Michigan Law Review

Volume 99 | Issue 5

2001

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SEPARATED AT BIRTH BUT SIBLINGS NONETHELESS: *MIRANDA* AND THE DUE PROCESS NOTICE CASES

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Paraphrasing Justice Holmes, law is less about logic than experience.[1] Courts and scholars have now had thirty-four years of experience with *Miranda v. Arizona*,[2] including the Court's recent endorsement in *Dickerson v. United States*[3] last Term. Looking back over this experience, it is plain that the Court has created a *Miranda* doctrine quite different from what it has *said* it was creating. I think the analytic structure in *Dickerson* supports this rethinking of *Miranda*. To connect the dots, I offer a new explanation for *Miranda* that permits us to reconcile *Dickerson* and the rest of the post-*Miranda* doctrine with the underlying theme of the *Miranda* opinion.

Consider two *Miranda* experiences that seem quite contradictory. The first experience draws upon my teaching of *Miranda* in my classes at Rutgers. Among my students, *Miranda* critics are as rare as the honest lawyers whom Diogenes sought.[4] I can find the loyal opposition on just about every other issue, but not, oddly enough, on *Miranda*. I try deploying the "plain meaning" argument, forcing the students to read the actual words in the Constitution: "nor shall any person be compelled in a criminal case to be a witness against himself."[5] It is clear that the Framers had in mind courtroom testimony. Moreover, I

* Professor of Law and Judge Alexander P. Waugh Sr. Distinguished Scholar, Rutgers, Newark. – Ed. I received helpful comments on earlier versions of this paper from Paul Cassell, Sherry Colb, Mike Dorf, Don Dripps, Al Garcia, Richard Leo, John Leubsdorf, Paul Marcus, Barbara Schweiger, Chris Slobogin, Welsh White, and Charles Whitebread. I also benefited greatly from presenting a version at a Rutgers faculty colloquium and, of course, at the "*Miranda* After *Dickerson*: The Future of Confession Law" Symposium sponsored by the *Michigan Law Review* and the Michigan Law School's Criminal Law Society. Susan Klein provided the most help, commenting on several versions and forcing me to clarify my thoughts. Finally, special thanks to Yale Kamisar. The leading figure in the law of confessions for over four decades, Yale always gives generously of his time and wisdom when I send him a draft, as he did this time. He helps many of us in the academy in many other ways as well, large and small. I should give the standard disclaimer that no one named in this footnote should be blamed for what follows.

1. *See* Richardson v. United States, 468 U.S. 317, 325-26 (1984) (quoting Holmes' "aphorism" that "a page of history is worth a volume of logic").

2. 384 U.S. 436 (1966).

3. 120 S. Ct. 2326 (2000).

4. I paraphrase Diogenes loosely!

5. U.S. CONST. amend. V.

ask, how can we say that a suspect is compelled to be a witness against himself if he answers "I shot my wife" to the officer's first question of "what happened last night?" Where is the compulsion? Despite my efforts, even the conservative students think it is unfair for police to question suspects without telling them that they need not answer.[6]

The second experience I offer is that of reading hundreds of appellate opinions deciding whether the police complied with *Miranda*. If you have read a few, you will not be surprised at my basic finding — once the prosecutor proves that the warnings were given in a language that the suspect understands, courts find waiver in almost every case. *Miranda* waiver is extraordinarily easy to show — basically that the suspect answered police questions after saying that he understood the warnings.[7] This waiver process bears little resemblance to waiver of the Fifth Amendment privilege at trial where the prosecutor is not permitted to badger the defendant with requests that he take the witness stand. Indeed, neither the prosecutor nor the judge can even comment on the failure of the defendant to testify.[8] As most defendants are represented by counsel at trial, the decision to take the stand, and waive the privilege, almost always is made after advice and careful thought.[9] By contrast, the *Miranda* version of the Fifth Amendment permits waiver to be made carelessly, inattentively, and without counsel.[10]

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6. In a dissent two years prior to *Miranda*, Justice White said that "it would be very doubtful" that a statement would be admissible if the police explicitly told the suspect he had to answer questions. *See* Escobedo v. Illinois, 378 U.S. 478, 499 (1964) (White, J., dissenting). Of course, this is different from finding a constitutional duty to provide warnings that suspects need not answer (and White also dissented in *Miranda*), but White's concern about police creating a false duty to answer points in the direction of informing suspects that no duty exists.

7. *See, e.g.*, North Carolina v. Butler, 441 U.S. 369 (1979); *see also infra* notes 83-95 and accompanying text.

8. *See* Griffin v. California, 380 U.S. 609 (1965).

9. The defendants who proceed pro se will also have had a rather extensive colloquy with the trial judge in which, among other warnings, she will tell the defendant that he has a right not to take the witness stand. *See, e.g.*, Godinez v. Moran, 509 U.S. 389, 392 (1993) (noting that the trial judge "inquired into" pro se defendant's "awareness of his rights"). We do not know, of course, how thoroughly a pro se defendant understands this right or how carefully he considers it. Indeed, we do not know for certain how carefully or thoughtfully defendants who are represented by counsel make the decision about testifying, but we would like to believe that lawyers perform competently and that defendants are rational actors.

10. I confess that the relative ease with which the state can secure waivers of the privilege in the grand jury context muddies my point. Grand juries, however, have been considered *sui generis* in other contexts. In *United States v. Williams*, 504 U.S. 36 (1992), for example, the Court held that courts simply lack the authority to require the prosecutor to disclose favorable evidence to the grand jury, in part because the grand jury is not textually assigned to any of the three branches of government and, therefore, exists independently of government. This unique status probably derives from the historic role of the grand jury as a group of citizens seeking evidence of crime in their midst. As the Court has put the common law principle: "[T]he public has a right to every man's evidence." Kastigar v. United States, 406 U.S. 441, 443 (1972). But no one ever claimed that every man owes the petit jury at trial his

These experiences suggest that almost everyone thinks fairness requires telling suspects that they do not have to answer police questions, but courts find waiver of the right not to answer on any evidence that the suspect understood the warnings. Is this really an application of the venerable privilege not to be compelled to take the witness stand at trial? More is going on here than meets the eye.

It is good that law does not depend completely on logic. Judged on that score, *Miranda* remains quite mysterious. I wish to identify some of these mysteries and offer a new way of thinking about *Miranda* that may explain some of the puzzles. Whatever the *Miranda* majority contemplated, my thesis is that later, and somewhat hostile, Courts have transformed *Miranda* from a case about the Fifth Amendment privilege against self incrimination to one about due process.

In Part I of this Article, by way of background, I outline some of the mysteries left open by the Court's *Miranda* decision and later jurisprudence. In Part II, I explore the theoretical and practical disjunction between *Miranda* and the Fifth Amendment privilege. Part III then draws on the conceptual and historical bases of due process to show how a due process understanding may provide answers to some of *Miranda*'s mysteries. Part IV demonstrates how the *Miranda* doctrine and subsequent case law is better explained under a due process notice theory than under any version of the Fifth Amendment privilege theory. Part V offers some tentative thoughts about how best to justify a *Miranda* requirement in the Due Process Clause. In Part VI, I offer some brief comments on Susan Klein's alternative theory for *Miranda*. Finally, I conclude that "truth-in-labeling" — the importance of which is emphasized by Professor Klein — requires that due process theory takes its rightful place in explaining *Miranda* and its progeny.

I. *MIRANDA*'S MYSTERIES: AN OVERVIEW OF THE ARGUMENT

The most basic mystery of *Miranda* is identifying the full extent of the holding itself. As Stephen Schulhofer points out,[11] there are actually three holdings. The Court held, first, that the Fifth Amendment privilege against compelled self-incrimination applies to custodial police interrogation. Second, the Court held that the pressure of custodial interrogation is inherently compelling for purposes of the Fifth Amendment. As to the third holding, the opinion is less than clear. Professor Schulhofer argues that the Court held that *every response* to custodial interrogation is compelled unless warnings are given.[12]

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evidence, or that suspects owe the police their evidence. Thus, the grand jury waiver process seems a less apt comparison to police interrogation than the process at trial.

11. Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1986).

12. *See id.* at 446-53.

Perhaps this is true, although the third holding does not necessarily follow from the second. It might be that some suspects who answer in the face of compelling pressure are not actually compelled to answer. This might be so for three reasons. First, humans surely have different tolerances for how well they can withstand compelling pressures. Second, the inherently compelling pressure of police interrogation comes in quite different levels of pressure. The question "what happened last night?" might be inherently compelling but it is of a different order of magnitude from the forty hours of interrogation, thirty of it with no break, that the defendant faced in *Lisenba v. California*.[13]

Third, humans who answer police questions might have independent motives to answer, motives that have nothing to do with police compulsion as it is traditionally understood. In *Lisenba*, for example, the suspect did not confess until confronted with a confession of his confederate; Lisenba said that he would never have confessed but for the statement of the confederate.[14] While the police disclosure of the confederate's confession *motivated* Lisenba's confession, courts have never found that providing truthful information to a suspect is compulsion. The distinction is between enabling the will of the suspect to operate with more information, which is not compulsion, and overbearing the will of the suspect. Like all distinctions in confession law, this one can be spun to gossamer fineness, but in *Lisenba*, the Court found that the suspect

> exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer.[15]

If it is possible to imagine a noncompelled response to inherently compelling police pressure (and the Court has on several occasions insisted that this is more than just an imaginary possibility),[16] then the narrow holding in *Miranda* is less than clear. Did the Court hold that every response is compelled unless accompanied by warnings and waiver or only that warnings and waiver are required because of the great risk that any given response will be compelled? Justice White, in his *Miranda* dissent, noted both of these formulations of the potential holding, ultimately deciding on the former — that *Miranda* held "any answers to any interrogation to be compelled regardless of the content and course of examination."[17]

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13. 314 U.S. 219 (1941).

