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Fifty Years Later and Miranda Still Leaves Us with Questions

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FIFTY YEARS LATER AND *MIRANDA* STILL LEAVES US WITH QUESTIONS*

*Honorable Bernice B. Donald*** *and Nicole Langston****

"Sometimes a people lose their right to remain silent when pressured to remain silent."
– Criss Jami, Killosophy

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In 1966, the United States Supreme Court decided the historic case of *Miranda v. Arizona*, which held that statements obtained from defendants during incommunicado interrogation in a police-dominated atmosphere, without full warning of Constitutional rights, were inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination.[1] Since that historic decision, "*Miranda* warnings" have become a common part of our English lexicon.[2] In fact, anyone who watches certain television series, such as *Law and Order*,[3] has probably memorized the four warnings that officers are required to give suspects in police custody prior to being questioned: (1) you have the right to remain silent; (2) any statement you make can be used as evidence against you; (3) you have the right to the presence of an attorney; and (4) if you cannot afford an attorney, one will be appointed for you.[4] If, after those four warnings, a suspect declines to waive his right to counsel, the police interrogation must stop.[5]

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* This Article is based on Judge Donald's participation in the 2017 Criminal Law Symposium: *Entering the Second Fifty Years of* Miranda, held at the Texas Tech University School of Law on March 31, 2017.

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1. Miranda v. Arizona, 384 U.S. 436, 492–94 (1966).
2. *See Readim His Rights*, BROADCASTING & CABLE (July 2, 2000, 8:00 PM), http://www.broadcastingcable.com/news/news-articles/readim-his-rights/88733.
3. *See generally, e.g., Law and Order* (NBC television broadcast 1990–2010).
4. *Miranda*, 384 U.S. at 444.
5. *Id.* at 444–45.

This affords the suspect safeguards to make an informed choice between speech and silence and prevents involuntary statements.[6]

Although *Miranda* warnings are seemingly standard, the *Miranda* decision did not come without criticism.[7] Now, on the fiftieth anniversary of the Supreme Court's decision, the topic still garners intense debate.[8] Even after all of these years, there are still critics who do not support *Miranda* warnings, and now they rely on long-term studies about the effectiveness of *Miranda* warnings to support their positions. Yet, even with these new studies, there still remains some ambiguity about the effectiveness of *Miranda* rights concerning whether they overprotect the Fifth Amendment and whether *Miranda* warnings have caused significant difficulties for arresting officers.[9] This Article will discuss some of those issues.

Part I of this Article briefly explores the debate that surrounds prophylactic rules' legitimacy.[10] The most infamous of prophylactic rules are the *Miranda* warnings. However, the prophylactic nature of these rules is not without criticism. In fact, scholars who support *Miranda* warnings believe they are not actually prophylactic rules, and argue that if *Miranda* rules are prophylactic, then most judicially crafted rules that aim to protect constitutional rights would be considered prophylactic.

Part II delves into the effect of *Miranda* warnings on police officers.[11] Many of the major criticisms that arose immediately after the

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6. *Id.* at 469; *see* Chavez v. Martinez, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part) (stating that *Miranda*'s procedures were designed "to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause"); Connecticut v. Barrett, 479 U.S. 523, 528 (1987) ("The fundamental purpose of the Court's decision in *Miranda* was 'to assure the *individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.'" (quoting *Miranda*, 384 U.S. at 469)); *see also* Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1521 (2008).

7. There is extensive scholarship and criticism about *Miranda* warnings. Although it is impossible to list all of the scholarly criticism in this area, it is helpful here to list some of them. *See* Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 187–89 (1988) (explaining the conflict between legitimacy and plausibility of the *Miranda* decision); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 101 (1985) [hereinafter *Prophylactic Rules in Criminal Procedure*] (analyzing the constitutional legitimacy of prophylactic rules); Paul Marcus, *A Return to the "Bright Line Rule" of* Miranda, 35 WM. & MARY L. REV. 93, 94 (1993) (arguing that *Miranda* suffers from too many exceptions and limitation that makes a case-by-case review process difficult); Weisselberg, *supra* note 6 (determining that, as a protective device, *Miranda* is largely dead); *see also* Daniel R. Dinger, *Is There a Seat for* Miranda *at* Terry*'s Table?: An Analysis of the Federal Circuit Court Split over the Need for* Miranda *Warnings During Coercive* Terry *Detentions*, 36 WM. MITCHELL L. REV. 1467, 1469 (2010) (analyzing a circuit split over the need for *Miranda* warnings during investigative detentions).

8. *See generally* Andrew Guthrie Ferguson & Richard A. Leo, *The* Miranda *App: Metaphor and Machine*, 97 B.U. L. REV. 935 (2017) (arguing that confusion about the *Miranda* warnings has rendered them ineffective).

9. *See* Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of* Miranda*'s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685, 778–87 (2017).

