Vanderbilt Law Review

Volume 39
Issue 1 *Issue 1 - January 1986*

Article 1

1-1986

Defending Miranda: A Reply to Professor Caplan

Welsh S. White

VANDERBILT LAW REVIEW

VOLUME 39 JANUARY 1986 NUMBER 1

Defending *Miranda*: A Reply to Professor Caplan*

*Welsh S. White***

I. INTRODUCTION

Professor Caplan yearns for the good old days "when the police enjoyed greater public confidence" and, in accordance with the tactics recommended in the police manuals, it was acceptable "for an investigator to talk sharply to the suspect or glare at him or sit too closely or withhold cigarettes, or, from the opposite vantage, to pretend to be a sympathetic friend or a concerned coreligionist."[1] Thus, Professor Caplan attacks the *Miranda* decision[2] on the ground that "by introducing novel conceptions of the proper relationship between the suspect and authority," *Miranda* operates to subvert the principal function of the criminal process, the reliable identification of offenders.[3] Professor Caplan concludes that *Miranda* should be overruled.[4]

---

* This Article responds to Professor Gerald Caplan's Article entitled, *Questioning* Miranda, which appeared at 38 VAND. L. REV. 1417 (1985).

** Professor of Law, University of Pittsburgh. I would like to thank Professor Steven Schulhofer of the University of Pennsylvania Law School for his helpful comments on an earlier draft of this Article and Alan Blanco for his valuable research assistance.

1. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1424 (1985).
2. Miranda v. Arizona, 384 U.S. 436 (1966).
3. Caplan, *supra* note 1, at 1419.
4. Other recent commentators also have argued that *Miranda* should be overruled. *See* Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U. PITT. L. REV. 731 (1981); Gangi, *The Inbau-Kamisar Debate: Time for Round 2?*, 12 W. ST. U.L. REV. 117 (1984); Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979). Until now, however, the Burger Court has indicated that while it is willing to carve

Although Professor Caplan presents his argument lucidly and forcefully, the doctrinal basis for his position is not entirely clear. He objects to *Miranda*'s holding and analysis but does not specify whether his objections primarily center on the Court's conclusion that the fifth amendment privilege applies to police questioning at the station house or to the Court's determination that the *Miranda* warnings are necessary to protect that privilege.[5] Professor Caplan does criticize the specific warnings required and intimates that the much maligned voluntariness test provides a preferable way to control police interrogation.[6] After examining the empirical data relating to *Miranda*'s operation and finding that *Miranda*'s adverse effect on law enforcement is much greater than generally has been recognized, he concludes that the rule established in *Miranda* is not an appropriate compromise between the competing interests of protecting individual rights and promoting the interests of law enforcement.

This Article deals briefly with Professor Caplan's principal arguments. Part II discusses the constitutional basis for the *Miranda* decision. Part III examines the viability of returning to the voluntariness test. Part IV addresses the question whether, in light of the empirical data on *Miranda*'s practical effect, the decision represents an appropriate compromise between the competing considerations of protecting individual rights and promoting the interests of law enforcement.

II. THE CONSTITUTIONAL BASIS FOR *Miranda*

Miranda's holding that the fifth amendment privilege applies to in-custody interrogation was innovative, but, as Justice White stated in his *Miranda* dissent, the novel conclusion does not in itself prove that the Court was "wrong or unwise in its . . . reinter-

---

out new exceptions to *Miranda*, *see, e.g.*, New York v. Quarles, 104 S. Ct. 2626 (1984) (establishing "public safety" exception to *Miranda*), it is not inclined to "disparage" or "overrule" the decision "at this late date." Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

5. In this respect Professor Caplan is similar to other critics of *Miranda*. For example, Attorney General Edwin Meese complained that *Miranda* was "a wrong decision." Nevertheless, Meese went on to say, "I think that if a person doesn't want to answer, that's their right, but you have had, time after time you've had all these ridiculous situations in which the police are precluded from asking the one person who knows the most about the crime what happened." *Mr. Meese and* Miranda, Wash. Post, Aug. 28, 1985, at A18, col. 1. By admitting that the defendant has a right to remain silent, the Attorney General implicitly suggested that he does not object to *Miranda*'s holding that the fifth amendment privilege applies at the police station.

6. Caplan, *supra* note 1, at 1432-35.

pretation of the Fifth Amendment."[7] Indeed, given the well-established rule that the fifth amendment privilege applies to grand jury questioning[8] as well as to legislative investigations[9] and civil proceedings,[10] holding that the privilege does not apply also to police questioning at the station house would seem anomalous. One possible basis for distinguishing the cases exists. Because, unlike the grand jury, a police officer who questions a suspect does not have the legal authority to compel an answer, there is no legal obligation to which the privilege can attach. As Professor Yale Kamisar has pointed out, however, this difference is not a tenable basis for distinction as long as the police are dealing with "suspects who are likely to assume or be led to believe that there *are* legal (or extralegal) sanctions for contumacy."[11]

The *Miranda* majority based its conclusion that suspects subjected to police interrogation would believe that there were legal or extralegal sanctions for a failure to answer not only on exposure to prior confession cases decided under the voluntariness test but also, and perhaps more importantly, on an examination of the interrogation tactics recommended in police manuals.[12] As Professor Caplan recognizes, these tactics were designed to place the suspect at a disadvantage.[13] The manuals recommended that the police seek to obtain confessions through the use of trickery and emotional appeals. Moreover, one of the manuals quoted by the Court emphasized that, in appropriate cases, the police must establish an atmosphere of intimidation:

> The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, be must rely on an oppressive atmosphere of dogged persistence. He mnst interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrograte for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated.[14]

---

7. 384 U.S. at 531 (White, J., dissenting).

8. *See* Counselman v. Hitchcock, 142 U.S. 547 (1892).

9. *See* Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955).

10. *See* McCarthy v. Arndstein, 266 U.S. 34 (1924).

11. Y. KAMISAR, *A Dissent from the* Miranda *Dissents*, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 46 (1980) (emphasis in original).

12. 384 U.S. at 448-55.

13. Caplan, *supra* note 1, at 1423-25.

14. 384 U.S. at 451 (quoting C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956)).

Professor Caplan does not contend that the tactics described in the police manuals were not employed by the police.[15] On the contrary, he recognizes that the most influential interrogation manual actually had the effect of curbing abuses that had existed previously.[16] If the practices described in the manuals do represent the norm, then the pressure on the suspect to answer questions is certainly no less than the pressure exerted on a witness facing the grand jury or a legislative committee.

