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I. INTRODUCTION

My exposure to police interrogation dates back to 1964 when, shortly following graduation from law school, I joined the United States Attorney's Office in the District of Columbia. Encouraged by my supervisor, I started riding with the police on evening patrol. The precinct detectives I met were serious and hardworking, and they demonstrated more than occasional bravery when responding to calls for assistance. Nevertheless, even if these detectives had been the "army of occupation" that some then labeled them, their shortcomings might not have caught my eye. It was my first look at urban crime, and I had not realized how scary it was "out there" or how limited the police were even at their best. At the time, I took for granted the need for police questioning of suspects.

When I quit prosecuting in 1965 to join the staff of the newly formed National Crime Commission, I became witness to a scorching debate that was spilling over from the Department of Justice on the merits of the Supreme Court's recent *Massiah*[1] and *Esco-*

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1. Massiah v. United States, 377 U.S. 201 (1964).

bedo[2] decisions expanding suspects' immunity from police interrogation.[3] I do not recall my own reaction—Supreme Court decisions were not immediately felt in the District of Columbia Court of General Sessions, or, for that matter, even read—but I do recall well my disappointment two years later in 1966 when *Miranda*[4] itself was decided. Because *Miranda* was intended to restrict, perhaps eliminate, virtually all police interrogation, and because interrogation was understood to be not merely another evidence gathering technique, but "*the* method of criminal investigation,"[5] I agreed with Justice White who predicted in his dissent that many criminals "will . . . under this new version of the Fifth Amendment, either not be tried at all or will be acquitted."[6]

Now, after nearly twenty years, *Miranda* retains its celebrity status. It is our best known criminal case.[7] Not only in name, but in the rights it accorded to criminal suspects, it has become part of our common awareness. But apart from this, *Miranda* seems to have won acceptance, even approval, extending beyond what its stormy past would have indicated. Although the incidence of crime surged skyward after 1966, concern over police interrogation, both in terms of its effectiveness and its fairness, largely vanished.

Nonetheless, in 1971 the Supreme Court in *Harris v. New York*[8] refused to interpret *Miranda* to prevent statements taken in violation of *Miranda* from being used to impeach a defendant's credibility. Since *Harris*, the Supreme Court not only has avoided other opportunities to extend *Miranda* but, arguably, has diluted its principles,[9] particularly in the last two Terms.[10]

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2. Escobedo v. Illinois, 378 U.S. 478 (1964).

3. *See, e.g.*, Kamisar, *Has the Court Left the Attorney General Behind?—The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice*, 54 KY. L.J. 464 (1966), and the spirited replies of such panelists as Richard Kuh, Dean Edward Barrett, and Justice Walter Schaefer, *id.* at 499-525.

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

5. L. WEINREB, DENIAL OF JUSTICE ix (1977); *see also* W. LAFAVE, ARREST 304 (1965) ("Interrogation is the principal investigative device.").

6. 384 U.S. at 542.

7. A 1976 poll of members of the American Bar Assocation to determine "milestone events" in American legal history gave *Miranda* a fourth place ranking. No other criminal law decision finished higher. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), came in first, and Brown v. Board of Educ., 347 U.S. 483 (1954), came in fifth. *See* J. LIEBERMAN, MILESTONES! vii (1976).

8. 401 U.S. 222 (1971).

9. *See* Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 118. One commentator asserts that the Burger Court did not provide a "clear-cut victory for *Miranda*" until 1981 when it decided Edwards v. Arizona, 451 U.S. 477 (holding that in a custodial interrogation, if a suspect indicates that he wants to remain silent, then the inter-

This Article argues that the Supreme Court should go further and reexamine the basic principles underlying *Miranda*. Although its impact has been tamed by interpretation and practice, and although the hour is late,[11] a case can be made for overruling *Miranda*. *Miranda* was not a wise or necessary decision, nor has *Miranda* proved to be, as is generally contended,[12] a harmless one. It sent our jurisprudence on a hazardous detour by introducing novel conceptions of the proper relationship between the suspect and authority. It accentuated just those features of our system that manifest the least regard for truthseeking, that imagine the criminal trial as a game of chance in which the offender should always have some prospect of victory, and that ultimately reflect doubt on the rectitude of our laws and institutions. Beyond this, it was decided at a time when effective alternatives for restraining unlawful police conduct were ripe for implementation.

This Article is divided into six parts. Part II discusses historical perspectives toward interrogation and confession and explores how *Miranda* may have influenced these perspectives. Part III traces the Supreme Court's attempt to fashion a means of controlling police misconduct without substantially impairing the effectiveness of criminal investigation. The focus of this section is on

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rogation must cease, and if he indicates that he wants counsel, the interrogation must cease until counsel is present). Sonenshein, Miranda *and the Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405, 447 (1982).

Apart from its specific holdings, the Supreme Court's ambivalence toward *Miranda* is evidenced by its declarations in support of police interrogation and the value of confession. For example, in United States v. Washington, 431 U.S. 181, 187 (1977), the Court observed that "far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable."

10. *See, e.g.*, Oregon v. Elstad, 105 S. Ct. 1285 (1985) (holding that an admission from an unwarned suspect may nonetheless be admissible in evidence against him when the admission was uncoerced and was repeated following the giving of *Miranda* warnings); New York v. Quarles, 104 S. Ct. 2626 (1984) (creating a "public safety" exception to *Miranda*); *see also* Goldberg, Escobedo *and* Miranda *Revisited*, 18 AKRON L. REV. 177, 180 (1984) (arguing that the present Court "is determined to limit or overrule *Miranda* by erosion").

11. Chief Justice Burger, in his concurring opinion in Rhode Island v. Innis, 446 U.S. 291, 304 (1978), stated that "at this late date" it is not necessary to "overrule" or even "disparage" *Miranda*.

12. *See* Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 537 ("The Court's great experience with per se rules in the *Miranda* case produced much less impact on actual law enforcement practices than either the supporters or opponents of the Court's holding anticipated. . . . [C]onsiderable empirical evidence suggests that the *Miranda* warnings, when given, are rarely sufficient to overcome the 'atmosphere of coercion' in custodial interrogation, that the warnings are often not fully understood by the arrested parties, and that a large majority of suspected persous waive their rights to counsel and to remain silent."); *see also infra* note 218. For a detailed discussion of the impact of *Miranda*, see *infra* text accompanying notes 222-41.

the due process clause of the fourteenth amendment. Part IV illustrates through two cases—*Gallegos v. Colorado*[13] and *Escobedo v. Illinois*[14]—the erosion of the fourteenth amendment voluntariness test. Part V critiques *Miranda*. Part VI examines how police have received and adapted to *Miranda* and attempts to assess the consequences. The final section makes the argument for overruling the decision and suggests alternative ways to limit police misconduct.

II. Changing Attitudes Toward Interrogation

A. *The Pre-*Miranda *Perspective*

Throughout history, governments have acted to safeguard their citizenry by seeking out those suspected of wrongdoing—revolutionaries, murderers, thieves, and other common criminals—and asking them questions about their conduct. Asking questions was understood not only as a reasonable way to get answers but also as the best way. Interrogation was the central method for identifying those who threatened the general well-being and, with few exceptions,[15] society perceived this form of investigation as a legitimate prerogative of properly constituted authority.[16]

Confession born of interrogation was viewed as the turning point in a criminal's life. When confession was accompanied by remorse, it marked the beginning of rehabilitation. The man who genuinely accused himself was a changed man; he had recognized his error; he admitted that he was at fault and not his judges. He had impliedly endorsed the moral order, and his confession celebrated the values of honesty and sincerity.[17] When received with

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13. 370 U.S. 49 (1962).

14. 378 U.S. 478 (1964).

15. L. Levy, Origins of the Fifth Amendment 314-15, 318-19 (1968).

16. Although there is not a specific provision in the Constitution that confers the power of interrogation on the government, such power, as Thurgood Marshall observed as Solicitor General during oral argument in Westover v. United States, 384 U.S. 436 (1966) (one of the companion cases to *Miranda*), "is inherent in the investigatory process . . . . I don't think it has ever been questioned." R. Medalie, From Escobedo to Miranda: The Anatomy of a Supreme Court Decision 134 (1966); *see also* W. Schaefer, The Suspect and Society 60 (1967) ("[A]sking questions is a reasonable way to get answers, and it seems to me that the burden rests upon those who advocate an entirely accusatorial system to justify its divergence from everyday morality and common sense.").

17. Attitudes toward confession have changed enormously. In a recent study, Professors Hepworth and Turner characterized earlier attitudes toward confession as follows:

> Prior to the nineteenth century crime was not by and large seen as the product of depressing social conditions, special circumstances, or "the criminal mind" to which only experts had access. On the contrary, it was seen as an integral part of the plight of

mercy, confession afforded the confessor a homecoming, a readmission to the community that had heen, but was no longer, offended.[18]

At the same time, society has long appreciated that interrogation may be linked with the unlawful use of force by the authorities. When officials believe that conduct is heinous and must be exposed, they are tempted to ignore what John Lilburne called "formalities, niceties, and punctilios."[19] Consequently, society always has been concerned with regulating interrogations lest they become a test of endurance rather than veracity. Even when torture was sanctioned as a means for obtaining proof of guilt during the middle ages in Europe, significant restrictions were imposed on its application as a matter of law: the crime had to be capital; the authorities had to establish a *corpus delicti*; there had to be substantial evidence against the suspect; and questioning could not be suggestive.[20]

An early provision of the Massachusetts Bill of Rights clearly demonstrates the historic tension between the government's obligation to protect society and its concern that it effect this protection in a decent manner. The Massachusetts Bill of Rights provided: "No man shall be forced by Torture to confess any Crime against himself . . . unless it be in some Capital case where he first be fully convicted by clear and sufficient evidence to be guilty."[21] Then "he may be tortured, yet not with such Tortures as be Barbarous and inhumane."[22] This tension is particularly evident in democratic governments because of the value accorded individual autonomy and dignity.

In the United States, until recently, people felt that incommunicado detention and questioning of suspects who were lawfully arrested on probable cause were integral features of the investigative process. Although never formalized, custodial interrogation was an

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everyman. Crime was the predictable result of an understandable failure to resist temptation to sin to which all men were prone. The role of confession in the popular literature of murder and its punishment was to confirm the common frailties of mankind fallen from Grace.

M. HEPWORTH & B. TURNER, CONFESSION: STUDIES IN DEVIANCE AND RELIGION 112 (1982).

18. *See, e.g.*, D. BONHOEFFER, THE COST OF DISCIPLESHIP (1959). The Freudian psychiatrist, Theodore Reik, described the remorseful criminal as an "outsider . . . on his painful detour back to the family of man." T. REIK, THE COMPULSION TO CONFESS 279 (1959).

19. L. LEVY, *supra* note 15, at 351.

20. J. LANGBEIN, TORTURE AND THE LAW OF PROOF 14-15 (1978).

21. L. LEVY, *supra* note 15, at 345.

22. *Id.*

accepted part of the police routine, and the police exercised this authority largely without supervision. Such broad discretion was generally thought to be "indispensable to crime detection."[23] The public safety demanded it. "[O]ffenses frequently occur . . . [in which] nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions . . . ."[24] So wrote Justice Frankfurter in the context of a Connecticut murder of a gas station attendant and his customer in which the only evidence for the police was the "two corpses and an infant."[25] Justice Jackson similarly observed that the "interrogation of those who know something about the facts is the chief means to the solution of crime."[26] These Justices were voicing the common view.

Consistent with this understanding, confession was assumed to be a reliable form of evidence.[27] Because a confession is capable of supplying "ways of verifying itself"[28]—only the guilty man knows where the murder weapon was discarded, the body concealed, or the proceeds of the burglary cached—society regarded police questioning as a particularly trustworthy instrument for screening out the innocent and fastening on the guilty. As Dean McCormick stated, the "insistent and ever-present forces of self-interest" and

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23. Culombe v. Connecticut, 367 U.S. 568, 570-71 (1961); *cf.* Watts v. Indiana, 338 U.S. 49, 57-58 (1949) (Jackson, J., concurring) (noting that in cases in which no external evidence exists, the alternative to interrogation is "to close the books on the crime and forget it with the suspect at large").

24. *Culombe*, 367 U.S. at 571.

25. *Id.* at 570.

26. Stein v. New York, 346 U.S. 156, 184 (1953); *cf.* L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 92 (1959) (stating that "prevailing opinion seems to be that police interrogation is the method most effective under contemporary American conditions for fostering guilt on the seasoned lawbreaker"); Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 447 (1948) (noting that even the best police departments depend on interrogations and confessions to solve many criminal cases).

27. *Watts*, 338 U.S. at 58 (Jackson, J., concurring).

28. Of the cases decided by the United States Supreme Court relating to confessions in the pre-*Miranda* era between 1936 and 1963, in only a few did the Court express any doubt as to the guilt of those confessing. Furthermore, the guilt seems as evident in those cases in which the confession was ultimately suppressed as it does in those in which the evidence was admitted. *See* Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313, 316 (1964). Of the 18 cases of erroneous conviction briefly described in J. FRANK & B. FRANK, NOT GUILTY (1957), none involved confession. *See* Robinson, Massiah, Escobedo, *and Rationales for the Exclusion of Confessions*, 56 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 412, 415 n.15 (1965); *cf.* 2 WIGMORE ON EVIDENCE § 867, at 227 (2d ed. 1923) (noting that the danger of a false confession is very slight and the cases in which it has occurred are quite rare).

"self-protection" operate to make confession probably true.[29] Even when viewed skeptically, questioning was still defended as a species of necessary evil. "The public interest," the New Jersey Supreme Court cautiously argued in 1960, "requires that interrogation . . . at a police station, not completely be forbidden, so long as it is conducted fairly, reasonably, within proper limits and with full regard to the rights of those being questioned."[30]

In this setting, the Supreme Court did not feel compelled to burden the government with any special duty to inform the suspect that he need not participate in the inquiry. When the police did advise a suspect of his right to silence, or the suspect was otherwise aware of it, the suspect's knowledge was considered a factor contributing to the "voluntariness" of the confession under the fourteenth amendment;[31] and, conversely, the absence of such counseling would weight against admissibility in the "totality of the circumstances" of the case.[32] That many suspects might erroneously believe that they were obligated to answer police questions or that the police acted as if such were the case did not trouble the Supreme Court. All understood that the government's obligation was not to counsel the accused but to question him. From this perspective, informing a suspect of his right to silence with the intent that he be given every opportunity to refuse to cooperate would have seemed contradictory to the main purpose of imposing custody.[33]

Implicit in these views was the feeling that some pressuring of the suspect was permissible to elicit his confession. Professor Fred E. Inbau in his textbook on interrogation for law enforcement officers captured the judicial as well as the popular sentiment when he asserted that criminal suspects must be dealt with "in a somewhat lower moral plane than that in which ethical, law-abiding citizens are expected to conduct their everyday affairs."[34] It was per-

29. McCormick, *The Scope of Privilege in the Law of Evidence*, 24 TEX. L. REV. 239, 241 (1946).

30. State v. Smith, 32 N.J. 501, 534, 161 A.2d 520, 537 (1960), *cert. denied*, 364 U.S. 936 (1961).

31. Crooker v. California, 357 U.S. 433 (1958).

32. *Watts*, 338 U.S. at 53-54.

33. In the early 1960's, Professors Inbau and Reid assured their readers that "in the absence of a statutory provision specifically requiring a criminal interrogator to warn a suspect or accused person, it is unnecessary to do so." F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 163-64 (1962). They also cited decisions in 30 states as support for this proposition. *Id.* at 163-65 n.46.

34. F. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 149 (2d ed. 1948); *see also* Larson, *Present Police and Legal Methods for the Determination of the Innocence or Guilt*

missible, for example, 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. Such practices were tolerated or defended not out of sadism or racism or even an overzealous desire to apprehend felons, but rather out of a pragmatic view of what was deemed necessary to apprehend criminals.

These sentiments prevailed at a time when the police enjoyed greater public confidence; when criminals were more likely to be imagined as a species apart rather than members of the community who had gone astray; and when the confession itself was likely to be perceived as "a declaration naturally born of remorse, of relief, or desperation, or calculation," rather than the "result of an overborne will."[35] Consequently, the Court did not prohibit the police from excluding outsiders—friends or family of the suspect, or even his attorney—from the interrogation room. The pre-*Escobedo* Court considered the denial of counsel to a suspect who had requested counsel or had retained counsel as only one factor among the "totality of the circumstances" used to determine whether the confession would be excluded as a violation of due process. The Court realized that the presence of counsel "would effectively preclude police questioning—*fair as well as unfair*,"[36] and "would constrict . . . [police ability] to solve difficult cases."[37] "[A]ny lawyer worth his salt," in Justice Jackson's oft-quoted phrase, would "tell the suspect in no uncertain terms to make no statement to the police under any circumstances."[38]

Quoting Lord Devlin, Justice Frankfurter captured pre-*Miranda* thinking when he wrote that "[t]he least criticism of police methods of interrogation deserves to be most carefully weighed because the evidence which such interrogation produces is often decisive."[39]

*B. Emerging Post-*Miranda *Attitudes*

Today people appear less interested in reconciling "full regard to the rights of those being questioned"[40] with effective interroga-

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of the Suspect, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 219, 252 (1925).