10. *See infra* Part I.

11. *See infra* Part II.

Miranda decision were that *Miranda* warnings would make it harder for police officers to question suspects and close cases. However, after fifty years, we now have data that helps explain the long-term effect of the *Miranda* decisions on police officers.[12]

Lastly, Part III explores how the Sixth Amendment right to counsel is different from the Fifth Amendment right to counsel.[13] This section also explores whether there should be a difference.[14] Although the Sixth Amendment and the Fifth Amendment aim to protect different rights, both boil down to a right to counsel. It is in this difference that questions arise about when a suspect has a right to counsel.

I. ARE PROPHYLACTIC RULES LEGITIMATE CONSTITUTIONAL RULES?

A "prophylactic rule" is a judicially-crafted, doctrinal rule designed to protect constitutional rights but, in reality, overprotects those rights.[15] Academic debate has surrounded the concept of the legitimacy of prophylactic rules.[16] Most famously, United States Supreme Court Justice Clarence Thomas and the late Justice Antonin Scalia have argued against these rules, writing that these judicially-crafted doctrinal rules place improper restrictions upon Congress and the states and are therefore, "an immense and frightening antidemocratic power."[17] For a judicially-crafted rule to be legitimate, it logically follows that the rule must not "invade the prerogatives of the other branches."[18] Additionally, a legitimate judicially-crafted rule

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12. *See infra* text accompanying notes 38–45 (explaining the long-term effects of *Miranda* warnings from crime-clearance-rate data).

13. *See infra* Part III.

14. *See infra* Part III.

15. Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 1 (2001); *see, e.g.*, Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 22 (1975); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195 (1988). Prophylactic rules have been defined in different ways. *See, e.g.*, Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1032 (2001) ("A 'constitutional prophylactic rule' is a judicially-created doctrinal rule or legal requirement determined by the Court as appropriate for deciding whether an explicit or 'true' federal constitutional rule is applicable."); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999) (stating that prophylactic rules "refer to those risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned [and] required rules").

16. *See Prophylactic Rules in Criminal Procedure*, *supra* note 7, at 102, 105–06 ("What distinguishes a prophylactic rule from a true constitutional rule is the possibility of violating the former without actually violating the Constitution. A decision that promulgates or employs a prophylactic rule will not attempt to demonstrate an actual violation of the defendant's constitutional rights in the case under review." (footnote omitted)).

17. Dickerson v. United States, 530 U.S. 428, 446 (2000).

18. Strauss, *supra* note 15, at 208.

must not be overbroad, as this too would render it illegitimate and would be the very definition of a prophylactic rule.[19]

On one side of the debate, there are critics who believe that prophylactic rules are not legitimate constitutional rules for this very reason.[20] However, supporters of *Miranda* rights do not believe the debate about legitimacy rests on the premise that all prophylactic rules are illegitimate.[21] Instead, supporters argue that most judicially created rules could be "prophylactic," but that does not make them illegitimate.[22] Both critics and defenders of prophylactic rules begin with the premise that there is something extraordinary about these rules.[23] However, prophylactic rules may in fact be more of the norm than the exception. Although the most infamous prophylactic rule is the *Miranda* warnings, constitutional law is arguably filled with rules that are prophylactic in nature. As David Strauss wrote in *The Ubiquity of Prophylactic Rules*, prophylactic rules, like *Miranda* warnings, are the norm because the "intensely practical considerations upon which they are thought to rely undergird all of constitutional doctrine."[24] "As a theoretical exercise, one could try to identify what the real, noumenal Constitution would require if governments had different tendencies or the courts had different capacities. But usually that would be a pointless task."[25] In short, "in deciding constitutional cases, the courts constantly consider institutional capacities and propensities. That is, to a large extent, what constitutional law consists of: [C]ourts create constitutional doctrine by taking into account *both* the principles and values reflected in the relevant constitutional provisions *and* institutional realities."[26]

So why, then, are *Miranda* warnings singled out? It has to be their mainstream appeal. Without a doubt, the most infamous prophylactic rule, *Miranda* warnings, permeate every aspect of our lives and have garnered some extreme dissents from the Supreme Court.[27] Yet, just because they have popular appeal should not unfairly subject *Miranda* warnings to heightened prophylactic scrutiny. Even supporters of *Miranda* rights seem to concede that *Miranda* warnings overprotect the Fifth Amendment privilege against self-incrimination.[28] However, this may not actually be the case. It is difficult to determine whether a judicially-crafted rule actually overprotects a right. Although it is important to maintain a separation of powers, it is not

19. *See id.* at 207.
20. *See supra* text accompanying note 17.
21. *See* Strauss, *supra* note 15, at 207.
22. *See id.*
23. *See id.*
24. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 21 (2004); Strauss, *supra* note 15.
25. Strauss, *supra* note 15, at 207–08.
26. *Id.* at 207 (emphasis in original).
27. *E.g.*, Dickerson v. United States, 530 U.S. 428 (2000).
28. *See generally* Klein, *supra* note 15; Strauss, *supra* note 15.

outside the realm of judicial authority to craft these rules to enforce the very Constitution that the judiciary has been charged with upholding. The question, therefore, may not be whether prophylactic rules are legitimate constitutional rules, but instead whether it is possible to determine if a rule overprotects a constitutional right. Further, if it is possible, what is the harm of overprotection? After fifty years, the answers to these questions may not matter all that much. It may be more important to focus on the practical effect of this so-called prophylactic rule, especially the effect on police officers charged with administering *Miranda* warnings.