14. *See id.* at 240.

15. *Id.* at 241.

16. *See infra* notes 38-41 and accompanying text.

17. Miranda v. Arizona, 384 U.S. 436, 536 (1966) (White, J., dissenting).

If the Court held that every statement made by suspects in response to police interrogation is compelled under the authority of the Fifth Amendment, this conclusive presumption would presumably apply in all situations just like a finding of "real" Fifth Amendment compulsion. This is the "strong" reading of *Miranda*'s relationship to the Fifth Amendment. The conclusive presumption makes it easier to decide when the constitutional provision has been violated, and nothing about the presumption suggests that a presumed violation is somehow less wrongful, or deserves a lesser remedy, than a "real" violation.

This introduces another *Miranda* mystery. The Court chooses sometimes not to apply the *Miranda* presumption of compulsion even though "actual" compulsion would produce an outcome in favor of the defendant. In these contexts, the Court insists that the defendant loses unless he can demonstrate "real" compulsion. Consider *New York v. Quarles*,[18] where the Court held that *Miranda* warnings are not required when the police are asking questions designed to advance public safety. A statement ("the gun is over there") is therefore admissible even though no warnings are given and *Miranda*'s conclusive presumption would otherwise be fully engaged. Although the Court withdrew the prophylactic protection from this category of cases, it did not withdraw the pre-*Miranda* protection against involuntary, compelled, or coerced statements.[19] Thus, the Court assured the reader that the suspect who loses the benefit of *Miranda*'s conclusive presumption, including Quarles himself on remand, can argue that his statement was "actually compelled by police conduct that overcame [his] will to resist."[20]

As *Quarles* makes clear, the Court has over the years adopted the less expansive, or "weak" reading of *Miranda*'s holding — not that every statement is compelled but that the warnings are necessary because the risk of compulsion is so great. If the warnings are not given, the presumption of compulsion will usually, but not always, require suppression of statements made in response to custodial interrogation. Justice Scalia in his *Dickerson* dissent suggests that the Court lacks the authority to structure a presumption in that way.[21] I disagree[22] but the

18. 467 U.S. 649 (1984).

19. Commentators have sought to draw differences between involuntary, compelled, and coerced statements. *See, e.g.*, Schulhofer, *supra* note 11, at 440-53. Whatever the common law approach, or the best philosophical approach, the Court today treats all three as synonymous. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 307 (1985) (using "presumption of coercion" and "presumption of compulsion" to explain *Miranda*'s holding); New York v. Quarles, 467 U.S. 649, 655 n.5 (1984) (using "coerced," "compelled," and "involuntary" interchangeably).

20. *Quarles*, 467 U.S. at 654, 655 n.5.

21. Dickerson v. United States, 120 S. Ct. 2326, 2337 (2000) (Scalia, J., dissenting) (stating that the power to impose "useful" prophylactic rules upon Congress and the States "is an immense and frightening antidemocratic power, and it does not exist").

novelty of the *Miranda* presumption requires a better explanation than the Court has given us. *Dickerson* explains *Quarles* with the cliche that no constitutional rule is absolute. But this misses the point that *Miranda* has exceptions where the "real" Fifth Amendment privilege does not.[23] By what standard does the Court decide which contexts should not benefit from *Miranda*'s conclusive presumption? This we are never told — another *Miranda* mystery.

I wish to "solve" these mysteries by introducing a new explanation of *Miranda*. In effect, I argue that the Supreme Court has carved out a specialized niche in the Due Process Clause for *Miranda*-style due process. On this view, the notion of a regularized criminal process includes the right to be warned that no duty exists to answer questions asked during custodial interrogation.

I want to be clear about the kind of claim I am making. It is descriptive, not normative. I am not claiming that a due process understanding of *Miranda* is the best approach to the problem of police interrogation. Nor am I claiming that a due process protection is what the *Miranda* Court thought it was creating (though much language in the opinion is at least consistent with this explanation). Indeed, I think the Court was doing precisely what Yale Kamisar called for the year prior to *Miranda*,[24] and what Kamisar, Steve Schulhofer, Larry Herman (and others) have since claimed[25] — it was seeking a test to

22. As does David Strauss. *See* David A. Strauss, Miranda, *the Constitution, and Congress*, 99 MICH. L. REV. 958 (2001). For his earlier thoughts on the issue generally, see David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

23. Yale Kamisar pointed out to me that, in the right case, a court might hold that even the "real" Fifth Amendment does not prevent coercion, as, for example, if the police are trying to find a ticking bomb in a school room. Susan Klein makes this argument as well. *See* Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001). The *Quarles* general public safety exception, however, is far broader than the ticking bomb emergency. More importantly, these speculations do not alter the reality that the Court has never identified, even in dicta, an exception to the "real" Fifth Amendment privilege.

24. *See* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From* Powell *to* Gideon, *From* Escobedo *to . . . , in* CRIMINAL JUSTICE IN OUR TIME 4-11, 64-81 (A.E. Dick Howard ed., 1965). Among the many virtues of Kamisar's paper is his title. The next year, of course, the Court would fill in the ellipsis with *Miranda v. Arizona*.

25. *See* Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733 (1987); Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Schulhofer, *supra* note 11; *see also* Leslie A. Lumney, *The Erosion of* Miranda: Stare Decisis *Consequences*, 48 CATH. U. L. REV. 727, 794 (1999); Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1838 (1987). Alfredo Garcia ably expresses a somewhat different explanation that *Miranda* was intended to ensure "the continued viability of confessions as an instrument of law enforcement." Alfredo Garcia, *Is* Miranda *Dead, Was it Overruled, or is it Irrelevant?*, 10 ST. THOMAS L. REV. 461, 474 (1998). These views are not completely antithetical because the Court might have intended to create a bright line that caused more suppressions and yet left a robust role for interrogation.

apply to custodial police interrogation that both created a bright line rule and made suppression more likely than under the due process coercion test. The substitution of Fifth Amendment "compulsion" for due process "coercion" as the relevant inquiry was almost certainly intended to lower the bar and make it easier for defendants to suppress confessions. Focusing on compulsion also made *Miranda*'s crucial presumption easier to justify. It is plausible to claim that police interrogation without warnings is always compelling. It is much more difficult to claim that it is always coercive.[26]

But *Miranda*'s bright line has been substantially blurred by the post-*Miranda* cases.[27] Whatever one calls the pressure of police interrogation today, it does not always render a response compelled under the Fifth Amendment because the Court does not always apply the presumption. My descriptive claim is that the Court has transformed the *Miranda* doctrine into a due process protection.

Susan Klein argues that I bend the due process category to make *Miranda* fit.[28] She argues that I have not identified a due process interest to be protected or, assuming a due process interest can be identified, that the bare notice requirement is insufficient to protect the interest.[29] While I acknowledge that *Miranda*-style due process is not a mainstream due process doctrine, my argument is that the Court has already done the heavy lifting of moving *Miranda* from the Fifth Amendment privilege to its next door neighbor in the Fifth Amendment, the Due Process Clause. Other than to demonstrate that doctrinal "fact," then, my only job is to find the due process theory that is the closest fit. In sum, I argue that the Court has already accomplished the rearranging of the due process furniture that Professor Klein finds objectionable. Whatever due process has been understood to require in the past, it is pretty clear that the Due Process Clause is sufficiently flexible (or amorphous) to accommodate *Miranda*-style due process.

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26. I indulge here the standard linguistic and philosophical view that coercion entails a greater magnitude of pressure than compulsion. Prior to *Miranda*, the Court had never drawn that distinction in its confessions cases. *Miranda* was, I believe, intended to be the first in a series of cases to hold that compulsion can be found where there is insufficient pressure to constitute coercion. *See* Schulhofer, *supra* note 11. The post-*Miranda* cases, however, continued to talk of compulsion as if it were synonymous with coercion, *see supra* note 19, an analytical move that made it easier to find no "actual" compulsion when carving out exceptions to *Miranda*.

27. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 663 (1984) (O'Connor, J., dissenting) (noting that the majority's public safety exception "unnecessarily blurs the edges of the clear line heretofore established").

28. *See* Susan R. Klein, Commentary, Miranda*'s Exceptions in a Post*-Dickerson *World* (forthcoming 2002) [hereinafter Klein, Miranda*'s Exceptions*].

29. *Id.*

II. THE DISJUNCTION BETWEEN *MIRANDA* AND THE FIFTH AMENDMENT PRIVILEGE

There are, I believe, three permissible accounts of *Miranda's* relationship to the Fifth Amendment privilege. First, as Schulhofer argues, it might be that every statement made to the police interrogators, in the absence of warnings and waiver, is conclusively presumed to be compelled and thus inadmissible on the authority of the Fifth Amendment.[30] On this reading, *Miranda* is a "strong force" application of the privilege. A second possible account is that the privilege applies differently in the interrogation room than it does in the courtroom and that sometimes the presumption of compulsion applies and sometimes it does not. I call this a "weak force" application of the privilege. The third account is that *Miranda* is a prophylaxis that protects the privilege rather than being an application of the privilege. The second and third accounts might appear to be the same but they are not.