35. *Culombe*, 367 U.S. at 576.
36. *Crooker*, 357 U.S. at 441.
37. Cicenia v. La Gay, 357 U.S. 504, 509 (1958).
38. *Watts*, 338 U.S. at 59.
39. *Culombe*, 367 U.S. at 576.
40. *Smith*, 32 N.J. at 534, 161 A.2d at 537.

tion. Indeed, as goals they appear irreconcilable to many people. Confession is seen darkly as the product of police coercion, trickery, or deception. Because confession runs directly against self-interest, one wonders what unscrupulous tactics the police undertook to compel self-incrimination.

Beyond the problem of irreconcilable goals, society espouses different attitudes toward suspects. Whereas Professor Inbau and others once insisted that the police should be given latitude to deal with suspects on a "lower moral plane,"[41] today's law professors argue that the police should treat those justifiably suspected of crime no differently than nonsuspects. These professors warn that the police should not use "any tactic that challenges a suspect's honor or dignity . . . [or that is] calculated to make the suspect feel that he is not a decent or honorable person unless he confesses."[42] Such tactics are seen as "assaults upon [human] dignity" that "should be barred as inherently unfair."[43] Others similarly argue that exploiting ignorance is offensive and, therefore, the police should inform the suspect of such facts as a victim's death lest he misapprehend that he was confessing to a lesser crime only.[44]

This concern for the suspect has been applied even when the confession is volunteered: "[I]f a person enters a police station and confesses to participation in a robbery which the police, but not the subject, know also involved a killing, his initial statement will not be admissible."[45] Others have gone further and expressed a hope that police questioning be prohibited entirely.[46] Whether these academic proponents of enlarged rights for suspects believe that no adverse consequences for the public safety are involved or whether they are simply fearless in the face of the added danger is unclear.[47]

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41. F. INBAU, *supra* note 34, at 149.

42. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 627-28 (1979).

43. *Id.*

44. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U.L.Q. 275, 347-50.

45. *Id.* at 358.

46. *See, e.g.*, L. WEINREB, *supra* note 5, at 129 (advocating magisterial questioning as an alternative); Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 61 (1968) (noting that the only way to right the imbalance created by the "inherently coercive" atmosphere would be to abolish the interrogation system).

47. A striking characteristic of the academic literature on *Miranda* (and criminal procedure generally) is the absence of anxiety about the decision's impact on the public safety and the community's sense of well-being. When commentators make reference to crime control, they usually use such narrow terms as "the police interest" or "law enforcement goals."

Although today people understand that the experienced criminal is able to resist even strenuous police entreaties, this fact excites neither indignation nor proposals for reform, only acceptance. Attention is turned instead to the confessor. He is likely to be imagined as in some way handicapped, a member of a minority group, or a person under great stress of whom the police have taken advantage.[48] This poor soul is viewed as the opposite of

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Unlike the discussions of perceived police abuse, in which passion abounds, the passing references to the possibility of uncaught murderers and rapists are flat. It is the police rather than the criminals who are treated as aliens.

Furthermore, the academic writers are virtually unanimous is urging that *Miranda* should be strengthened and extended. *See, e.g.*, T. GRISSO, JUVENILES' WAIVER OF RIGHTS 202 (1981) ("Legislation to provide blanket exclusion to confessions [of juveniles], or to provide automatically for effective legal counsel to these juveniles prior to police questioning, would afford the type of protection which [the results of the study] suggest that these juveniles need."); O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 205 (1973) ("Probably nothing short of a blanket requirement that no suspect be questioned except in the presence of his attorney could be expected to remove the elements of psychological coercion to which the Court so long objected."); Amsterdam, *The Rights of Suspects*, in THE RIGHTS OF AMERICANS 424 (N. Dorsen ed. 1970) ("*Miranda* does not go far enough. Although its standards governing waiver of the right to counsel are strict, it does permit findings of waiver to be made. Those findings will be made by the same old trial judges, following the same old swearing contest."); Dix, *supra* note 44, at 326 ("[T]here seems little doubt that emphasis should continue to be placed upon providing representation during interrogation, since there is a generally acknowledged need for the assistance of counsel throughout the criminal justice system."); Griffiths & Ayres, *A Postscript to the* Miranda *Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300, 318 (1967) ("For full achievement of *Miranda*'s values, a suspect needs even more than a sympathetic explanation before his interrogation—he needs a sympathetic advocate during the interrogation."); Leiken, *Police Interrogation in Colorado: The Implementation of* Miranda, 47 DEN. L.J. 1, 49-50 (1970) ("[T]o give the present fifth amendment waiver standard more integrity is to make the right of counsel nonwaivable. . . . As presently applied, *Miranda* is an expression of judicial mythology. It is a case which impressively defines fundamental rights but does not go far enough in providing practical remedies."); Special Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1614-15 (1967) ("The Supreme Court spoke in terms of placing the suspect on an equal footing with the police and of placing the inexperienced on a par with the experienced. If such is the goal, this can be done only by providing each accused with counsel before the police begin questioning—someone who knows the system, the institutions, the personalities involved. The lone suspect cannot make a 'free and informed' choice to speak or remain silent."); *cf.* Kamisar, Brewer v. Williams, Massiah & Miranda: *What is "Interrogation"? When does it matter?*, 67 GEO. L.J. 1, 97-98 (1978) (finding that *Miranda* warnings are ineffective and should be supplemented by a system which better protects the suspect's constitutional rights).

48. A related perspective sees confession as a manifestation of pathology. The confessor, to satisfy inner neurotic needs, admits to imaginary misconduct. Under Jewish law, for example, the prohibition against admitting confessions into evidence in criminal matters has been explained by one commentator as an attempt to prevent depressed and melancholic persons who want to be put to death from confessing to crimes that they did not commit. THE PRINCIPLES OF JEWISH LAW 614 (M. Elon ed. 1975). History provides many examples when the prospect of punishment has provoked confession by persons overwhelmed with guilt but entirely innocent of the offense to which they were confessing. In our own history,

Job:[49] a man who cannot resist admonitions to confess.

III. The Supreme Court Imposes Standards

The change in attitude toward interrogation in recent decades is largely a consequence of Supreme Court decisions. The Court drew the map on police practices, identified abuses, and imposed corrective rules. In the body of law the Court created from 1936 to 1966, one can see the difficulties of regulating police conduct, and one can find a vantage point from which to evaluate the break with precedent that occurred in *Miranda*. The place to begin this examination is *Brown v. Mississippi*.[50] *Brown* was the first state confession case to be reviewed by the Supreme Court and was as appalling on its facts as *Miranda* was benign.

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the Salem witch trials were made possible in part by the confession of one of the first women accused of witchcraft, who immediately acknowledged her guilt and launched into a vivid account of the many ways the devil worked his will in her life. Her confession, like a contagion, triggered the impulse to confess in others. George Orwell's *Animal Farm*, published in 1945 following the show trials in Stalinist Russia, reveals the orgiastic proportions of these spectacles:

> Then a sheep confessed to having urinated in the drinking pool . . . and two other sheep confessed to having murdered an old ram, an especially devoted follower of Napoleon by chasing him round and round a bonfire when he was suffering from a cough. They are slain on the spot. And so the tale of confessions and executions went on, until there was a pile of corpses lying before Napoleon's feet.

G. Orwell, Animal Farm 73-74 (Penguin ed. 1951).

Even in the days when people believed in the existence of witches, there was some awareness that not all confessed witches were credible. For example, in 1672, in Massachusetts Bay Colony, John Broadstreet admitted to "having familiarity with the devil," but the court was so unimpressed that they fined him for telling a lie and sent him home. K. Erikson, Wayward Puritans 155 (1966).

49. "I will hold on to my innocence and will not let it go. My conscience does not reproach any of my days." *Job* 25:6.

50. 297 U.S. 278 (1936). *Brown* was not the Court's first confession case. Nearly 40 years earlier, in Bram v. United States, 168 U.S. 532 (1897), the Court utilized the fifth amendment privilege against self-incrimination to reverse a federal conviction. Even before *Bram* the Court relied upon the common law rules of evidence prohibiting promises of leniency or threats to hold confessions inadmissible. The common law rule barring the admissibility of involuntary confessions emerged during the eighteenth century in England. Its development is chronicled in 3 J. Wigmore, Evidence in Trials at Common Law § 860, at 562 n.1 (3d ed. 1940) and L. Levy, *supra* note 15, at 327-28. In the United States, the Supreme Court first invoked the rule in Hopt v. Utah, 110 U.S. 574 (1884). Reviewing a death sentence for a murder conviction in *Hopt*, Justice Harlan, without referring to any constitutional provision, concluded for a unanimous Court that the confession was voluntary and therefore admissible. *Cf.* Sparf v. United States, 156 U.S. 51 (1895) (holding that the confession of a person imprisoned and in irons, given under accusations of having committed a capital offense, are admissible in evidence if the confessions appear to have been made voluntarily, and were not obtained by putting the suspect in fear or by making promises).

A. Emergence of the Voluntariness Test

Although the "third degree" was pervasive in the United States during the first half of this century,[51] its application in the South, where it was fueled by racial prejudice and the spectre of mob violence, was particularly shocking. *Brown* represented a twentieth century application of the rack. At the trial, one deputy sheriff testified unabashedly to beating the prisoners with a metal-buckled leather strap and volunteered that if the decision had been his alone, he would have whipped them harder. The beating, he said, was "[n]ot too much for a negro."[52]

In unanimously reversing Brown's conviction, the Court turned to the due process clause of the fourteenth amendment. The Court reasoned that the State of Mississippi had substituted "trial by ordeal" for the constitutionally mandated "fair trial" and thereby deprived Brown and his codefendants of their guarantee of due process of law.[53]

Chambers v. Florida[54] was the next confession case to be decided after *Brown*. In *Chambers*, the Court sought to define the requirements of due process in less violent situations. Following Isiah Chambers' arrest for the murder of an elderly man in Pompano, Florida, the local sheriff threatened Chambers with mob violence and then took him to the Dade County jail in Miami, purportedly for his own protection. There, a battery of at least four officers questioned him continuously for five days and an entire night before he made his "sunrise confession."[55] Justice Black, re-

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51. The single best source of information on illegal police practices is the NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) [hereinafter cited as WICKERSHAM REPORT]. For an excellent summary of the report, see Potts, *The Preliminary Examination and "The Third Degree,"* 2 BAYLOR L. REV. 131 (1950).

52. *Brown*, 297 U.S. at 284. What Roscoe Pound asserted about the police generally—that "a feeling that the public are with them is largely behind the boldness with which high-handed, secret, extra-legal interrogations of persons held *incommunicado* are constantly carried on"—had special application in the South. Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. AM. INST. CRIM. L. & CRIMINOLOGY 1014, 1017 (1934).

53. *Brown*, 297 U.S. at 285-86. Parenthetically, it seems as if Mississippi has gone from one extreme to the other. In Hicks v. State, 355 So. 2d 679 (Miss. 1978), the Mississippi Supreme Court suppressed a confession, because an officer had told the suspect that he was lying and that it would be better if he told the truth. This admonition, the court felt, placed grave doubt on the voluntariness of the confession. For cases to the contrary, see Kaci, *Confessions: A Comparison of Exclusion Under* Miranda *in the United States and Under the Judges' Rules in England*, 10 AM. J. CRIM. L. 87 (1982).

54. 309 U.S. 227 (1940).

55. *Id.* at 235.

versing the conviction for a unanimous Court, found that the questioning occurred "under circumstances calculated to break the strongest nerves and the stoutest resistance."[56] Because any person in the position of these "ignorant young colored tenant farmers" would have confessed, Black concluded that Chambers' confession was unreliable because it was not necessarily the product of his own perception of events.[57] If the interrogators had asked themselves, "Is what we are about to say or do apt to make an innocent person confess?" they would have had to answer, "Yes." Voluntariness, as defined by *Chambers*, was roughly synonymous with trustworthiness.

The Court employed a similar analysis in *Ashcraft v. Tennessee*,[58] a 1944 decision. Accused of murdering his wife, Ashcraft was questioned in relays from Saturday evening until the following Monday morning, an unbroken stretch of thirty-six hours. The Court found the interrogation "inherently coercive" because its duration created too high a risk of false confession.[59] The Court, however, avoided specifying the permissible length of inquiry; it based its decision on the totality of the circumstances.[60] The Court expressed only its unwillingness to utilize a subjective test to decide whether Ashcraft himself was the sort of man who could "withstand for days pressure that would destroy the will of another in hours."[61]

In his dissent, Justice Jackson protested the employment of an objective standard. The test, he insisted, should be the effect of the questioning on the subject himself, not some hypothetical person with assumed powers of resistance. The Court's obligation was to weigh the insistence of the police in conjunction with Ashcraft's

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56. *Id.* at 238-39.

57. *See id.* at 238-41.

58. 322 U.S. 143 (1944).

59. *Id.* at 154.

60. *See id.* at 152-54. Lisenba v. California, 314 U.S. 219 (1941), was the first confession case actually to use the "totality of the circumstances" language; *cf.* Reck v. Pate, 367 U.S. 433, 440 (1961) (noting that voluntariness cannot be measured by looking to the presence or ahsence of only one circumstance).

61. *Ashcraft*, 322 U.S. at 162 (Jackson, J., dissenting). On the question of "inherent coercion," Jackson had this rejoinder:

> The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is "inherently coercive." Of course it is. And so is custody and examination for one hour. Arrest itself is inherently coercive, and so is detention. When not justified, infliction of such indiguities upon the person is actionable as a tort. Of course such acts put pressure upon the prisoner to answer questions[,] to answer them truthfully, and to confess if guilty.

Id.

"strength or weakness, whether he was educated or illiterate, intelligent or moronic, well or ill, Negro or white."[62] Jackson himself found Ashcraft to be neither an "ignorant" person nor a "victim of prejudice," but instead "a white man of good reputation, good position and substantial property."[63] Jackson would thus have treated his confession as "voluntary" for due process purposes.[64]

In the setting of cases such as *Chambers* and *Ashcraft*, the Court defined voluntariness in a technical sense, at odds with common usage. In ordinary discourse, voluntariness suggests free will, choice, even spontaneity. In the typical interrogation, however, there is some coercion; the suspect is detained, queried, challenged, and contradicted. *Chambers* and *Ashcraft* employed the voluntariness concept as a shorthand for the conclusion that a confession had to be obtained under circumstances that made it trustworthy.

B. Voluntariness as Fairness

Over time, the voluntariness test evolved into more than a proxy for credibility. It became a vehicle for evaluating not only the effect of interrogative techniques on a suspect's will but also the propriety of police conduct, isolated from and unrelated to its impact on the suspect. In *Lisenba v. California*,[65] a particularly grisly case of wife murder, the Court stated that to meet due process standards, the police would have to obtain confessions by using methods that comported with a standard of basic fairness. "The aim of the requirement of due process," the Court announced, was "not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[66] In other cases, the Court continued to stress that the reliability of the statement was not enough to warrant admissibility if the police methods were unfair. In *Rogers v. Richmond*,[67] for example, the Court stated that the defendant's statement must be evaluated with "complete disregard of whether or not . . . [he] spoke the truth."[68] In *Stein v. New York*,[69] Justice Frankfurter wrote that judges must avoid being influenced by "the confirma-

62. *Id.*
63. *Id.* at 173.
64. *Id.* at 168.
65. 314 U.S. 219 (1941).
66. *Id.* at 236.
67. 365 U.S. 534 (1961).
68. *Id.* at 544.
69. 346 U.S. 156 (1953).

tion of details in the confession by reliable other evidence" or by a "feeling of certitude that the accused is guilty of the crime to which he confessed."[70]

Eventually, the concept of voluntariness became a hybrid containing elements of subjective and objective inquiry. In determining voluntariness, the Court focused on the conduct of the police *in conjunction* with the personal characteristics of the arrestee. It weighed "the circumstances of pressure against the power of resistance of the person confessing."[71] When the pressure was low and the resistance high, the statement of the suspect was labeled voluntary and admitted into evidence. Conversely, when the suspect seemed especially vulnerable and the police especially aggressive, the Court excluded the confession. For example, in *Haley v. Ohio*,[72] the Court reversed the conviction of a black youth, who, along with two others, had confessed to murdering the owner of a confectionary store, largely because he was "only 15 years old," "a tender and difficult age for a boy of any race."[73] Justice Douglas, stressing the limited capacity of juveniles, chastised the police for their "callous attitude" and "disregard of the standards of decency"[74] in treating Haley as if he had the decisionmaking capability of an adult.