II. IS *MIRANDA* GOOD NEWS OR BAD NEWS FOR POLICE OFFICERS?

Critics of *Miranda* warnings speculated that the warnings would have dire effects for police officers.[29] Although *Miranda* warnings came from the judiciary, it is police officers who are charged with doling out these warnings every time they have to arrest a suspect.[30] Initially, many of the critics believed that *Miranda* warnings would prevent police officers from apprehending countless dangerous criminals and solving difficult cases.[31] As Justice Harlan warned in his dissenting opinion in *Miranda*, "[the decision would] entail[ ] harmful consequences for the country at large. How serious these consequences may prove to be only time can tell."[32] Justice White also speculated that, "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him."[33] Despite these criticisms, there has been very little data on the actual effects of *Miranda* warnings for police officers.[34]

Shortly after the *Miranda* decision, there were a few short-term studies that suggested fewer suspects confessed (that is, the "confession rate" decreased),[35] but those studies were not universally accepted as accurate

29. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1057 (1998) (citing *More Criminals to Go Free? Effect of High Court's Ruling*, U.S. NEWS & WORLD REP., June 27, 1966, at 32–33 (quoting Los Angeles Mayor Samuel W. Yorty) (including a statement by Fred E. Inbau, Professor of Criminal Law at Northwestern University, that law enforcement officials would choose not to prosecute a number of cases because of *Miranda*)).

30. *Id.*

31. *Id.*

32. Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).

33. *Id.* at 542 (White, J., dissenting).

34. *See* Gerald Caplan, Book Review and commentary, 40 WAYNE L. REV. 279, 281 (1993) (reviewing JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993)) ("We still lack sufficient data about *Miranda*'s impact on the administration of justice."); George C. Thomas III, *Is* Miranda *a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821, 837 (1996) ("We need more empirical evidence [about *Miranda*]. What we have so far raises more questions than it answers.").

35. Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 395–417 (1996) [hereinafter Miranda*'s Social Costs*]. For discussion of this assessment, compare the

because the studies examined the effect of *Miranda* directly before and after the decision.[36] This short-term analysis on the effect of *Miranda* warnings did not analyze them over a long enough period of time to determine whether the *Miranda* decision actually had a negative effect on the rate of confessions or if some other factor was the cause of the decline.[37]

One of the only available long-term measures of *Miranda*'s effectiveness is crime-clearance-rate data.[38] The crime clearance rate is the rate at which police can declare that a crime is solved.[39] Confessions are needed in approximately one out of every four criminal convictions (24% of cases).[40] Assuming that *Miranda* warnings actually have an effect on a suspect's willingness to confess, it would logically follow that the *Miranda* decision would lead to a decrease in crime clearance rates.

A thirty-year study on the effects of *Miranda* warnings on confessions showed just that.[41] The "thirty-year study" examined the FBI's Uniform Crime Reports (UCR), which collects data about crime clearance rates from around the country.[42] The study found that crime clearance rates for violent crimes (that is, non-negligent homicide, rape, aggravated assault, and robbery) were "fairly stable from 1950–1965, generally hovering above 60%."[43] However, in the thirty years following the *Miranda* decision, crime clearance rates for violent crimes hovered around 45%.[44] The thirty-year study concluded that this long-term trend did in fact harm police officers' ability to solve violent crimes.[45]

This data applied not only to violent crimes, but also to property crimes (that is, burglary, larceny, and auto theft).[46] The study showed that post-*Miranda*, the property crime clearance rate also decreased, although less dramatically than the violent crime clearance rate.[47] There is little data about the national total for all crimes because the UCR stopped reporting the

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criticism of this analysis in Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 505 (1996) (criticizing Cassell's metrics for determining decreased confessions), with its defense in Paul G. Cassell, Reply, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084 (1996) (reaffirming his metric for determining a decreased confession rate using before-after studies).

36. Cassell & Fowles, *supra* note 29, at 1060.

37. *Id.*

38. *Id.* at 1059.

39. *Id.*

40. *Id.* at 1061.

41. *Id.* at 1068 (examining the "long-term perspective on clearance rates by plotting the FBI's annual [violent crime] figures").