The "weak force" application of the privilege suggests that *Miranda* is constitutional and thus beyond the power of Congress to change in any way. The prophylactic understanding, on the other hand, leaves room for Congress to legislate provided the legislation is at least as protective as the *Miranda* prophylaxis.[31] An example of a prophylaxis that is not an application of a constitutional right is the *Blockburger* presumption that a necessarily included offense is the "same offense" as the greater offense for purposes of preventing multiple punishment under the Double Jeopardy Clause.[32] That presumption is a proxy for legislative intent on the multiple punishment issue and may therefore be overridden by the legislature. It is not part of the Double Jeopardy Clause, as the Court made clear in *Missouri v. Hunter* when it held that "crystal clear" legislative intent to punish both offenses rebuts the *Blockburger* presumption.[33]

The "strong force" understanding of *Miranda* is open to criticism for being an ahistorical extension of a right intended to apply only to trials and other formal hearings. Other policy criticisms build on the

30. *See* Schulhofer, *supra* note 11, at 453.

31. Susan Klein argues that *Miranda* should be viewed as prophylactic rather than a "weak force" application of the privilege so that Congress and the states would have the option to legislate. *See* Klein, *supra* note 23, at 1054.

32. *See* Blockburger v. United States, 284 U.S. 299 (1932). For example, joyriding is presumed to be the same offense as auto theft if proving auto theft always proves joyriding. *See* Brown v. Ohio, 432 U.S. 161 (1977).

33. 459 U.S. 359 (1983). For a detailed look at *Hunter*, see George C. Thomas III, *Multiple Punishments for the Same Offense: The Analysis After* Missouri v. Hunter, 62 WASH. U. L.Q. 79 (1984). For an extended argument that the multiple punishment presumption should also apply in the context of successive prosecutions, see GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW (1998).

core notion that the Court's conclusive presumption of compulsion is not empirically defensible and, thus, it makes little sense to exempt guilty suspects from police interrogation that would probably not, by the *Miranda* Court's own admission, rise to the level of due process coercion.[34] Right or wrong as a policy or an historical matter, this understanding of *Miranda* is coherent.

This understanding, however, fails to explain the post-*Miranda* cases carving out exceptions to the original rule. The best example of the disconnect between *Miranda* and the Fifth Amendment is the very first case in which the Court departed from *Miranda*'s bright line. In 1971, the Court held in *Harris v. New York*[35] that prosecutors can use statements taken in violation of *Miranda* to impeach a defendant's credibility. Seven years after *Harris*, the Court distinguished *Harris* in *Portash v. New Jersey*[36] when it held that a statement "actually compelled" by threat of contempt of court cannot be used for impeachment later in a criminal case. The analytical structure of *Portash* is as important as the holding. Noting that *Harris* had balanced interests to hold against the defendant, *Portash* wrote:

> Balancing of interests was thought to be necessary in *Harris* . . . when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.[37]

The central difference between *Harris* and *Portash*, according to the Court, was that the statements in *Harris* were only presumptively compelled. The rule is different when the issue is the "pristine" Fifth Amendment: "[A] defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatsoever against him in a criminal trial."[38] *Portash* thus settles the question of whether statements taken in violation of *Miranda* are compelled under the Fifth Amendment — they are not.

Recognizing this, the Court often describes the *Miranda* rights as prophylactic or "not themselves rights protected by the Constitution but . . . instead measures to insure that the right against compulsory self-incrimination was protected."[39] The clearest expression of this

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34. *See Miranda*, 384 U.S. at 457.

35. 401 U.S. 222 (1971).

36. 440 U.S. 450 (1979). The Court had reached the same conclusion a year earlier when the compulsion came not from the contempt power, as in *Portash*, but from police interrogation that constituted "actual compulsion." *See* Mincey v. Arizona, 437 U.S. 385 (1978).

37. *Portash*, 440 U.S. at 459.

38. *Id.*

39. Michigan v. Tucker, 417 U.S. 433, 444 (1974). I recognize that the first "exception" to *Miranda* was in *Harris v. New York*, 401 U.S. 222 (1971). *See* discussion *supra* note 35 and accompanying text. The *Harris* opinion, however, did not use the prophylactic locution to

idea was *Oregon v. Elstad*.[40] The Court held that a *Miranda* violation does not taint a subsequent confession taken in compliance with *Miranda*, and was at pains to note that *Miranda*

> may be triggered even in the absence of a Fifth Amendment violation. . . . Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.[41]

This "preventive medicine" explanation of *Miranda* minimizes the role of the Fifth Amendment in explaining why statements must be suppressed. On this view, not all violations of *Miranda* produce constitutional harm, giving the Court flexibility to approach issues about the scope of the *Miranda* exclusionary rule as well as exceptions to its presumption of compulsion. While a prophylactic explanation might not be the best understanding of what *Miranda* originally sought to accomplish, or the best approach to the problem of police interrogation, nothing keeps a Court from modifying its doctrine. This explanation of *Miranda*, whether right or wrong as a policy matter, is coherent.

The difficulty is *Dickerson*, where the Court seemed to suggest that *Miranda* is more than a prophylactic rule or, perhaps, that it is a constitutional prophylactic rule that Congress has no power to modify. Given the Court's citation to *City of Boerne v. Flores*[42] for the proposition that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution,"[43] and the Court's application of this principle to *Miranda*, it is difficult to avoid reading *Dickerson* as holding that *Miranda* is constitutional — either in a strong sense, as co-extensive with the Fifth Amendment privilege, or in a weak sense, as a constitutionally required prophylactic rule.

If *Miranda* is best understood, in light of *Dickerson*, as constitutional in the strong sense, the exceptions and doctrinal limitations made on the authority of the prophylactic theory seem doomed. If *Portash* is the right approach to the use of compelled statements to impeach, and if *Miranda* is co-extensive with the Fifth Amendment privilege, then *Harris* must be overruled. This analytical turn is, I think, Paul Cassell's nightmare. He challenges *Miranda*, loses, and takes down with him the doctrinal limitations placed on *Miranda*. Un-

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justify permitting the use of statements taken in violation of *Miranda* to impeach defendants. Rather, it simply assumed that the interests in reliable fact-finding were heavier than whatever interests supported a total ban on statements presumed to be compelled.

40. 470 U.S. 298 (1985).

41. *Id.* at 306-07.

42. 521 U.S. 507 (1997).

43. Dickerson v. United States, 120 S. Ct. 2326, 2332 (2000).

doubtedly fearing this analytical challenge, the Court in *Dickerson* embraced the entire doctrinal superstructure created with the prophylactic understanding.[44] That language is dicta, however, and it might be that *Dickerson* is the beginning of the end for some or all of those doctrinal limitations.

If, on the other hand, we accept the *Dickerson* dicta that *Miranda* is constitutional in the weak sense — that it is a constitutionally required prophylactic theory — the exceptions survive but without a theory that explains why the Fifth Amendment privilege deserves a constitutional prophylaxis that does not apply to some cases in which the Fifth Amendment itself would apply. While that kind of prophylaxis is not illegitimate, it requires an explanation. One explanation is that the Court is making the Fifth Amendment privilege do work it was never intended to do and, consequently, has had to remodel the privilege. In effect, to view *Miranda* as a weak version of the Fifth Amendment privilege requires that we recognize the Fifth Amendment as having a strong force in formal proceedings and a weak force in police interrogation. Nothing keeps the Court from having a Fifth Amendment privilege with a strong and a weak force, but it is a conceptually unsatisfying interpretation of a single guarantee.

A due process theory offers an alternative account that avoids the problem of constructing a theory of the Fifth Amendment with weak and strong forces. Due process requires notice in other contexts before rights to liberty or property are lost. Why not in the context of police interrogation? I think a permissible understanding of *Miranda* is that it protects the liberty interest in not being subjected to custodial interrogation by providing notice that the suspect can terminate the interview. While this is a novel "liberty interest," it is one that *Miranda* itself seemed to contemplate. The Court said that "custodial interrogation exacts a heavy toll on individual liberty."[45] And the *Miranda* solution, after all, was to tell the suspect that he has a "right to remain silent" as a way of terminating the deprivation of liberty that attends custodial interrogation.

This "right," however, does not exist outside the context of police interrogation. Witnesses can be subpoenaed, given immunity, and compelled to testify consistently with the Fifth Amendment privilege.[46] Defendants who take the witness stand can be fully cross-examined.[47] No "right to remain silent" exists when the "real" Fifth Amendment

44. *Id.* at 2334-36.

45. Miranda v. Arizona, 384 U.S. 436, 455 (1966).

46. *See* Kastigar v. United States, 406 U.S. 441 (1972).

47. *See, e.g.*, Brown v. United States, 356 U.S. 148 (1958).

privilege is involved.[48] *Miranda* is so loosely connected to the Fifth Amendment privilege that it promises a right that the privilege itself cannot deliver. This should suggest rethinking the relationship of *Miranda* to the Fifth Amendment privilege.