In fact, as Professor Kamisar has noted, even commentators who generally have opposed expanding the fifth amendment privilege argue in favor of applying it to police station questioning.[17] For example, prior to *Miranda*, Professor John McNaughton presented the following analysis of the underlying fifth amendment policies:

> The significant purposes of the privilege . . . are two: (1) The first is to remove the right to an answer in the hard cores of instances where compulsion might lead to inhumanity, the principal inhumanity being abusive tactics by a zealous questioner. (2) The second is to comply with the prevailing ethic that the individual is sovereign and that proper rules of battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponents to defeat himself.
> . . . .
> . . . Both policies of the privilege which I accept, as well as most of those which I reject, apply with full force to insure that police in informal interrogations not have the right to compel self-incriminatory answers. Whether the result is reached by pointing out the elementary fact that police have not been given the authority to compel disclosures of any kind or whether the result is put on the ground that the person questioned is "privileged" not to answer makes little difference. Answers should not be compelled by police . . . .[18]

Professor Caplan's principal argument seems to be that even if the fifth amendment privilege applies at the station house, the *Miranda* warnings are not necessary to safeguard this privilege. Although he particularly objects to the warning concerning the right

---

15. Bernard Weisberg, the first lawyer to emphasize the police manuals, argued Escobedo v. Illinois, 378 U.S. 478 (1964), for the ACLU as amicus curiae. "In his *Escobedo* brief, Weisberg maintained that since police interrogation of arrested persons is characteristically conducted in privacy and without a record being made, 'the best sources' for understanding police questioning 'are the published manuals.'" Y. KAMISAR, *supra* note 11, at 109. For further discussion of the manuals, see *id.* at 1-8, 109-10.

16. Caplan, *supra* note 1, at 1432-33.

17. Y. KAMISAR, *supra* note 11, at 46-50.

18. McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affectation, Raison d'Etre and Miscellaneous Implications*, in POLICE POWER AND INDIVIDUAL FREEDOM 223, 237 (C. Sowle ed. 1962), *quoted in* Y. KAMISAR, *supra* note 11, at 46-47.

to have an attorney present during police interrogation,[19] he also objects to the basic requirement that the police warn the suspect of his right to remain silent. In addressing the latter warning, Professor Caplan makes essentially two points. First, he contends that the warning encourages the suspect to withhold information, and in related contexts, such as one in which a professor suspects a student of plagiarism, we do not require this encouragement. Professor Caplan says, "Of course, a man suspected of murder faces a greater penalty than a student risking expulsion, but does this factor support an argument for or against a warning of a right to remain silent?"[20] The simple answer to this question is that, under our constitutional system, the person who is charged with a criminal offense is entitled to more protection than a person who is accused of plagiarism. In particular, the fifth amendment privilege potentially applies to the murder suspect but not to the plagiarism suspect. This does not necessarily mean that the person suspected of murder is entitled to a warning before police questioning, but the fifth amendment's applicability does distinguish the murder suspect's case from the other ones discussed by Professor Caplan.

Professor Caplan concedes that a warning of the right to remain silent has value because "[p]roof that the suspect knows his rights is relevant to a determination that his statements were not coerced."[21] Presumably, Professor Caplan would also agree that if the suspect is not aware of his right to remain silent, then at least from the suspect's perspective, his answers would be compelled because he might believe that his only alternative was to answer the questions asked by the police.[22] But Professor Caplan is concerned about the suspect who knows his rights. He concludes that "[i]n

---

19. Caplan, *supra* note 1, at 1438-41, 1463-64. Strictly speaking, this warning is not constitutionally required by *Miranda*. *Miranda* holds only that the warnings described in that opinion are required in the absence of "other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." 384 U.S. at 467. Thus, a system in which a neutral party warned criminal suspects of their right to remain silent and then observed police interrogations to insure that the suspects had a continuous opportunity to exercise that right might be an adequate substitute for the *Miranda* warnings.

20. Caplan, *supra* note 1, at 1452.

21. *Id.* at 1454.

22. *But cf.* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that an individual's lack of knowledge of his right to refuse a police request to search does not necessarily render a consent search involuntary). In *Schneckloth* Justice Stewart distinguished the situation presented in *Miranda*, stating, "[T]he [*Miranda*] Court found that the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation." *Id.* at 247.

the fifth amendment context, . . . the automatic suppression of an incriminating statement solely because of a failure to advise a suspect who in fact knows his rights seems excessive."[23]

Professor Caplan's position seems to make sense on its face. If the defendant already is cognizant of his right to remain silent, why should the police be required to inform him of that right? Of course, problems of proof will be lessened if the police do inform the defendant. As the Court said, assessing the defendant's knowledge on the basis of "his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact."[24] Nevertheless, some cases certainly exist in which the government can prove the suspect's knowledge of his right to remain silent by convincing evidence. In these cases, why should the suspect be entitled to a warning?

Miranda's answer is that the warning is "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."[25] Even a suspect who has a complete understanding of his rights is likely to be coerced into making a statement because of the pressure created by police questioning. From one perspective, this position seems very surprising. Suppose the police have a law professor at the police station. They ask him one question after failing to warn him of his constitutional rights. Can it be said that the coercive atmosphere of the police station will overbear the professor's will to such an extent that he will feel compelled to answer the officer's question?

Maybe not in every case, but certainly in some cases the combination of custody and interrogation will lead the professor to feel that his only alternative is to answer the officer's question. Even if the professor is aware of his right to remain silent, he does not necessarily know that the officer is prepared to honor that right. The warnings may be necessary to give him that assurance. Moreover, in a highly stressful situation such as custodial interrogation, an individual's abstract knowledge of his rights may be less important than his ability to cope with the pressure of the situation.[26] Empirical evidence suggests that even in noncoercive settings, individuals who are aware of their rights may feel compelled to re-

23. Caplan, *supra* note 1, at 1455.

24. 384 U.S. at 469.

25. *Id.* at 468.

26. *See* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968).

spond to police questioning.[27]

Of course, there still may be some cases in which the warnings are not necessary to protect the professor's fifth amendment privilege. But how can those cases be identified in advance? Because there is a legitimate basis for concluding that custodial interrogation may overbear the will of even a knowledgeable individual, *Miranda* should not be criticized for its failure to distinguish between suspects who are more or less knowledgeable about their rights.[28]

Moreover, from an historical perspective, this discussion may seem somewhat unnecessary. In the years prior to *Miranda*, the Court had not been exposed to any situation in which a knowledgeable individual confessed after being asked a single question. As Professor Caplan's account of the cases decided under the voluntariness standard[29] indicates, the prior cases almost invariably concerned situations in which police questioned relatively unsophisticated suspects for prolonged periods.[30] Moreover, the tactics described in the police manuals that were presented to the *Miranda* Court reinforced the claim that the typical police interrogation was calculated to overcome an individual's will to resist. Against this background, *Miranda*'s conclusion that warnings were necessary to prevent compulsion seems justified.