Other cases also singled out acts of perceived unfairness. In *Spano v. New York*[75] the Court expressed disapproval with the police tactic of utilizing a uniformed officer who was a longtime friend of the accused to pressure the accused into confessing by telling him that the officer would lose his job on the force unless a confession was forthcoming.[76] In *Rogers v. Richmond*[77] the Court objected to the police threat of calling in the accused's wife, who suffered from an arthritic condition, for questioning should Rogers fail to admit to the crime.[78]

Although registering its disapproval of these particular acts, the Court did not denote them constitutional violations per se, automatically requiring exclusion of the confession. A conviction would be reversed only if on "all the facts" or under the "totality

70. *Id.* at 200 (Frankfurter, J., concurring).
71. Stein v. New York, 346 U.S. 156, 185 (1953).
72. 332 U.S. 596 (1948).
73. *Id.* at 599-600.
74. *Id.* at 600.
75. 360 U.S. 315 (1959).
76. *Id.* at 323.
77. 365 U.S. 534 (1961).
78. *Id.* at 541-44.

of the circumstances" the Court found that the method of interrogation had been too unfair or that the suspect's free will had been overborne.[79]

C. The Strengths of the Voluntariness Test

The totality of the circumstances approach frequently has been criticized.[80] Commentators have noted that its elusive boundaries made the admissibility of a particular confession difficult to predict. To some extent the decision to admit or exclude a statement depended on whether the trial court judge was squeamish or tough, sensitive or callous. But to argue that the Supreme Court, by putting the entire police-suspect confrontation under a microscope, made "[a]lmost everything . . . relevant, but almost nothing . . . decisive"[81] seems to be a great exaggeration. It is clear from the Court's decisions that if the police engaged in certain practices—prolonged detention, relay questioning, threats or other intimidation, promises of benefit, denial of food or sleep—they did so at their peril. Although the most influential textbook on interrogation of the time is best known today because the Court in *Mi-*

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79. The Court was also likely to reverse a conviction if aggravating circumstances were present that would have made the Court hesitate to affirm the conviction even under the earlier, voluntariness-as-reliability test. Spano, for example, was a highly emotional person who had been questioned for eight hours straight. And in Blackburn v. Alabama, 361 U.S. 199 (1960), in which the Court suppressed the confession of a mentally ill person, it observed that its "judgment can without difficulty be articulated in terms of the unreliability of the confession" as well as out of a "strong conviction that our system of law enforcement should not operate so as to take advantage of a person" while insane. *Id.* at 207.

80. For an excellent summary of the deficiencies of the voluntariness test as seen by its critics, see Schulhofer, *Confessions and the Court* (Book Review), 79 MICH. L. REV. 865, 867-78 (1981). The classic critique is Y. KAMISAR, *What is an "Involuntary" Confession?*, in POLICE INTERROGATIONS AND CONFESSIONS 1 (1980). *See also* Kamisar, Gates, *"Probable Cause," "Good Faith" and Beyond*, 69 IOWA L. REV. 551, 570 (1984) (stating that in pre-*Escobedo*, pre-*Miranda* days when the voluntariness test prevailed, "[a]lmost everything was relevant, but almost nothing was decisive."). Perhaps the underlying basis for the crticism of the test was that it "accomodated law enforcement interests to a much greater extent than it accommodated" individual interests. *Id.* at 571.

For a creative attempt to breathe new life into the voluntariness test, see Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 785 (1979).

81. Kamisar, *supra* note 80, at 570; *see also* Dix, *supra* note 44, at 293 ("[M]aking 'everything' relevant—and nothing necessarily determinative—also eliminated the necessity for specific discussion of the legal effect of single factors. Relieved from the necessity of addressing the significance of each factor, the Court tended to explain its results in the broad, often meaningless, 'overbearing of the will' or the 'totality of the circumstances' language. This, of course, greatly reduced the pressure to explain specifically why particular characteristics of a case were significant and thus facilitated avoidance of what would undoubtedly have been difficult analysis.").

randa disparaged it, the Inbau and Reid manual[82] served to upgrade police practices by making those practices responsive to the stated concerns of the Supreme Court. And there seems to be no doubt that by the time of the great doctrinal changes of the 1960's—*Escobedo*,[83] *Massiah*,[84] and *Miranda*[85]—the police were operating with far greater sensitivity to constitutional requirements.[86] In short, after nearly thirty years of judicial development, the voluntariness test was an evolving moral inquiry into what was decent and fair in police interrogation practices.

Since its first review of a state confession case in *Brown v. Mississippi*,[87] the Court both had provided much guidance to the police and had left important questions unanswered. Its voluntariness test was like an edifice in which many stones had been laid but not all were cemented, and there was no master plan to order future construction. Unlike the construction of a building, however, incompleteness was part of the design. It allowed the Court to move carefully, to feel its way, and to make its judgments with-

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82. F. INBAU & J. REID, *supra* note 33.

83. Escobedo v. Illinois, 378 U.S. 478 (1964).

84. Massiah v. United States, 377 U.S. 201 (1964).

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

86. It may be that we do not want to bind the police completely to due process standards. When life is at stake, the procedures we endorse for the investigation of the routine felony may be too restrictive. For example, if in Brewer v. Williams, 430 U.S. 387, *reh'g denied*, 431 U.S. 925 (1977), Captain Leaming had made his now famous appeal to conscience, the "Christian burial" speech, with good reason to believe that Pamela Powers, the kidnapped little girl, was still alive, and Williams responded by exercising his right to silence, would we want Leaming to end his interrogation and go searching elsewhere for other leads, or would we want the police to continue to ask where Pamela was even if these questions intimidated Williams? On this point, see Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 949 (1965).

The Supreme Court recently recognized the merits of this argument in New York v. Quarles, 104 S. Ct. 2626 (1984). The majority in *Quarles* created a "public safety" exception to the requirement that *Miranda* warnings be given before a suspect's answers will be admitted into evidence. Even the dissent in *Quarles* allowed that at times extralegal police action is required:

> If a bomb is about to explode or the puhlic is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing.

Id. at 2648 (Marshall, J., dissenting). But the dissent drew the line at allowing the fruits of these interrogations into evidence. The dissent concluded that even under emergency circumstances, "the Fifth Amendment forbids . . . the introduction of coerced statements at trial." *Id.*

87. *See supra* text accompanying notes 50-53.

out fear of prematurely constitutionalizing interrogation practices.

The Court was, it is true, often divided in its judgments, but the fragmentation was less a by-product of the voluntariness standard than a reflection of deep cleavages in society that were at last becoming apparent.[88] The Court's failure to state the basis for a particular decision or its blurring of a holding in the guise of the "totality of the circumstances" can be seen as shrewd and responsible pragmatism. Pragmatism may have been preferable to principles at a time when there was little general agreement on the principles to be applied.[89] When social cohesion and solidarity are strained, there is merit in an approach that, while showing direction toward increased police restraint, proceeds imprecisely and with some ambiguity, avoiding reductionism and overgeneralization. In applying the voluntariness test, the Court was able to put existing police practices into plainer view—its inquiry was a search for existential fact, an attempt to capture what actually happened at the police station—and to focus the issues more sharply. If the development of the voluntariness test had not come to a near end with the advent of *Miranda*,[90] perhaps the test would have contin-

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88. When judges are making essentially moral decisions, it is to be expected that a particular jurist's fear or fearlessness of crime will come into play, as will his attitudes toward order and freedom generally. But this is not so much a shortcoming of the voluntariness test as an attribute of judging.

89. *See generally* Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249 (1980) (discussing the tension that exists between principle and pragmatism in the judicial process and explaining the shift in the judicial process away from a system based on principles and toward a system based on pragmatism).

90. Although *Miranda* was designed as a supplementary test to be applied in conjunction with the traditional due process voluntariness test, in practice it has operated more as a substitute than a supplement. Justice Marshall recently noted:

> We do not suggest that compliance with *Miranda* conclusively established the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.

Berkemer v. McCarty, 104 S. Ct. 3138, 3147 n.20 (1984); *see also* M. BERGER, TAKING THE FIFTH 150 (1980); S. SALZBERG, AMERICAN CRIMINAL PROCEDURE 464 (1984); Duke, *The Interpretive Struggle Over the Voluntariness Concept*, NAT'L L.J., Aug. 22, 1983, at 21, col. 2.

Because the prosecution usually can prove the voluntariness of the waiver more easily than it can prove the voluntariness of the confession, the exchange of fourteenth amendment for fifth amendment protection has resulted in a net dimunition of rights. "When one also considers the rather relaxed standards that have come to be applied in determining the validity of *Miranda* waivers, the ultimate irony of *Miranda* may well be that the police are freer to use coercive tactics now than they were before that landmark decision." Note, *Police Use of Trickery as an Interrogation Technique*, 32 VAND. L. REV. 1167, 1181 (1979).

Nevertheless, there are instances in which courts that have found a valid waiver of *Miranda* rights have suppressed the defendant's statements as involuntary, but these cases are

ued to achieve definition and improved serviceability.

IV. Erosion of the Voluntariness Test

A. Gallegos v. Colorado

In retrospect, it is easy to see *Gallegos v. Colorado*,[91] decided in 1962 by a four to three majority, as an ideological harbinger of both *Escobedo* and *Miranda*. Robert Gallegos, a "child of 14,"[92] and two companions followed an elderly man into his hotel and used a ruse to enter his room. Once in his room, they assaulted him and stole thirteen dollars. It was their second assault of the day, and, this time, the victim died. Later, a juvenile officer spotted Gallegos and his two younger brothers sitting on the curb in front of a local restaurant. Since the youths matched the description of the felons, the officer identified himself and invited the boys to come sit in his car. Gallegos did so and almost "immediately admitted the assault and robbery" (the victim had not yet died).[93] Gallegos repeated the confession the next day and once more five days later by signing a "formal" confession.

Although at times segregated during his confinement, Gallegos was allowed to eat and converse with the other youths. By his own account, he was not intensely questioned during this period nor mistreated. Before making his "formal" confession, he had been advised of his right to remain silent, of the possibility that a murder charge might be placed against him, and of his right to be represented by counsel and to have his family present. Gallegos expressly indicated that he did not want an attorney and signed the confession.[94]

In terms of the traditional criteria of the voluntariness test—length of questioning, denial of access to others, awareness of one's right to withhold incriminating information—there was little to commend the case for reversal,[95] unless as a matter of law a fourteen year old was held incapable of making a voluntary confes-

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uncommon. *See, e.g.*, People v. Hogan, 31 Cal. 3d 815, 647 P.2d 93 (1982); *see also* United States v. Koch, 552 F.2d 1216 (7th Cir. 1977) (holding that after the defendant declined to sign a written waiver of his rights, the government failed to meet its burden of establishing the voluntariness of the subsequent confession).

91. 370 U.S. 49 (1962).

92. *Id.* at 49.

93. *Id.* at 50.

94. *Id.* at 61 (Clark, J., dissenting).

95. Perhaps the most troubling feature of the case was that Gallegos had been sentenced to life imprisonment.

sion. The Court had refused to take this drastic course earlier in *Haley v. Ohio*,[96] in which police pressures were far more evident,[97] and it hesitated to do so here as well, resting its decision to reverse the conviction on the totality of the circumstances. Weight was accorded not only to Gallegos' youth but also to the authorities' failure to grant his parents immediate access to him and to present him promptly before the juvenile court. In addition, the Court focused on the superior status of the police officer investigating the case: "[W]e deal with a person [Gallegos] who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights."[98]

The assertion that Gallegos was "not equal to the police," although surely correct, was nonetheless jarring. Why should this circumstance be relevant to whether an otherwise voluntary confession is admissible into evidence? The traditional inquiry was whether a particular suspect, however unequal in legal knowledge, emotional stability, and mature judgment, made a "voluntary" statement, not whether the government had the upper hand during interrogation. Although the absence of advice from his parents or a lawyer made it more likely that Gallegos would confess, this confession was in the public interest as long as the police acted with sufficient restraint. Gallegos' oral confession in the police car followed the officer's opening questions so quickly that the confession almost can be characterized as volunteered rather than voluntary. Nevertheless, the Court determined that the police showed "callous disregard" for Gallegos' "constitutional rights."[99]

The implications of *Gallegos* extended far beyond the special problems of juveniles. If it is true, as the Court concluded, that "[a]dult advice would have put [Gallegos] on a less unequal footing with his interrogators,"[100] then the same reasoning would apply to the adult suspect who was still not a match for the officer. Professor Donald King observed that the Court's argument logically extended to "all cases involving lack of knowledge or appreciation of rights,"[101] and he even suggested that the Court introduced a "new

96. 332 U.S. 596 (1948).
97. Haley had been questioned in relays for most of the night.
98. *Gallegos*, 370 U.S. at 54.
99. *Id.*
100. *Id.*
101. King, *Developing a Future Constitutional Standard for Confessions*, 8 WAYNE L.

constitutional standard . . . under the guise of the traditional [voluntariness] test."[102] Of course, under the voluntariness test, the *Gallegos* Court focused on those characteristics of the defendant—his age, intelligence, mental stability, experience in life—that might make his statement unreliable or the interrogation itself unfair; but, prior to *Gallegos*, the Court had never conceptualized the problems of interrogation in terms of equality.

B. Escobedo v. Illinois

"There is a case in the Supreme Court that . . . involves . . . [the right to counsel] and I am scared that the Court is going to hold that this right exists from the time of arrest—if a person asks for counsel and he is not given counsel, anything you get from him after that is to be excluded."[103] So wrote Professor Inbau, the leading champion of broad police investigative powers. As events transpired, his premonition was warranted. *Escobedo v. Illinois*[104] marked a turning point in the law of confessions.

Following the shooting of his brother-in-law, Danny Escobedo was questioned for several hours about the killing before his attorney secured his release. He made no statement. Ten days later, the police learned from another suspect, one DiGerlando, that Escobedo had been the trigger man. Escobedo was again arrested and questioned. During this second interrogation, Escohedo asked to see his attorney. At the same time, his attorney unsuccessfully sought admission to the homicide bureau where Escobedo was being held. This time the questioning was successful. When one of the detectives challenged Escobedo, who had been calling DiGerlando a liar, to repeat the accusation in front of DiGerlando, Escobedo agreed. DiGerlando was brought in, then Escobedo accused

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REV. 481, 487-88 (1962).

102. *Id.* at 481. In an earlier case, decided in 1951, also involving a defendant named Gallegos, the Court adverted to the defendant's need for legal advice. Gallegos, an itinerant Mexican farmworker who could neither read nor speak English, had confessed to killing his girl friend. In assessing the voluntariness of his confession, the Court looked to the circumstances: his "lack of education and *familiarity with our law*, his experience and condition in life, *his need for advice of counsel as to the law of homicide* and the probable effect on such a man of interrogation during [four days of] confinement." Gallegos v. Nebraska, 342 U.S. 55, 68 (1951) (emphasis added). Unlike the other factors cited by the Court it is unclear how Gallegos' understanding of the law of homicide related to his ability to withstand police pressure. What was it that Gallegos did not know that the counsel could help him understand?

103. Inbau, *A Forum on the Interrogation of the Accused*, 49 CORNELL L.Q. 382, 401 (1964).

104. 378 U.S. 478 (1964).

him of lying in these words: "I didn't shoot Manuel, you did it."[105] Thus Escobedo inadvertently implicated himself in the murder.

On its facts, *Escobedo* bore little resemblance to prior cases. The police had used no force, no intimidation, no questioning in relays, and no denials of food or sleep. Furthermore, Escobedo suffered no special handicap. He was not mentally disturbed, illiterate, the victim of discrimination, or inexperienced in the ways of the world. Perhaps most importantly, Escobedo had retained a lawyer, and in prior conversations with his lawyer, he had been told what he "should do in the event of interrogation."[106] Finally, during a chance encounter with his attorney during the interrogation—when the door to the homicide bureau was opened briefly, the attorney walked by—Escobedo took his attorney's passing gesture to mean that he should keep silent. Nonetheless, in a five-to-four decision, the Court reversed the conviction and held the statement inadmissible:

> We hold . . . that where . . . the investigation . . . has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment . . . .[107]

1. The Role of Counsel at the Police Station

Prior to *Escobedo*, the Justices' decisions had made reference to the role of counsel at the station house, particularly in the dissents of Justices Black and Douglas. Justice Jackson's 1949 dissent in *Watts v. Indiana*,[108] however, stands as the most forthright and penetrating statement of the interests at stake:

> [O]ne serious situation seems to me to stand out in these [confession] cases. The suspect neither had nor was advised of his right to get counsel. This presents a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.

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105. *Id.* at 483.
106. *Id.* at 485 n.5.
107. *Id.* at 490-91.
108. 338 U.S. 49 (1949).

> If the State may arrest . . . and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guaranty of the right to assistance of counsel. Any lawyer who has ever been called into a case after his client has "told all" . . . knows how helpless he is to protect his client against the facts thus disclosed.
>
> I suppose the view one takes will turn on what one thinks should be the right of an accused person against the State. Is it his right to have the judgment on the facts? Or is it his right to have a judgment based on only such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court and also cannot question him before? Our system comes close to the latter by any interpretation, for the defendant is shielded by such safeguards as no system of law except the Anglo American concedes to him.[109]

In striking the balance, Jackson came down against a right to counsel at the station house: "I doubt very much if . . . [the Constitution and Bill of Rights] require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder."[110]

In *Escobedo*, the balance was struck differently.[111] Unlike earlier opinions such as *Gallegos* in which the role of counsel was only vaguely specified as one factor in the "totality of the circumstances," the Court in *Escobedo* precisely identified how *Escobedo* had been injured by being denied access to his attorney: "Petitioner, a layman, was undoubtedly unaware that under Illinois law an admission of 'mere' complicity was legally as damaging as an admission of firing the fatal shots." The "guiding hand of counsel" was "essential" in this "delicate situation" to inform Escobedo of the applicable rules of law.[112]

The Court was not swayed by the fact that Escobedo had actually received instructions from his attorney concerning what to do in the event of police questioning. This guidance could not correct the imbalance. The Court noted that the attorney may not have contemplated "what petitioner should, or could, do in the face of a false statement that he had fired the fatal bullets."[113]

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109. *Id.* at 59 (Jackson, J., dissenting).