Even if we assume that *Miranda* is constitutional in the weak sense, and thus not very closely connected to the privilege, we require an alternative theory — such as due process — to explain when the Court will apply, or refuse to apply, the presumption or when it will create a broader right than the Fifth Amendment creates in its strong force form that applies to formal proceedings. Yale Kamisar's classic study of confessions law that paved the way for *Miranda* draws heavily on equal protection to conclude that suspects should be told of their Fifth Amendment privilege before being interrogated.[49] Drawing a parallel to cases requiring the state to provide indigent defendants with a transcript and a lawyer to handle their appeal,[50] Professor Kamisar argued that "respect for the individual and securing equal treatment in law enforcement" require the state to make counsel available to suspects who face police interrogation and to warn them that they need not answer.[51] As Professor Kamisar put it: "To the extent that the Constitution permits the wealthy and the educated to 'defeat justice,' if you will, *why shouldn't* all defendants be given a like opportunity?"[52] If the Fourteenth Amendment helps us decide to apply the Fifth Amendment privilege to police interrogation, rather than just in formal proceedings, Fourteenth Amendment due process may help decide when and how the *Miranda* presumption should be applied.

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48. The text and history are also inconsistent with a "right to remain silent" view of the Fifth Amendment privilege. The text forbids compelling a witness to testify. That is far from a general right to remain silent. Moreover, Albert Alschuler has concluded that no one in the eighteenth century would have thought of the common law privilege as creating a right to silence. *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996).

49. Kamisar, *supra* note 24, at 4-11, 64-81. Professor Kamisar's paper laid out the theory that the privilege against self-incrimination should apply to the police interrogation room and that notions of equal protection required providing suspects notice that they did not have to answer questions.

50. *See* Douglas v. California, 372 U.S. 353 (1963) (counsel on appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (transcript). About the only erroneous prediction Professor Kamisar made in his *Equal Justice* paper, *see supra* note 24, was that *Douglas* would turn out to be a more important right to counsel case than *Gideon v. Wainwright*, 372 U.S. 335 (1963). The prediction was based on Professor Kamisar's view that the Equal Protection Clause was going to play a key role in deciding how to apply the criminal procedure guarantees. The Court's appetite for using the Equal Protection Clause in this way, however, turned out to be quite limited. *See, e.g.*, Ross v. Moffitt, 417 U.S. 600 (1974) (refusing to extend *Douglas* to a discretionary second appeal to the state supreme court even though indigents are unquestionably disadvantaged by not having appointed counsel).

51. Kamisar, *supra* note 24, at 79-80.

52. Kamisar, *supra* note 24, at 80.

On this understanding of *Miranda*, the difficult questions have been, and will continue to be, about when and how to apply the presumption, questions not answered by asserting that *Miranda* presumes Fifth Amendment compulsion. My due process account fills in this gap either by operating as the mechanism by which we decide when the "weak force" Fifth Amendment applies or operating as a free-standing source of the duty to warn. On either view, it is the Due Process Clause that does the analytical work.

III. Is *MIRANDA* About Due Process Notice or "Weak Force" Fifth Amendment Compulsion?: A Look at the Conceptual and Historical Basis of Due Process

Professor Klein argues that the Fifth Amendment right not to be compelled to be a witness against oneself is the only right one needs, or is permitted to use, to craft doctrines that warn of a right to silence.[53] In effect, she claims that the existence of the criminal procedure guarantees of the Bill of Rights sucked most of the "criminal process" oxygen from the Due Process Clause, exhausting it of content in the criminal context — at least where there is a plausible nexus between a particular right and the government action being challenged.[54] But I believe that the criminal procedure guarantees in the Bill of Rights leave room for the Due Process Clause to work when we think about the controls that should apply to police interrogation.

History supports the idea that due process has independent life in the criminal context. The clause derives from the Magna Carta requirement that all persons are entitled to the "law of the land," a hoary phrase that has been understood for centuries to require a regularized process before the state can deprive someone of life, liberty, or property.[55] The Framers of the Fifth Amendment created a right to "due process of law" that courts understood to be equivalent to the Magna Carta right to the "law of the land."[56] The Fifth Amendment privilege is a separate protection in the Fifth Amendment from that of due process (the two clauses are located next to each other, separated by a comma). Separate provisions must mean something different, and when the privilege applies, it does indeed provide all the process that is due. But how would the Framers have understood the application of the privilege?

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53. *See* Klein, *supra* note 23, at 53.

54. This additional condition is needed to preserve a place for due process or equal protection to operate in areas when no specific right seems to apply — for example, to create a rule that equal protection forbids a prosecutor to act if motivated by a racially discriminatory purpose. *See* United States v. Armstrong, 517 U.S. 456 (1996); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

55. *See, e.g.*, Hurtado v. California, 110 U.S. 516 (1884).

56. *Id.* at 528-32.

Scholars as diverse as Yale Kamisar and John Henry Wigmore agree that the privilege has a different history from that of the common law rule forbidding the use of involuntary confessions.[57] The privilege grew out of the concern with the power of the monarch to compel political and religious dissenters to take an oath to tell the truth in formal hearings.[58] Part of the objection to this process was that the state could force anyone to take the oath, even if it lacked a basis to suspect the particular individual, thus allowing the monarch to seek out and destroy its opponents. Part of the objection, however, was that the state should not have the power to compel a person to destroy himself even if the state had adequate suspicion. In 1651, Hobbes stated that even a "justly condemned" person has "the Liberty to disobey" the sovereign when it orders him to "kill, wound, or mayme himselfe [sic]."[59] From this principle, Hobbes derived the following corollary: "If a man be interrogated by the Soveraign [sic], or his Authority, concerning a crime done by himselfe [sic], he is not bound (without assurance of Pardon) to confess it; because no man . . . can be obliged . . . to accuse himselfe [sic]."[60] Here, what is being protected is the autonomy of the subject and the corresponding right to ignore the order of the sovereign to confess a crime. The idea made the voyage across the Atlantic. In 1677, the Virginia House of Burgesses "declared that forcing suspects to answer incriminating questions under oath was incompatible with their natural rights."[61]

The common law simultaneously developed another principle that overlapped the Hobbesian right to ignore the sovereign's order to accuse oneself. Confessions had to be voluntary to be admissible. The underlying concern was not autonomy as much as it was reliability of the fact finding process. For example, Blackstone noted that confessions made out of court are "the weakest and most suspicious of all testimony, ever liable to be obtained by artifice, false hopes, promises of favor, or menaces, seldom remembered accurately, or reported with due precision, and incapable in their nature of being disproved by other negative evidence."[62]

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57. 8 JOHN HENRY WIGMORE, EVIDENCE § 2266 (3d ed. 1940); Kamisar, *supra* note 24, at 26-27. Historians also agree. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); Alschuler, *supra* note 48; R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European* Ius Commune, 65 N.Y.U. L. REV. 962 (1990); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994).

58. *See* Alschuler, *supra* note 48, at 2638-47.

59. THOMAS HOBBES, LEVIATHAN 268-69 (C.B. MacPherson ed., Penguin Books 1984).

60. *Id.* at 269.

61. Alschuler, *supra* note 48, at 2651.

62. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 357 (John L. Wendell ed., New York, Harper & Bros. 1854).

If we were able to ask the Framers whether any part of the Fifth Amendment was relevant to interrogation of suspects, they would almost certainly reply in the negative, asserting that the common law prohibition of involuntary confessions would do the job. If we insisted, however, that *something* in the Fifth Amendment be put to that task, the Framers would likely propose the Due Process Clause rather than the right not to be compelled to be a witness against oneself. They would see the latter provision as preventing Congress or the judiciary from creating procedures that would require individuals to answer questions under oath in a criminal trial.[63] If the common law were suddenly not available to protect against the use of involuntary confessions (as it is not available today except to the extent it survives in cases decided under the Due Process Clause), the Framers would probably agree that part of the "process" that is "due" is the right not to have involuntary confessions used to prove guilt.

Indeed, I believe we can push this thought experiment a bit further. It would be silly to claim that the Framers contemplated any kind of *Miranda*-style notice of the right not to answer questions. But consider how they might respond if they accepted the *Miranda* Court's finding that, to prevent compelled responses to police interrogation (not under oath), it was necessary to warn suspects that they have no duty to answer police questions. Now we ask again: Given that this right exists and must be located somewhere in the Bill of Rights, where would it go? I cannot prove my answer, of course (which is why this is a thought experiment), but I am confident that the Framers would locate this new right to a particular kind of process in the Due Process Clause rather than in the right not to be compelled to answer questions under oath. The law that existed in 1791 drew a very bright line between compelling answers under oath (a procedure that was subject to the common law privilege) and compelling answers not under oath (a procedure subject to the common law rule prohibiting the use of involuntary confessions).

Having enlisted the Framers of the Fifth Amendment to support my argument, I now turn to the Framers of the Fourteenth Amendment. It contains a Due Process Clause worded identically to the one in the Fifth Amendment, thus extending the due process limitation on government power to the states. Whatever else is true about the debates over the Fourteenth Amendment — for example, whether the Framers intended the Fourteenth Amendment to incorporate the criminal procedure guarantees in the Bill of Rights[64] — one fact is

63. That Congress has never attempted to require that kind of procedure simply attests to the core settled meaning of the Fifth Amendment privilege. *See, e.g.*, George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819 (1997).