In addition, *Miranda* was designed to alleviate the litigation problems involved in determining whether a particular confession was compelled. Professor Caplan praises the voluntariness test in part because "its inquiry was a search for existential fact, an attempt to capture what actually happened at the police station."[31] But long before *Miranda*, it was widely recognized that, in most cases, the adversary process was not equipped to give anything close to an accurate picture of what happened at the police sta-

---

27. *See* Griffiths & Ayres, *A Postscript to the* Miranda *Project: Interrogation of Draft Protesters*, 77 YALE L.J. 300 (1967).

28. Moreover, from a practical standpoint, it seems fruitless to quibble over whether the warnings should be given to someone who already is aware of his rights. If the suspect already knows his rights, what is the harm in giving him the warnings?

29. Caplan, *supra* note 1, at 1428-43.

30. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737 (1966) (defendant, an "impoverished Negro with a third or fourth grade education," was interrogated for about an hour once or twice each day for 16 continuous days until he confessed); Culombe v. Connecticut, 367 U.S. 568 (1961) (defendant with an IQ of 64 and a mental age of 9 ½ years was questioned repeatedly but intermittently for over four days before he confessed); Spano v. New York, 360 U.S. 315 (1959) (defendant, who had a ninth grade education and a history of emotional instability, was interrogated over an eight hour period extending into the early hours of the morning).

31. Caplan, *supra* note 1, at 1434.

tion.[32] The problem was not simply one of resolving the "swearing contest" in which the police officers and the defendant gave differing versions of the interrogation.[33] As Professor Kamisar's account of the *Williams*[34] litigation vividly demonstrates, even if the officers gave an accurate account of the facts, including the length of questioning, the number of officers involved, and a description of any tricks that were used, this account would still not begin to describe the interrogation process experienced by the suspect.[35] The police manuals indicate that interrogation techniques are sophisticated. The police tactics are designed to have subtle effects that may not easily be described. Thus, a verbal account of what the police said or did to a suspect does not reflect the atmosphere created in the interrogation room.

The few existing tapes of interrogations confirm this. For example, the police recorded their six hour interrogation of John Biron in 1962.[36] Six hours of interrogation may not sound excessive, and the police allowed the suspect to rest and did not threaten or abuse him at any time. An accurate account of the police conduct in that case might not suggest that the defendant was exposed to coercive tactics. But as Professor Kamisar has observed, when you listen to the police on the tape, "their urging, beseeching, wheedling, nagging Biron to confess is so repetitious and so unrelenting that *two hours of listening* is about all most students can stand."[37]

The *Miranda* rule, therefore, was necessary in part because the litigation process was incapable of "captur[ing] what actually happened at the police station."[38] Based on this perception of the realities of police interrogation, the Court believed that the warnings generally would be necessary to dissipate the coercive atmosphere at the station house. Moreover, based on the Court's awareness of the inherent limitations of the litigation process, it also

---

32. *See generally* Y. KAMISAR, *supra* note 11, at 135; Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 806 (1970); Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 1014, 1017 (1934).

33. For an incisive discussion of the implications of this "swearing contest," see Amsterdam, *supra* note 32, at 806-08. *See also* Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 870-71 (1981).

34. Brewer v. Williams, 430 U.S. 387, *reh'g denied*, 431 U.S. 925 (1977).

35. *See* Y. KAMISAR, *supra* note 11, at 113-37.

36. *See* State v. Biron, 266 Minn. 272, 123 N.W.2d 392 (1963), *noted in* 48 MINN. L. REV. 160 (1963). *See generally* Y. KAMISAR, *supra* note 11, at 98-99 & n.3.

37. Y. KAMISAR, *supra* note 11, at 98-99.

38. *See supra* note 31 and accompanying text.

believed that the warnings were appropriate because, in their absence, the objective of determining whether a particular confession was coerced would be elusive at best.[39] Finally, the Court implicitly believed that, by providing the defendant an opportunity to exercise his rights, the warnings largely would eliminate the need for future litigation relating to the circumstances of the interrogation process.[40]

Thus, *Miranda* rests on a legitimate constitutional basis. The *Miranda* rule represents an effort to apply the fifth amendment privilege to a vital stage of the adversary process. Moreover, the Court was justified in believing that the *Miranda* rule would alleviate some of the principal problems associated with the Court's earlier efforts to control police interrogation at the police station.

III. THE VOLUNTARINESS TEST

In retrospect, it is easy to criticize *Miranda*, but it is probably easier to criticize *Miranda* for not going far enough than for going too far. As several commentators have pointed out,[41] requiring the police to warn suspects of their rights creates an inherent conflict of interest.[42] Because the police are expected to solve crimes, one of their principal objectives is to persuade the suspect to talk. If the police are responsible for solving crimes, is it fair to make them also the guardian of the suspect's constitutional rights by requiring them to give warnings that are designed to persuade the suspect not to talk?[43] As Professor Caplan explains, "The enduring consequence of the Court's decision to make the police couriers of fifth

---

39. 384 U.S. at 445.

40. *See id.* at 457.

41. *See generally* Y. KAMISAR, *supra* note 11, at 85.

42. Professor Kamisar has noted that an analogous point was made during the oral argument before the Supreme Court in Oregon v. Elstad, 105 S. Ct. 1285 (1985):

> [W]hen one Justice suggested that it would not be unduly burdensome for the police to tell a suspect that they had treated him improperly at an earlier session and that therefore they would not offer the incriminating statement obtained at the earlier session as evidence against him, the Attorney General of Oregon retorted that such a requirement "might do a great deal of mischief because it confuses the role of the police officer with that of the criminal defense lawyer."