110. *Id.* at 61 (Jackson, J., dissenting).

111. Massiah v. United States, 377 U.S. 201 (1964), decided a few months earlier, also illustrates how far the Court was prepared to utilize the sixth amendment to change existing law. Whereas Escobedo had the advice of counsel prior to being questioned, Massiah did not even know that the government was trying to elicit information from him because the government used an accomplice as its agent. To Professor Kamisar, this smacked of unsportsmanlike conduct. Massiah, he argued, was in one sense "more seriously imposed on" than Escobedo because "he did not, and could not be expected to, keep his guard up 'because he did not even know that he was under interrogation by a government agent.'" Kamisar, *supra* note 47, at 39-40 (quoting *Massiah*, 377 U.S. at 206).

112. *Escobedo*, 378 U.S. at 486.

113. *Id.* at 485 n.5.

In making Escobedo's ignorance of a technical point of complicity law dispositive, the Court laid the foundation for an unrestricted right to counsel during custodial interrogation.[114] Only a rare arrestee would know this subtlety of criminal law. Escobedo was just a layman on his own in the adversarial world of the law. In these strange waters, how could he, or any other suspect, navigate confidently? How could he know as much as his more experienced police opponents? The Court obviously was concerned that, without a lawyer, he would be at risk; he might incriminate himself.[115]

The *Escobedo* Court did not define the role of counsel in this new setting. The tone of the opinion is defensive; the customary conciliatory language toward police and prosecution is absent. Responding to the charge that the presence of counsel would eliminate all interrogation, the Court countered: "[I]f the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[116] This statement is misleading because the right that the Court was defending, far from being of long standing, was newly discovered, indeed created, in this very opinion. What may have been "very wrong" was not the extant "system," but the right the Court just announced.

In the absence of any guidance from the *Escobedo* Court, what can be said about the proper role of counsel? Danny Escobedo's lawyer had advised him not to say anything to the police. If the homicide detectives had granted Escobedo's request to see his attorney again, there would have been nothing additional for his attorney to communicate. Escobedo had already been given all the assistance his counsel could provide without actually being present to assist his client on a question-by-question basis. Was Escobedo's attorney seeking the right to be present during the interrogation?

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114. In California v. Stewart, 385 U.S. 890 (1966), one of the cases consolidated for decision in *Miranda*, counsel for Stewart drew upon the *Escobedo* rationale hy arguing that his client was unaware of the rule of law that punished deaths occurring accidentally during the course of a felony as severely as those intentionally caused. Stewart "didn't know the consequences of the felony murder doctrine." R. MEDALIE, *supra* note 16, at 183.

115. *See* Enker & Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 U. MINN. L. REV. 47, 58-68 (1964).

116. *Escobedo*, 378 U.S. at 490. To this assertion, the Court added another: "[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Id.* at 488-89. To the police, this hint at mysterious means of catching felons must have been particularly galling.

Probably not. His intent in seeking entry to the homicide bureau was most likely to bring the interrogation to a close.[117] Given that a defense attorney's usual objective is to stop the interrogation, it is hard to understand why the Court was so certain that "no system worth preserving should have to fear that if an accused person is permitted to consult with a lawyer, he will become aware of, and exercise . . . [his] rights," unless the Court simply believed that there was no social utility in police interrogation.[118] The *Escobedo* opinion contains no hint of anxiety that harm may accrue from a right to counsel: that there may be fewer confessions and more crime.

2. The "Sporting Theory" of Justice

The *Escobedo* majority opinion demonstrates a change in the Court's, and perhaps society's, perception of the accused. The opinion shows sympathy for Danny Escobedo because he was the underdog. One detects what Thurman Arnold referred to as "the humanitarian notion that the underdog is always entitled to a chance."[119]

Perhaps the impulse to allow even the unquestionably guilty some prospect of escaping detection or conviction is universal.[120] Wigmore referred to this impulse as the "instinct of giving the game fair play."[121] Pound characterized it as "the sporting theory" of justice,[122] and Bentham derisively labeled it "the fox hunter's reason."[123] Under this view, fairness is given that special definition that sportsmen reserve for their games. Bentham elaborated on his analogy to the fox hunt: "The fox is to have a fair chance for his

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117. *Cf.* W. SCHAEFER, *supra* note 16, at 53 (noting that a lawyer's primary function at the station house is to tell the suspect not to talk).

118. In contrast, the English allow "every person at any stage of an investigation . . . to consult privately with a solicitor . . . provided that . . . no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so." Home Office Circular, *The Judges' Rules and Administrative Directions to the Police*, 1964 CRIM. L. REV. (Eng.) 165, 167; *cf.* Criminal Law Act of 1977, § 62, *cited in* HANSBURY'S LAWS OF ENGLAND, ANNUAL ABRIDGEMENT 635 (1977) (not recognizing a right to have an attorney present during the actual interrogation—it is a matter of police discretion—since there may he a good reason to hold an arrested person incommunicado for a limited period).

119. T. ARNOLD, SYMBOLS OF GOVERNMENT 135 (1935).

120. *See id.* at 139.

121. 1A J. WIGMORE, *supra* note 50, § 57, at 1185.

122. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 404-05 (1906).

123. 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 238 (1827).

life: he must have . . . leave to run a certain length of way, for the express purpose of giving him a chance for escape."[124] Fairness, so defined, dictates that neither side should have an undue advantage; the police and the criminal should be on roughly equal footing and the rules of the game should be drawn to avoid favoring one side or the other. As Justice Fortas put it in a well-known article (written before he joined the Court), the accused and the accuser are "equals, meeting in battle."[125] The state was sovereign, but so was the individual. The individual possessed the "sovereign right . . . to meet the state on terms as equal as their respective strength would permit . . . strength against strength, resource against resource, argument against argument."[126]

In the context of police interrogation, this outlook translates as follows: treating the accused fairly, as a worthy adversary, means encouraging him to view his right to silence as a weapon at his disposal, to be used when it offers the best chance of dismissal or acquittal. The suspect should be allowed to present his case in the time, place, and manner that, in accordance with his understanding or that of his attorney, will be most advantageous. And, of course, he must be told all the rules of the contest.[127]

Danny Escobedo did not know the relevant rule relating to the liability of accomplices. As Chief Justice Warren subsequently

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124. *Id.* at 238-39. Similarly, John Stuart Mill criticized those who "speak and act . . . as if they regarded a criminal trial as a sort of game, partly of chance, partly of skill, in which the proper end to be aimed at is, not that the truth may be discovered, but that both parties may have fair play; in a word, that whether a guilty person shall be acquitted or punished, may be, as nearly as possible, an even chance." *Id.* at 318.

125. Fortas, *The Fifth Amendment: Nemo Tenetur Seipsum Prodere*, 25 J. CLEV. B.A. 91, 98 (1954).

126. *Id.*

127. The sporting theory philosophy is particularly evident in the writings of Professor George Dix. Dix writes:

> A major objective of the law of confessions . . . should be regarded as assuring that a person who confesses does so with as complete an understanding of his tactical position as possible. This, of course, would require awareness not only of his abstract legal rights, but also of his practical ability to implement those rights in light of his factual situation and of the tactical wisdom of asserting them.

Dix, *supra* note 44, at 330-331. Professor Dix also argues that

> if a person enters a police station and confesses to participation in a robbery which the police, but not the subject, know also involved a killing, his initial statement [should] not be admissible. A subsequent statement will be, however, but only *if* . . . the officers inform the subject of the death and his potential liability for it *and*, in order to avoid the second statement being the fruit of the first, insure that he understands that his initial statement is not admissible against him.

Id. at 358 (emphasis in original); *see also* White, *supra* note 42, at 627-28 (arguing that the police should not use "any tactic that challenges a suspect's honor and diguity").

noted in *Miranda*, Escobedo "fully intended his accusation of another [DiGerlando] . . . to be exculpatory as to himself."[128] Because the government took advantage of this unawareness in its interrogation, the Court penalized the government by denying it the use of Escobedo's confession as evidence in any subsequent trial. The government had failed to comport itself within the bounds of this new definition of fairness.

The sporting theory of justice, as Pound observed, has great attraction; but its appeal is easier to experience than to explain. In its origins, it may draw upon our childhood experiences with our parents, when justice was perceived largely in terms of equal treatment with our brothers and sisters. Beyond that, there seems to be something distinctly American in the subversive notion of beating the law, even though this feeling may be "only a survival of the days when a lawsuit was a fight between two clans" rather than a "fundamental right of jurisprudence."[129]

The weakness of the sporting theory in the context of *Escobedo* is not so much what Pound suggests, that by "its exaggerated contentious procedures . . . [it gives] the whole community a false notion of the purpose and the end of the law,"[130] but rather that by arming the suspect with counsel at the station house the Court strikes the wrong balance—it gives the suspect too great an advantage. If the police are too formidable for the average offender, a lawyer will be too formidable for the average investigator. The lawyer will protect his client from injuring himself by confessing. Thus, even if one sees criminal law as a "mere game," to use Pound's expression, *Escobedo* may deprive the government of a fair chance at victory. By design, *Escobedo* was a significant step toward barring "from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not."[131]

V. *Miranda v. Arizona*

After *Escobedo* was decided in the early summer of 1964, commentators predicted that the Supreme Court would wait to observe the effects of what Time magazine referred to as a "constitutional thunderbolt" and a "cop's nightmare."[132] The decision not only triggered sharp criticism but also inspired an unprecedented inter-

128. Miranda v. Arizona, 384 U.S. 436, 477 (1966).
129. Pound, *supra* note 122, at 405.
130. *Id.* at 406.
131. *Escobedo*, 378 U.S. at 495 (White, J., dissenting).
132. *Concern About Confessions*, TIME, Apr. 29, 1966, at 52.

est in police investigative practices. The American Bar Association, the American Law Institute, and the National Crime Commission independently undertook studies of police methods. In addition, the law enforcement establishment was engaged in a critical self-examination of its procedures. Increasingly, the evidence suggested that the police were more restrained and law-abiding than ever. The most recent studies showed that interrogations were short—less than thirty minutes on the average[133]—and that coercion was infrequent.[134] The Court could thus have sat back and awaited the forthcoming proposals for reform fostered by its *Escobedo* decision. Unlike the areas of reapportionment and segregation, nonjudicial efforts could have filled the gaps left by the Court. To the dismay of many,[135] however, the Court did not pause for long: on June 13, 1966, by a five-to-four majority,[136] it decided *Miranda v. Arizona*.[137]

As with many criminal cases, there was a fortuitous quality to Ernesto Miranda's arrest and conviction for rape.[138] He almost escaped detection. His teenage victim was so shy and easily confused that she appeared to be lying even when she was telling the truth. Moreover, there were apparent discrepancies in her initial report

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133. Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 42-44 (1962).

134. W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 386 (1965). Professor LaFave described the interrogation practices in 1965 as follows:

> In the great majority of in-custody interrogations observed [in the states of Michigan, Wisconsin, and Kansas in 1956 and 1957], the possibility of coercion appeared slight. In many instances the suspect is merely confronted with the evidence against him or with evidence inconsistent with his prior statements and is asked to give an explanation. . . . Lengthy, continuous questioning is the exception . . . . In practice the interrogating detective often terminates the questioning after a brief period to appear in court or . . . to check upon the statements already given by the suspect.

Id.

135. *See* Miranda v. Arizona, 384 U.S. 436, 523-24 (1966) (Harlan, J., dissenting); G. WHITE, EARL WARREN 271 (1982); Bickel, *Is the Warren Court Too "Political"?*, in THE SUPREME COURT UNDER EARL WARREN 216, 221-22 (L. Levy ed. 1972).

136. That *Miranda*'s controversial message was supported by only five members of the Court remains a troubling feature of the case. However one evaluates the Supreme Court, it is an antimajoritarian institution. Its claim to hegemony is a limited one, arising from its responsibility to interpret the Constitution. When it embarks on momentous changes without a solid majority of the justices, it places its own legitimacy in jeopardy. Beyond that, it invites counter-reaction. The Burger Court, created by a slight shift in composition, was placed in the untenable position of either endorsing a rule of constitutional law of which it disapproved or overruling *Miranda* and risking the Court's special moral status.

137. 384 U.S. 436 (1966).

138. Although the Supreme Court cursorily treated the facts of the four cases consolidated for decision in *Miranda*, recent research has provided a rich narrative of *Miranda* from arrest to final appeal. *See* L. BAKER, *Miranda*: CRIME, LAW & POLITICS (1983).

to the police. The medical investigation did not confirm her assertion that she was a virgin at the time of the rape; and when Miranda was placed in a lineup with only two others, she could not make a positive identification.

But the investigating officers, convinced that she was truthful, employed a routine trick to encourage Miranda to confess. Following the lineup, when Miranda inquired of them, "How did I do?" they replied, "You flunked."[139] Miranda's questioning was mild; it was conducted at midday by only two men who made no hint of force, and it lasted only two hours. Before it was over, Miranda had confessed not only to the rape for which he had been arrested, but also to attempting the rape of a second victim, and trying to rob still a third person. Once his confession was reduced to writing, the officers brought his victim into the interrogation room and asked Miranda if he recognized her. "That's the girl," he replied.[140]

When Miranda identified his victim for the police, he believed that she already had picked him out of the lineup. But neither this deception nor anything else that transpired during the questioning particularly troubled the Supreme Court three years later; Miranda's confession met existing due process standards for voluntariness. The *Miranda* Court was concerned about something quite different and novel.

A. The Fifth Amendment Rationale

Writing for the Court, Chief Justice Warren held that, prior to any questioning, the police must warn a suspect in custody "that he has a right to remain silent, that any statement he does make may be used . . . against him, and that he has a right to the presence of an attorney, either retained or appointed."[141] These warnings were to be administered in every case without regard for whether the accused was competent or experienced. If the police failed to issue the warnings, any statement secured from the suspect, however voluntary, would be treated as coerced. A suspect conceivably could waive his rights, but "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed

139. *Id.* at 12.
140. *Id.* at 13.
141. *Miranda*, 384 U.S. at 444.

counsel."[142] The Court thus stationed a fifth amendment high hurdle at the threshold of every police inquiry.

This reliance on the fifth amendment surprised many. Apart from a few early federal decisions,[143] the fifth amendment had fallen into disuse as the constitutional basis for judging the coerciveness of police interrogation, and only two years earlier the Court had introduced the sixth amendment right to counsel as the vehicle for governing custodial interrogation.[144] Nonetheless, the Court explicitly refused to recognize its reliance on the fifth amendment privilege as "an innovation in our jurisprudence."[145] Rather, the Court characterized its holding as "an explication of basic rights that are enshrined in our Constitution—that 'No person . . . shall be compelled in any criminal case to be a witness against himself.' "[146]

It is easy to fault Warren's opinion. In contrast to the lengthy compilation of police interrogation strategies (largely illustrated by reference to the standard police manuals, thus exaggerating the intensity and sophistication of police practices generally), the section of the sixty page opinion that attempted to ground the holding in precedent was thin. In all, Warren cited as precedent three cases incorporating the fifth amendment privilege against the states, none of which concerned custodial interrogation. Warren also cited *Escobedo*, which had been decided entirely on sixth amendment grounds.

The Court's objections to police interrogation ran deep. Its concern was not primarily with the third degree, which was conceded to be "undoubtedly the exception now,"[147] or with the historic problem of reliability—only in a footnote does the Court mention that "[i]nterrogation procedures may . . . give rise to a false confession."[148] It was custodial interrogation itself, apart from its duration or intensity or the tactics employed, that was vexatious. The Court explained: "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to . . . techniques of persuasion . . . cannot

142. *Id.* at 475. In dissent, Justice White predicted that when the government sought to demonstrate waiver, it would confront a "severe, if not impossible burden of proof." *Id.* at 536 (White, J., dissenting).

143. *See supra* note 50.

144. Escobedo v. Illinois, 378 U.S. 478 (1964).

145. *Miranda*, 384 U.S. at 442.

146. *Id.*

147. *Id.* at 447.

148. *Id.* at 455 n.24.

be otherwise than under compulsion to speak."[149] Offensive police practices were a natural, indeed inevitable, outgrowth of incommunicado interrogation: "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement . . . from the defendant can truly be the product of his free choice."[150]

If a suspect, without encouragement from the police, volunteered a statement of guilt, the statement would be admissible;[151] the coercion inherent in arrest and detention alone was not so momentous as to preclude it. But once a question was asked—"Where were you last night?" "Do you own a shotgun?" or "Will you tell us your version?"—any response would be barred unless the police had administered the warnings and obtained an informed waiver of the rights conferred.[152]

The *Miranda* majority thus viewed the arrested suspect from a different perspective. Whereas earlier Supreme Court decisions envisioned a hardy suspect, unwilling to confess to a murder and able to resist police admonitions for hours without having his will overborne, the *Miranda* Court saw the very fact of custodial questioning as a grave threat to "rational judgment" that induced the "abdication of the constitutional privilege."[153] Whereas prior opinions defined the central problem in criminal constitutional law as striking the right balance between respect for the autonomy of the individual and concern for the protection of the general public, the Court in *Miranda* assumed a radical posture, treating the constitutional bar against compulsory self-incrimination as absolute. The *Miranda* Court posed new questions: How can we promote the assertion of the privilege in the police station? How can we ensure its exercise?