64. *See* George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. (forthcoming Oct. 2001).

clear. The Framers did not think that the Bill of Rights guarantees exhausted the extent to which the Fourteenth Amendment imposed limitations on state criminal processes. Michigan Senator Jacob Howard, who was on the Reconstruction Committee that drafted the Amendment, favored a reading of the Fourteenth Amendment that incorporated the "personal rights guarantied [sic] and secured by the first eight amendments of the Constitution."[65] He noted, however, that the Amendment also protected due process of law and equal protection of the laws.[66] Howard thus contemplated that the incorporation of the Bill of Rights left room for the Fourteenth Amendment Due Process Clause to operate as an independent limitation on the states. As an example of the protection of due process and equal protection, he said: "It prohibits the hanging of a black man for a crime for which the white man is not to be hanged."[67] While the distinction between equal protection and due process is unclear in Howard's example, it seems that Howard found a role for due process to play in preventing this hanging. If so, it is a role that is independent of the first eight amendments. Moreover, the example strongly suggests a kind of "law of the land" rule that black men are due the same process as white men.

An opponent of the Fourteenth Amendment gave the following example of how the Amendment would limit state criminal processes:

> [I]f a murderer be arrested, tried, convicted and sentenced to be hung, he may claim the protection of the new constitutional provision, allege that a State is about to deprive him of life without due process of law, and arrest all further proceedings until the Federal Government shall have inquired [into the case].[68]

This example assumes a free-standing due process protection by which state criminal proceedings can be evaluated.

The Court has explicitly turned to due process in other criminal contexts even though the issue seemed, logically, to lie within the ambit of a particular procedural guarantee. For example, the Court analyzed whether a state must allow a defendant access to exculpatory records within its control as a due process question, even though it might logically be thought to be an issue of Sixth Amendment compulsory process.[69] Additionally, the Court found due process violated when a state's evidence law prevented the defendant from putting on his ex-

65. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

66. *See id.* at 2766.

67. *Id.*

68. Letter from Orville H. Browning, Secretary of the Interior, to Colonel W.H. Benneson and Major H.V. Sullivan (Oct. 13, 1866), *in* CINCINNATI COMMERCIAL, Oct. 26, 1866 at 2.

69. *See* Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

culpatory evidence even though the specific deprivations were of the Sixth Amendment rights to confront witnesses and to have compulsory process.[70]

Does due process provide a comfortable "home" for notice that a suspect does not have a duty to answer police questions? Consider another thought experiment suggested by Yale Kamisar.[71] Suppose the Warren Court had decided that it was too much of a stretch to apply the Fifth Amendment privilege to the police interrogation room. Could it have used its due process cases to create a *Miranda*-like rule? I believe the answer is yes.

In *Blackburn v. Alabama*,[72] the Court held involuntary on due process grounds the confession given by a suspect suffering from mental illness. *Blackburn*'s due process analysis tracks *Miranda*'s Fifth Amendment privilege analysis pretty closely. Both are concerned with the ability of the suspect to make a decision based on "a rational intellect and a free will."[73] *Blackburn* holds that a confession not so based is a violation of due process. The piece that is missing in *Blackburn* is a global concern with the effect on suspects of all police interrogation, not just the particular one under the Court's microscope. In the next three years, however, the Court began to expand its due process focus.

In *Lynumn v. Illinois*,[74] the Court commented that the suspect "was encircled in her apartment by three police officers and a twice convicted felon who had purportedly 'set her up.' There was no friend or adviser to whom she might turn."[75] Though the police also made a threat (to have her children taken from her), it is significant that the Court considered the coercive effect of being "encircled" by police without "friend or adviser to whom she might turn." These coercive pressures would be true in almost every case of custodial police interrogation.

In *Haynes v. Washington*,[76] decided two months after *Lynumn*, the Court found compulsion without a threat beyond that of further incommunicado interrogation. The concern in *Haynes* was the effect on suspects generally of incommunicado interrogation. Here is what the Court said, near the end of its opinion — a passage that surely presages *Miranda*:

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70. *See* Chambers v. Mississippi, 410 U.S. 284 (1973).

71. Professor Kamisar offered this idea in a question during the symposium.

72. 361 U.S. 199 (1960).

73. *Id.* at 208.

74. 372 U.S. 528 (1963).

75. *Id.* at 534.

76. 373 U.S. 503 (1963).

> We cannot blind ourselves to what experience unmistakably teaches: that even apart from the express threat, the basic techniques present here — the secret and incommunicado detention and interrogation — are devices adapted and used to extort confessions from suspects .... [W]e do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused.[77]

The *Miranda* Court could have relied on *Blackburn*, *Lynumn*, and *Haynes* to hold that custodial police interrogation is inherently a deprivation of due process liberty unless the suspect is warned that he has a right to terminate the interrogation. The Court chose a different path, of course, probably in part because the due process path would have required the Court to overrule prior cases permitting some pretty rough interrogation techniques[78] as well cases refusing to find due process violations even when the suspect requested counsel.[79] As the Fifth Amendment privilege had only applied to the states for two years when *Miranda* was decided,[80] there were no contrary Fifth Amendment precedents to be overruled. Moreover, it is difficult to read the *Miranda* opinion without getting the sense that the Court thought the Fifth Amendment privilege was a clearer, cleaner solution than a thorough overhaul of the due process doctrine. Now that the Fifth Amendment solution has been blurred and warped, however, there is no reason the Court cannot reconsider what is the best doctrinal home for a *Miranda* rule. If a due process home is a better fit in the twenty-first century, the Court should embrace it.

Is due process a better fit? One reason to prefer a due process understanding, touched on earlier, is that *Miranda* waiver looks very different from waiving the privilege at trial. The *Miranda* opinion hints that the Court expected a high percentage of suspects to invoke the right to remain silent and the right to counsel. Had that occurred, one could argue that the *Miranda* protection of the privilege was sturdy enough, in an informal way, for rough parity with the formal courtroom application of the privilege. If most suspects say nothing that could be used against them later, or if they request counsel to advise them about answering police questions, there would be little practical

77. *Id.* at 514-15.

78. *See, e.g.*, Lisenba v. California, 314 U.S. 219 (1941). For a more detailed discussion of this case, see *supra* notes 13-15 and accompanying text.

79. *See, e.g.*, Crooker v. California, 357 U.S. 433 (1958) (rejecting the claim that failure to honor suspect's request for counsel violated Due Process Clause).

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

difference, in the total universe of cases, between the *Miranda* protection and that of the "real" Fifth Amendment privilege. But that is not the reality of how *Miranda* operates. Roughly eighty percent of all suspects waive *Miranda*, and the vast majority of those suspects incriminate themselves.[81] This is not parity with the courtroom application and its waiver standard. As Professor Kamisar said in 1965, "if the privilege is easily waived, there is really no privilege at all."[82]

The Court's language in *Miranda* could be read to require considerably more to prove waiver than has turned out to be the standard. The Court wrote: "If 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 counsel."[83] But the whole concept of Fifth Amendment waiver is oddly attached to the "weak" force of the Fifth Amendment that seems to explain *Miranda*. Part of what has given *Miranda* critics traction all these years is the incongruity of asking whether a suspect has waived his right not to be compelled to answer questions. How can one waive the right not to be compelled? It makes sense to think about waiving the Fifth Amendment privilege in the context of a trial — by choosing to testify, the defendant waives the right she has not to be subpoenaed to testify. But because police cannot compel suspects to answer under penalty of contempt, the notion of waiving the right not to be compelled in the interrogation room borders on the incoherent.[84] This conceptual oddity makes the task of fashioning a waiver standard in the police interrogation room comparable to that in the courtroom more difficult, even if the Court had the political will to attempt to do so.

Due process, by comparison, does not require an affirmative, counseled waiver. The prisoner facing loss of good time credits and the parolee facing parole revocation can waive the right to a hearing by simply not appearing after notice has been given.[85] To be sure, one could describe the non-appearance in these cases as forfeiture, rather

81. *See, e.g.*, Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839 (1996); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

82. Kamisar, *supra* note 24, at 33 (quoting Note, *The Privilege Against Self-Incrimination: Does it Exist in the Police Station?*, 5 STAN. L. REV. 459, 477 (1953)).

83. Miranda v. Arizona, 384 U.S. 436, 475 (1966).

84. The standard response to that argument is that *Miranda* created (or found in the Fifth Amendment) a right to silence. *See, e.g.*, R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981) (articulating and critiquing this conception of the Fifth Amendment); *see also* discussion *supra* notes 57-63 and accompanying text.

85. *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972); *see also* discussion *infra* notes 145-147 and accompanying text.

than waiver, but nothing turns on the formalistic label that is applied. What counts is that the prisoner and the parolee had notice and failed to exercise the right about which they were notified. The suspect in the police interrogation room can similarly waive *Miranda* by listening to the warnings and talking to the police. Talking to the police is a failure to exercise the relevant right in the same way as failing to appear at the parole revocation hearing. Waiver can be found even in a case where the suspect refuses to sign the waiver form and states, "I will talk to you but I am not signing any form."[86] To compare that to the decision to take the witness stand in a criminal trial is to diminish the Fifth Amendment privilege.

The distinction between Fifth Amendment waiver at trial and due process waiver becomes clearer in two of the Court's *Miranda* cases. In *Connecticut v. Barrett*,[87] the Court upheld waiver when the suspect answered orally even though he said he would not sign a statement until his lawyer appeared. In *Colorado v. Spring*,[88] the Court found waiver even though the suspect did not know he was going to be interrogated for a more serious crime than the one for which he was under arrest. Do these cases meet due process standards for notice? I think so. In both cases, the suspect knew he did not have to answer police questions and that he could have a lawyer present during the interrogation. That he lacked perfect information in *Spring* or made an illogical decision in *Barrett* does not mean he lacked notice of the consequence of answering police questions or of his right to counsel and to terminate the interview. The argument is more difficult, however, if one has to conclude that either Spring or Barrett was no longer reacting to the inherent compulsion of police interrogation when they answered questions while holding a warped or incomplete understanding of what they faced.[89]

In addition to the way waiver is proved, what happens after waiver further distinguishes *Miranda* from the Fifth Amendment privilege that attends the trial. At trial, the defendant who waives the Fifth Amendment privilege and takes the witness stand has "his lawyer . . . at his side, not only to shield him from oppressive or tricky cross-examination which angers, upsets, or confuses him, but to guide him on direct examination."[90] The Court has even said that "to prevent a

86. North Carolina v. Butler, 441 U.S. 369, 371 (1979).

87. 479 U.S. 523 (1987).

