Michigan Law Review

Volume 99 | Issue 5

2001

Miranda, *Dickerson*, and the Puzzling Persistence of Fifth Amendment Exceptionalism

Stephen J. Schulhofer
University of Chicago Law School

MIRANDA, *DICKERSON*, AND THE PUZZLING PERSISTENCE OF FIFTH AMENDMENT EXCEPTIONALISM

*Stephen J. Schulhofer**

Dickerson v. United States[1] preserves the status quo regime for judicial oversight of police interrogation. That result could be seen, in the present climate, as a victory for due process values, but there remain many reasons for concern that existing safeguards are flawed — that they are either too restrictive or not restrictive enough. Such concerns are partly empirical, of course. They depend on factual assessments of how much the *Miranda* rules do restrict the police. But such concerns also reflect a crucial, though often unstated, normative premise; they presuppose a certain view of how much the police *should be* restricted.

To evaluate the *Miranda* safeguards and determine whether they should be replaced by some other regime, it is essential to focus first on that normative premise. And for present purposes I will restrict myself to its constitutional dimension. I will focus on a surprisingly neglected question — that of determining which restrictions on police interrogation are mandated by ordinary Fifth Amendment principles. My thesis is that the Court, even as it reaffirmed *Miranda*, perpetuated an extraordinarily confusing and illogical notion of what the Fifth Amendment means. Both the Court's majority in *Dickerson* and its dissenters share a conception of the Fifth Amendment that can be right only if the constitutional principles governing police interrogation differ from those that determine Fifth Amendment compulsion in every other setting. In other words, the Court (and all its Justices) apparently accept a kind of Fifth Amendment *exceptionalism*, under which the standards applicable to police interrogation are kept distinct from the standards applicable to all other official questioning of witnesses and suspected offenders.

---

* Julius Kreeger Professor of Law and Criminology, University of Chicago Law School. – Ed. I want to express special appreciation to Yale Kamisar. Even before we met, he had opened my eyes to the realities of police interrogation, and for many years he has been for me a generous and inspiring teacher. For comments on the manuscript, I owe thanks as well to participants at the conference and at the Fordham Law School Faculty Workshop, and to Abner Greene, Larry Kramer, and Carol Steiker.

1. 120 S. Ct. 2326 (2000).

Part I of this Article defends that thesis. Part II then explores conceivable alternatives to *Miranda*, and Part III suggests several ways to supplement the *Miranda* regime in order to bring it more closely into conformity with the Fifth Amendment principles that are accepted, largely without controversy, in every interrogation setting outside the police station. But first one preliminary: Are there *any* alternatives that the Court would tolerate as replacements for *Miranda*?

Opponents of *Miranda* often complain that the Court eliminated promising alternatives, "blocked" experimentation, and locked us into a straitjacket of rigid rules.[2] That was never a plausible reading of *Miranda*, and the *Dickerson* opinion re-emphasizes that the Court is perfectly willing to uphold alternatives to the *Miranda* system (that is, the system of police-delivered warnings, an express waiver prior to questioning, and respect for a suspect's request to cut off questioning at any time). The only limitation stated in *Dickerson* is one that appears almost verbatim in *Miranda* itself: any alternative must include "procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored."[3]

That is a reasonable and fairly minimal limitation. It's easy to imagine procedures that would meet it. Police could, for example, be excused from the warnings part of *Miranda* whenever warnings were given by a magistrate or by duty counsel at the stationhouse. There are many other ways to protect Fifth Amendment rights as effectively or more effectively than *Miranda* does, and if an alternative does that, there is no reason to worry that the Supreme Court would overturn it.

That brings us to choosing among alternatives, which means figuring out what problems a substitute for *Miranda* should seek to solve.

I am going to set aside Professor Cassell's complaint that *Miranda* puts tens of thousands of violent criminals on the streets every year by lowering clearance and conviction rates. He and I have debated that claim many times, and it's hard to imagine that there could be anything more to say about it.[4]

---

2. *See, e.g.*, Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 498 (1996).

3. *Dickerson*, 120 S. Ct. at 2335. The limitation, as originally stated in *Miranda*, is virtually identical: Any alternative must be "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." Miranda v. Arizona, 384 U.S. 436, 467 (1966).

4. *See, e.g.*, Cassell, *supra* note 2; Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996) [hereinafter Schulhofer, Miranda's *Practical Effect*]; Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084 (1996) [hereinafter Cassell, *All Benefits, No Costs*]; Stephen J. Schulhofer, Miranda *and Clearance Rates*, 91 NW. U. L. REV. 278 (1996); Paul G. Cassell, Miranda*'s Negligible Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. PUB. POL'Y 327 (1997); Stephen J. Schulhofer,

I think it's fair to say that Professor Cassell's position has not won overwhelming agreement from criminal justice scholars. And in *Dickerson*, after reams of paper had been devoted to raising the issue, no member of the Supreme Court nibbled at it. There's no hint, even from Chief Justice Rehnquist, that any Justice sees lost confessions as a serious problem,[5] and there's no hint that the Court will give that concern any weight in future decisions.