Y. Kamisar, Prepared Remarks at the U.S. Law Week's Constitutional Law Conference 8 (Sept. 13, 1985) (on file with the *Vanderbilt Law Review*). In commenting on this argument, Professor Kamisar asks, "Doesn't the *Miranda* case itself 'confuse the role of the police officer with that of the criminal defense lawyer'?" *Id.*

43. As one advocate put it: "[I]s it the duty of the police to persuade the suspect to talk or persuade him not to talk? They cannot be expected to do both." Brief of Edward L. Barrett, Jr., as amicus curiae at 9, People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (on rehearing), *cert. denied*, 381 U.S. 937 (1965).

amendment rights was to stifle the exercise of those rights."[44]

In addition, *Miranda* has not substantially alleviated the litigation problems that existed in administering the voluntariness test. Under that test, courts had to determine whether the defendant's confession was voluntary. Under *Miranda*, if it appears that a defendant was given *Miranda* warnings and was subsequently subjected to custodial interrogation, a court must determine whether the defendant waived his constitutional rights. Both the voluntariness and waiver issues generate the same "swearing contest" between the suspect and the police and ironically, in resolving the waiver issue, many lower courts have applied a totality of circumstances test that is similar to the totality of circumstances test utilized to determine whether a confession is voluntary.[45]

These problems suggest a basic flaw in *Miranda*. The Court's determination that a suspect's decision to incriminate himself cannot be truly voluntary is fundamentally inconsistent with its conclusion that the same suspect's choice to waive his constitutional rights can be voluntary. This inconsistency suggests either that *Miranda* went too far or not far enough.[46] The compromise reached in *Miranda* may not be the best means of accommodating the conflicting interests involved.[47]

So *Miranda* does have problems. But if the decision is to be overruled, some alternative means of protecting the constitutional rights of individuals who are subjected to police interrogation at the station house should be offered. Professor Caplan declines to propose alternatives. Thus, the effect of his proposal is that the Court overrule *Miranda* and return to the voluntariness test. Moreover, he supports this position by arguing that the voluntariness test is superior to *Miranda* because it strikes a more appropriate balance between the needs of law enforcement and the protec-

---

44. Caplan, *supra* note 1, at 1461.

45. *See, e.g.*, Commonwealth v. Starkes, 461 Pa. 178, 335 A.2d 698 (1975). The *Starkes* court stated:

> [I]n determining the voluntariness of the waiver, all attending facters . . . must be considered . . . [including the] "duration, and the methods of interrogation; the conditions of detention, the manifest attitude of the police teward the defendant, the defendant's physical and psychological state and all other conditions present which may serve to drain ones [sic] powers of resistance . . . ."

Id. at 184-85, 335 A.2d at 701 (quoting Commonwealth v. Alston, 456 Pa. 128, 134, 317 A.2d 241, 244 (1974)).

46. *See generally* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 286 (1985).

47. For suggestions of other possible approaches to accommodating the conflicting interests, see Y. KAMISAR, *supra* note 11, at 77-94; Schulhofer, *supra* note 33, at 884 n.84.

tion of the suspect's constitutional rights.[48] In addition, he intimates that a return to the voluntariness test may be especially appropriate now because the increasing professionalization of the police in the last two decades has made interrogators less inclined to use coercive tactics in questioning suspects.[49]

Professor Caplan's defense of the voluntariness test echoes, in part, the views of the dissenting Justices in *Miranda*. Each of the three dissenting opinions[50] suggests that the approach of examining the totality of circumstances in each case can provide "workable and effective means of dealing with confessions in a judicial manner."[51] In his classic "dissent" from these dissents, Professor Kamisar effectively demolished the dissenters' arguments.[52] His examination of pre-*Miranda* cases decided under the voluntariness standard,[53] especially the *Davis* case in which the lower courts held the defendant's confession voluntary despite the fact that no one but the police had seen or spoken to the suspect during the sixteen days of detention and interrogation that preceded his confessions;[54] his selection of quotes from authorities relied on by the dissent[55] (including one of the dissenter's own statements) characterizing the voluntariness standard as uncertain,[56] "unpredictable,"[57] and "provid[ing] little guidance"[58] for the police or the courts; and his pointed statistics exposing the small proportion of confession cases actually reviewed by the Court[59] all "expose[d] the central premise of the dissenters' argument as altogether unconvincing if not mildly ridiculous."[60]

Two decades have not altered the soundness of Kamisar's analysis. As Professor Stephen Schulhofer has noted, the voluntariness "standard remains the principal basis for adjudication in va-

---

48. Caplan, *supra* note 1, at 1473-76.

49. *Id.*

50. *See* 384 U.S. at 499 (Clark, J., dissenting); *id.* at 504 (Harlan, J., dissenting); *id.* at 526 (White, J., dissenting).

51. *E.g.*, *id.* at 506 (Harlan, J., dissenting).

52. *See* Kamisar, *A Dissent from the* Miranda *Dissents*, in Y. KAMISAR, *supra* note 11, at 41-76.

53. *Id.* at 73-74.

54. Davis v. North Carolina, 384 U.S. 737, 745 (1966).

55. Y. KAMISAR, *supra* note 11, at 71-73.

56. Irvine v. California, 347 U.S. 128, 138 (1954) (Clark, J., concurring).

57. *Id.*

58. Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 72 (1966), *quoted with approval in Miranda*, 384 U.S. at 507 n.4 (Harlan, J., dissenting).

59. Y. KAMISAR, *supra* note 11, at 75.

60. Schulhofer, *supra* note 33, at 869.

rious confessions situations not governed by *Miranda*."[61] Even in quite recent times, lower courts have ruled confessions admissible under the voluntariness standard despite the presence of factors that seem to be extraordinarily coercive. *Mincey v. Arizona*[62] provides one striking example. In *Mincey* the defendant had been seriously wounded by the police a few hours prior to his interrogation and was "barely conscious" and in the intensive care unit of a hospital at the time he was questioned. Lying on his back on a hospital bed, encumbered by tubes, needles, and a breathing apparatus, and unable to speak, the defendant clearly and repeatedly expressed his wish not be questioned, at one point writing on a piece of paper, "This is all I can say without a lawyer."[63] Nevertheless, the detective continued to question him and to receive written answers. The trial court found "with unmistakable clarity" that the defendant's statements were "voluntary" and thus, although obtained in violation of *Miranda*, were admissible for impeachment purposes.[64] The state supreme court unanimously affirmed.[65] The United States Supreme Court, with only Justice Rehnquist dissenting,[66] reversed the lower court's ruling. The Supreme Court has not reviewed, however, other, equally questionable lower court rulings that confessions were admissible under the voluntariness standard.[67]

---

61. *Id.* at 873.

62. 437 U.S. 385 (1978).

63. *Id.* at 399.

64. *Id.* at 397 n.12.

65. State v. Mincey, 115 Ariz. 472, 566 P.2d 273 (1977).

66. In his dissent, Justice Rehnquist disputed the Court's reading of the record, emphasizing that greater weight should have been given to testimony by the interrogating detective and a nurse indicating "that neither mental or physical force nor abuse was used on [the defendant]." 384 U.S. at 409. The dissent's approach suggests a further problem in administering the voluntariness test. Once the trial court has determined that a confession is voluntary, a reviewing court that is inclined to uphold the ruling may interpret the record ingeniously in a way that will sustain the trial court's ruling.