88. 479 U.S. 564 (1987).

89. One reader of a draft, citing *Barrett* and *Spring*, suggested that the *Miranda* version of notice is too thin to qualify as due process notice. Perhaps, but this argument proves too much. If *Miranda* notice is too thin for the Due Process Clause, it is surely too thin to warn effectively of the Fifth Amendment privilege.

90. Kamisar, *supra* note 24, at 13 (internal footnote omitted).

defendant's lawyer from guiding him on direct examination constitutes a per se violation of 'fundamental fairness.' "[91]

When a suspect waives *Miranda*, the only limitation on police interrogation is the Due Process Clause, the very protection that *Miranda* found unacceptably parsimonious. And in the hands of later courts, the due process protection *is* pretty parsimonious. Alfredo Garcia provides a dramatic example of what courts will permit police to do once they have a waiver.[92] In this case, the courts found a confession voluntary despite thirty hours of continuous interrogation without sleep followed by another fourteen hours of interrogation after the suspect slept for six hours. The Garcia example is not an isolated case, nor is it in any way antithetical to *Miranda* doctrine as it has evolved. A North Carolina case, *State v. Jackson*,[93] provides another example. Jackson was a murder suspect. He waived *Miranda* and was interviewed for three hours and released; the next day, again waiving *Miranda*, he was questioned and told that the clothes he wore the day of the murder were stained with blood, and that tracks made by his tennis shoes were found at the scene of the crime. Both statements were false. Jackson did not confess. Ten days later, he voluntarily came to the police station and waived *Miranda*; he was shown a bloody fingerprint on a knife. The police said that the print on the knife was Jackson's and that an eyewitness could identify him leaving the murdered woman's apartment carrying a knife. Both statements were, once again, false. In addition, the officers warned that, if Jackson denied what he had done, they would "go into court and . . . testify that the defendant was a black man raping and killing white women."[94] Jackson confessed, and the North Carolina Supreme Court held that it was admissible under the Due Process Clause.

Miranda doctrine *could* have developed differently; perhaps the Fifth Amendment privilege contains a non-waivable core that forbids trickery and oppressive interrogations inconsistent with the "free choice" rationale in the *Miranda* opinion. The Supreme Court, however, has not provided guidance on these questions, and the state courts permit considerable deception and pressure without finding a due process violation.[95] Thus, for eighty percent of suspects, the law

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91. *Id.* at 16 (citing, and later quoting from, Ferguson v. Georgia, 365 U.S. 570, 594 (1961)).

92. *See* Garcia, *supra* note 25, at 499-502.

93. State v. Jackson, 304 S.E.2d 134 (N.C. 1983).

94. *Id.* at 140.

95. *See, e.g.*, Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986) (deception and pressure); Sheriff v. Bessey, 914 P.2d 618 (Nev. 1996) (deception); Arthur v. Commonwealth, 480 S.E.2d 749 (Va. Ct. App. 1997) (deception); *cf.* State v. Cayward, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (holding inadmissible as coerced a confession made after police showed the suspect fabricated scientific evidence prepared on the stationery of a state department of criminal law enforcement); *see also* Laurie Magid, *Deceptive Police Interrogation Practices:*

that applies is not in fact *Miranda* but the law that *Miranda* sought to change. It seems odd, at best, to say that the Fifth Amendment requires suspects to be warned that they have a privilege not to answer police questions, but that once they agree to answer, they are in the due process soup where police can lie and cheat to get a confession. This view of the Fifth Amendment impoverishes it.

This evidence suggests that *Miranda* is not really about the Fifth Amendment privilege. No, my students had it right all along — *Miranda* is about fair notice that suspects have no duty to answer police questions. Once the police give that notice, the basic rationale of *Miranda* is satisfied and everyone is happy. The suspect gets the notice he deserves, the police get a statement, the prosecutor gets a conviction, and the appellate court will affirm (as long as the suspect understands the language in which the warnings are given).

Because the Due Process Clause sometimes forbids the state from taking advantage of structural inequities in the level of information,[96] it makes sense to think of *Miranda* as a due process case rather than a case about compelled self-incrimination. But why limit the due process notice to custodial interrogation? Structural inequities in information about the right of the suspect not to answer questions or to refuse to give consent to search exist in a myriad of contexts.[97] Why not a right to due process notice every time any state actor asks a question of anyone?

A superficial answer, at the doctrinal level, is that this was as far as the *Miranda* Court was willing to go. A deeper kind of answer is found in the reason the Due Process Clause requires notice. Here, I agree with one of the Court's premises in *Miranda*, if not its ultimate conclusion. There is a rough and ready difference in the level of pressure between typical cases of police approaching an individual on the street and asking a question, and police conducting a sustained interrogation of a suspect who is under arrest.[98] Under arrest, in an unfamiliar room,

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How Far is Too Far?, 99 MICH. L. REV. 1168 (2001); Welsh White, Miranda*'s Failure to Restrain Pernicious Police Interrogation Tactics*, 99 MICH. L. REV. 1211 (2001).

96. For example, due process forbids the state from using a probate system that relies on constructive notice to creditors when the creditor is known or might reasonably be ascertained. *See* Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988).

97. *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977) (holding that no *Miranda* warnings were necessary because the suspect was not under arrest or otherwise in custody even though he was a parolee who was being interrogated in the police station); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that a consent search is valid if the consent is voluntarily given based on the totality of the circumstances, without requiring that the suspect knew of the right to refuse consent).

98. Professor Kamisar agrees here. Taking *Miranda* at its literal word that it applies to anyone who is "deprived of his freedom of action in any significant way," Miranda v. Arizona, 384 U.S. 436, 444 (1966), Professor Kamisar argued in 1966 that the case for applying *Miranda* to stops on the street was much more difficult. *See* Kamisar, *supra* note 25, at 60 n.8. The bright line between an approach on the street and an interrogation blurs as we add arrest and interrogation elements to the street stop — for example, detention for several

suspects face police interrogators who are capable of relentless questioning and who imply, if they do not state, that the suspect must answer. This is about as extreme a pressure to answer as interrogation can produce short of physical coercion or threats of physical coercion. I can adopt, therefore, the *Miranda* Court's factual premise that custodial police interrogation creates inherently compelling pressure to answer the questions.

My due process explanation does not, however, have to take the next step and conclusively presume that any answer in the absence of warnings and waiver is therefore compelled within the meaning of the Fifth Amendment. Compelling pressures can exist without causing the actor to behave in a particular way. In Robert Nozick's classic account of coercion, for example, the last condition states that part of the actor's reason for doing X (for confessing) must be to avoid (or lessen the likelihood of) the thing that has been threatened.[99] If that condition is not met, the actor has been subjected to coercion but has not been coerced.[100] In other words, the existence of a threat does not entail that the threat caused the actor to do something.

Compelling pressures can exist without the suspect succumbing to them. We act out of many motives that intersect in complex psychological ways, and we are differentially susceptible to varying levels of pressure. To ask the suspect what he did last night might be, in some way, compelling if he thinks he has a duty to answer, but it is far less compelling than the pressure that Lisenba faced during forty hours of interrogation.[101] Moreover, recall that the Court found that Lisenba confessed not because of the interrogation but because he chose to shift blame to his confederate. The single most telling criticism of the *Miranda* conceptual structure is the assumption that every answer to every question posed by police interrogators is compelled. It flies in the face of our pragmatic, intuitive view of human nature as well as what philosophers have taught us about compulsion. As far back as Aristotle, philosophers noted that the decision to act in a way one does not want to act is voluntary, in a sense, because it is a decision made by the actor.[102]

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minutes and intense questioning — but the Court is committed to drawing a line at arrest for purposes of triggering *Miranda*. *See* Berkemer v. McCarty, 468 U.S. 420 (1984).

99. *See* Robert Nozick, *Coercion*, *in* PHILOSOPHY, POLITICS, AND SOCIETY 102-04 (Peter Laslett et al. eds., 1972).

100. Peter Westen makes the same distinction in Peter Westen, *"Freedom" and "Coercion" — Virtue Words and Vice Words*, 1985 DUKE L.J. 541.

101. *See* Lisenba v. California, 314 U.S. 219 (1941). For a more detailed discussion of this case, see *supra* notes 13-15 and accompanying text.

102. ARISTOTLE, 3 ETHICS § 1 (J.A.K. Thomson trans., Penguin Rev. ed. 1976). To be sure, the free will premise underlying Aristotle's view of voluntariness ultimately defeats the notion of an involuntary confession. Wigmore famously observed, "As between the rack and a false confession, the latter would usually be considered the less disagreeable; but it is none

Miranda had to embrace the pragmatically and philosophically dubious premise that every response is a compelled response to justify suppressing statements under the authority of the Fifth Amendment privilege in every case where warnings are not given. If one is disposed to accept that premise, however, it is not clear that a set of warnings delivered by the actors who are creating the inherent compulsion is a sufficient remedy. *Miranda* is a glass half full no matter how it is held to the light, a recognition of the essential compromise that has always been at the heart of *Miranda.* If the inherent compulsion of police interrogation really compels every response, a better remedy seems required. If the inherent compulsion does not compel every response, we are left with a "weak force" understanding of *Miranda* without a clear account of when and how it will differ from the "pristine" privilege.