That in itself does not prove that Professor Cassell is wrong — what does, in my opinion, is the data. In any case, for practical purposes the lost-convictions issue is now moot. Professor Cassell is free to continue flogging that very dead horse if he wants to, but there's no reason why anyone else should devote energy to trying to solve what looks like a nonexistent problem. *Miranda* probably prevents some confessions, but it also helps the police obtain others. The great weight of the evidence suggests that the *Miranda* system, as currently administered, causes no *net* reduction in confession rates, clearance rates, or conviction rates.[6]

The problems with *Miranda* lie almost entirely in the other direction — the *Miranda* system is too weak. That claim will sound odd to anyone used to hearing that *Miranda* mandates overinclusive prophylactic rules and that it "sweeps more broadly than the Fifth Amendment itself."[7] So it is essential that I begin with first principles and consider why and to what extent the Constitution restrains police interrogation in the first place. Then I will specifically address where *Miranda* falls short and propose several remedies.

I. POLICE INTERROGATION AND THE FIFTH AMENDMENT

Much as I welcomed the *Dickerson* result and nearly all of the opinion's language, I was disappointed that the Court perpetuated confusion about the constitutional basis for restrictions on police interrogation. The Fifth Amendment, as everyone knows, says that no person shall be "compelled" to be a witness against himself in a criminal case. Two misperceptions about "compulsion" are commonly

---

Bashing Miranda *is Unjustified — and Harmful*, 20 HARV. J.L. PUB. POL'Y 347 (1997) [hereinafter Schulhofer, *Bashing* Miranda].

5. The Chief Justice does write, in his opinion for the court, that a "disadvantage of the *Miranda* rule" is that "a guilty person [may] go free as a result." 120 S. Ct. at 2336. But he mentions nothing to suggest that he considers this a frequent or serious problem, and immediately after noting this disadvantage, he enumerates offsetting ways in which *Miranda* sometimes eases the task of insuring that a confession will be ruled admissible.

6. *See, e.g.*, sources cited *supra* note 4; *see also* John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998).

7. The claim that *Miranda* "sweeps more broadly than the Fifth Amendment itself" appears repeatedly in Rehnquist Court comments on the conceptual basis of *Miranda*. *E.g.*, Oregon v. Elstad, 470 U.S. 298, 306 (1985).

voiced. They are echoed in such Supreme Court opinions as *Elstad*, *Tucker* and *Quarles*,[8] and to a lesser extent carried forward in *Dickerson* itself: (1) that a statement isn't *really* compelled unless it is judged "involuntary" within the meaning of Fourteenth Amendment due process, and (2) that judgments about *real* compulsion must consider the totality of the circumstances in the particular case.

Conservative unease about *Miranda* and the perception of its dubious legitimacy, not to mention temper tantrums like the one on display in Justice Scalia's *Dickerson* dissent, rest directly on these two premises — that compulsion means involuntariness and that judgments about compulsion must consider the totality of the circumstances. Yet both of these premises are dead wrong.

It may seem presumptuous for me to pronounce a legal assertion dead wrong when it appears over and over in opinions of the U.S. Supreme Court. But, nonetheless, as the next section explains, those two premises are *indisputably* wrong. Or — to put the point more politely — those two premises can be right only if the constitutional principles governing police interrogation differ from those that determine Fifth Amendment compulsion in every other setting. In other words, those two premises imply a kind of Fifth Amendment exceptionalism, under which the standards applicable to police interrogation, even under *Miranda*, remain distinct from the standards applicable to all other official questioning of witnesses and suspected offenders.

A. *The Concept of Fifth Amendment Compulsion*

Consider the first premise — that compulsion means the kind of involuntariness barred by Fourteenth Amendment due process. This premise simply cannot be true. Compulsion *cannot* mean involuntariness. Outside the context of police interrogation at least, it is impossible to equate compulsion with involuntariness because courts that consider themselves barred from ever admitting an involuntary statement nonetheless routinely admit and use statements that are unambiguously compelled.

A statement that is truly involuntary, one that has been coerced by "breaking the suspect's will," is never admissible for any purpose.[9] But witnesses are routinely *required* to give statements under subpoena. Even when a person is a criminal suspect, he can, after a grant of immunity, be forced to give statements under subpoena.[10] Such statements are clearly and literally *compelled*. Yet, far from being inadmissible, as involuntary statements are, these compelled statements are

8. *Elstad*, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984); Michigan v. Tucker, 417 U.S. 433 (1974).