The Court's answer to these questions is now well known: "The presence of counsel . . . [is] the adequate protective device . . . to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the prod-

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149. *Id.* at 461.

150. *Id.* at 458.

151. *Id.* at 478.

152. *Cf. id.* at 533-34 (White, J., dissenting) (noting dissatisfaction with the majority's conclusion that the answer to such questions would he deemed compelled unless warnings had been given); H. FRIENDLY, BENCHMARKS 271 (1967) (noting dissatisfaction with the *Miranda* majority's establishment of a conclusive presumption in favor of finding all answers compelled if given without a prior warning).

153. *Miranda*, 384 U.S. at 465.

uct of compulsion."[154]

No one can be sure whether it was the Court's intent to eliminate all, or nearly all, custodial interrogation or even whether the majority of five shared a common intention. Certainly the Court had been put on notice that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."[155] But the Court may not have accepted these predictions at face value,[156] or it may have preferred the more equivocal projections of defense counsel.[157] Most likely, as naive as it now appears, the Court expected the presence of counsel at the station house to be routine and the waiver of rights extraordinary.[158] The Court probably imagined that the typical suspect advised of his rights would elect to exercise them. He would choose to speak to counsel rather than to police, and counsel would

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154. *Id.* at 466.

155. Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring).

156. *Cf.* Enker & Elsen, *supra* note 115, at 68 ("[O]ur experience indicates that counsel would gain no advantage for his client by advising him to confess to the police which he could not gain later on in his negotiations with the prosecutor.").

For a similar view, see the illuminating article by Bernard Weisberg written in 1962 when he was General Counsel to the American Civil Liberties Union, Illinois Division:

> Since silence inevitably invites suspicion, it is not unreasonable to suppose that in many cases where the suspect is innocent his lawyer will advise him to answer questions in order to clear himself as quickly as possible and assist the police. Moreover, the lawyer's advice may be different if he is present at the interrogation. It is one thing to dispense general advice to a suspect from whose interrogation the lawyer will be barred and quite a different matter to counsel silence or answers to particular questions when the lawyer hears them as they are asked.
>
> But there seems no reason to doubt that counsel will ordinarily advise silence where he learns that his client is guilty or, although innocent, endangered by compromising circumstances and probably also when he lacks sufficient information to form a considered judgment. This would make the work of the police more difficult. Introducing counsel into police station questioning would have the practical effect of giving life to the privilege against self-incrimination prior to the judicial stage of criminal proceedings. From the police point of view, it would have the effect of making interrogation after arrest impossible in the very cases in which it is most likely to help them find the offender.

Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, in POLICE POWER AND INDIVIDUAL FREEDOM 153, 179 (C. Sowle ed. 1962) (footnote omitted).

157. *See* Brief for Petitioner at 45, Miranda v. Arizona, 384 U.S. 436 (1966), cited in R. MEDALIE, *supra* note 16, at 68 ("As a practical matter, we cannot know with assurance whether amplification of the right to counsel in the interrogation period will severely handicap the police; we end by trading opinion."); *cf.* Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1049 (1964) ("[O]ur conclusions favor counsel during interrogation even if the result is the end of interrogation. But the fact that most prosecutors do not now interrogate a man once he has obtained counsel does not mean that they would find interrogation with counsel useless.") (footnotes omitted).

158. *See Miranda*, 384 U.S. at 475; *id.* at 536 (White, J., dissenting).

ordinarily be provided to the indigent as an alternative to foregoing interrogation altogether. Once summoned, counsel might "advise his client not to talk to police until he has an opportunity to investigate the case, or he may wish to be present during any police questioning."[159]

One can imagine the *Miranda* warnings as serving a function similar to the caution printed on cigarette packages. The smoker is advised of the risks he is taking, but he does not get the message until the package is in hand when the impulse for gratification is strongest. The warning is thus ineffective in most cases. But the *Miranda* Court did not intend to create an ineffective prophylactic. Its vision was not of gesture or ritual. It sought to deter suspects from confessing. It interpreted the fifth amendment privilege not merely as conferring a power in the suspect—to talk or not, to insist on counsel or not—but as stating a preference for noncooperation with the police.[160] The warnings, fairly administered, were designed to impress on the suspect that he placed himself in jeopardy by answering any questions. They were supposed to be the equivalent of the police telling the suspect, "Look, Joe, you had better get a lawyer." Fairly administered, they would render "most police questioning ineffective."[161]

Was it now wrong for the police to urge a person to confess or for counsel to allow or advise his client to do so? It would seem so.[162] The Chief Justice's opinion treats confession as an act of poor judgment by a vulnerable person outmaneuvered by the po-

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159. *Id.* at 480.

160. This view was most clearly expressed by Justice Black during the course of oral argument in *Miranda*:

> Mr. Nelson [Attorney General of Arizona]: [T]he practical effect of introducing counsel at the interrogation stage is . . . to stop the interrogation . . . .
>
> Mr. Justice Black: Isn't that . . . the . . . object of the 5th Amendment which says, he shall not be compelled to give testimony against himself? Is there any difference, for our purposes, of the two, what the lawyer tells him and what the 5th Amendment tells him?

R. MEDALIE, *supra* note 16, at 94.

161. L. WEINREB, *supra* note 5, at 151.

162. If an attorney represents a client who wishes to confess and plead guilty, must the atterney try to talk him out of it? Is it "ineffective assistance of counsel" to acquiesce in the client's decision if the client has an arguable defense? *See* People v. Claudio, 59 N.Y.2d 556, 453 N.E.2d 500, 466 N.Y.S.2d 271 (1983) (attorney criticized for advising client to surrender and confess when he knew that the prosecutor did not have enough evidence to prosecute); *see also* Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 663-64 (1981) (characterizing an attorney's exhortations to his client to stand trial as "conscientious advice" even though the client, "a murder defendant [had] told him, 'I couldn't possibly plead not guilty. I did it.' ").

lice.[163] In a draft opinion, Warren had emphasized the racial character of the third degree and our history of "police violence upon minority groups."[164] But at the suggestion of Justice Brennan, who wondered "if it [was] appropriate . . . to turn police brutality into a racial problem,"[165] the reference to blacks and the South was omitted, and the overall accent was, as Brennan suggested, on poverty: "If anything characterizes the group [of criminal suspects] it is poverty more than race."[166] With this focus, the offender became the victim.

B. The Impropriety of Warning the Suspect

Most of the controversy that followed *Miranda* centered on the right to counsel at the station. Scant attention was directed to the requirement that the police inform a suspect that he had a right to remain silent and that anything he said could be used against him as evidence in court.[167] In part, this neglect arose from a general impression that these warnings would not have much consequence. Justice Harlan's dissent glossed over them as "minor obstructions."[168] Even the police offered no protest; moreover, many agencies, including the prestigious Federal Bureau of Investigation, already required its officers to administer a similar caution; the English police had done so since 1848.[169] Finally, many believed that requiring the police to inform a suspect of his right to silence and of the consequences of his confession was only fair.

Nonetheless, the propriety of making the state responsible for informing the suspect of his rights is not evident. It is not easy to explain why fair play requires the police to warn a suspect of the danger in answering truthfully. As John Stuart Mill asked, "Whence all this dread of truth?"[170] Requiring an officer to tell a

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163. The Chief Justice wrote that interrogation "exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Miranda*, 384 U.S. at 455. According to a recent biographer, Chief Justice Warren understood criminals as persons who "might have turned to crime because of disadvantage or out of degradation." G. WHITE, *supra* note 135, at 265. The Chief Justice recognized that "the Court could do nothing about the deplorable conditions of urban America," but felt that "it could at least ensure that the process of criminal justice did not add to the degraded status of those participating in it." *Id.*

164. B. SCHWARTZ, SUPER CHIEF 591 (1983).

165. *Id.*

166. *Id.*

167. *Miranda*, 384 U.S. at 444.

168. *Id.* at 516.

169. L. LEVY, *supra* note 15, at 375.

170. S. HOOK, COMMON SENSE AND THE FIFTH AMENDMENT 59 (1957) (quoting John Stuart Mill).

murder or rape suspect that he need not answer the officer's questions and that, if he does, he might suffer the consequences seems altogether too charitable. It suggests an ambivalence toward the suspect and his deed. Giving the warning is not a neutral act designed merely to place the suspect in an independent position to decide whether to take responsibility for his wrongdoing. A police warning provides information with a purpose. If delivered faithfully, it will encourage the suspect to withhold information.[171]

One need not agree with J.F. Stephen that "the proper attitude of mind toward criminals is not long-suffering charity but open enmity"[172] to ask why such generosity is called for.[173] If condemnation and punishment are appropriate responses to rape and murder, then paternalistic counseling is inappropriate. To expect truthful answers from a suspect is too much to ask; most persons would not perceive or honor an obligation to respond candidly. Nonetheless, the government has good reason to make the inquiry.[174]

In related contexts we do not encourage persons to withhold information. Judge Friendly observed, "Every hour of the day people are being asked to explain their conduct to parents, employers, and teachers."[175] Sidney Hook similarly commented, "Let any sensible person ask himself whether he would hire a secretary, nurse,

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171. In some cases, however, a warning will be misperceived by the subject as a gesture of friendliness and invite rather than foreclose communication. T. GUTHEIL & P. APPELBAUM, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 289-90 (1982).

172. 1 J.F. STEPHEN, A HISTORY OF THE CRIMINAL LAW IN ENGLAND 432 (1883).

173. *Cf.* Robinson, *supra* note 28, at 412 ("[I]t is one thing for society to establish a policy of not applying coercive sanctions against behavior and quite another to urge it. For example, one may grant a 'right' to kill to prevent the escape of a felon without promoting its exercise whenever possible.").

174. L. WEINREB, *supra* note 5, at 161. That questions may trigger a suspect's conscience troubles some commentators and judges. See, for example, the dissenting opinions of Justices Marshall and Stevens in Rhode Island v. Innis, 446 U.S. 291 (1980). For a contrary view, see Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U. PITT. L. REV. 731, 732 (1981) ("I find it extraordinary that three members of the United States Supreme Court (and many legal commentators) discern in the constitution . . . a principle that prohibits police from appealing to the conscience of a person suspected of having committed a serious crime."); *cf.* Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L.J. 350, 381 (1983) (noting that when the interrogator in Brewer v. Williams, 430 U.S. 387 (1977), made a plea to the suspect's conscience, he was asking the suspect "to do the only decent and honorable thing: to reveal where he had hidden the body [of the victim], so the police could recover it and return it to the grieving family for burial. Perhaps the police ought not to be allowed to make such an appeal to a suspect in their custody, but . . . *somebody* ought to do it.").

175. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 680 (1968).

or even a babysitter for his children, if she refused to reply to a question bearing upon the proper execution of her duties with a response equivalent to the privilege against self-incrimination."[176] Professor Mayers offered this hypothetical:

> Suppose that evidence were laid before [a professor] warranting suspicion that one of his students, called upon to submit an essay to satisfy the requirements of the faculty, had employed another person to prepare the essay and had submitted it as his own. Would the [professor] regard it as an essential and inherent cruelty to demand of the student that he explain away the evidence? Would not the [professor] regard the student's refusal to offer an explanation as of itself sufficient ground for his expulsion from school—a fearful penalty?[177]

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? If the police were to issue a warning that reflected the common understanding of the implications of silence in the face of an accusation, the suspect would be told something like this: "We cannot compel you to answer our questions, but your failure to provide us with information concerning this matter may have a bad effect on your case in general."[178] The exercise of the right to silence might not invariably lead to adverse inferences, but in many cases, perhaps most, a person could be expected to protest his innocence and give an account of himself rather than stand on his rights.[179] The

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176. S. HOOK, *supra* note 170, at 73.

177. L. MAYERS, *supra* note 26, at 168; *cf.* McCormick, *Law and the Future: Evidence*, 51 NW. U.L. REV. 218, 222 (1956) ("[The privilege] goes beyond the demands of ordinary morality, which sees nothing wrong in asking a man, for adequate reason, about particular misdeeds of which he has been suspected and charged.").

In a 1962 Symposium, Professor Bratholm reported that in Norway

> the police have no duty to draw the attention of a suspect to the fact that he need not make a statement or that everything he says may be taken down and used as evidence against him. On the contrary, if the suspect declines to make a statement, the examining officer can draw his attention to the fact that his refusal could be considered as a circumstance which weighs against him. The same applies if the accused refuses to make a statement in court.

Bratholm, *Police Interrogation in Norway*, in POLICE POWER AND INDIVIDUAL FREEDOM 211 (C. Sowle ed. 1962).

178. A proposal to give this type of warning was made by the Criminal Law Revision Committee of the Home Office in England in 1972, but, after much debate, it was not adopted. CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, EVIDENCE (General Cmnd. 4991) 24-26 (1972); *cf.* Gerstein, *The Self-Incrimination Debate in Great Britian*, 27 AM. J. COMP. L. 81 (1979) (exploring the debate surrounding the rejection of this proposal for the light that the debate sheds on the assumptions underlying the right to silence).

179. An observer of 60 interrogations in Brighton, England concluded that "the innocent . . . do not exercise their right to silence; they talk, usually volubly." B. IRVING, POLICE INTERROGATION: THE PSYCHOLOGICAL APPROACH 153 (1980).

right that is being asserted, it must be recalled, is the right to withhold incriminating evidence, not evidence. However unpleasant it may be to testify, in the absence of privilege, a citizen ordinarily is required to do so. As Jeremy Bentham long ago wrote, "Evidence is the basis of justice: exclude evidence, you exclude justice."[180] A person may prefer not to respond to questions about a burglary or automobile accident he witnessed, but the law has never countenanced such reticence. Only the person who seeks to deny the state damaging material about himself is protected, and we provide protection not because we admire the man who stands silent, but because we do not wish to give the authorities the power to coerce testimony.

From the suspect's point of view, the privilege has undoubted appeal. It fosters self-preservation. But whether silence is a right,[181] or something less worthy and more instinctive, there seems nothing admirable in standing silent in the face of a criminal accusation.[182] The suspect who is told, "We are investigating

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180. 5 J. BENTHAM, *supra* note 123, at 1.

181. *See, e.g.*, Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981).

182. In this connection, Justice Schaefer wrote:

> The chief difficulty with [the privilege against self-incrimination] is that it runs counter to ordinary standards of morality. Parents try hard to inculcate in their children the simple virtues of truth and responsibility. Yet in the enforcement of criminal law a different set of values has come to prevail. Perhaps to prepare our children for adult life we should carefully instruct them never to answer any questions if the answers may reveal misconduct—but I don't think so.

W. SCHAEFER, *supra* note 16, at 59. A recent study suggests that parents accept Justice Schaefer's principles of child-rearing even in the context of police interrogation of their children. T. GRISSO, *supra* note 47, at 120. A survey of 752 middle and upper-middle class white parents revealed that the great majority felt that their children should be required to answer questions put to them when they are suspected of a crime: "[O]ver half of the parents expressly disagreed with the idea that juveniles should be allowed to avoid incriminating themselves by withholding information. The majority of parents . . . did not support the protective privilege for juveniles which the Supreme Court ruled in *In Re* Gault, 387 U.S. 1 (1967), must be provided." *Id.* at 175. When asked how they would advise their children to respond to police questions, parents answered: "He should tell the truth," "Tell the police whatever they want to know," and "If he's guilty, own up—if he's not, there's nothing to hide." *Id.* at 180. Such parental advice was motivated both by moral reasons—it's the right thing to do—and by strategic ones—cooperation with the police was felt likely to result in more lenient treatment. *Id.* at 180-81.

The same study also indicates that many juveniles believe that if they admit their guilt to their lawyer, the lawyer must either inform the judge or enter a plea of guilty to the offense. *Id.* at 120. This misconception may reveal more than juveniles' lack knowledge of their legal rights and of the legal system; it suggests that if a person is taught that he should be held responsible for his own misconduct, and that others should not conceal wrongdoing, these moral precepts may compete with and override more specific information about legal rules. This also may explain why many juveniles believe that it is wrong to refuse to answer

the murder of your wife. What can you tell us about this matter?" and remains silent is not heroic; he is merely covering up. Only when viewed as a symbolic statement of the limits to truthseeking when the fact finding methods are demeaning does the right to silence justify the high praise that has been showered upon it.[183] But when viewed from the perspective of the accused, it is difficult to see "just how the stature of the individual man gains in 'dignity and importance' by his maintaining silence in the face of grave evidence,"[184] unless one takes the position that the government was wrong to ask.

All this is not to say that a suspect's knowledge of his right to silence should be ignored. Proof that the suspect knows his rights is relevant to a determination that his statements were not coerced. Knowledge that one is not compelled to answer may fortify the will; and the fact that the interrogator provided the suspect with the information about the suspect's rights evidences the government's awareness of the limitations on its inquiry.[185] These considerations make sense in the determination of voluntariness, and the Court on several occasions has measured the suspect's aware-

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a judge's question: "If I'm in court, I have to tell the truth . . . . [W]hen a judge asks you what you done, you have to tell him even if you don't want to." *Id.* at 124.