A due process right to notice that suspects do not have to answer police questions does not require the assumption that the suspect is compelled to answer in every case where warnings are not given. The compelling pressures of custodial police interrogation simply provide a justification for limiting the notice to that category. Viewing the warnings as required under a due process notice theory avoids the "glass half full" conceptual problem. It accomplishes precisely what the "weak force" explanation accomplishes but provides an account, however imprecise, of when warnings are required and when the failure to warn should not lead to suppression. It achieves what the Court now achieves with Fifth Amendment privilege "strong" and "weak" forces by moving the "weak" protection into the Due Process Clause and thus avoiding the awkwardness of finding two quite different kinds of protection in a single constitutional guarantee.

IV. THE *MIRANDA* DOCTRINE UNDERSTOOD AS REQUIRING DUE PROCESS NOTICE

The *Miranda* opinion is itself somewhat consistent with a notice explanation. Some of the examples the Court drew from the interrogation manuals do not create what is normally considered compulsion —

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the less voluntarily chosen." 3 JOHN HENRY WIGMORE, EVIDENCE § 824 n.1 (Chadbourn rev. 1970). One could quite plausibly array the various approaches to the confession problem on a free will-determinism spectrum with Aristotle, Wigmore, and *Lisenba* near the free will pole and *Miranda* near the determinism pole. For some thoughts on the various historical and philosophical approaches to confessions, see George C. Thomas III, *A Philosophical Account of Coerced Self-Incrimination*, 5 YALE J.L. & HUMAN. 79 (1993) [hereinafter Thomas, *Philosophical Account*]; George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243 (1991). Whatever approach one adopts, some gross distinctions are possible — for example, asking a suspect whether he has anything to say versus a relentless interrogation with threats of physical coercion. *Miranda*'s casual assumption that these two situations are indistinguishable for Fifth Amendment purposes has always been controversial.

for example, feigning sympathy or pretending to give the suspect an excuse for the killing. In each of these situations, the suspect makes a free choice, based on the information available to him. What makes these routines questionable is not compulsion, as traditionally understood, but the unfairness that comes with making a choice based on incomplete or false information. This would not have to be described as compulsion. It might better be described as a failure of information.[103]

The focus in *Miranda* generally is on the police-created atmosphere that leads the suspect to believe that he has an obligation — legal, moral, or pragmatic — to answer police questions. For example, in discussing how to deal with a request for a lawyer, the interrogation manuals recommend that the suspect be told to save himself and his family the expense because all the police want is the truth from the suspect. "You can handle this by yourself."[104] In discussing how to respond to a refusal to answer questions, the manuals suggest noting the natural inference that anyone would draw from a refusal to answer, that the suspect is guilty. "So let's sit here and talk the whole thing over."[105] At one point, the Court concludes, after analyzing the police training manuals, that the interrogator's aim is to "persuade, trick, or cajole [the suspect]" into confessing.[106]

As *Miranda* critics are quick to point out, however, persuasion and cajoling are not compulsion, at least as it is classically defined.[107] Indeed, even trickery may not rise to the level of Fifth Amendment compulsion.[108] The focus in the opinion is on *Miranda*-style compulsion, a concept that seems more concerned with a level playing field and the "free choice" about answering police questions than anything else. Supplying information was thought sufficient to permit a "free choice," which strongly suggests that the compulsion concerning the Court was a failure of information rather than the level of pressure in any individual case.

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103. To be sure, on a "thick" account of compulsion, one with its roots in notions of positive liberty, a failure of relevant information can be viewed as compelling. *See generally* Thomas, *Philosophical Account*, *supra* note 102 (describing that account but rejecting it as an explanation of *Miranda*'s holding).

104. Miranda v. Arizona, 384 U.S. 436, 454 (1966) (quoting FRED G. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 112 (1962)).

105. *Id.* (quoting from INBAU & REID, *supra* note 104, at 111).

106. *Id.* at 455.

107. The Court engaged in a lengthy discussion of common law voluntariness in *Bram v. United States*, 168 U.S. 532 (1897).

108. In *Rhode Island v. Innis*, 446 U.S. 291, 303 (1980), for example, the police engaged in what appeared to be a form of trickery that the state supreme court characterized as "subtle compulsion," but the United States Supreme Court nonetheless found the resulting statements admissible. For a discussion of other forms of trickery employed by the police during interrogation, see generally Magid, *supra* note 95; White, *supra* note 95.

To say that *Miranda* was concerned with failure of information as to rights, however, is not to diminish its importance. The right to be told what one's rights are before they are waived is part of the fundamental belief structure underlying Anglo-American law. Our law assumes autonomous agents capable of acting in their own best interests. This entails at least some level of information about the consequences of conduct before one acts in a way that causes a right to be lost. That is, I believe, the explanation of *Miranda*'s long life. Whether or not the Fifth Amendment privilege should apply formally to the interrogation room, it might be that our culture believes, at some intuitive level, in precisely the kind of notice that *Miranda* requires. *Miranda* did not, after all, forbid police interrogation or require lawyers. It left the decision of whether to answer police questions up to presumably autonomous agents who have been given information about the consequences of answering. It might be that this is simply the fairest solution to the interrogation problem.

Viewing *Miranda* as due process fairness explains *Doyle v. Ohio*,[109] where the Court held that the state cannot cross-examine a defendant about his failure to mention his exculpatory defense when he was arrested and given *Miranda* warnings. The Court found an implicit "assurance" in the warnings that silence would "carry no penalty." Given this implicit promise, the Court held that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[110] Here, the warnings create the due process right, rather than vice-versa,[111] but *Doyle* shows an intimate connection between the warnings and the overall question of fairness to suspects.

As we saw earlier,[112] viewing *Miranda* as providing a threshold level of fairness in the interrogation room, rather than ameliorating the pressure of police interrogation, explains the *Miranda* waiver cases. It also explains why *Dickerson* embraced *Miranda*, however tepidly. *Miranda* was not a candidate to be overruled because, in *Dickerson*'s words, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[113] Translated: our culture, and even the police, accept the fairness of telling the suspect that he does not have to answer police questions and if he does it will hurt his case.

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109. 426 U.S. 610 (1976).

110. *Id.* at 618.

111. Indeed, in later cases, the Court held that there was no constitutional prohibition against using silence to impeach an exculpatory trial story when the police did not give *Miranda* warnings. *See* Fletcher v. Weir, 455 U.S. 603 (1982); Jenkins v. Anderson, 447 U.S. 231 (1980).

112. *See supra* notes 81-95 and accompanying text.

113. Dickerson v. United States, 120 S. Ct. 2326, 2336 (2000).

That *Miranda* is more about due process notice than neutralizing inherent compulsion seems clear enough in *Duckworth v. Eagan*.[114] *Duckworth* is rarely analyzed in the literature,[115] perhaps because it suggests a due process framework and thus is not easily analyzed under traditional approaches. In *Duckworth*, the police gave the following warnings:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.[116]

The problem here, of course, is that the warnings seem to promise an appointed lawyer only if the suspect is arraigned at some later time. If *Miranda* is understood as neutralizing the inherent compulsion of police interrogation, *Duckworth* might or might not be consistent with *Miranda*. Four members of the *Duckworth* Court dissented in an opinion by Justice Marshall that accused the majority of a "continuing debasement" of *Miranda*.[117] Marshall concluded that "[a]n unwitting suspect harboring uncertainty [about when he could have a lawyer] is precisely the sort of person who may feel compelled to talk 'voluntarily' to the police, without the presence of counsel, in an effort to extricate himself from his predicament."[118]

Marshall quoted from a state case holding similar warnings unconstitutional under *Miranda*:

> [The suspect] is effectively told that he can talk now or remain in custody — in an alien, friendless, harsh world — for an indeterminate length of time. To the average accused, still hoping at this stage to be home on time for dinner or to make it to work on time, the implication that his choice is to answer questions right away or remain in custody until that nebulous time "if and when" he goes to court is a coerced choice of the most obvious kind.[119]

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114. 492 U.S. 195 (1989).

115. A notable exception is Yale Kamisar, Duckworth v. Eagan: *A Little Noticed* Miranda *Case That May Cause Much Mischief*, 25 CRIM. L. BULL. 550 (1989) (concluding that *Duckworth* was wrongly decided).

116. *Duckworth*, 492 U.S. at 198.

117. *Id.* at 214 (Marshall, J., dissenting).

118. *Id.* at 217.

119. *Id.* (quoting Dickerson v. State, 276 N.E.2d 845, 852 (Ind. 1972) (DeBruler, J., concurring in result) (alteration in original)).

Marshall is correct that, if the principal function of the warnings is to dispel the inherent compulsion of police interrogation, the warnings in *Duckworth* don't seem particularly well fitted for the job.[120] If the principal idea, however, is to provide notice that a suspect does not have to answer and notice that his answers can be used against him in court, these warnings work just fine. However much pressure Eagan still felt to answer police questions after the warnings, he had been given the requisite notice that he did not have to talk to the police at all and that he could consult a lawyer before answering questions.