9. Mincey v. Arizona, 437 U.S. 385 (1978).

10. Kastigar v. United States, 406 U.S. 441 (1972).

unquestionably admissible; they are the bread and butter of virtually all judicial proceedings. Consider the Supreme Court's comment, the essential underpinning for its decision in *United States v. Nixon*,[11] that "it is imperative to the function of courts that *compulsory* process be available . . . ."[12] Indeed, the Sixth Amendment grants the accused a constitutional right to compulsory process to call witnesses in his favor; the Constitution mandates the admissibility of these *compelled* (but not involuntary) statements.[13]

Waiver doctrine underscores the same point. When it comes to Fourteenth Amendment safeguards against involuntariness, against being subjected to coercion that breaks the will, talk of "waiver" is inapt. One can never waive the right not to have one's will overborne by intolerable pressure, by conduct that "shocks the conscience."[14] But Fifth Amendment rights can be waived; once a witness testifies under oath, the court can compel her to answer questions under cross-examination. Not by lashes or electric shock of course — that would overbear her will in violation of the Fourteenth Amendment. But after a valid waiver, she can be subpoenaed, held in contempt, and sent to jail until she talks, even when her answers may incriminate her. Such measures obviously involve compulsion and are impermissible against a suspect who properly claims the Fifth Amendment, but they do not "overbear the will" in the way that the Fourteenth Amendment categorically forbids.

If the suggested distinction between compelled and involuntary statements seems fine-spun and verbally artificial, we should try to imagine whether the law could manage without such a distinction. Clearly, we need some concept (call it concept *A*) to define the kind of pressures and penalties that government should never be allowed to deploy against a potential witness under any circumstances. With respect to pressures and penalties that do not fall within *A*, we could conceivably say that government may use those methods to get testimony from *any* potential witness, regardless of whether the witness is a criminal suspect or a person making a plausible claim of self-incrimination. Under that view, any penalty that could be deployed against an ordinary witness (a contempt citation, for example) could also be used against a criminal defendant. That view would require repeal of the Fifth Amendment.

As long as we have a Fifth Amendment, some of the pressures and penalties that can be freely deployed against ordinary witnesses will not be available as devices to obtain self-incriminating testimony from

11. 418 U.S. 683 (1974).

12. *Id.* at 709 (emphasis added).

13. Washington v. Texas, 388 U.S. 14 (1967).

14. Rochin v. California, 342 U.S. 165, 172 (1952).

a criminal suspect. And we will therefore of necessity require some concept (call it concept *Z*) to identify those devices — that is, the pressures and penalties that can be legitimately deployed against ordinary witnesses but cannot be used to obtain self-incriminating statements from criminal defendants or suspects.

There is obviously no verbal similarity and no necessary conceptual congruence between *A* and *Z*. It is only the labels traditionally used (coercion, involuntariness, and breaking the will for *A*; compulsion for *Z*) that sometimes trick us into assuming that concepts *A* and *Z* are essentially one. In fact they are distinct and only distantly related. And concept *Z* ("compulsion") clearly and inevitably — by definition — extends to pressures and penalties that are not prohibited by concept *A* ("involuntariness").

Thus it is not just *Miranda* that "sweeps more broadly" than the due process rule against involuntary statements. *The Fifth Amendment itself* sweeps more broadly than the due process rule against involuntary statements. Absent a valid waiver, the Fifth Amendment prohibits use of a compelled statement against the person compelled, even when the compelled statement is *not* involuntary within the meaning of the Fourteenth Amendment. The premise that Fifth Amendment compulsion means involuntariness is simply incoherent.[15]

The second premise of *Miranda* criticism is that the only way to determine whether a statement is *really* compelled is to assess the relevant pressures under the totality of the circumstances. This premise fares no better than the first. If we set aside Fifth Amendment exceptionalism (the idea that police interrogation should be severed from the principles governing witness questioning in every other setting), then the totality-of-the-circumstances premise is indisputably wrong.

Consider the classic example of impermissible Fifth Amendment compulsion — the threat of a contempt citation for refusal to testify under oath. That threat has always been treated as impermissibly compelling per se, even though many witnesses can and do resist it and face jail rather than testify. A comment at trial on a criminal defen-

15. This truncated analysis leaves open at least two important issues. First, to stress, as I have done here, the inherent distinction between Fourteenth Amendment involuntariness and Fifth Amendment compulsion does not by itself provide normative justification for the Fifth Amendment itself, that is for a constitutional regime that permits certain strong pressures to be deployed against ordinary witnesses but not against criminal suspects. For discussion of that normative issue, see Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311 (1991).

Second, the analysis does not attempt to fill out the exact content of either "compulsion" or "involuntariness." It is only a partial defense of this gap to note that the Court itself has given little precise content to either term, and the distinction between them cannot be measured until the content of each is operationally defined. For one attempt to develop a formal definition of compulsion, see Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987). For attempts to define involuntariness, see Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195 (1996); Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998).

dant's failure to testify is impermissibly compelling per se, regardless of the tactical and evidentiary factors that determine how much pressure such a comment would present in a particular case.[16] The point is made especially clear in *Carter v. Kentucky*.[17] The Court not only noted the potentially compelling effect of commenting at trial on a defendant's silence, but also observed that, even in the absence of any prosecutorial or judicial comment, a jury might draw inferences adverse to the defendant "if left to roam at large with only its untutored instincts to guide it."[18] As a result, the Court held, the trial judge "has an affirmative obligation" to warn the jury not to draw an adverse inference from the defendant's silence.[19] The judge's obligation to take affirmative steps to dispel potentially compelling pressures applies *whenever* the defendant requests such an instruction, regardless of any other trial circumstances.