183. Professor Griswold has called the privilege "one of the great landmarks in man's struggle to make himself civilized," E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955); "an ever-present reminder of our belief in the importance of the individual," *id.* at 81; and "a symbol of our highest aspirations," *id.*

184. L. MAYERS, *supra* note 26, at 167. Professor Mayers adds:

> Neither is it self-evident that there is anything repugnant to civilized or decent conduct, or any invasion of the citizen's dignity and importance, in the community's requiring him to respond to orderly inquiry, even at the risk of disclosing his own complicity in wrongdoing. Law observance and law enforcement are the essence of a civilized community; and only by dispassionate and thorough investigation of breaches of law can this civilized order be sustained. Surely there is nothing uncivilized, nothing expressive of the unlimited power of the state, in demanding of every citizen, under proper safeguards against abuse, that he answer proper questions put to him in a proper manner by constituted authority. To some indeed, such a requirement may seem itself an essential of a civilized order.

Id. at 167-68.

For an extended argument that *Miranda* should be read to emphasize the value of "free and rational choice" of the suspect as an "independent constitutional good," see Sbrock, Welsh & Collins, *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. CAL. L. REV. 1, 41-51 (1978). The authors argne that there is an enormous difference in dignity "between the person who can only say, 'I won't talk,' and one who knows enough to say, 'I stand on my right not to talk.'" *Id.* at 50.

185. Enker & Elsen, *supra* note 115, at 62; *cf.* P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 37 (1958) (finding that the warning serves to put the suspect on notice that the police are at "war" with him and that they do not have the "right, legal or moral, to further help from" him).

ness of his rights in deciding whether his statement was admissible.[186] In the fifth amendment context, however, the automatic suppression of an incriminating statement solely because of a failure to advise a suspect who in fact knows his rights seems excessive.

When inquiring into the propriety of requiring disclosure of the suspect's right to silence, one should not start with the premise that a person cannot waive a constitutional right if he is unaware of its existence. Ordinarily, our legal system does not excuse an individual for ignorance of his rights and obligations. Routinely, individuals who make decisions based on imperfect knowledge of the law or the facts must suffer the consequences. In the lawyer-client context, for example, a client who wishes to fire his attorney should know that he might incur additional liability if the discharge is wrongful, but ignorance of this rule does not relieve him of liability. He remains bound to his agreement. Moreover, the attorney is not obligated to advise the client of this potential liability, even though without such counseling the client probably will remain ignorant of it. In some situations the law does impose a responsibility to disclose information, but these characteristically relate to transactions in which a failure to disclose would result in a grossly unfair bargain. In these circumstances, no societal interest is advanced by allowing the party with superior knowledge to bind another party to an agreement that he would not have made had the relevant facts been known.

In the fourth amendment area, the Supreme Court has held that a suspect may validly waive his right to refuse to allow the police to conduct a warrantless search of his premises or property even though he is unaware of his constitutional right to deny the police access. The government need not prove that there was "an intentional relinquishment or abandonment of a known right"[187] by the suspect. The government need only prove that the consent was given "voluntarily" under the totality of the circumstances.[188] The Court has stated that this test represents a balance between two competing concerns: "the legitimate need for such searches and the equally important requirement of assuring the absence of coercion."[189] By adopting this balance, the Supreme Court refused

186. *See, e.g.*, Crooker v. California, 357 U.S. 433 (1958). For additional citations, see King, *supra* note 101, at 486-88.

187. Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973).

188. *Id.* at 248-49.

189. *Id.* at 227.

to follow the lead of *Miranda*. The *Miranda* approach—that a suspect is irrebuttably presumed to be ignorant of his rights unless the police inform him of them and that such ignorance renders any statement made in response to questions coerced—ignores the competing values at stake.[190]

Thus, the *Miranda* approach reflects a bias against self-accusation on principle. This bias has roots in the desire to treat suspects equally. Suspects who do not know their rights, or do not assert them, as a consequence of some handicap—poverty, lack of education, emotional instability—should not, it is felt, fare worse than more accomplished suspects who know and have the capacity to assert their rights. This "equal protection" appeal finds its way repeatedly into judicial opinions and legal commentary. In *Miranda* itself, Chief Justice Warren referred approvingly to the California Supreme Court's decision in *People v. Dorado*,[191] which stressed that "the defendant who does not realize his rights under the law and who therefore does not request counsel is the very defendant who most needs counsel."[192] A few years earlier, Professor Beisel similarly argued that only the "frightened, the insecure, the weak, and untrained, the bewildered, the stupid, the naive, the credulous" confess.[193] More recently, Professor Kamisar asserted that the pre-*Miranda* voluntariness test favored the more sophisti-

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190. *See* Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981) (characterizing "the balance of competing interests" as "the key principle of the Fourth Amendment").

In a recent fifth amendment decision, the Court emphasized that it "has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." Oregon v. Elstad, 105 S. Ct. 1285, 1297 (1985) (holding that the privilege against self-incrimination does not require the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained a prior unwarned admission from the suspect). The significance of this assertion is unclear because elsewhere in the opinion the Court stressed that it was "in no way" retreating "from the bright line rule of *Miranda*" requiring that warnings be administered in every case of custodial interrogation. *Id.* at 1298.

191. 40 Cal. Rptr. 264, 394 P.2d 952 (1964), *cert. denied*, 381 U.S. 937, *vacated*, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied*, 381 U.S. 946 (1965).

192. 40 Cal. Rptr. at 268, 384 P.2d at 956. Even the National District Attorneys' Association in oral argument on *Miranda* conceded that "if we are talking about equality between the rich and the poor we are striving for a worthy object" and reserved its criticism for what has been labeled here the game or sporting theory: "If we are talking about equality between the policemen and the criminal, we are on dangerous ground." R. MEDALIE, *supra* note 16, at 101.

193. A. BEISEL, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 106 (1955); *cf.* Special Project, *supra* note 47, at 1610 (finding that a lawyer's presence at the station house "would insure that the weaker, less experienced suspect who might have confessed will not be penalized during bargaining in comparison with the professional or sophisticated").

cated suspects because it probably did not permit greater-than-average pressures to be applied against stronger-than-average suspects.[194]

To the extent that these observations are true—and they seem true enough[195]—they suggest two distinct remedies. One would be to make it more difficult to convict those who are most vulnerable; the other would be to develop ways to bring those hardier, more knowledgeable persons—the hired killer, the calculating embezzler, the experienced burglar—to justice. The critics—Kamisar, Beisel, and many others—have preferred the former. They do not see the lack of stamina and professionalism of the suspect as conferring a benefit on society by facilitating the identification of wrongdoers.[196]

But guilt is personal.[197] That another, equally guilty, person got away with murder because of some fortuitous factor—he was more experienced in dealing with the police, he had a poorly developed sense of guilt, he had a smart lawyer, he knew his rights—or even because of discrimination, does not make the more vulnerable murderer less guilty. To hold otherwise is to confuse justice with equality. "Both are desirable. However, neither can replace the other."[198] Since sophisticated suspects ordinarily will choose not to confess (with or without knowledge of their rights), "[t]o strive for

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194. Y. KAMISAR, *supra* note 80, at 23-24. Professor Schulhofer argues that the real objection is not "based on equal protection doctrine," but rather that "we do (and should) find it unseemly for government officials systematically to seek out and take advantage of the psychological vulnerabilities of a citizen. Whether or not one considers such tactics necessary for effective law enforcement, they convey a feeling of manipulation and exploitation of the weak by the powerful that many would tolerate with at best considerable reluctance." Schulhofer, *supra* note 80, at 872.

195. For example, a study of interrogation in the District of Columbia found that the "typical defendant . . . is a young, single, Negro, male recidivist of low socio-economic status characterized by low income, low educational attainment, high unemployment, poor job status, borderline overcrowded living accommodations, and a dearth of voluntary affiliations." Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347, 1357 (1968).

196. Nicholas Katzenbach, former United States Attorney General, stated, "I never understood why the gangster should be made the model and all others raised, in the name of equality, to his level of success in suppressing evidence." Bazelon, *Equal Treatment in the Enforcement of the Criminal Law: The Bazelon-Katzenbach Letters*, 56 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 498, 502 (1965).

197. Van den Haag, *Comment on John Kaplan's "Administering Capital Punishment"*, 36 U. FLA. L. REV. 193, 199 (1984).

198. *Id.* See also van den Haag's arguments on "equal injustice and unequal justice." Van den Haag, *Refuting Reiman and Nathanson*, 14 PHIL. & PUB. AFF. 165, 174 (1985); *cf.* L. WEINREB, *supra* note 5, at 5 (arguing that justice is obtained by treating all like criminals equally).

equality . . . is to strive to eliminate confessions."[199] Thus, the *Miranda* Court elected to let one person get away with murder because of the advantage possessed by another.

VI. *Miranda* IN OPERATION

A. *The Interrogation Process*

At the time *Miranda* was argued, the worst practices of the 1940's and 1950's—prolonged detention, relay questioning, denial of food or sleep, threats of physical harm—were disappearing. In their place were gentler methods, more tolerable and less likely to induce false confession. The police also were showing a greater willingness to forego questioning when the suspect was insistent or the crime not that serious.[200]

In most cases today, the police dispense with interrogation or carry it out in a desultory manner because the offense is too minor, other evidence is ample, or, in the larger cities where crime is heavily concentrated, police resources are too limited to allow questioning in all instances in which it might prove useful. When the police engage in sustained questioning, it is confined to the more serious cases and conducted by the more skilled officers, those from the specialized branches of the detective division.

The interrogator is like an actor playing a dramatic role. To induce a confession, an act that ordinarily runs against inclination and interest, he manipulates and deceives the suspect.[201] He plays upon the stress inherent in the arrest and creates added conditions of tension. He exhibits confidence, asks direct questions, reasserts his position in the face of denials, maintains steady eye contact, and sits a bit too close. He pretends to be friendly (or unfriendly), to sympathize with the suspect or condemn the victim, to believe in something that he does not believe in, to insist on the guilt of

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199. Grano, *supra* note 80, at 914.

200. For example, observers of interrogation in New Haven observed, "The detectives seemed friendly or businesslike more often than hostile and relentless . . . . Interrogations were seldom long, and the detectives frequently offered the suspects such amenities as food, drink, or cigarettes." Special Project, *supra* note 47, at 1536. "If the suspect categorically refused to answer any questions, the interview usually ended almost immediately." *Id.* at 1538. "Most of the interrogations were short, averaging about 30 minutes of actual questioning." *Id.* at 1541. "We saw no undue physical force used by the detectives." *Id.* at 1549.

201. Emphasizing the abnormality of the suspect-police confrontation, Inbau and Reid in their famous textbook on interrogation insist that "deceit is inherent in every question asked of the suspect, and in every statement made by the interrogator." F. INBAU & J. REID, *supra* note 33, at 96; *cf.* R. ARTHER & R. CAPUTO, INTERROGATION FOR INVESTIGATORS 147 (1959) (describing different ways of getting a youth to confess to a crime).

the suspect when he is uncertain about that guilt, to assert that evidence exists (fingerprints, eyewitnesses, an accomplice's confession) when it does not exist.

Ultimately, to be effective when the suspect continues to deny his guilt, the interrogator must evoke a felt response in his adversary. What he touches may be simply the instinct for self-preservation or the desire for a better deal or for lenient treatment.[202] It may be the self-justification for misdeeds that usually exists in the mind of a prisoner.[203] It may be curiosity to know the extent of the state's evidence.[204]

On occasion, the interrogator may be able to strike something deeper. When the suspect has internalized prevailing ethical standards or when he believes that robbery or assault is wrong, exhortations that he will feel better once he admits his error strike a familiar chord. Guilt and contrition are then implicated: "Guilt is something that separates us from others and confession and 'sharing' are means of assuaging it."[205] When these two feelings coa-

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202. In some instances, the arrestee takes the initiative. "What can I do to get out of this thing?" is not an uncommon question for an experienced offender who knows that the police traffic in information about other offenses. *See* C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 228-29 (1978).

203. One commentator elaborated on how the interrogator could reach the suspect:

> Suggest [to the subject] that there was a good reason for his having committed the deed, that he has too much intelligence to have done it without rhyme or reason. In the case of sex-crimes, explain that sex hunger is one of the strongest instincts motivating our lives. In case of theft, suggest that the subject may have been hungry, or deprived of the necessaries of life; or in homicide, that the victim had done him a great wrong and probably had it coming to him. Be friendly and sympathetic and encourage him to write out or relate the whole story—to clean up and start afresh.

C.D. LEE, INSTRUMENTAL DETECTION OF DECEPTION, *cited in* J. BROWN, TECHNIQUES OF PERSUASION 251 (Penguin ed. 1963).

204. In his documentary of a family murder case, R. Levine described the interrogation process as follows:

> [The detective] read Chuck [a suspect in a double-murder case] his rights from a standard form and was not at all surprised that Chuck agreed—indeed, seemed even anxious to talk to him, checking the appropriate box on the waiver and even writing, "Yes, OK" beside it. One thing [he] always told rookie cops in his interrogation courses was that guilty parties usually waive their right to remain silent, since they're so impatient to learn how much the police already know.

R. LEVINE, BAD BLOOD: A FAMILY MURDER IN MARIN COUNTY 244 (1982); *cf.* Edwards v. Arizona, 451 U.S. 477, 480 (1981) (The suspect agreed to talk if permitted to hear a tape recording of a statement of his accomplice implicating both of them.).

205. J. BROWN, *supra* note 203, at 284. In a much diluted form, the identical process can be seen at work in the routine of everyday life. Self-accusation as apology is an essential agent for living amicably together. Think of the common occasion when a person who is scheduled to meet a friend for lunch arrives 15 or 20 minutes late. If the tardiness is accompanied by explanation and apology, the friend is mollified and the lunch is likely to take place as anticipated. By genuinely indicating regret over such lapses, we perform a healing

lesce, the interrogation becomes not only a discomforting confrontation but a moral process.[206]

It was in this setting that the *Miranda* Court sought to encourage the suspect to secure a lawyer, or, at the least, to exercise his right to silence. The Court chose the police as the bearers of the good news: law enforcement officers were given the responsibility of informing the suspect of his constitutional rights.

Like requiring a convict to build his own place of confinement, there was something mischievous about making the police the

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act. However, if we only offer a halfhearted excuse or ignore the delinquency altogether, the relationship is jeopardized. Our failure to show the appropriate contrition raises the possibility that our friend will avoid having lunch with us again or will harbor resentment. Similar examples abound in family life: the child who takes cookies when mother is away, the teenager who surreptitiously uses the family sedan for a midnight cruise, the husband who smokes on the sly after telling his wife he has quit. All these occurrences, once discovered, present a problem that must be confronted if social harmony is to be restored. There may have to be punishment—the child can have no sweets for a week, the teenager is denied driving privileges temporarily—but such punishment is incidental to the main purpose of reinstating the offender. Confession becomes the vehicle for getting back together. Punishment without confession would not achieve the same purpose (nor, I suspect, would forgiveness). Just as churchgoing provides the opportunity for corporate admission of wrongdoing, so does the experience of everyday life provide occasions for confession. As Bonhoeffer put it: "In confession the break-through to community takes place." D. BONHOEFFER, LIFE TOGETHER 112 (1954); *cf.* D. BONHOEFFER, *supra* note 18, at 261-64.

In a related connection, Professors Wilson and Kelling speak of "untended behavior" in the community, the process by which one broken window becomes many:

> [I]f a window in a building is broken *and is left unrepaired*, all the rest of the windows will soon be broken. This is as true in nice neighhorhoods as in run-down ones. Window-breaking does not necessarily occur on a large scale because some areas are inhabited by determined window-breakers whereas others are populated by window-lovers; rather, one unrepaired broken window is a signal that no one cares."

Wilson & Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, Mar., 1982, at 31.

In much the same way that the community has a stake in prompt repair of the physical damage, it has an interest in detecting the offender. Investigation manifests its concern that such derelictions matter. But the goal is not merely detection but also reformation of the offender. When the wrongdoer exhibits himself as a person who understands that he has offended others by his behavior, then his presence, far from being a sign of social breakdown, operates to reinforce the community in its orderly ways.

We have, as Wilson and Kelling point out, "difficulty thinking about such matters, not simply because the ethical and legal issues are so complex but because we have become accustomed to thinking of the law in essentially individualistic terms." *Id.* at 36. But there is a community perspective that needs to be added to the calculus.

206. Guilt may be more of a factor in producing confession than the *Miranda* Court thought. In the study of custodial interrogation in the District of Columbia following *Miranda*, 38% of those who gave statements to the police "stated that they had volunteered the statements without being interrogated." Medalie, Zeitz & Alexander, *supra* note 195, at 1366. In New Haven, however, "[o]nly six suspects clearly wanted to confess regardless of their rights." Special Project, *supra* note 47, at 1576. Of course, in some cases the willingness to confess is induced not from remorse but from a cool-headed knowledge that the evidence of guilt is strong and the police may show leniency in exchange for confession.

harbingers of good tidings to those they had just arrested. The police not surprisingly saw *Miranda* as more than simply an undesirable change in the rules; it was a public humiliation, a "slap at policemen everywhere."[207] But this reaction was transient. The enduring consequence of the Court's decision to make the police couriers of fifth amendment rights was to stifle the exercise of those rights. As Professor Edward Barrett asked: "[I]s it the duty of the police to persuade the subject to talk or persuade him not to talk? They cannot be expected to do both."[208] Professor Kamisar similarly asserted that "when we expect the police dutifully" to advise a suspect of his rights, "we demand too much of even our best officers."[209]

As a logical proposition, assigning the police responsibility for advising the suspect was inconsistent with the overarching rationale of *Miranda*. The purpose of the warnings was "to dispel the compulsion inherent in custodial surroundings."[210] But, as Justice White pointed out in his dissent, "[I]f the defendant may not now answer without a warning a question such as 'Where were you last night?' without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult . . . counsel . . .?"[211]

In imposing this obligation on the police, the Court rejected much of the advice it received. Both the American Civil Liberties Union and the National District Attorneys' Association opposed the police warning.[212] The prosecutors felt that the police might "stretch the truth" regarding their full compliance with *Miranda* requirements, and, quoting Lord Devlin, asserted that "it is the general habit of the police never to admit to the slightest departure from correctness."[213] But beyond this concern, the district attorneys were puzzled over how the police should respond to a suspect who, after being appropriately advised of his constitutional

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207. Special Project, *supra* note 47, at 1610.