42. *See generally* U.S. DEP'T OF JUSTICE: FED. BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1995 (Oct. 13, 1996), https://ucr.fbi.gov/crime-in-the-u.s/1995.

43. Cassell & Fowles, *supra* note 29, at 1068–69.

44. *Id.*

45. *Id.*

46. *Id.* at 1070.

47. *Id.*

clearance rate for total crimes in 1973.[48] When the UCR did compile crime data to report the national totals, the UCR placed the crimes into seven index categories, including homicide, rape, robbery, assault, burglary, larceny $50 and over, and auto theft.[49] The thirty-year study analyzed those seven categories individually and found that the *Miranda* laws did in fact decrease the crime clearance rates for robbery, larceny, vehicle theft, and burglary but not for homicide, rape or assault.[50] The thirty-year study concluded that *Miranda* was responsible for an approximately 3.8% decrease in conviction rates for serious crimes.[51]

However, it is still debatable whether *Miranda* warnings actually impact the conviction rate. One critic of the thirty-year study determined that the actual impact of *Miranda* on conviction rates was not 3.8% as the thirty-year study suggested, but was closer to 0.98%, a less than 1.0% drop in conviction rates.[52] Even assuming, however, that the thirty-year study 3.8% drop in conviction rates was correct, a 3.8% decline is negligible at best.[53] As one critic of the thirty-year study explained, "[f]or all practical purposes, *Miranda*'s empirically detectable harm to law enforcement shrinks virtually to zero."[54]

Nevertheless, even if the drop in conviction rates does make police officers' jobs more difficult, that may not be a bad thing. *Miranda* warnings may have made it harder for police officers to illicit confessions out of suspects who were intimidated by police questioning.[55] In fact, the lower rates of convictions could be an indication that *Miranda* warnings are

48. *Id.* at 1132.

49. *Id.* at 1099 (citing U.S. DEP'T OF JUSTICE: FED. BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1995 2–3 (Sept. 2, 1959), https://ia801408.us.archive.org/5/items/uniformcrimerepo1958unit/uniformcrimerepo1958unit.pdf).

50. *Id.* at 1089. The study proposed several possible explanations for the difference between the clearance rates of different crimes after *Miranda*. *Id.* at 1089–91. The thirty-year study explained that "crimes of passion or aggression (i.e., murder, rape, and assault) were apparently unaffected by *Miranda*, while what are more often crimes of deliberation (i.e., robbery, larceny, vehicle theft, and possibly burglary) were affected." *Id.* at 1089. The thirty-year study also suggested that police are sometimes more likely to clear certain kinds of crimes through "[confessions]—specifically burglary, grand larceny, grand larceny vehicle, and robbery." *Id.* Another possible explanation may be that police departments are able to "shift resources" to obtain high clearance rates for violent crimes (for example, murder and rape) instead of less serious crimes (for example, larceny and vehicle theft). *Id.* at 1090. Specifically, homicide, the thirty-year study suggested, may have to do more with the changing pattern of homicide (that is, the decrease of "romantic triangles and lovers' quarrels" to felony-type murders which are harder to solve because they are often committed by strangers). *Id.* at 1089–91.

51. *Id.* at 1061. This rate was determined by the "16% confession rate drop multiplied by the 24% confession necessity rate," or about one in every four. *Id.*; *see also* Miranda*'s Social Costs*, *supra* note 35, at 437–38.

52. Schulhofer, *supra* note 35, at 541.

53. *Id.* at 502 (citing Welsh S. White, *Defending* Miranda*: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 20 (1986)).

54. *Id.*

55. *See* cases cited *supra* note 6 (explaining that the purpose of *Miranda* was to protect an individual's right to remain silent).

working in precisely the way the Supreme Court intended.[56] It is important that there is some restraint on police officers' ability to illicit confessions outside the presence of a suspect's counsel. Although that may result in fewer crimes being solved,[57] it may be for good reason. The police may no longer be able to utilize unconstitutionally coercive questioning techniques which otherwise would have led to false confessions.[58]

Additionally, some law enforcement professionals and academic researchers believe that police officers have adapted to the *Miranda* warnings requirement.[59] Although the *Miranda* decision may have made it harder for police officers in the short term, studies have shown, and many have admitted, that police officers have adapted to the *Miranda* decision.[60] Police officers learned how to avoid admissibility problems when questioning subjects and altered their investigations to obtain convictions when there was not a confession.[61]

Furthermore, since the *Miranda* decision, there have been numerous cases that have effectively chipped away at the *Miranda* protections.[62] In some ways, this is good news for police officers who no longer have to

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56. *See supra* text accompanying notes 41–45 (discussing *Miranda*'s effect on crime clearance rates).

57. *See supra* text accompanying notes 38–44 (explaining the effect of *Miranda* on crime clearance rates).

58. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

59. *See, e.g.*, Schulhofer *supra* note 35, at 501 n.4, 504 n.9 (citing ABA SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC'Y, CRIMINAL JUSTICE IN CRISIS 28 (1988) (noting the results of a survey in which a "very strong majority" of judges, prosecutors, and police officers agreed that *Miranda* does not pose serious problems). Chief Justice Burger noted "that 'law enforcement practices have adjusted to [*Miranda*'s] strictures.'" *Id.* at 504 n.9 (Burger, C.J., concurring) (alterations in original) (citing Rhode Island v. Innis, 466 U.S. 291, 304 (1980)). *See also* Tom C. Clark, *Observations: Criminal Justice in America*, 46 TEX. L. REV. 742, 745 (1968) (former Justice, who dissented in *Miranda*, recognized "error" in his "appraisal of [its] effect[s] upon the successful detection and prosecution of crime"); Richard H. Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 26 (1967) (noting that in 1961, Detroit police judged confessions to be necessary in 23.6% of their cases but that "improved investigation and preparation of the cases" in the wake of *Miranda*'s precursor, *Escobedo v. Illinois*, 378 U.S. 478 (1964), caused the necessity rate to drop to 15.2%); Wayne E. Green, *Police vs.* 'Miranda'*: Has the Supreme Court Really Hampered Law Enforcement?*, WALL. STREET J., Dec. 15, 1966, at 16 (reporting views of Kansas City police chief—later FBI Director—Clarence Kelley); Yale Kamisar, *Landmark Ruling's Had No Detrimental Effect*, BOSTON GLOBE, Feb. 1, 1987, at A27 (quoting former Philadelphia District Attorney—now Republican Senator—Arlen Specter's conclusion that "law enforcement has become accommodated to *Miranda*, and therefore [he saw] no reason to turn the clock back"); Eduardo Paz-Martinez, *Police Chiefs Defend* Miranda *Against Meese Threats*, BOSTON GLOBE, Feb. 5, 1987, at 25, 29).

60. *See* Brook Holland, Miranda v. Arizona*: 50 Years of Judges Regulating Police Interrogation*, 16 Insights on L. & Soc'y, no.1 (2015), https://www.americanbar.org/publications/insights_on_law_andsociety/15/fall-2015/miradavarizona_holland.html ("For example, one study by an anti-*Miranda* scholar claimed that *Miranda* affected the outcome of less than 8 percent of cases. Other studies argue an even more minimal impact by *Miranda* on the ability of the police to secure admissible confessions.").

61. *See id.* ("One explanation is that police have adapted their interrogation practices to *Miranda*'s requirements.").

62. *See* cases cited *infra* note 84 (providing cases that have chipped away at the *Miranda* protections).

administer perfect *Miranda* warnings before questioning a suspect. Even better for police officers, fifty years after the *Miranda* decision, police officers no longer have to administer *Miranda* warnings before getting a suspect to confess.[63] The Supreme Court, in a 5-4 decision in *Salinas v. Texas*, held just that.[64] In *Salinas*, a suspect, without being placed in custody or receiving *Miranda* warnings, voluntarily came to the police station and answered some of the police officer's questions about a murder.[65] However, the suspect fell silent when asked about whether ballistics testing would match his shotgun to the shell casings found at the scene of the crime.[66] The suspect was charged with murder.[67] At the murder trial, the Texas state prosecutor introduced evidence of the suspect's failure to answer the ballistics questions—his "noncustodial silence"—as evidence of guilt.[68] The suspect was found guilty and appealed his conviction, asserting that his Fifth Amendment rights were violated because he was never given his *Miranda* warnings.[69]

The Court held that the police officer did not violate the suspect's Fifth Amendment rights.[70] The *Salinas* Court concluded that the suspect's Fifth Amendment claim failed because the suspect did not expressly invoke his Fifth Amendment privilege against self-incrimination.[71] This case now

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63. *See infra* note 84 and accompanying text (discussing a trend toward the erosion of *Miranda* rights in cases leading up to Salinas v. Texas).

64. *See* Salinas v. Texas, 133 S. Ct. 2174 (2013).

65. *Id.* at 2177.

66. *Id.*

67. *Id.*

68. *Id.* at 2180. Many of the cases over the past fifty years have hinged on whether the conversations between officers and potential suspects were custodial or noncustodial in nature.

For a case that stands for the proposition that probation interviews are generally noncustodial, see *Minnesota v. Murphy*, 465 U.S. 420, 439–40 (1984) (holding no custody because the probation interview was in a familiar environment at a time mutually convenient to the probationer and the probation officer). For the rule that certain in-home interrogations are custodial, see *Orozco v. Texas*, 394 U.S. 324, 326–37 (1969) (holding that the suspect was in custody when suspect was questioned in his bedroom during pre-dawn hours by multiple officers). For other Supreme Court cases regarding the *Miranda* "custody" issue, see *Berkemer v. McCarty*, 468 U.S. 420, 443–45 (1984) (holding ordinary *Terry* stops non-custodial) and also see *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011) (holding that the age of a juvenile suspect may be considered in custody evaluations); *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) (barring consideration of suspect's experience with police for court evaluation of custody determination); *Beckwith v. United States*, 425 U.S. 341, 346–47 (1976) (holding that a suspect being "the 'focus' of the investigation" by police is not determinative of custody).