A threat to discharge a public employee for a refusal to testify likewise is impermissibly compelling per se.[20] The actual force of such a threat for any given employee depends on the context — his assets, the time remaining until retirement, any vested pension rights, his employment opportunities in the private sector, and so on. Yet the Court has never suggested that the totality of the circumstances must be assessed to determine if such a threat is compelling in light of the particular employee's economic situation; the specific circumstances are irrelevant.[21]

The same principle applies to a threat to disqualify a contractor from doing business with public agencies because of his refusal to testify. A host of economic factors affects the impact of such a threat on any particular contractor. But under settled Fifth Amendment doctrine, such contextual factors are irrelevant. The disqualification threat, like the threat to discharge the public employee, is impermissibly compelling per se.[22] And there is no longer anything the least bit controversial about these holdings. None of the Justices has ever thought to brand them as overbroad prophylactic rules or illegitimate usurpations of legislative prerogative.

In short, totality-of-circumstances analysis, so often touted as the only really pure and correct way to make Fifth Amendment judg-

16. Brooks v. Tennessee, 406 U.S. 605 (1972); Griffin v. California, 380 U.S. 609, 614 (1965).

17. 450 U.S. 288 (1981).

18. *Id.* at 301.

19. *Id.* at 303.

20. Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

21. *Id.* at 806.

22. Lefkowitz v. Turley, 414 U.S. 70 (1973). The Court's refusal to consider circumstantial distinctions in degrees of pressure is made explicit in an extended discussion, 414 U.S. at 83-84.

ments,[23] is entirely foreign to the Court's Fifth Amendment jurisprudence, at least in settings other than the police station.

B. *The Origins of Exceptionalism*

The story of how the Court came to define compulsion differently in the police interrogation setting (what I have called Fifth Amendment exceptionalism) is revealing. Before *Miranda*, Fifth Amendment standards did not apply to police interrogation at all. Indeed, during the good old 1950s and early 1960s, Fifth Amendment restrictions did not apply to any state proceedings whatsoever. The Federal Constitution barred use of confessions in a state case only when they were obtained by methods that in the totality of the circumstances broke the defendant's will or shocked the judicial conscience. Such confessions were deemed "involuntary."[24]

It was not until 1964, just two years prior to *Miranda,* that the Court in *Malloy v. Hogan*[25] took the revolutionary step of "incorporating" the Fifth Amendment and applying it to the states. Even then, the Fifth Amendment did not apply to police interrogation, federal or state, because courts usually defined Fifth Amendment compulsion to mean compulsion by *formal* process (by subpoena, for example), rather than informal pressure, however severe.[26] In effect, questioning of suspects in police custody was subject to a different standard from official questioning of suspects in any other setting; Fifth Amendment exceptionalism was expressly encoded in legal doctrine prior to *Miranda*. But before *Malloy*, the Court had little occasion to confront the implications of this anomaly, because the Fifth Amendment was not applicable to the states, and because in federal cases the supervisory rule suppressing statements obtained after an undue delay in arraignment[27] avoided much of the need to assess issues of Fifth Amendment compulsion.

Then, two years after *Malloy*, the *Miranda* Court took another revolutionary step when it rejected the formal-process requirement and held that Fifth Amendment barred any substantial pressure, for-

23. *See, e.g.*, Dickerson v. United States, 120 S. Ct. 2326, 2346-48 (2000) (Scalia, J., dissenting); Oregon v. Elstad. 470 U.S. 298, 306 (1985).

24. Brown v. Mississippi, 297 U.S. 278 (1936); *see* Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195 (1996).

25. 378 U.S. 1 (1964).

26. *See* Brown v. Mississippi: "[T]he right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements [concerning to the Fifth Amendment] refer is that of the *processes of justice* by which the accused may be called as a witness and required to testify. *Compulsion by torture to extort a confession is a different matter.*" 297 U.S. at 285 (emphasis added).

27. Mallory v. United States, 354 U.S. 449 (1957).

mal or informal.[28] The Court's opinion recounted in detail the history of its interrogations cases and the jurisprudential divide that, until then, had distinguished its standards of Fourteenth Amendment "involuntariness" from its standards of Fifth Amendment "compulsion." In rejecting the artificial notion that only formal legal sanctions could count as "compelling," the Court ended Fifth Amendment exceptionalism and applied the Fifth Amendment directly to stationhouse interrogation. The *Miranda* Court made no effort to hide the fact that these steps represented a radical, though justified, break with the past. It ruled out stationhouse confessions obtained by informal compulsion, even though (and the Court said this explicitly) such confessions might not be involuntary in traditional Fourteenth Amendment terms.[29]

I have mentioned two revolutionary steps, both of which involved a radical break from then-existing precedent: the decision to apply the Fifth Amendment to the states and the decision to include informal as well as formal pressures within the concept of Fifth Amendment compulsion. Both steps now lie embedded in almost forty years of interrogation and noninterrogation precedent, and no member of the Court, Justices Scalia and Thomas included, shows any inclination to overturn them.[30]