208. Brief for Edward L. Barrett, Jr., as Amicus Curiae at 9, People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965) (on rehearing), *cited in* Y. KAMISAR, *supra* note 80, at 85.

209. Kamisar, *Equal Justice in the Gatehouse and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 35-36 (D. Howard ed. 1965).

210. *Miranda*, 384 U.S. 436, 458 (1966).

211. *Id.* at 536 (White, J., dissenting).

212. Brief for American Civil Liberties Union, as Amicus Curiae at 25-26, Miranda v. Arizona, 384 U.S. 436 (1966) (citing the Brief for the National District Attorneys' Association, as Amicus Curiae at 14, Miranda v. Arizona, 384 U.S. 436 (1966)).

213. *Id.* at 26.

rights, inquires, "Should I get a lawyer? Why do I need a lawyer? What will a lawyer do for me?"[214] The prosecuters wondered whether the interrogator should act in the criminal's best interest by advising him to get an attorney or whether the interrogator should proceed in the government's interest by convincing the accused that an attorney was unnecessary.[215] If a police officer responded honestly to such inquiries from the suspect, he would say, "Look, Joe, you ought to get yourself an attorney before answering any questions. Otherwise, you might inadvertently incriminate yourself or provide evidence that you committed a more serious crime than we would otherwise prove."

It is clear, however, that no officer "worth his salt" would respond so honestly, and no police department could operate efficiently with officers who saw their *primary* obligation as safeguarding the constitutional rights of the suspect.[216] Instead, the early empirical studies on the influence of *Miranda* clearly document that, where opportunity permitted, post-*Miranda* interrogators chose to "persuade the subject to talk" rather than "persuade him not to talk."[217] The studies reveal that, contrary to the intent of

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214. R. MEDALIE, *supra* note 16, at 63 (citing the Brief for the National District Attorneys' Association, as Amicus Curiae at 13, Miranda v. Arizona, 384 U.S. 436 (1966)).

215. *See id.*

216. We know from observations of another stressful relationship, that of doctor and patient, that it is often difficult for the doctor to separate his interests from those of the patient. Although there is no theoretical conflict of interest—both parties want to do what is best for the patient—in practice the doctor may find it difficult to provide an anxious patient with enough assistance to enable the patient to reach his own judgment respecting treatment. Where disabling illness is involved, the patient may want to fall back on the doctor's expertise, and the doctor may want to give the patient more reassurance than events warrant. "Transference feelings become more intense when persons are . . . beset by fears and anxieties." J. KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT 143 (1984). In the police-suspect relationship, which by its nature is adversarial, the tendency of the officer is to exploit rather than allay the "fears and anxieties" of the suspect. The officer will choose that course that best fits his own needs (solving the crime) rather than that which best serves the suspect's interest (concealing the crime).

217. Brief for Edward L. Barrett, Jr., *supra* note 208, at 9.

Leiken, in his study on interrogations in Colorado, describes police motivation as follows:

> The interrogators uniformly appeared to be concerned with accomplishing two goals. The first was to get the suspect to sign the waiver provision after warning him of his rights, and the second was to get him to talk whenever possible. A few of them indicated that if a suspect is reluctant to sign the form or to talk, then it would be permissible to give him some mild encouragement to do so.

Leiken, *supra* note 47, at 37.

In New Haven, the "police told suspects . . . that they would be 'worse off' if they did not talk, played down the seriousness of the crime, swore at the suspects, and made promises of leniency." Special Project, *supra* note 47, at 1531. A detective by his manner or

the Court, suspects more often have surrendered their rights than exercised them. These studies conclude that *Miranda* has done little to promote the exercise of the right to silence or the right to have counsel at the police station.[218]

To be truly protective of the suspect's decision to invoke or forego his rights would require making the right to counsel nonwaivable, so that prior professional advice would always be available, or granting the suspect a cooling-off period.[219] In civil law applications, a mandatory cooling-off period provides a decisionmaker time to change his mind. It provides an opportunity to reflect on the commitment at hand and allows the hasty, emotional, or pressured decision to be undone. Other instances of paternalism in the civil law—the prohibition against agreements surrendering the promisor's right to engage in a certain profession, obtain a discharge in bankruptcy, or initiate a divorce action—similarly manifest the law's concern that a person bargaining away his liberty "be protected from himself, no matter how rational his decision or compelling the circumstances."[220] But in all of these instances, the protected person is not a suspected felon, and there is merit in granting relief from what may turn out to be too harsh a bargain.

In criminal law, it is difficult to justify requiring a cooling-off

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tone would defuse the warnings

> by implying that the suspect had better not exercise his rights, or by delivering his statement in a formalized, bureaucratic tone to indicate that his remarks were simply a routine, meaningless legalism . . . . After they had finished the advice they would solemnly intone, "Now you have been warned of your rights," then immediately shift to a conversational tone to ask, "Now, would you like to tell me what happened?"

Id. at 1552.

218. Special Project, *supra* note 47, at 1615; Leiken, *supra* note 47, at 47-49. A three year study of juvenile interrogation in St. Louis revealed that although most juveniles believe it is wise to have an attorney, in practice there is a "near absence of requests for attorneys in actual juvenile interrogations. . . . [T]he reason might be that [the juveniles] are too inhibited by the interpersonal and emotional characteristics of police interrogation to do what they would otherwise believe to be in their best interest." T. GRISSO, *supra* note 47, at 147. Similarly, Professor Stephens concludes that "[i]f the impact of *Miranda* is assessed strictly from the standpoint of its tangible effect on the interrogation process, the decision may thus be regarded as an act of judicial futility." O. STEPHENS, *supra* note 47, at 200. In Professor Stephens' own study of police attitudes and behavior in the Knoxville-Macon area of Tennessee, he found a "high level of adherence to the letter of the decision but very limited compliance with its policy objectives." *Id.* at 199.

219. For example, under the UNIFORM CONSUMER CREDIT CODE, 1974 ACT, § 3.502, 7A U.L.A. 134 (1985), a buyer "has the right to cancel a home solicitation sale until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase."

220. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 775 (1983).

interval before the suspect is allowed to respond to questioning. There is no reason to insist that the suspect's decision to incriminate himself reflect mature judgment. Because mature judgment implies distancing oneself from intimate desires and impulses, a cooling-off period would allow those who are remorseful to have second thoughts after they ponder the consequences of confession.[221] A cooling-off period might make for more dispassionate judgment, but, if we believe in the justness of our prohibitions and punishments, what social value is promoted?

B. *Evaluating the* Miranda *Studies*

The empirical studies contain valuable information about the impact of *Miranda* on crime detection. Although these studies are often cited for the proposition that *Miranda* has had little effect on police efficiency, this characterization is inaccurate. This interpretation makes sense only in a historical context as a reply to the hyperbolic assertions of those who predicted that installing a right to counsel at the station house would maim criminal investigation.[222] This perspective notwithstanding, the studies indicate that *Miranda* took a toll.

The study that best measures *Miranda*'s impact on crime detection was conducted in Pittsburgh, a medium-sized city with a significant crime problem.[223] The researchers compared the difference in the confession rate before and after the *Miranda* decision for all offenses investigated by the detective division: homicide, robbery, burglary, auto larceny, and forcible sex. The results are striking. Before *Miranda*, the detective division obtained confessions in 54.4% of all cases. After *Miranda* confessions were secured in 37.5% of the cases, an overall decline of 31%.[224] For robbery and burglary cases, the drop is sharper, from a 60% confession rate prior to *Miranda* to a 40% rate after *Miranda*. In homicide cases, the decline in confessions is even steeper.[225] The researchers fur-

221. *See* Stroble v. California, 343 U.S. 181, 192 (1952); United States v. Carnigan, 342 U.S. 36, 39-41 (1951); People v. Claudio, 59 N.Y.2d 556, 453 N.E.2d 500, 466 N.Y.S.2d 271 (1983).

222. *See generally* Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436 (1964) (discussing and critiquing the arguments of those who strongly criticized the Warren Court's expansion of right for the criminally accused).

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

224. *Id.* at 11.

225. *Id.* Measuring the impact on suspects as opposed to investigations, the researchers found that prior to *Miranda* about half of all suspects arrested for the aforementioned

ther estimate that in "approximately 20% of all cases a confession is probably necessary to obtain a conviction," and that in 25% of the cases in which the suspect confessed, the confession probably was necessary to obtain the conviction.[226]

A second study that measures the importance of confessions in cases of serious crime was conducted in "Seaside City," a large beach town in Los Angeles County.[227] The researchers examined 478 files, including both pre- and post-*Miranda* cases, and found that interrogation was "essential" or "important" in 24% of the cases and successful in producing incriminating matter in 67% of the cases.[228] There was only a slight post-*Miranda* decline in the number of cases in which the suspect divulged fruitful information or signed a confession. With regard to the "collateral" benefits of interrogation, however, the study reports that "[t]he police were found to be implicating fewer accomplices, clearing fewer crimes and recovering less property through interrogation, and helping fewer suspects clear themselves."[229]

Other studies, although not reflecting before and after data, also demonstrate the importance of interrogation. A 1966 study of interrogations in New Haven, Connecticut,[230] a small city with a low crime rate, reveals that questioning was successful in over half (forty-nine of ninety) of the interrogations.[231] Interviews with fifty-five lawyers who defended seventy-five cases during early 1966 produced similar findings: in forty-nine of the seventy-five cases, the police obtained incriminating statements.[232] The researchers also found that from 1960 to 1966 there appeared to be a decline of "roughly 10 to 15 per cent . . . in the number of people who gave

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felonies provided incriminating information, whereas after *Miranda* only about one third provided such information. *Id.* at 12.

226. *Id.* at 15-16. Of those burglary and robbery files that indicated the outcome of the case, defendants who had confessed were convicted 79% of the time, while defendants who had not confessed were convicted 55% of the time. *Id.* at 20.

227. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973).

228. *Id.* at 324-25.

229. *Id.* at 332.

230. Special Project, *supra* note 47, at 1519. In New Haven in 1956 there were only arrests for 2 murders, 19 armed robberies and 9 forcible rapes. *Id.* at 1525. The authors conclude that "interrogations play but a secondary role in solving the crimes . . . both because serious offenses are relatively infrequent and because the police rarely arrest suspects without substantial evidence." *Id.* at 1613.

231. *Id.* at 1589.

232. *Id.* at 1589 n.186. Similarly, Professor Edward Barrett in his examination of criminal investigations in two cities reports that interrogation was both short and "surprisingly productive of confessions and admissions." Barrett, *supra* note 133, at 45.

some form of incriminating evidence over the entire time."[233] The researchers did not attempt to examine interrogation at the point of arrest, before transportation to the police station, except to observe in a footnote that "[o]f the 33 suspects who were questioned on the street, ten gave information."[234] At least one other study notes the high incidence of incriminating statements secured immediately following arrest.[235]

Although most of the New Haven interrogations did not resemble the sophisticated and intense questioning alluded to in *Miranda*, the study identified seventeen instances where the police intensively examined the suspects. These interrogations were "disproportionately successful";[236] in eleven of the seventeen cases, the interrogations yielded incriminating evidence. The study concludes that "[a]ggressive interrogation pays off in confessions."[237]

All the studies suggest that suspects frequently waive their rights. In the District of Columbia, two-fifths of the 260 defendants interviewed in a 1966-67 post-*Miranda* study said that they had given statements to the police.[238] In "Prairie City," a "medium-sized city in central Illinois with a population of over 100,000,"[239] the police in 1968 were "able to obtain a suspect's waiver of his *Miranda* rights, as well as secure confessions, in almost half of the felony cases."[240]

Most of the empirical investigations of *Miranda* were undertaken shortly after the decision was rendered. Hence, they fail, as

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233. Special Project, *supra* note 47, at 1573.

234. *Id.* at 1533 n.40.

235. Medalie, Zeitz & Alexander, *supra* note 195, at 1369. Of the 37 inculpatory statements obtained through police questioning, 19 (51%) were reported to have been elicited at the time and place of arrest.

236. Special Project, *supra* note 47, at 1562. Low-key questioning also has its dividends as a recent study of police practices in Brighton, England demonstrates: "Of the sixty suspects who were observed being interviewed, thirty five made admissions during the interview. A further four . . . made admissions subsequently." B. IRVING, *supra* note 178, at 149. Irving concludes that interrogation, "as the art is currently practiced at Brighton, plays a vital part in the criminal detection process." *Id.* at 152.

237. Special Project, *supra* note 47, at 1562. The study suggests that although interrogation yields incriminating evidence, it may be an unnecessary tool in many cases because of the presence of other strong evidence of guilt. *Id.* at 1588. Such a judgment seems speculative. The time between arrest and plea bargaining or trial may be lengthy; witnesses move on, memories fade, evidence grows stale. A confession, however, retains its force, and when supplemented with other evidence of guilt, can induce a plea of guilty or persuade a doubtful jury.

238. Medalie, Zeitz & Alexander, *supra* note 195, at 1395.

239. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103 (1974).

240. *Id.* at 104.

Professor Berger notes, "to conclusively tell us what *Miranda* would mean if followed in letter *and* spirit,"[241] or the impact if it were extended. Probably, there would be a further reduction in confessions, perhaps a significant one.

VII. Restoring the Balance

The crucial concern for criminal procedure is the appropriate bias to build into the rules. The rules can be constructed to favor either side. Historically, there has been a continual movement between the two sides, at one end showing "an extreme solicitude for the general security, leading to a minimum of regard for the individual accused" and at the other end showing an "extreme excessive solicitude for the social interest" in the individual, "leading to a minimum of regard for the general security and security of social institutions."[242] Because the rules function like a pendulum, at any given time they are likely to be out of balance. Every generation or so, they must be reset.

In evaluating the privilege against self-incrimination, we should start with the premise that the privilege shelters the guilty. As such, it exacts a costly price. This price is high not only because our society, more than others, is plagued by violent crime, but also because, as Sidney Hook reminds us, "justice in the individual case consists as much in not letting the guilty escape as in not letting the innocent suffer."[243] Although we are not prepared to adopt rules that allow many innocent persons to be convicted, it does not follow that there is merit in allowing individuals who have committed crimes to escape detection. Whenever a guilty person escapes detection as a result of the privilege against self-incrimination, justice, in an important sense, is denied. This is true even if we accept that we purposefully have adopted rules that are desigued to allow many guilty persons to go unpunished. An adversary system will necessarily have some elements of chance to it, but to be just, the system must be reliable not only in screening out the innocent but in identifying the guilty. The rules must be fair, and the authorities must adhere to them, but such rules must be fashioned for the larger purpose of finding the truth without too much harshness.[244]

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241. M. Berger, *supra* note 90, at 131 (emphasis in original).

242. Pound, *Criminal Justice and the American City—A Summary*, in R. Pound & F. Frankfurter, Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio 576-77 (1922).

243. S. Hook, Common Sense and the Fifth Amendment 132 (1954).

244. On this point, Sidney Hook adds:

Prior to *Miranda*, the constitutional restraints on police questioning had been treated as roughly analogous to the fourth amendment prohibition against search and seizure. The fourth amendment was not understood as forbidding all invasions of privacy, only "unreasonable" ones.[245] Similarly, the due process clause of the fourteenth amendement was interpreted to permit "mild pressure"[246] and to prohibit only police conduct likely to produce an "involuntary" statement. The rules relating to obtaining confessions were a compromise among competing considerations, only one of which was the protection of the suspect's interests in avoiding the discomforts of interrogation and escaping punishment. The suspect's determination of whether cooperation would earn lenient treatment, whether "fast talk" would divert suspicion, or whether a steadfast refusal to answer questions might contribute to the prosecutor's decision to "throw the book at him" was considered an appropriate dilemma. That some suspects were no match for the police, did not grasp their rights, and unwisely tried to talk their way out of trouble was seen as a benefit to society, as long as the police were not too harsh or the suspect under too great a handicap. Pre-*Miranda* sentiment was reflected in the following comment: "[T]here is no reason residing in the proposition that persons charged with crime should be protected by law against their voluntary admissions and confessions that they committed the crime with which they are charged."[247]

> [P]rinciples of evidence must be such as to make it much more than an even chance that an innocent person will be acquitted and much more than an even chance that a guilty person will be convicted. Otherwise we may as well toss a coin to decide the guilt or innocence of a person in the dock.

Id. at 57.