For cases that stand for the proposition that some suspects who are determined to be in custody may still not receive *Miranda* warnings because they are found not to have been subjected to police interrogation either expressly or functionally, see *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980) (holding that a less direct appeal to suspect's conscience was not the functional equivalent of interrogation—that is, the police could not have known that their words were "reasonably likely to elicit an incriminating response from the suspect"); *Arizona v. Mauro*, 481 U.S. 520, 527–29 (1987) (holding that placing a suspect in same room with a family member while police are recording and listening in on conversation, is not the functional equivalent of interrogation).

69. *Salinas*, 133 S. Ct. at 2175–76.

70. *Id.* at 2180.

71. *See id.* at 2178.

stands for the proposition that there must be an unequivocal invocation of the desire for counsel.

In a scathing dissent, several justices criticized the majority and questioned whether this new view of *Miranda* warnings would put the onus on suspects to understand a complex area of constitutional law and know the proper language necessary to invoke their right to remain silent.[72] In *Salinas*, the suspect did not speak.[73] He remained silent.[74] However, under the majority's view, this was not enough, and that silence would be taken as evidence of guilt unless the suspect affirmatively invokes the Fifth Amendment privilege.[75] As one criminal law scholar explained:

> [O]ne of the most troubling issue[s] from the plurality's opinion in *Salinas* is that most police suspects subjected to noncustodial police interrogation, regardless of whether they are actually guilty of the suspected crime, will most likely not know to expressly invoke the Fifth Amendment privilege against self-incrimination in order to attempt to prevent their silence from being used against them as evidence of guilt at a future trial.[76]

Lest we forget the 1965 Supreme Court decision that banned prosecutors from making comments during a criminal trial about the defendant's decision not to testify and stay silent at trial.[77] Today, however, a prosecutor can use a defendant's silence during a noncustodial interrogation in which no *Miranda* warnings were given as evidence of guilt.[78]

The *Salinas* decision has been criticized as essentially turning the *Miranda* decision upside down.[79] However, it has also been championed as beneficial to police officers and prosecutors who seemingly no longer have to administer *Miranda* warnings to get a confession from a suspect.[80] Now, like the police officers in *Salinas*, an officer can ask a potential suspect to come down to the police station for questioning to clear the suspect of wrongdoing, never administer *Miranda* rights to the suspects, and elicit an

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72. *Id.* at 2190 (Breyer, J., dissenting).

73. *See id.* at 2178.

74. *See id.*

75. *See id.* at 2184 ("Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it.").

76. Christopher Totten, Salinas v. Texas*: Guilt by Silence and the Disappearing Fifth Amendment Privilege against Self Incrimination*, 49 CRIM. L. BULL. no. 6, 1501, 1508 (2013).

77. *See* Griffin v. California, 380 U.S. 609, 615 (1965) ("The Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.").

78. *See Salinas*, 133 S. Ct. at 2184.

79. *See* Harvey Gee, Salinas v. Texas*: Pre-*Miranda *Silence Can be Used Against a Defendant*, 47 SUFFOLK U. L. REV. 727, 747 (2014) ("*Salinas* forgets *Miranda*'s insistence that, prior to any questioning, the arrestee must be warned of his right to remain silent and as a result, he waived it.").

80. *See* Holland, *supra* note 60.

admissible confession nonetheless.[81] This seems to fly in the face of the Fifth Amendment privilege that *Miranda* sought to protect.[82]

However, the *Salinas* decision should not come as a surprise.[83] The ten years preceding the *Salinas* decision were riddled with decisions that created exceptions to *Miranda* warning requirements, indicating a trend toward the erosion of *Miranda* rights.[84] Even if the statistics after *Miranda* indicate that it has been at least slightly harder for police officers to elicit confessions and convict criminals, the most recent Supreme Court decisions on *Miranda* rights have made it easier for officers to get confessions without even having to read a suspect his or her *Miranda* rights.[85] Nonetheless, there still seems to be some question as to whether police officers have the ability to question suspects without their counsel present even after a suspect is charged with a crime. These questions may turn on whether the suspect has a right to counsel under the Fifth or Sixth Amendment.

III. HOW AND SHOULD THE SIXTH AMENDMENT RIGHT TO COUNSEL BE DIFFERENT FROM THE FIFTH AMENDMENT RIGHT TO COUNSEL?

The Fifth Amendment right to counsel was recognized as part of the *Miranda* decision as a suspect's right to counsel during a custodial

81. *See Salinas*, 133 S. Ct. at 2178, 2184.