But, surprisingly, and with no fanfare, Fifth Amendment exceptionalism has crept back into the picture. Without questioning the applicability of the Fifth Amendment to the states and without challenging the premise that informal stationhouse pressure is a form of Fifth Amendment compulsion, the Court has managed to render these once-controversial steps virtually meaningless. By subtle phraseology, deployed originally by then-Justice Rehnquist and later followed by Justice O'Connor, the Court silently up-ended the conceptual basis of *Miranda* and once again rigidly compartmentalized its Fifth Amendment jurisprudence. It began deciding police interrogation cases as if they had nothing to do with Fifth Amendment precedents in other settings. In the newly severed context of police interrogation, now regarded as *sui generis*, the Court began speaking as if *real* compulsion (in that setting alone) required precisely what the *Miranda* Court had held unnecessary, the stringent "breaking the will" brand of

28. "We are satisfied that all the principles embodied in the privilege apply to *informal* compulsion exerted by law-enforcement officers during in-custody questioning." Miranda v. Arizona, 384 U.S. 436, 461 (1966) (emphasis added).

29. "[W]e might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest." *Miranda*, 384 U.S. at 457.

30. *See* Schulhofer, *Reconsidering* Miranda, *supra* note 15, at 439, 453 (1987).

coercion that would render a confession involuntary in traditional Fourteenth Amendment terms.[31]

We will probably never know whether Justice Rehnquist realized, as he wrote *Tucker*, that he was draining Fifth Amendment compulsion of its distinctive content, or whether verbal similarities between compulsion and coercion by "breaking the will" simply obscured for him the traditional distinction between Fifth and Fourteenth Amendment requirements. Either way, *Tucker* and subsequent cases echoing its language accomplished a world-class conceptual counterrevolution.

Miranda had brought Fifth Amendment standards into the stationhouse under the expressly stated assumption that those standards provided more protection than the traditional Fourteenth Amendment voluntariness requirement. Fifth Amendment requirements do "sweep more broadly" than those of the Fourteenth, and it was precisely for that reason that incorporation was, in its day, so controversial. Starting with *Tucker*, the Court took the teeth out of incorporation by asserting that compulsion meant nothing different from involuntariness after all. If valid, that claim leaves one to wonder what all the fuss was about in *Malloy v. Hogan* and why Justices Harlan and Clark so passionately argued, in dissent, that *only* Fourteenth Amendment voluntariness, *not* freedom from Fifth Amendment compulsion, should be required of the states.

Tucker, however, dealt only with police interrogation and stopped short of equating compulsion with involuntariness across the board. Its author was perhaps content to plant seeds that could ultimately undermine not only *Miranda* but the protective Fifth Amendment jurisprudence applicable in non-stationhouse settings as well. However that may be, the net effect of the *Tucker-Elstad-Quarles* language was to bring the law full circle, reinstituting Fifth Amendment exceptionalism, and — for the stationhouse setting only — assuming that a confession could be *truly* compelled only if it was judged involuntary under the totality of the circumstances.

That historical and conceptual background is crucial for assessing the legitimacy of the *Miranda* restrictions and the importance of assuring that they are respected in practice. When police interrogate a suspect who is alone, in custody, and unable to walk away from questions he wants to avoid; when police do not warn him that he isn't required to answer; when they do not warn him that he has the right to

31. *See* Oregon v. Elstad, 470 U.S. 298, 312, 315 (1985) ("[A] simple failure to administer the warnings [is not equivalent to] *actual coercion* . . . [There] is a vast difference between coercion of a confession by physical violence or other *deliberate means calculated to break the suspect's will* and . . . [a] disclosure freely given in response to an unwarned but noncoercive question . . . [R]espondent's earlier remark was voluntary, within the meaning of the Fifth Amendment." (emphasis added)). Note especially the last quoted sentence, giving the word "voluntary" textual status, as if it were part of the language of the Fifth Amendment.

cut off the questioning, return to his cell, and sleep or rest if he wishes; when they do not honor his pleas to be left alone and instead continue to press on him their questions, their seductive offers of help, and their alarming comments on the evidence against him, the pressures dwarf those faced by the public employee, the public contractor, or even many witnesses who (with the help of counsel) face a citation for contempt.[32]

Judged by the standards that govern Fifth Amendment assessments in every other context, a police interrogation without warnings and without any right to escape unwanted questions is unambiguously compelling. And it is compelling per se, regardless of the suspect's age, intelligence, education, or economic circumstances, regardless of whether guns or billy clubs are waved in his face, and regardless of how long the questioning ultimately lasts.[33] Absent safeguards as strong or stronger than those mandated by *Miranda*, such an interrogation, *from the very outset*, violates the Fifth Amendment — the real Fifth Amendment — and not just some set of broader, optional prophylactic rules.