245. More recently, the Supreme Court has described "the balancing of competing interests" as "the key principle of the Fourth Amendment." Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981) (quoting Justice White in Dunaway v. New York, 442 U.S. 200, 219 (1979)); *see also* Tennessee v. Garner, 105 S. Ct. 1694 (1985) (In determining whether apprehension of suspects by the use of deadly force satisfies the fourth amendment's reasonableness requirement, the extent of the intrusion on the suspect's rights must be balanced against governmental interest in effective law enforcement.).

246. Miranda v. Arizona, 384 U.S. 436, 513 (Harlan, J., dissenting).

247. Ervin, *A Decision Based on Excessive and Visionary Solicitude for the Accused*, 5 AM. CRIM. L.Q. 125, 127 (1966). Another commentator similarly finds that judicial regulation of police interrogation has resulted in

> the ascendancy of one consideration to a dominant position in the constitutional analysis—the protection of the suspect from unwise or improvident disclosures that may seal his fate at trial. We have decided to attempt to simulate the situation that would exist if the suspect has a lawyer present, by imposing on the police the duty of giving an advice of rights and of taking statements only from those suspects who are unequivocally willing to give them.

Before *Miranda*, therefore, the judicial inquiry focused on the vulnerability of the suspect to interrogation pressure. It was assumed that the suspect ordinarily would participate in the investigation even though he had a right to refuse cooperation without suffering any formal adverse consequences. The American attitude toward interrogation was very similar to the English one as described by Lord Devlin in 1958:

> [W]hile the English system undoubtedly does give the accused man the right to be silent, it does nothing to urge him to take advantage of his right or even to make that course invariably the attractive one. The balance on which the English system works is that it combines the suspect's right to silence with the opportunity to speak . . . . The dilemma in which the law puts the suspect—to speak or not to speak, which is the safer,—seems to be a perfectly fair one.[248]

The *Miranda* majority saw interrogation quite differently. The Court viewed as unfair a suspect's inadequacies in confronting his interrogators on an equal basis or in possessing the same fortitude as other suspects. The Court wanted to place all of the participants on equal ground. To accomplish this objective, the Court sought to provide counsel to the suspect before the police could take advantage of the suspect's particular shortcomings.[249] Thus, with one stroke, the Court boldly and improperly resolved the contradictions in the law of confessions by giving it a single focus—protection of the suspect.[250]

Frey, *supra* note 174, at 732.

248. P. DEVLIN, *supra* note 185, at 59-61.

249. *See* Special Project, *supra* note 47, at 1614-15.

250. *See* Schulhofer, *supra* note 80, at 878 n.61 ("[B]y viewing the problem in fifth amendment terms, the Court made clear . . . that protection against compulsory self-incrimination was not to be balanced against other legitimate social interests."); *cf.* T. ARNOLD, *supra* note 119, at 9 (The strength of our law is that it allows for the "dramatization of all sorts of mutually inconsistent ideals.").

A biographer of Chief Justice Warren recently noted:

> The problem with Warren's posture, of course, is that there is no compelling reason why law enforcement officers and suspects should be on an equal footing. Although interrogated persons are technically presumed to be innocent of potential charges, as a practical matter a system of law enforcement has to presume potential guilt in detained suspects to justify their detention. Prosecuting authorities and persons charged with crimes may be "equal" in court, but by definition they are not equal in the station honse, because law enforcement authorities are assumed to concentrate their efforts on persons whom they think have some connection with a law-enforcement violation. Warren's application of the fairness principle in *Miranda* seemed to ignore the practical necessity of giving law enforcement personnel some advantages in doing what society has asked them to do.

G. WHITE, *supra* note 135, at 271. Earlier, in the same vein, Professor Kurland wrote:

> The self-incrimination prohibition was read as a doctrinaire formula [in *Miranda*] rather than a rule derived from historical necessity. In protecting the interest it

In retrospect, *Miranda* seems most understandable as an exaggerated response to the times rather than as an enunciation of a natural right mined at last from the Constitution. *Miranda* was a child of the racially troubled 1960's and our tragic legacy of slavery. It "was decided when blood was actually being spilled in the streets. There were civil rights protests in the South and civil disorders in urban areas elsewhere. On national television, black protesters [and their supporters] were bullied and beaten, black rioters beaten and shot."[251] *Miranda* itself was decided not only in the shadow of the police practices exposed in *Brown v. Mississippi*[252] and *Chambers v. Florida*[253] but also in the more recent past of the third degree applied particularly to southern blacks. To many, the government itself seemed the cause of racism and poverty, and those apprehended by the police, armed robbers as well as civil rights protesters, were seen as victims rather than offenders. Crime was not understood as the offshoot of individual will but as a by-product of one's poverty or race or both. The goal was to attack "root causes" rather than root out individual felons. President Johnson proposed a "Great Society" that would bring "an end to poverty and racial injustice," in which both crime and police brutality would be banished. The country was ready to embark on a grand future that would make up for this troubled past.

In this setting, *Miranda* stood out like a crown jewel. It spoke to the disadvantaged and the discontented. It conferred status on the accused. As such, it infused vitality into larger social and political movements, and it contributed to a climate of greater respect for suspects.[254] *Miranda* popularized the principle of warning one's

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thought valuable, [the Court] tended to ignore any countervailing interests that society properly demanded also be given consideration. It thus mandated more than it could accomplish.

P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT xx-xxi (1970).

251. Caplan, Miranda *Revisited* (Book Review), 93 YALE L.J. 1375, 1382 (1984).

252. 297 U.S. 278 (1936).

253. 309 U.S. 227 (1940).

254. Fred Graham provides an extensive analysis of *Miranda*'s role in this process:

[T]he Supreme Court might have done better in the long run if it had relied more in *Miranda* on its role as constitutional teacher and propagandist, and had not attempted to police the police through the compulsion of an inflexible threat to include evidence. In retrospect, it appears that the most spectacular success of the Warren Court's due process revolution has been to create a climate of fairness about criminal justice. The Supreme Court's idealism proved contagious. Better people are now going into police work, prosecutors' offices and public defender careers . . . . The heavy-handed treatment of defendants that had been almost an assumption of the system has given way to a heightened and observable sensitivity among police, trial judges and appellate judges of the importance of fairness . . . . [But] there is still reason to ask if the American

adversary, of assisting him in defending himself, and of envisioning the criminal not as a foreigner but as a neighbor down on his luck. Criminals, *Miranda* suggested, were not wicked; they were unfortunate.

Given this orientation, a thorough evaluation of *Miranda* should look beyond the findings of empirical studies to what Thurman Arnold called the "symbols of government."[255] Values, beliefs, and emotions are implicated. Although some would alter their assessment of *Miranda* if research demonstrated that the decision has influenced the conviction rate greatly, as opposed to marginally, most of us, I suspect, would hold to our views.[256] As a symbol, *Miranda* is too rooted in our attitudes toward authority to yield easily to statistics.

For its supporters, *Miranda* is a gesture of government's willingness to treat the lowliest antagonist as worthy of respect and consideration. They have a point. There is something attractive about a legal system that insists that suspects have a right to refuse to answer police inquiries, that imposes on the police an obligation to communicate that right, and that provides counsel to the indigent. The fifth amendment, as much as any constitutional provision, illustrates that ours is a limited government. It reflects an historic distrust of authority. It reveals an unwillingness to wage all-out war on crime, even heinous crime, lest other values be demeaned.

But the root idea of *Miranda*, as well as earlier decisions such as *Gallegos v. Colorado*[257] and *Escobedo v. Illinois*,[258] is quite different and more ominous. These decisions do more than suggest that the government must be restricted in the means it employs in criminal investigation. They impose a serious handicap on the government, which arises not merely from a desire to curb historic police abuses but also from an ambivalence about criminality itself and a confusion concerning the purpose behind the rules of crimi-

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system of justice is not now suffering from an excess of due process.
F. GRAHAM, THE SELF-INFLICTED WOUND 289 (1970).

255. T. ARNOLD, *supra* note 119, at iv.

256. When a researcher finds that his premises logically imply a conclusion he rejects in his heart, he faces a quandary. He can adopt the conclusion or reject some previously held premises, or he can abandon the whole enterprise. Most likely, he will find a way around the unwelcomed conclusion. I do not recall an instance where a criminal law researcher has reported that he had been forced to come to some unwanted conclusion on some fundamental question.

257. 370 U.S. 49 (1962).

258. 378 U.S. 478 (1964).

nal procedure. The result blurs the traditional and theoretical distinction between the police and the criminal: one is useful, the other noxious.

This blurring arose, in part, because we lost sight of the values implicated by confession. Confession should be understood as an endorsement of the prevailing order. When a person confesses against himself, he speaks for the law. As Focault put it, the confessor's "personal condemnation [of himself] becomes a public affirmation of legal truth."[259] Felt confession is more than self-denunciation in the service of the establishment; it is an essential prelude to readmission to the larger community that the confessor has offended. It is the "ritual of inclusion."[260] To receive pardon, the offender must acknowledge his deed. He cannot place the blame elsewhere—on his upbringing, his poverty, his impulsivity, his bad luck, or on some shortcoming in his accusers, his judges, or the community at large. It is he himself who is at fault.

Because confession implicates social values, the existence of an integrated, shared network of values is a precondition to the proper operation of confession.[261] One does not confess to persons considered unworthy, the "pigs," as the radical students called the police during the 1960's; they are the representatives of an exploitative regime. When the existing order is widely considered unjust, offenders are encouraged to excuse their own misconduct and accuse their accusers. Confession then, far from providing relief from the pain of conscience or restoration to the community, becomes an "apparatus of personal and social degradation."[262]

When *Miranda* was decided in 1966, it was popular to see the criminal as a type of victim; he was caught in the role assigned to persons in his circumstances, a member of the underclass. One spoke not of volition but of status or condition. The idea of individual gnilt and remorse for wrongful deeds was out of fashion. The causal factors of criminality were thought to lie outside the individual, in the deeper, corrupt foundations of the society—the so-called "root causes."

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259. M. HEPWORTH & B. TURNER, *supra* note 17, at 93 (summarizing M. FOCAULT, DISCIPLINE AND PUNISH (1977)).

260. *Id.* at 37.

261. *See id.* at 49 ("In a society where there is relative agreement over certain crucial social values, confession may serve to reinforce and underline those values by confirming the beliefs of persons in authority, symbolically restoring 'deviant' individuals to the community and by socializing individuals in terms of anxieties about certain types of misconduct. Confession thus serves to buttress social values . . . .").

262. *Id.* at 37.

This perspective on criminal process was perhaps but a special case of "authority under seige" during the decade of the 1960's and early 1970's, an understandable reaction to a history of racial prejudice and perhaps to Vietnam and Watergate as well, but a reaction in need of tempering nonetheless. It may be, as Professor Francis Allen has recently suggested, that these attitudes toward authority reflect "less a staunch individualism standing against the coercions . . . of the state than a decline of confidence in public purposes."[263] But "sooner or later," Allen correctly insists, we

> must come to terms with social authority. Athough the notion of there being an identity of social and individual interests is a chimera, there are social purposes which, if realized, contribute to a fuller humanity and are indeed the conditions for the achievement of human potentialities. Thus protection of persons and property from unwarranted agressions [sic] by other members of the community must be accomplished at some level of adequacy.[264]

Just what that "level of adequacy" should be is hard to say. The answer may turn more on our personal threshold of tolerance for disorder and violence than the objective realities of crime at any given time. Clearly, the amount of tolerance we, as a society, have for violent crime will determine how the rules of the criminal process are drawn—how much of an advantage is to be assigned to the police in carrying out their duties of crime detection and apprehension of suspected offenders.

We know from the experience of other countries that the rules can be drawn to make the police far more effective than they are in this country; and there may be nations where the police in some particulars operate under greater restraints than our own. A fair state-individual balance can be achieved, it would seem, through a variety of arrangements as long as it is conceded at the outset that society has a stake in the outcome of police efforts to investigate crime.

The Warren Court did have other options. Less potent medicine was at hand. Requiring the government to prove voluntariness beyond a reasonable doubt, rather than by a preponderance

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263. F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 88 (1981).

264. *Id.* More recently, Dean Allen has observed:

> Among the central failures of liberal politics in our time has been its inability to take the crime problem seriously and to associate itself with persuasive measures in response. . . . There is ample reason to assert that the fact of crime and the resulting fears and outrage have contributed importantly to the deliberalization of American society.

Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 315-16 (1985).

of the evidence, would have accomplished much. A higher burden of proof would have encouraged further compliance with the law and stimulated the government to find improved evidentiary methods for proving its adherence. In addition, the Court could have added teeth to the voluntariness test by establishing per se rules forbidding certain practices. Certainly, the totality of the circumstances test could have been modified to ban behavior that was inherently coercive. A time limit for questioning suspects would have been a strong prophylactic against police abuse and probably would have attracted broad based support. Perhaps the presence of neutral observers from the community to witness the interrogation could have been encouraged.

The Court also could have mandated compliance with the prompt arraignment statutes in effect in about three quarters of the states.[265] In the federal system, the Court had fashioned the *McNabb-Mallory* rule, derived from Rule 5(a) of the Federal Rules of Criminal Procedure, to exclude confessions obtained during a period of "unnecessary delay from the time of arrest to arraignment."[266] Arguably, it had the authority to impose similar constraints on the states.

Beyond these possibilities, in 1968 Congress passed legislation in response to *Miranda* that admirably blended the traditional voluntariness test with the fourfold warnings. Under the Omnibus Crime Control and Safe Streets Act, the federal trial judge was allowed to consider "all the circumstances surrounding the giving of the confession," but he also was required "to take into consideration" whether the defendant had been "advised or knew that he was not required to make any statement and that any such statement could be used against him," and "whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel," and "whether or not such defendant was without the assistance of counsel when questioned and when giving such confession."[267] These provisions, although never constitutionally tested, remain today as a prospective alternative to the *Miranda* solution.

Finally, current technology makes videotaped interrogations

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265. *See* LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331, 332-33.

266. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

267. 18 U.S.C. § 3501 (1982). For a summary of state legislative responses to *Miranda*, see MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.8 commentary (1975).

practical. A rule mandating recording would confine extensive questioning to those cases in which it mattered most and would provide an accurate record by which the judiciary could evaluate the police pressure on the suspect.

These proposals are consistent with other rules of criminal procedure that impose a handicap on the government to temper its zeal and effectiveness. Certainly, the dangers of uncontrolled government rival or exceed those of an uncontrolled populace. For this reason we properly build into criminal investigation and the criminal trial some elements of chance. It is fear of overzealous prosecution that, in part, causes us to provide the accused with counsel and to permit counsel a rather free hand in seeking an acquittal. But to go further, as the *Miranda* Court did, and posit rules designed to put the adversaries on equal terms in the investigative phase is "too great a concession to egalitarianism."[268]

It may be that at times the police and the criminal are adversaries "so well attuned to one another that they can and often do reverse roles with minor shifts in the historical climate,"[269] and it may be, as a defense counsel has recently suggested, that "many criminals think that the only difference between them and the police is that the police get health benefits and a pension."[270] But such should not be the case nor, as a matter of official policy, should both sides be treated as possessing equal moral worth.

There is no neutral position. One must lean toward the government or subversion. With respect to criminal investigations, we should not require the government to provide information that would discourage a suspect's participation when the lawful character of the interrogation can otherwise be guaranteed; the concern for accuracy runs too high and the public interest in identifying and segregating dangerous persons is too great. The ultimate issue is whether the government proceeded fairly, in a proper manner, not whether the suspect knew his rights. When the interrogation is noncoercive and the answers voluntary, the Constitution should be satisfied.[271] The privilege against self-incrimination is best under-

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268. Friendly, *supra* note 175, at 711.

269. K. ERIKSON, *supra* note 48, at 20.

270. Wishman, *Evidence Illegally Obtained By Police*, N.Y. Times, Sept. 21, 1981, at A25, col. 2.

271. It is clear, of course, that the Supreme Court has the power to overrule or modify *Miranda*. A basic reexamination of *Miranda* will occur if the government seeks a determination of the validity of § 701 of the Crime Control Act of 1968. *See supra* note 267. Because that section provides for the admissibility of a confession "if voluntarily given," it is inconsistent with *Miranda*'s requirement of a warning to a suspect and the provision of counsel to

stood as a denial to the government of the power to extract confessions forcibly and indecently, not as a denial of the value of confession. "[P]eaceful interrogation," Justice Harlan wisely reminded us in his *Miranda* dissent, "is not one of the dark moments of the law."[272]

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indigent suspects who request counsel. *See* Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971) (discussing the constitutional validity of § 701).

If the *Miranda* rules are viewed not as constitutional commands, but as prophylactic measures to achieve or secure constitutional commands, they may be susceptible to congressional reversal. In *Michigan v. Tucker* the Court held that *Miranda* warnings are "not themselves rights protected by the Constitution," but only "prophylactic standards" designed to "safegnard" the privilege against self-incrimination. 417 U.S. 433, 444-46 (1974). In this regard, *Miranda* is similar to *Mapp v. Ohio*, holding that evidence obtained by unlawful search and seizure is simply a sanction for encouraging the police to observe the fourth amendment "right of the people to be secure in their persons, houses, papers and effects." 367 U.S. 643, 646 n.4 (1961); *see also* United States v. Wade, 388 U.S. 218 (1967) (holding that the presence of counsel at a post-indictment lineup necessary to promote fairness *in the absence* of legislative enactments designed to lessen the potential for unfairness).

272. *Miranda*, 384 U.S. at 517 (Harlan, J., dissenting).