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

83. *See* Berghuis v. Thompkins, 560 U.S. 370, 388–89 (2010) (holding that a defendant who heard and understood his *Miranda* warnings, yet spoke for the first time after nearly three hours, did not invoke his right to remain silent, thus waiving it).

84. For cases leading up to the *Salinas* decision that have chipped away at *Miranda* protections, see *id.* (finding a valid waiver of *Miranda* after a custodial suspect made incriminating statements following a period of almost three hours of silence); *Maryland v. Shatzer*, 559 U.S. 98, 130 (2010) (limiting *Edwards* protection, or safeguard, following a custodial suspect's assertion of the right to counsel under *Miranda*—the *Edwards* rule under which a suspect who has invoked his right to the presence of counsel during custodial interrogation is not subject to further interrogation until either counsel has been made available or the suspect himself further initiates exchanges with the police); *Davis v. United States*, 512 U.S. 452, 459 (1994) (requiring essentially unambiguous language by a custodial suspect for successful assertion of the right to counsel under *Miranda*); *Illinois v. Perkins*, 496 U.S. 292, 300 (1990) (discussing undercover agent exception); *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (discussing the booking, or "routine booking question[s]" exception to *Miranda*); *Colorado v. Connelly*, 479 U.S. 157, 162, 170–71 (1986) (finding that a suspect with severe mental illness could voluntary waive *Miranda* rights); *Moran v. Burbine*, 475 U.S. 412, 415, 433–34 (1986) (finding voluntary waiver despite police failure to inform defendant that his attorney was trying to contact him); *Oregon v. Elstad*, 470 U.S. 298, 304, 317–18 (1985) (limiting the "fruit of the poisonous tree" doctrine in *Miranda* context); *New York v. Quarles*, 467 U.S. 649, 656 (1984) (discussing *Miranda* "public safety" exception); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044–45 (1983) (citing *Wyrick v. Fields*, 459 U.S. 42 (1982) (per curiam)) (establishing a rather low threshold for situations when a suspect re-initiates police contact following valid *Edwards* invocation); *Fare v. Michael C.*, 442 U.S. 707, 729 (1979) (holding valid waiver by a juvenile who requested to see his probation officer); *Michigan v. Tucker*, 417 U.S. 433, 451–52 (1974) (limiting the fruit of the poisonous tree doctrine in *Miranda* context); *Harris v. New York*, 401 U.S. 222, 226 (1971) (holding that statements taken in violation of *Miranda* may be used at trial to impeach defendant).

85. *See, e.g.*, *Salinas*, 133 S. Ct. 2174; Howes v. Fields, 565 U.S. 499 (2012).

interrogation.[86] The Sixth Amendment right to counsel, however, is the right to provide suspects, once they have been charged, effective assistance of counsel at every "critical stage" of a criminal prosecution.[87] "The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations .... The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at postarraignment interrogations."[88] As the Court explained, "The Sixth Amendment right is intended to protect the unaided layman at critical confrontations with the government after the initiation of the adversary process with respect to a particular crime .... The *Miranda-Edwards* guarantee is intended to protect the suspect's 'desire to deal with the police only through counsel.'"[89] The key difference between the two is the time of the attachment of the right to counsel. The Fifth Amendment invokes the right before a suspect is even charged.[90] The Sixth Amendment invokes the right only after a suspect is charged.[91]

Besides the obvious temporal differences, there are many other key differences between the Fifth Amendment and Sixth Amendment rights to counsel.[92] One particular difference is important to note. The Fifth

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86. *See generally Miranda*, 384 U.S. at 436.

87. *See generally* McNeil v. Wisconsin, 501 U.S. 171 (1991). "Critical stage" includes arraignment or similar proceedings. *See* Montejo v. Louisiana, 556 U.S. 778, 802 (2009).

88. Michigan v. Jackson, 475 U.S. 625, 629 (1986), *overruled by* Montejo v. Louisiana, 556 U.S. 778 (2009).

89. *McNeil*, 501 U.S. at 171–72 (citing Edwards v. Arizona, 451 U.S. 477, 484 (1981)).

90. *See Edwards*, 451 U.S. at 485–86.