67. *See, e.g.*, Almon v. Jernigan, 715 F.2d 1505 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1684 (1984) (defendant was arrested by victim's son, a sheriff's deputy, forced to lie down in a road, kicked in the side, and shot in the hand; confession elicited the following day by a different officer held voluntary notwithstanding defendant's fear that he would be beaten by sheriff's department personnel if he did not confess); Burch v. State, 343 So. 2d 831 (Fla. 1977) (confession held voluntary despite extreme psychological coercion including fabrication of incriminating evidence, administration of a bogus polygraph examination that defendant "failed," and representations that if defendant confessed, he would be charged with second degree murder and face a seven to twenty year sentence, instead of first degree murder, a capital crime); State v. Wilms, 449 So. 2d 442 (La. 1984) (arresting officer struck defendant's pregnant wife in the stomach; interrogating officers withheld medical aid for over eight hours until defendant confessed; confession held voluntary). A later Florida court

Professor Caplan suggests that *Miranda* is not as necessary today because the more abusive forms of police interrogation practices no longer exist.[68] He states that even "[a]t the time *Miranda* was argued, the worst practices of the nineteen forties and fifties . . . were disappearing."[69] I am not prepared to dispute this statement. A perusal of the cases, however, indicates that if the "worst practices" have disappeared, some pretty bad ones are still taking place. In a 1973 Connecticut murder case the police held an immature eighteen-year-old suspect incommunicado, allowed him a few hours of sleep at most and no hot food, and interrogated him for nearly twenty-six continuous hours in order to obtain his confession.[70] In another 1973 case a police officer admitted to striking the defendant while interrogating him in the back seat of a police car.[71] In a 1984 Louisiana case unrebutted evidence showed that one police officer inexcusably struck the defendant's pregnant wife in the stomach and a second police officer prevented her from receiving medical attention for over eight hours until the defendant confessed.[72]

These examples, which are not in any way aberrational,[73] do

---

considered *Burch* to represent "a startling recitation of lies, deceptions, threats and promises of leniency." Williams v. State, 441 So. 2d 653, 656 n.5 (Fla. Dist. Ct. App. 1983), *review denied*, 450 So. 2d 489 (Fla. 1984).

68. Of course, this argument ignores the basic premise of *Miranda*. If custodial interrogation is inherently coercive, the warnings are needed to protect the suspect's fifth amendment privilege whether or not the police engage in abusive practices. Professor Kamisar has expressed this point eloquently:

> It is the impact on the suspect of the *interplay* between police interrogation *and* police custody—each condition *reinforcing* the pressures and anxieties produced by the other—that, as the *Miranda* Court correctly discerned, makes "custodial police interrogation" so coercive. It is the *combination* of "custody" and "interrogation" that establishes the "interrogation environment" that is "at odds" with the privilege against self-incrimination and that calls for "adequate protective devices."

Kamisar, Miranda: *The Case, The Man, and The Players*, 82 MICH. L. REV. 1074, 1077 (1984) (empbasis in original) (quoting *Miranda*, 384 U.S. at 455-58); *see also* Y. KAMISAR, *supra* note 11, at 195-97.

69. Caplan, *supra* note 1, at 1458.

70. *See* State v. Reilly, No. 5285 (Conn. Super. Ct. Apr. 12, 1974), *vacated*, 32 Conn. Supp. 349, 355 A.2d 324 (Super. Ct. 1976). For a detailed account of the confession obtained in the *Reilly* case, see J. BARTHEL, A DEATH IN CANAAN 39-130 (1976).

71. *See* United States v. Brown, 557 F.2d 541, 548 (6th Cir. 1977).

72. State v. Wilms, 449 So. 2d 442, 444-45 (La. 1984).

73. Examples include the use of physical brutality, *e.g.*, Leon v. State, 410 So. 2d 201 (Fla. Dist. Ct. App. 1982) (defendant was threatened with death, was choked, and had arm twisted behind his back in order to force him to reveal location of kidnap victim); Hill v. State, 91 Wis. 2d 315, 283 N.W.2d 585 (1978) (detective told defendant he was playing games, pulled handcuffed defendant out of a chair into the hall, and tripped defendant in the hall); the administration of truth serum or alcohol to induce confessions, *e.g.*, State v.

not suggest that the police lack professional qualifications. They do indicate that some effective mechanism is needed to curb potential abuses. The voluntariness test is not well equipped to achieve this objective. Indeed, as Professor Schulhofer suggests, application of the voluntariness test tends to exacerbate the problem by permitting and even encouraging an interrogation process that might extend for several hours.[74] As Professor Schulhofer observes:

> Unfortunately, after several hours of questioning, "slowly mounting fatigue does . . . play its part" in weakening *the officer. His* will—to comply with the law—may be "overborne" by impatience, frustration, or the persistence of a stubborn suspect who refuses to "come clean." It should not have been surprising that sincere, dedicated investigators, intent on solving brutal crimes, occasionally lost their tempers.[75]

Thus, even if the qualifications and training of our police have improved, the voluntariness test does not provide an adequate check on abusive police practices.

Professor Caplan's research of the post-*Miranda* cases discloses that since *Miranda* very few lower courts have held that a defendant's confession was involuntary. He interprets this data to mean that *Miranda* has diminished the effectiveness of the voluntariness test.[76] This inference might be proper if an examination of pre-*Miranda* cases showed that the voluntariness test was being applied vigorously during that period, but Professor Caplan does not claim that the voluntariness test has been rigorously applied at any time. In fact, the existing data suggests that the reverse is true.

Pennsylvania is probably a typical state in its approach to po-

---

Mikulewicz, 462 A.2d 497 (Me. 1983) (59 year old defendant, naked except for his socks, was held in custody in his camp, subjected to tag-team interrogation by numbers of officers, and encouraged to consume large quantities of alcohol to induce him to "give loose talk"); State v. Allies, 186 Mont. 99, 606 P.2d 1043 (1979) (defendant, a multiple drug abuser under the influence of drugs, was subjected to isolated interrogation including mean cop/nice cop and guilt assumption strategies, misled as to evidence against him, and persuaded to submit to a sodium amytol (truth serum) interview); threats to jail wife and place children in foster care, *e.g.*, State v. Stotler, 282 S.E.2d 255 (W. Va. 1981); confinement under inhuman conditions, *e.g.*, O'Tinger v. State, 342 So. 2d 1343 (Ala. Crim. App. 1977) (defendant was confined without shoes for six days in a dirty jail, his feet became sore and infected, and he confessed when promised the return of his boots); State v. Howard, 617 S.W.2d 658 (Tenn. Crim. App. 1981) (defendant, dressed only in cutoff blue jean shorts, was confined in a four by five or five by six foot cell, furnished with only a chair, for 14 hours and misled regarding evidence against him after asking to speak with counsel).