---

32. The comparison suggested in the text perhaps oversimplifies in assuming a unitary metric to assess degrees of compulsion presented by qualitatively different forms of pressure. Formal penalties are, in one sense, especially troublesome because they exact an explicit, officially sanctioned price for conduct that the Constitution expressly protects. And formal penalties can be prohibited without inviting the kind of line-drawing problems that inevitably attend attempts to prescribe informal pressures. From that perspective, one could conceivably argue that Fifth Amendment compulsion should be understood to embrace only formal sanctions, together with the extreme types of informal pressure that rise to the level of Fourteenth Amendment involuntariness.

That approach, however, seems unsatisfactory as a matter of both substance and precedent. Any effort to limit *informal* compulsion to sanctions that overbear the will would stand in tension with the case law applicable to informal economic pressure, most notably *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). Moreover, formal penalties are imposed openly, subject to specific limits and with time for a rational weighing of alternatives with the advice of counsel. From that perspective, the psychologically coercive effect of formal penalties and their capacity to engender fear seem far less significant than is the case for many informal pressures, especially those deployed by police in the unregulated incommunicado context of custodial police interrogation. That said, the precise content of informal "compulsion" remains open to more specific elaboration.

33. It is technically an overstatement to suggest that compulsion must inevitably be present in every conceivable interrogation. Imagine that a knowledgeable suspect, fully aware of his right to silence and fully briefed by his attorney, is questioned without full *Miranda* warnings, after being assured that the arresting officer has only one short question to ask and will then leave the suspect alone in his cell. If the suspect then confesses, it would be implausible to suggest that his response was the result of "compulsion." Cases of this sort, however, are surely rare, if not nonexistent. In virtually all real cases of custodial interrogation without warnings, the circumstantial pressures, from the very outset, are at least as significant as those found "compelling" in cases like *Carter v. Kentucky*, 450 U.S. 288 (1981), *Cunningham*, 431 U.S. 801 (1977), and *Lefkowitz v. Turley*, 414 U.S. 70 (1973). For a discussion of the justification for per se rules in settings where a few cases might, if scrutinized, be found to lack the facts that are determinative in principle, see Schulhofer, *Reconsidering* Miranda, *supra* note 15.

II. NEXT STEPS — SUBSTITUTES FOR *MIRANDA*

The conception of the Fifth Amendment I advance here may strike some as utopian. It is certainly not the criterion by which reform efforts will be judged by the current Court or by any Court we are likely to get. So I will put myself in the shoes of Justices Kennedy, O'Connor, and Rehnquist and consider which possible reform alternatives are likely to satisfy the more grudging conception of the Fifth Amendment that holds sway on the Court today. The controlling criterion is that any alternative must include "procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that his exercise of that right will be honored."[34]

One much-discussed alternative to *Miranda* is the option of videotaping the confession or the entire interrogation. Videotaping *only* the confession is useful only to the police; it provides others no window into the "suction process"[35] by which the confession was elicited. So videotaping only the confession cannot possibly serve as a replacement for any part of *Miranda.* I don't think anyone seriously suggests that it could.

Videotaping the entire interrogation process is an alternative that some, Professor Cassell most prominently, suggest as a replacement for *Miranda.*[36] Videotaping mitigates the problem of the swearing contest — it gives us a more or less clear picture of what occurred. But the swearing contest was not a problem that *Miranda* sought to solve, and videotaping does nothing to address the problems that *Miranda* did seek to address.

Recall that the swearing contest problem was pressed on the Court in the *Miranda* arguments, but the Court chose to ignore it. On the heroic assumption that the normal fact-finding process will accurately resolve credibility questions, *Miranda* sought measures to dispel the inherently compelling effect of custodial interrogation. A videotape will not do that if, as Professor Cassell hopes,[37] we can keep suspects from knowing about it. If suspects do not know that what police do to them in the interrogation room is being recorded for outside observers, the psychological atmosphere they confront will be exactly the same as the one the *Miranda* Court correctly pronounced inherently compelling.

Even if suspects learn or are told explicitly that what happens to them in the privacy of the interrogation room is being taped, the pres-

34. Dickerson v. United States, 120 S. Ct. 2326, 2335 (2000). The limitation, as originally stated in *Miranda,* is virtually identical: Any alternative must be "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it . . . ." 384 U.S. at 467.

35. *See* Watts v. Indiana, 338 U.S. 49, 53 (1949) (opinion of Frankfurter, J.).

36. Cassell, *supra* note 2, at 492.

37. *Id.* at 492 & n.610.

sures that *Miranda* sought to dissipate will nonetheless remain unchecked. Any suspect who is worried about outright torture will find little reassurance in a tape that a lawless officer can turn off or destroy at will. The more subtle pressures remain unchanged and may even be enhanced if the suspect worries about how he will appear on tape as he persists in refusing to answer. *A videotape unaccompanied by the existing Miranda system will make matters much worse, not better.*

There is no reason, moreover, to think that the Court's centrists would disagree. For the current Court, any valid alternative to *Miranda* must include "procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that his exercise of that right will be honored."[38] Videotaping the interrogation, with or without the suspect's knowledge, does nothing to inform him of his right to remain silent, and it does nothing to assure him that his exercise of that right will be honored. Indeed, the aim of the videotaping proposal is to eliminate *Miranda*'s cut-off right and free the police to continue questioning the suspect who says he prefers not to talk.[39] So as an alternative to *Miranda*, videotaping is a nonstarter.