91. Texas v. Cobb, 532 U.S. 162, 172 (2001).

92. *See* Meredith B. Halama, Note, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule"*, 1998 U. ILL. L. REV. 1207, 1214–15. In her article, Halama compares the Fifth and Sixth Amendment rights to counsel:

> The differences in the purpose and history of the Sixth and Fifth Amendment rights to counsel cannot be understated. The Sixth Amendment right to counsel is in the Bill of Rights and has been part of our adversarial system for over 200 years; it has applied to pretrial confrontations for sixty years. By contrast, the Supreme Court created the Fifth Amendment right to counsel barely thirty years ago. The Sixth Amendment is a right to counsel for its own sake; *Miranda*'s right to counsel protects the privilege against self-incrimination. The Sixth Amendment exists to maintain the integrity of our adversarial system as a whole; the *Miranda* right exists solely to protect suspects from being compelled to waive their Fifth Amendment rights in custodial interrogations. The Sixth Amendment focuses on the conduct of the police; the Fifth Amendment focuses on whether the suspect felt coerced.
>
> Because of the differences in the origins and purposes of the Sixth and Fifth Amendments, they apply at different times in criminal proceedings. The dangers of an imbalanced adversarial system that the Sixth Amendment is designed to protect against arise when the government assumes the posture of an adversary, regardless of custody or interrogation. Conversely, the Fifth Amendment perils of compelled self-incrimination, by definition, exist only when a suspect is pressured to divulge his guilt, whether or not adversarial proceedings have begun. Thus, a suspect may have a Fifth Amendment right to counsel to protect his privilege against self-incrimination at a time when he does not have a Sixth Amendment right to counsel, such as in a preindictment or prearraignment interrogation. Conversely, the accused will have a Sixth, but not a Fifth, Amendment right to counsel at all critical stages after the initiation of formal judicial proceedings, regardless of whether he is in

Amendment right to counsel prohibits a police officer from questioning a suspect about any matter until the suspect has the opportunity to speak to an attorney.[93] Whereas, the Sixth Amendment right to counsel, unlike the Fifth Amendment right, is "offense specific."[94] This means that even though the suspect has the right to effective counsel during every step of a criminal prosecution, the police have the right to question the suspect outside the presence of counsel about an unrelated matter.[95] Yet, if police officers violate either the Fifth or Sixth Amendment right to counsel, the consequences are the same: Any evidence obtained during these interrogations cannot be used against the suspect in a court of law.[96]

With similar consequences, and seemingly very little difference, it begs the question: Should the right to counsel be different depending on whether it is invoked by the Fifth or Sixth Amendment? The purpose of the Sixth Amendment is to provide criminal suspects effective assistance of counsel at all critical stages of trial.[97] It is not hard to imagine a scenario in which a suspect is awaiting a criminal trial, but is being questioned by officers about a matter not only unrelated to the suspect's pending criminal trial but also unrelated to a potential charge against that suspect. Police may be using the suspect to gather information about another potential suspect. Unless the suspect is under arrest, the suspect does not have a right to counsel under the Fifth Amendment.[98] Nor would the suspect have the right to effective assistance of counsel under the Sixth Amendment.[99] It is in this gray area that police officers can get a confession from a suspect outside the presence of counsel.

If a suspect is in jail awaiting trial, the suspect is not in custody in the traditional sense that would invoke a *Miranda* warning and Fifth Amendment right to counsel.[100] In fact, the Supreme Court has upheld just that type of case.[101] However, one would think that if a suspect already has counsel representing him in one matter, it would not cause much harm to question the

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> custody or under interrogation. Thus, deliberate attempts by the state to elicit information from an unknowing defendant (such as by an undercover agent or wiretap) after he has been indicted implicates the Sixth, but not the Fifth, Amendment. At all custodial interrogations after the initiation of formal judicial proceedings, the accused has a right to counsel under both the Sixth and Fifth Amendments.

Id. (citations omitted).

93. Miranda v. Arizona, 384 U.S. 436, 474 (1966).

94. *See McNeil*, 501 U.S. at 171.

95. *See generally* Howes v. Fields, 565 U.S. 499 (2012).

96. *See, e.g.*, United States v. Patane, 542 U.S. 630, 639 (2004) ("[T]he Self-Incrimination Clause contains its own exclusionary rule. It provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'"); *see also* Massiah v. United States, 377 U.S. 201, 207 (1964).

97. *See* United States v. Wade, 388 U.S. 218, 224 (1967).

98. *See generally Miranda*, 384 U.S. 436.

99. *Id.*

100. *Howes*, 565 U.S. at 510–11 ("[I]t must follow that imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*.").

101. *See id.*

suspect about another matter in the presence of that same counsel. Albeit not required, it seems only just.

In conclusion, although the *Miranda* decision did not come without its share of criticism, after fifty years it is important not to lose sight of the reason for the decision. The importance of protecting the Fifth Amendment right against self-incrimination cannot be understated. Although the *Miranda* decision may have effectively created a prophylactic rule and may have made it harder for police officers to convict suspects and close cases, it is important to remember that the Supreme Court has not overturned *Miranda*; it is still good law.[102] After fifty years, the majority of the Supreme Court Justices still believe that the Fifth Amendment right is so essential that the *Miranda* decision has not been overturned.

102. *See generally* Holland, *supra* note 60.