74. *See* Schulhofer, *supra* note 33, at 872.

75. *Id.* (quoting Spano v. New York, 360 U.S. 315, 322 (1959)).

76. Caplan, *supra* note 1, at 1464-67.

lice induced confessions, perhaps more liberal than most.[77] Yet, in pre-*Miranda* cases the Pennsylvania appellate courts held that confessions were involuntary only rarely,[78] and then, only when the uncontradicted facts disclosed extraordinarily abusive conduct by law enforcement officials.[79] Moreover, the Pennsylvania trial court judges' performance in dealing with cases that were remanded for a judicial determination on the voluntariness issue in light of *Jackson v. Denno*[80] illustrates their attitude toward coerced confession claims. Like Professor Caplan, I was an assistant prosecutor during that era, and I was involved in litigating some of those cases.[81] While I did not keep a personal account of our office's record, I know that it was exceptionally good. In fact, I remember my supervisor telling me that out of the dozens of *Jackson v. Denno* cases litigated by our office, he could think of only one in which the lower court ruled in the defendant's favor.

If the Pennsylvania courts' application of the pre-*Miranda* voluntariness test was typical, the ineffectiveness of the voluntariness test observed by Professor Caplan is not a new phenomenon. That test has never been an effective means of controlling the po-

---

77. The Pennsylvania Supreme Court has interpreted *Miranda* quite liberally. *See, e.g.*, Commonwealth v. Singleton, 439 Pa. 185, 266 A.2d 753 (1970) (the warning that defendant's statement could be used "for or against him" at trial held inadequate under *Miranda*); Commonwealth v. Simala, 434 Pa. 219, 252 A.2d 575, 576 (1969) (defendant was questioned within meaning of *Miranda* when mayor told him, "[Y]ou look kind of down in tbe dumps; do you want to talk? . . . [I]f you want to talk, talk"). Drawing upon the Supreme Court's *McNabb-Mallory* rule, the Pennsylvania Supreme Court has held that unnecessary delay in bringing an arrested suspect before a magistrate for preliminary arraignment will result in the exclusion of any confession obtained between arrest and arraignment. *See, e.g.*, Commonwealth v. Davenport, 471 Pa. 278, 370 A.2d 301 (1977).

78. A Lexis search indicates that during the five year period from June, 1960, to May, 1966, the Pennsylvania appellate courts did not hold a single confession to be involuntary. One confession held to be voluntary by the Pennsylvania Superior Court during the search period was later ruled involuntary by the Pennsylvania Supreme Court. *See* Commonwealth *ex rel.* Gaito v. Maroney, 422 Pa. 171, 220 A.2d 628 (1966).

79. In Commonwealth *ex rel.* Gaito v. Maroney, 422 Pa. 171, 220 A.2d 628 (1966), an assistant district attorney interrogated the defendant four hours after he had undergone major surgery for a bullet wound. Hospital records before and after the confession indicated that the defendant was incoherent and semiconscious. At the time of the confession, the defendant was restrained in his bed with six tubes emanating from his body. The Commonwealth's medical expert testified at trial that under the totality of circumstances test, there was a reasonable doubt whether the confession was voluntary.

80. 378 U.S. 368 (1964). The *Jackson* Court held that requiring the same jury to adjudicate both the defendant's gnilt and the voluntariness of the defendant's confession was unconstitutional. The Court also held that cases in which this improper procedure was followed should be remanded to the state courts for a judge to pass upon the voluntariness of each disputed confession.

81. I was an assistant district attorney in Philadelphia from 1966 to 1968.

tential evils of incommunicado interrogation.[82] Thus, if we are committed to the idea of protecting the defendant's fifth amendment privilege during police interrogation, replacing *Miranda* with the voluntariness test would be a major step backward, marking the return to a test that provides not only too little guidance for the police and lower courts but also historically little or no check on coercive police questioning.

IV. Striking an Appropriate Balance

In arguing that *Miranda* fails to strike an appropriate balance between government and individual interests, Professor Caplan quotes extensively from Justice Jackson's opinion in *Watts v. Indiana*.[83] After observing that police interrogation of suspects in the absence of counsel "presents a real dilemma in a free society," Jackson posited a stark contrast between allowing the police to question a suspect without his attorney present and allowing the suspect to have counsel present during the custodial interrogation.[84] Anticipating the views of the dissenters in *Miranda*, Jackson indicated that the choice is between police questioning that may lead to effective law enforcement and requiring that the "police stand by helplessly while those suspected of murder prowl about unmolested."[85]

Like Professor Caplan, both Justice Jackson and the *Miranda* dissenters intimated that the fifth amendment privilege should not be treated as an absolute but should be interpreted with a regard for law enforcement interests. Thus, if providing additional safeguards for suspects at the police station imposed a substantial burden on law enforcement, this burden should be considered in determining the scope of the applicable constitutional protections. In particular, if a new safeguard created the law enforcement dilemma envisioned by Justice Jackson, this would be a strong argument for refusing to require it.

Despite Justice Jackson's perception of the consequences involved, he nevertheless acknowledged that the issue of the suspect's right to have counsel present during police questioning was a difficult one. He noted that, under any interpretation, our constitutional system "comes close" to requiring that a suspect be con-

82. *See generally* W. Schaefer, The Suspect and Society 10 (1967).
83. 338 U.S. 49 (1949).
84. *Id.* at 59.
85. *Id.* at 61-62.

victed only on the basis of "such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court and also cannot question him before."[86] After presenting his view of the extreme costs to law enforcement that this requirement would impose, he concludes with the following famous passage:

> Is it a necessary price to pay for the fairness which we know as "due process of law"? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society.[87]

Miranda does not, of course, answer the questions Justice Jackson posed, but the post-*Miranda* experience suggests that the questions should perhaps be posed in different terms. The empirical data on *Miranda*'s impact suggests that contrary to the dissenters' expectations, the Court's decision to provide suspects with the *Miranda* protections has not substantially "increase[d] the handicap on society."[88] Surprisingly, the studies show that *Miranda* has had relatively little effect on law enforcement. These results suggest perhaps that the dilemma Justice Jackson posited does not really exist. Maybe criminal suspects can be afforded protections that are fully consistent with the spirit of our constitutional system without significantly impairing the interests of law enforcement.