There is, however, an intriguing possibility for audio or videotape that the Court's test for alternatives brings to mind. Videotaping the interrogation does nothing to warn the suspect, but why not videotape or audiotape the warnings themselves? Any recent visitor to New York has probably heard the recorded message that greets you when you close the door of a taxicab. The voice of Mayor Giuliani, Barbra Streisand, or Oprah implores you to "buckle up," makes sure you know that using your seat belt is the cool thing to do. In interrogation, of course, a major concern centers on the tone in which police deliver the warnings; the worry is that police often manage to convey that no innocent person would sensibly seek to hide behind *Miranda*. So why do we leave the warnings up to the very people most likely to blunt their effect?

A better approach would be a system in which, when the suspect gets into the back seat of the squad car, as soon as the door closes, he would hear the voice of Johnnie Cochran, Alan Dershowitz, or Yale Kamisar telling him his rights in no uncertain terms (or even imploring him to "buckle up"). That is a genuine alternative to the warnings branch of *Miranda*. Earlier versions of the same idea involved procedures to have a magistrate or duty counsel at the stationhouse inform a suspect of his rights before interrogation could begin.

Procedures of this sort would do almost everything that police-delivered warnings can do, and they would avoid disputes about whether police delivered the warnings too late or got the details

38. *Dickerson*, 120 S. Ct. at 2335.

39. *See* Cassell, *supra* note 2, at 492.

wrong. So these are promising alternatives to the warnings requirement of *Miranda*, and there is little doubt that the Court would uphold them as substitutes for police-delivered warnings.[40]

Taking the same idea one step further, some suggested during the *Dickerson* debates that *Miranda* warnings had become superfluous. By now, they said, suspects no longer need warnings from the police, much less from Professor Kamisar. Thanks to movies and TV, they already know that they have the right to remain silent, and therefore, some said, it was really irrelevant whether *Miranda* was overruled.[41]

The Court did not buy that argument for several pretty obvious reasons. Television scripts can change even faster than Supreme Court precedent. If warnings were no longer required, many police would stop giving them, and then the television shows might stop depicting them. Before long, suspects *wouldn't* know they had the right to remain silent. At that point, the Supreme Court would have to overrule the overruling and re-instate *Miranda*, at least for three or four television seasons, when the cycle would start all over again.

And that quirk is the least of the problems. The more basic points are two: First, a civics lesson, even one dramatized on a cop show, is no substitute for a warning from official sources at the moment of arrest. Any arrestee, even a constitutional scholar, needs the assurance that his rights are acknowledged and accepted by those who hold him in their power.

Second, the claim that now we all know our *Miranda* rights (because we've heard the warnings so often)[42] refutes itself. The public's tendency to identify *Miranda* with the warnings requirement shows that, even now, after three decades, the public *does not* know its *Miranda* rights. The public, and many law students, still do not understand the heart of *Miranda*, which lies not so much in the famous warnings as in the cut-off rule — that if at any time the suspect indicates a desire to remain silent, all questioning must cease.[43] This rule, far more than the warnings, revolutionized police interrogation and posed the greatest potential threat to the confession rate. We will always need a system to inform suspects of their rights at the time of arrest, but an effective system of warnings can serve only as a substitute for police-delivered warnings, not for the other elements of the *Miranda* system.

---

40. We might worry, however, that without police acknowledgment of the warnings, a suspect who knows perfectly well the rights that the law gives him would nonetheless have no assurance that the police were prepared to honor those rights.

41. *E.g.*, Akhil Reed Amar, *Ok, All Together Now: 'You Have the Right to . . .'* L.A. TIMES, Dec. 12, 1999, at M1.

42. Amar, *supra* note 41.

43. Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).

We could conceivably eliminate *Miranda* requirements altogether (the warnings, the express-waiver requirement and the suspect's right to cut off questioning at any time) if we required interrogation, like post-indictment line-ups, to be conducted only in the presence of counsel.[44] Or we could prohibit *all* interrogation by police and permit questioning of an arrestee only when conducted by a magistrate in open court in the presence of defense counsel. Again, there is little doubt that the Court would uphold substitutes like these.

But none of these proposals is very attractive to the political constituencies that complain so insistently that "law enforcement never recovered from the blow inflicted by *Miranda*."[45] Even the modest idea of replacing police-delivered warnings with Kamisar-delivered warnings is politically unacceptable for the same reason that it is not constitutionally unacceptable — it would be at least as protective of the suspect (and therefore at least as burdensome to investigators) as *Miranda* itself.

The converse is also true. To attract political support, any substitute for *Miranda* must to some extent dilute the protections that suspects now get under *Miranda*. So politically attractive alternatives to *Miranda* cannot pass constitutional muster, and constitutional alternatives cannot attract political support — unless the alternative's supporters can spin their case well enough to dupe either the judicial or political audience, in one direction or the other. That's the real reason that no legislature has attempted to develop a serious replacement for the *Miranda* system.

