And that's what *Miranda* protects him against—you compelling him to make a statement that is later used in trial to convict him of the charge.

But, you may want to go "outside *Miranda*" and get information to help you clear cases. If you wanna clear paper on a bunch a cases that look a whole lot like the one you popped him on, and you think

this is your chance to do it—it's true his statements will not be admissible in court on those cases or on this one that he's talking about, his statements won't be admissible in court—but they'll help you clear some files out of the file drawer, go right ahead on.

Or, maybe it will help you recover a dead body or missing person. If he's kidnapped or killed somebody and you're still looking for a body, go "outside *Miranda*" if he invokes on you and you're not gonna have another chance to talk to him and see if you can recover a body for some bereaved family.

You may be able to recover stolen property. He tells you where the property is ditched, his statement will not be admissible against him in trial if you go "outside *Miranda*," but you'll get the property back and the owner will get the property back. That's a legitimate function.

Maybe his statement "outside *Miranda*" will reveal methods—his methods of operation. How he was able to obtain these credit cards and how he was able to pull off this scam or whatever. So sometimes use it for G-2, to get yourself some intelligence. Go "outside *Miranda*," take his statements, knowing you're not going to be able to use them in trial against him, but you are gonna be able to use them to figure out how this guy operates and how other criminals like him operate so that you can do a better job of shutting him down next time.

Maybe his statement will identify other criminals that are capering in your community. Sources for whatever it is he's doing—if he's doing drugs, maybe he'll give you some kind of a line on a connection. Fences, if he's fencing stolen property, maybe he'll finger the fence for you; location where crime is going down. So use it for all this intelligence information even though the statements wouldn't be admissible in court. He may reveal the existence and identity and location of other accomplices that he had in this crime and we may be able to go and arrest them or other witnesses on the case and we may be able to track them down and get them to come in and testify.

Or, his statements might reveal the existence and the location of physical evidence. You've got him, but you'd kinda like to have the gun that he used or the knife that he used or whatever else it was. But he ditched it somewhere and you can't find it. And so you've arrested him, he's invoked *Miranda* and you say, "Well I'd still like to find the evidence in the case." So you go "outside *Miranda*," and if he talks "outside *Miranda*"—if the only thing that was shutting him up was the chance of it being used against him in court—and then you go "outside *Miranda*" and take a statement and then he tells you where the stuff is, we can go and get all that evidence.

And it forces the defendant to commit to a statement that will prevent him from pulling out some defense and using it at trial—that

he's cooked up with some defense lawyer—that wasn't true. So if you get a statement "outside *Miranda*" and he tells you that he did it and how he did it or if he gives you a denial of some sort, he's tied to that, he is married to that, because the U.S. Supreme Court in *Harris v. New York* and the California Supreme Court in *People v. May* have told us that we can use statements "outside *Miranda*" to impeach or to rebut. We can't use them for our case-in-chief. The D.A. can't trot them out to the jury before he says "I rest," but if the defendant then gets up there and gets on the stand and lies and says something different, we can use his "outside *Miranda*" statements to impeach him. We can use it to rebut his case. Perfectly legitimate said both the California and U.S. Supreme Courts to use non-Mirandized statement[s] if they're otherwise voluntary. I mean we can't use them for any purpose if you beat them out of him, but if they're voluntary statements, the fact that they weren't Mirandized will mean we cannot use them in the case-in-chief but it does not mean we can't use them to impeach or rebut. So you see you got all those legitimate purposes that could be served by statements taken "outside *Miranda.*"

Let me back up for a second because you may have raised an eyebrow when I ran across a couple of these. I said maybe he'll tell us about other witnesses or the location of physical evidence and we can go and get that. We can use those witnesses against him, said *Michigan v. Tucker.* The U.S. Supreme Court said, even though you only discovered that there was a witness because you took a statement "outside *Miranda,*" the witness can still come and testify. All you lose under *Miranda* is the defendant's own statement. The *Miranda* exclusionary rule is limited to the defendant's own statement out of his mouth. That is all that is excluded under *Miranda.* It doesn't have a fruits of the poisonous tree theory attached to it the way constitutional violations do. When you violate *Miranda,* you're not violating the Constitution. *Miranda* is not in the Constitution. It's a court-created decision that affects the admissibility of testimonial evidence and that's all it is. So you don't violate any law. There's no law says you can't question people "outside *Miranda.*" You don't violate the Constitution. The Constitution doesn't say you have to do that. It's a court decision. So all you're violating is a court decision controlling admissibility of evidence. So you're not doing anything unlawful, you're not doing anything illegal, you're not violating anybody's civil rights, you're doing nothing improper. The only consequence of your talking to somebody who has invoked his rights is we will not be able to use his statement in the case in chief in trial against him. But it doesn't have the consequence of excluding fruits of his statement. *Oregon v. Elstad,* from the U.S. Supreme Court, and a bunch of federal cases and some state cases that—too numerous to show up here on

the screen, but I've listed them for you in this week's syllabus—a lot of cases have said "the fruit of the poisonous tree" derivative products doctrine does not apply to *Miranda* violations. All we lose is the statement taken in violation of *Miranda.* We do not lose physical evidence that resulted from that. We do not lose the testimony of other witnesses that we learned about only by violating his *Miranda* invocation.

Now, some people worry, "Gee, if I question a guy 'outside *Miranda,*' won't I get prosecuted myself?" "Won't I go to jail for doing something illegal?" "Won't I get sued in civil court for violating his civil rights?" Well just ask yourself, have you ever seen hundreds—hundreds and hundreds—of published cases where a court found a *Miranda* violation. Hundreds of them on the books where courts have found *Miranda* violations. Did any of those police officers get sued? Zero. Did any of those police officers get charged with a criminal offense? Zero. None of those police officers who should have Mirandized somebody but didn't, who thought they were asking clarifying questions and the court later held it was an interrogation, who didn't think that *Miranda* applied but it really did *Miranda* none of those police officers who has made what the courts later found to be a *Miranda* mistake, has been sued over it, has been filed on in criminal court over it—there's nothing illegal about continuing to talk to somebody. It simply has a consequence, an evidentiary consequence in the case-in-chief in trial that we cannot use that statement. It does not have any penal consequence for you. You're not doing anything unlawful, you're not violating any statute, you're not violating the Constitution, you're not violating his civil rights, you're not incurring any civil liability. All you're doing is limiting the admissibility of evidence—you're limiting it to the impeachment and rebuttal phase of the trial—but you can accomplish all of these legitimate purposes that don't have anything to do with the prosecution of the case, and some that do, by talking to the guy "outside *Miranda.*"

So, whether you do it is up to you. I don't tell you what to do. Can you do it? Sure you can. All of these cases have said there's legitimate uses that a *Miranda*-violative statement can be put to. The only use it can't be put to is to prove the person's guilt in a trial. But it can be used to prove that he's a liar when he gets on the stand and tells a different story. It can be used to discover other evidence that will prove his guilt in trial. Okay? So you may want to consult with folks there in your department and maybe your local prosecutor to see if they have a strong feeling one way or another. But you're up to date on what the law tells you about going "outside *Miranda.*"