Professor Caplan would disagree with this assessment. He asserts that the *Miranda* studies show that it is inaccurate to conclude that "*Miranda* has had little effect on police efficiency."[89] He relies particularly on the Pittsburgh study in which the researchers determined that the detective division, which investigated homicide, robbery, burglary, auto larceny, and forcible sex, obtained confessions in 54.5% of all cases before *Miranda* but only in 37.5% of all cases after *Miranda*—an overall decline of seventeen percentage points.[90] A decline of seventeen percentage points in the confession rate does appear to be significant, but in order to determine the effect of this decline on police efficiency, one would also want to investigate the conviction rate. The authors of the Pittsburgh study in fact made this investigation. They concluded that the conviction rate for major crimes in Allegheny County during this period "remained steady. For the first six months after *Miranda* the conviction rate dropped slightly but it then bounced

86. *Id.* at 59.
87. *Id.* at 62.
88. *Id.*
89. Caplan, *supra* note 1, at 1464.
90. *Id.*

back in the first half in 1967."[91] In fact, the authors' tables show that during the first six months of 1967, the conviction rate was higher than at any other time during 1964 to 1966.[92] While the conviction rate is not the only indication of police efficiency,[93] these figures certainly suggest that the decline of seventeen percentage points in the confession rate did not produce a dramatic impact on law enforcement.

Professor Caplan asserts that the Pittsburgh study "best measures *Miranda*'s impact on crime detection."[94] Apparently, Professor Caplan based this assertion on the fact that the Pittsburgh study presented pre-*Miranda* and post-*Miranda* data obtained from "a medium-sized city with a significant crime problem."[95] In fact, the Pittsburgh study is not the only one meeting these criteria. A much more extensive study, conducted by the Institute of Criminal Law and Procedure, Georgetown University Law Center, examined the effect of *Miranda* on people arrested for felony and serious misdemeanor cases in Washington, D.C.[96] By questioning defendants subjected to arrest procedures in the District of Columbia during 1965 and 1966, the Institute obtained figures showing the frequency with which defendants asserted their rights before and after *Miranda*. The study's overall conclusion is that little has changed since *Miranda* was decided.[97] The rate of statements reported to have been given to the police was "remarkably uniform" at around forty percent in both the pre- and post-*Miranda* periods.[98]

I have no basis for asserting that either of these studies is superior to the other. Of all the post-*Miranda* studies, however, the

---

91. Seeburger & Wettick, Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 19 (1967).

92. *See id.* at 19. The table shows that the conviction rate during the first six months of 1967 was 68.7%. Prior to *Miranda*, the highest conviction rate over the period of the study was 67.2% in 1965. During the six months prior to *Miranda*, the conviction rate was 66.8%.

93. The police clearance rate (measuring the percentage of cases in which the police are satisfied they have found the perpetrator of the crime) might also be taken as an indicator of police efficiency. The Pittsburgh study data indicate that when the figures for the 18 months preceding *Miranda* are compared with those for the 12 months succeeding *Miranda*, it appears that the clearance rate in Allegheny County increased by 1.4%. *See* Seeburger & Wettick, *supra* note 90, at 21.

94. Caplan, *supra* note 1, at 1464.

95. *Id.*

96. *See* Medalie, Zeitz & Alexander, *Custodial Interrogation in Our Nation's Capitol: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347 (1968).

97. *Id.*

98. *Id.* at 1351-52, 1352 n.20, 1441.

Pittsburgh study was the only one to find that *Miranda* effected a significant decrease in the confession rate.[99] The authors of that study even suggested that the confession rate decrease could be attributed in part to sampling bias. The study focused on a detective branch composed of highly professional officers who may have been particularly conscientious in complying with *Miranda*.[100] Moreover, Professor Richard Seeburger, one of the study's authors, recently commented that the study's "central finding was that law enforcement's effectiveness was not significantly impaired as a result of *Miranda*."[101] Professor Seeburger added that at the time of

---

99. The great weight of empirical evidence supports the conclusion that *Miranda*'s impact on the police's ability to obtain confessions has not been significant. A study conducted by the *Yale Law Review* in New Haven, Connecticut concluded that "*Miranda* warnings had little impact on suspects' behavior." *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1563 (1967). That study, described by the Council of the American Law Institute as "probably the most comprehensive," A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 108 (Study Draft No. 1, 1968) [hereinafter cited as MODEL CODE STUDY DRAFT], based its conclusion on three observations: (1) observation of interrogations of both warned and unwarned suspects indicated that police paradoxically were more successful in obtaining confessions from warned suspects, 76 YALE L.J. at 1563; (2) individual evaluation of each case indicated that warnings were a factor in reducing interrogation success in ouly 8 of 81 cases, *id.* at 1563; and (3) review of police records from 1960 to 1966 indicated a 10% to 15% drop in the confession rate, *id.* at 1564. Figures from other metropolitan areas indicate even smaller changes in confession rates. *See* Medalie, Zeitz & Alexander, *supra* note 96, at 1414 Table E-1 (1967-68) (pre- and post-*Miranda* confession rate stable at about 40%); Witt, *Non Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320, 325 (1973) (interrogations conducted in "Seaside City," a pseudonymous subdivision of the Los Angeles metropolitan area, were successful in 69% of pre-*Miranda* cases and 67% of post-*Miranda* cases); Younger, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 255, 255-60 (1966-67) (confession rate for a sample of Los Angeles County felony cases increased from 40% to 50% after *Miranda*). Other studies, while not focusing upon the confession rate before and after *Miranda*, strengthen the conclusion that *Miranda* has had a minimal effect on law enforcement. *See, e.g.*, Neubaner, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103, 111 (1974) (1968 data for medium sized central Illinois city indicated that "police are fairly successful in obtaining statements from suspects: over 45% of the felony defendants made a confession."); Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-*Miranda *Questionnaires: A Contruct of Police Capacity to Comply*, 1968 DUKE L.J. 425, 464-65 n.90 (police clearance rate unchanged after *Miranda*); *see also* Reiss & Black, *Interrogation and the Criminal Process*, 374 ANNALS 47 (Nov. 1967) (concluding, based on post-*Miranda* study of field interrogation in high crime rate precincts in Wasbington, D.C., Boston, and Chicago, that extension of *Miranda* into field settings would have little effect); *cf.* Souris, *Stop and Frisk or Arrest and Search*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 251, 263-64 (1966) (Detroit study scrutinizing effect of *Escobedo* warning found confessions given in 64.7% of completed prosecutions in 1961 and 65.6% of completed prosecutions in 1965).