III. SUPPLEMENTS FOR *MIRANDA*

Dickerson leaves us with only one question of practical significance. The *Miranda* rules will remain as the constitutionally mandated floor, but there is ample room for steps to supplement the *Miranda* system.

One attractive option would be to mandate videotaping in addition to the substantive ground rules laid down by *Miranda*. Videotaping would greatly reduce the problems of the swearing contest and, except for expenses (which generally appear to be minimal), videotaping infringes no conceivable governmental interest. Everyone gains by having an unambiguous record of what actually occurred in the interrogation.[46]

There are a large number of other procedural possibilities — changes in the rules governing use of confessions for impeachment,

44. United States v. Wade, 388 U.S. 218 (1967).

45. Cassell, *All Benefits, No Costs*, *supra* note 4, at 1090-91.

46. For more detailed discussion, see Schulhofer, Miranda's *Practical Effect*, *supra* note 4, at 556-57.

use of fruits, controls over deceptive interrogation methods, and safeguards against false confessions. All of these options pose similar problems of trying to honor constitutional rights, to maintain or enhance protections for the suspect (especially the innocent suspect), and simultaneously to maintain or enhance public safety by adequately preventing violent crime. That dilemma is the constant preoccupation of students of criminal procedure, and it will continue to deserve careful attention.

Nonetheless, efforts to resolve that dilemma offer only limited opportunities for improvement. If we implement a system of stronger warnings, narrow some of the exceptions to *Miranda*, or grant defendants a less onerous burden of proof, we set in motion a familiar debate. Constitutional rights are better protected (at least a bit, at the margins), but crime control will suffer (at least a bit, at the margins). The implications can be projected with infinite imagination and refinement. But at the end of the day, the effects at issue are exceedingly small, on both the civil liberties and crime control sides of the equation.

We can perhaps make progress if we are willing to step outside the narrow boundaries of the usual procedural reform debate. If our goal is (as it should be) the effective protection of the innocent and decent treatment of the guilty, we can accomplish infinitely more through structural reform of police departments and better delivery of defense services than we can ever hope to achieve by a dozen changes in impeachment doctrine or shifts in various burdens of proof.[47] And gains from the first set of strategies should come with no adverse effect (and probably some beneficial effect) on our crime-control effort.

There are similar win-win opportunities if we focus attention on proven strategies that make large dents in the crime rate *without* diminishing civil liberties. If our goal is (as it should be) the reduction of violent crime and effective protection of the most vulnerable members of society, we should be thinking about prenatal care in risky pregnancies, better health services for pre-school children, scattered site housing, Head Start and other education initiatives, better funding for battered women's shelters and intervention for abusive men, drug treatment on demand, and even hiring more police officers. For all of these strategies (with the possible exception of hiring more officers) there are now solid, uncontroversial data showing very large, cost-effective crime-control gains.[48] Again, we can accomplish infinitely

47. *Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 65-74 (1997) (discussing importance of funding decisions and substantive culpability requirements).

48. *See* NAT'L INSTITUTE OF JUSTICE, PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING (1998); LISBETH B. SCHORR, WITHIN OUR REACH (1988); John J. Donohue III & Peter Seligman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUDIES 1 (1998).

more through steps of this sort than we can ever hope to achieve by weakening *Miranda*, the Fourth Amendment exclusionary rule and all the rest of the Warren Court edifice combined. And we can achieve those gains without putting any of our Bill of Rights safeguards at risk.

So if crime control is on our minds, we cannot look at the details of criminal procedure in isolation. We have to consider the entire range of promising crime-reduction strategies. And we have to think carefully about which research projects or programmatic efforts should have the first claim on our limited time and energies.[49]

Above all, we have to remember, as much on the crime-control side as on the civil-liberties side, that resources are crucial. In the mid-1950's, before the Warren Court started "handcuffing the police," we had 121 police officers for every 100 violent crimes. By the 1990s that number had fallen to only 28 police officers for every 100 violent crimes.[50] Whatever difficulties police may encounter because of new criminal procedure requirements pale in comparison to the burden we inflict on them when we leave each officer with, in effect, more than four times as many violent crimes to handle.

It is in this light that I want to do what must be very bad form in a criminal procedure symposium, and that is to insist that we stop our obsessive focus on the technical nuances of criminal procedure. Courts still have to decide cases, and criminal procedure scholars still have to help them where we can. But we should not overestimate the value of the enterprise. Regardless of who is right or wrong about the implications of doctrinal change, the debate itself diverts energy and attention, our own and that of whatever public may be listening. This waste of time and energy is the real tragedy of the *Dickerson* case and the years of litigation and advocacy scholarship that law enforcement proponents devoted to their quixotic effort to force a reconsideration of *Miranda*. I hope that mistake will not be repeated in the years to come.

49. *See* Stuntz, *supra* note 47, at 72-76.

50. Schulhofer, *Bashing* Miranda, *supra* note 4, at 372.