100. Seeburger & Wettick, *supra* note 90, at 24.

101. Letter from Professor Richard Seeburger to the author (Sept. 20, 1985) (on file with the *Vanderbilt Law Review*).

the study, Pittsburgh law enforcement officials expressed the opinion that *Miranda* would ultimately benefit law enforcement by prompting the police to develop more effective investigatory techniques.[102]

Since Professor Caplan obviously is a skilled advocate, his emphasis on the Pittsburgh study is itself significant. If there were any hard data to support the conclusion that *Miranda* has had an adverse impact on law enforcement, critics of *Miranda* certainly would have unearthed it by now.[103] The strongest evidence that Professor Caplan can cite, however, is a study that shows a decline of seventeen percentage points in the confession rate and no decline in the conviction rate. This in itself provides striking confirmation of the widely shared perception that *Miranda*'s effect on law enforcement has been negligible.[104]

Professor Caplan concludes his discussion of the empirical data by pointing out that because the studies were conducted shortly after the *Miranda* decision, they fail " 'to conclusively tell

---

102. *Id.*

103. Professor Kamisar's account of the prosecutors' reaction to then Los Angeles District Attorney Evelle Younger's report on the impact of *Miranda* in his county provides some indication of law enforcement's eagerness to obtain this type of data:

> In the fall of 1966, (after his office had surveyed more than 1,000 post-*Miranda* cases, in fully half of which the defendant had made an incriminating statement), Evelle Younger, one of the nation's most respected prosecutors, reported that *Miranda* seemed to have had no appreciable effect on law enforcement in his jurisdiction—indeed that the conviction rate had increased. "Large or small," concluded Younger, "conscience usually, or at least often, drives a guilty person to confess. If an individual wants to confess, a warning from a police officer, acting as required by recent decisions, is not likely to discourage him."
>
> It is interesting to note that, according to a news story covering the 1967 Annual Convention of the National District Attorneys Association (presumably accurate because reprinted in the association's official journal), "many" of Younger's colleagues showed "resentment" toward him "for having broken ranks with them on Miranda":
>
> > Civil libertarians, defending the Supreme Court in the face of the huge crime increases, have clung to Mr. Younger's assertions and statistics, holding them as positive proof that the crime problem exists independent of court decisions, and is fostered by social conditions.
> >
> > A number of his colleagues buttonholed Mr. Younger here, pleading with him to review his statistics and reverse his position. But he only shrugged, said he was sorry, and stated that his most current figures reinforced his beliefs.

Kamisar, *How to Use, Abuse,—And Fight Back With—Crime Statistics*, 25 OKLA. L. REV. 239, 255 (1972).

104. *See generally* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 285-86 (1985); *see also* Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1383 (1977) ("The police officers with whom I have spoken generally acknowledge that announcement of the *Miranda* warnings causes little difficulty if the warnings requirement is limited to interrogation of arrested persons at the police station or in similar settings (*e.g.*, a patrol car).").

us what *Miranda* would mean if followed in letter *and* spirit' or . . . if extended."[105] The simple answer to this point is that Professor Caplan is neither arguing against a different implementation of *Miranda* nor against its extension. According to his thesis, the decision should be overruled because it strikes an inappropriate accommodation between individual and law enforcement interests. The *Miranda* decision as it presently stands, however, seems to strike an excellent accommodation between those interests. The criminal suspect is afforded constitutional protection, but the interests of law enforcement are not impaired. Why should *Miranda* be overruled? It gives us the best of all possible worlds.

V. CONCLUSION

My last statement could be challenged by those who feel that the *Miranda* warnings do not effectively safeguard the individual's fifth amendment privilege at the station house. If the empirical studies indicate that *Miranda* has made little difference, perhaps the goal of providing constitutional protections at the station house has not been realized. If *Miranda* merely provides the illusion that we can avoid the dilemma arising from our simultaneous commitments to the fifth amendment privilege and to a system of law enforcement that relies heavily upon police interrogation, what is the value of retaining it? Indeed, Professor Schulhofer suggests that *Miranda* is inferior to the voluntariness test in one respect because "[*Miranda*'s] technique for denying this dilemma, for insuring that we can have our cake and eat it, is infinitely less candid than the due process balancing analysis."[106]

In my opinion, *Miranda* does have value as a symbol of our commitment to maintaining a fair system of criminal procedure that seeks to implement the protections embodied in the federal constitution. As Professor Caplan admits, *Miranda* "contributed to a climate of greater respect for suspects . . . [and] is a gesture of government's willinguess to treat the lowliest antagonist as worthy of respect and consideration."[107] Thus, *Miranda*'s symbolic value not only has produced a better atmosphere for people who come in contact with the police but also may have made a tangible contribution toward curbing abusive police practices. Retaining *Miranda*

105. Caplan, *supra* note 1, at 1466-67 (quoting M. BERGER, TAKING THE FIFTH 131 (1980)).

106. Schulhofer, *supra* note 33, at 884.

107. Caplan, *supra* note 1, at 1470-71.

symbolizes the Court's approval of the direction in which our system of justice has moved since the time when, in the words of Justice Harlan, the police were allowed to exert "quite significant pressures" to extract confessions from suspects.[108]

Conversely, overruling *Miranda* would send a very different message. In reference to the fourth amendment's prohibition upon unreasonable searches, Justice Jackson once said, "We must remember that the extent of any privilege . . . which we sustain, the officers interpret and apply themselves and will push to the limit."[109] Just as overruling the fourth amendment exclusionary rule likely would suggest to the police that they no longer must comply with the fourth amendment,[110] overruling *Miranda* would convey the message that restraints on police interrogation have been largely abandoned. Undoubtedly, this decision would change the relationship between the police and the criminal suspect. In light of our commitment to maintaining a fair system of criminal justice, however, it seems doubtful whether this new relationship would be preferable to the present one.

108. 384 U.S. at 509 (Harlan, J., dissenting). As one "not too distant example," Justice Harlan cited Stroble v. California, 343 U.S. 181 (1952), "in which the suspect was kicked and threatened after his arrest, questioned a little later for two hours, and isolated from a lawyer trying to see him; the resulting confession was held admissible." 384 U.S. at 509 n.5 (Harlan, J., dissenting).

109. Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

110. *See generally* Kamisar, *The Exclusionary Rule in Historical Perspective*, 62 JUDICATURE 333 (1979).