Duckworth contrasts quite nicely, on a due process theory, with *Edwards v. Arizona*.[121] In *Edwards*, the Burger Court held, without dissent,[122] that when the suspect requests counsel, police cannot reinitiate interrogation in the absence of counsel even if the suspect later waives his rights.[123] Putting *Duckworth* and *Edwards* together as due process cases, they stand for the rather simple proposition that the state must deliver what it promises, but it can make at least some changes in the *Miranda* model warnings. The state does not have to promise to provide an appointed lawyer during the current encounter with the police (*Duckworth*) but if the police promise counsel, the police must keep the promise to provide a lawyer during questioning if the suspect requests one (*Edwards*). Viewed as due process cases, rather than as an antidote to inherent compulsion in the interrogation room, these cases make perfect sense.

Michigan v. Mosley,[124] decided six years before *Edwards*, reached the opposite result when the suspect invoked his right to remain silent. The police terminated the initial interrogation, but a different team of interrogators questioned Mosley two hours later about a different crime, after once again providing warnings and, this time, getting a waiver. The Court held that this procedure complied with *Miranda*. The distinction between *Mosley* and *Edwards* seems consistent with, if not compelled by, a due process theory. The two kinds of promises are different. If the state promises the right to a lawyer during interrogation, and then begins to interrogate without providing a lawyer, that is a bright line failure to provide what is promised. If, on the other hand, the state promises that the suspect has a right to remain silent, the act of asking again, hours later, and about a different crime, is not the same kind of bright line failure. Indeed, as the Court pointed out in *Mosley*, when the suspect invoked his right to remain silent, the police

120. *See also* Kamisar, *supra* note 115, at 554.

121. 451 U.S. 477 (1981).

122. Justices Powell and Rehnquist concurred in the result. *See id.*

123. *See also* Minnick v. Mississippi, 498 U.S. 146 (1990) (making clear that *Edwards* requires the lawyer be physically present at any subsequent interrogation).

124. 423 U.S. 96 (1975).

immediately ceased questioning. The warnings do not promise that the police will never again seek to talk to the suspect, and the police action in *Mosley* thus seems consistent with a due process notice theory.

We saw earlier that the Court in *Quarles* held that a police officer who asks a rape suspect the whereabouts of a gun in a public place does not have to give *Miranda* warnings. The Court performed a cost-benefit balance to conclude that the threat to public safety more than outweighed the benefit of a rule designed to protect the Fifth Amendment privilege. What is missing, again, is an account of *why* the Fifth Amendment privilege should not apply when a gun might be in a supermarket at midnight. As Justice O'Connor recognized in her dissent, "since there is nothing about an exigency that makes custodial interrogation any less compelling, a principled application of *Miranda* requires that respondent's statement be suppressed."[125] That seems right even if *Miranda* is only a "weak force" application of the Fifth Amendment privilege.

If *Miranda* is best understood as requiring due process notice that the suspect does not have to answer questions, however, O'Connor's dissent misses the point. The majority's balance of the equities might be wrong, but the attack that the Court is ignoring Fifth Amendment compulsion goes nowhere. Due process is sufficiently flexible to permit — Professor Klein will likely say "amorphous enough to allow"[126]— different procedures depending on the cost to the party charged with the responsibility of providing notice. The Court requires actual notice to known or reasonably ascertainable creditors of an estate, for example, but notice by publication suffices for all other creditors.[127] The Court in *Quarles* concluded that the cost to suspects in terms of bearing compelling pressures is outweighed, in this instance, by the cost of greater risk to the public that follows from requiring notice. This is a starkly due process form of analysis. I personally think the Court got the balance wrong in *Quarles*, but the very act of balancing the social good versus the value of the Fifth Amendment privilege suggests that *Miranda* has become, at heart, a due process case.

Once we realize that the presumption of compulsion is not a doctrinal imperative, the Court's tendency to balance the equities when deciding how best to apply the *Miranda* exclusionary remedy becomes coherent, if not necessarily the best policy. Return to *Harris v. New*

125. New York v. Quarles, 467 U.S. 649, 665 (1984) (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor dissented from the Court's holding that the statement was admissible; she concurred in the judgment that the gun should be admitted, though she used a different analysis to reach that result.

126. Klein, Miranda*'s Exceptions*, *supra* note 28.

127. *See* Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988).

York,[128] holding that statements taken in violation of *Miranda* can be used to impeach. This holding is incoherent if *Miranda* creates a "strong force" presumption of compulsion, but it can easily be squared with a due process notice requirement (or a due process mechanism for determining when the *Miranda* "weak force" version of the privilege should apply). Although the analysis is cursory, *Harris* appears to be balancing the decreased incentive for police to give the warnings against the loss of trustworthy evidence[129] — a balance similar to what it would do later, and more clearly, in *Quarles*.

The Court also balances when deciding whether a *Miranda* violation taints other evidence discovered by means of the violation. In *Michigan v. Tucker*,[130] for example, the Court had to decide whether to suppress the testimony of a witness whose identity was discovered through a *Miranda* violation. On one side of the balance the Court put "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce."[131] On the other side, the Court put the interest in creating an effective sanction for the violation of a constitutional right. That side of the balance was lighter in *Tucker* than in *Miranda* because Tucker's statements were suppressed. The question was whether to "extend the excision further . . . and exclude relevant testimony of a third-party witness."[132] That balance came out against the defendant, as it did in the Fourth Amendment context.[133]

Physical evidence found by means of a Fourth Amendment violation is, on the other hand, generally suppressed as the poisoned fruit of the violation.[134] If a statement is "actually compelled" — as in *Brown v. Mississippi*[135]— a court would likely suppress physical evidence discovered from the statement. To admit the evidence is to reward the state for using coercion. To suppress the evidence brings confession law into parity with the Fourth Amendment. As to *Miranda* violations, however, the Court said in *Oregon v. Elstad*[136] that they have no poisoned fruit. The rationale should be familiar by now: errors "in administering the prophylactic *Miranda* procedures . . . should

128. 401 U.S. 222 (1971).

129. *See id.* at 225-26.

130. 417 U.S. 433 (1974).

131. *Id.* at 450.

132. *Id.* at 451.

133. *See* United States v. Ceccolini, 435 U.S. 268 (1978).

134. There are, of course, exceptions to this derivative evidence rule, but the details of Fourth Amendment law are beyond the scope of my paper.

135. 297 U.S. 278 (1936). The deputy sheriff and a gang of white men tortured confessions from black suspects. The deputy sheriff admitted the torture in court.

136. 470 U.S. 298 (1985).

not breed the same irremediable consequence as police infringement of the Fifth Amendment itself."[137]

My theory does not provide a different answer or form of analysis on the question of whether to exclude physical fruits or the testimony of a witness found by violating *Miranda.* A due process theory simply recognizes what the Court has been doing all along — balancing the notice violation with the interest in admitting reliable evidence. It makes more sense to balance under the flexible Due Process Clause than under a Fifth Amendment privilege that otherwise has no exceptions. The virtue of this approach is, admittedly, also its flaw, as Professor Klein notes in her Article.[138] Due process balancing is a pretty inexact science. Yet it is what the Court has been doing in *Miranda* cases for almost thirty years, and we should at least call it by its real name — due process.

But my notice theory does provide a more satisfying explanation for the *Elstad* holding that a violation of *Miranda* does not taint a later statement taken in compliance with *Miranda.* The Court sought to justify its holding by repeating the *Tucker* balance: "[T]he absence of any coercion or improper tactics undercuts the twin rationales — trustworthiness and deterrence" that would support a broader rule of exclusion.[139] If the *Miranda* concern is really about inherent compulsion, however, one can argue that Elstad gave the second statement knowing he had already incriminated himself and thus likely felt the compelling pressures of police interrogation all the more acutely. This argument persuaded the state court and the *Elstad* dissenters. Under a notice understanding of *Miranda* that does not presume compulsion, however, Elstad has no plausible argument. If all *Miranda* requires is notice, Elstad has to lose, for he received the notice that was required, and then made a statement.

There are, I believe, only four ways to line up *Dickerson* with *Miranda* and the many cases interpreting *Miranda.* First, one can simply accept the idea of a Fifth Amendment "weak force" privilege that requires notice but often permits a balance between the suspect's interests and the state's interest in the admission of reliable evidence. This leaves things as they were prior to *Dickerson* and is the least jarring solution. Those who, like me, find the idea of a "weak force" privilege to be ad hoc and unsatisfying have three choices. They can follow Justices Scalia and Thomas in *Dickerson* and insist that the "weak force" cases have deconstitutionalized *Miranda.* In that event,

137. *Id.* at 309. The facts of *Elstad* make clear that the officer did not intentionally omit the warning to gain an advantage, nor did he seek to exploit the first statement by, for example, reminding Elstad that he had already incriminated himself. Presumably, the derivative evidence consequences of that kind of police conduct remain unsettled.

138. *See* Klein, Miranda*'s Exceptions*, *supra* note 28.

139. *Elstad*, 470 U.S. at 308.

of course, Congress can replace the *Miranda* remedy with anything it chooses, and the states can ignore *Miranda* entirely. Paul Cassell chooses this option.[140]

Another option is to insist, dicta in *Dickerson* notwithstanding, that *Miranda* meant to apply a "strong force" privilege to the police station house. This requires revisiting, and probably overruling, most of the exceptions and limitations created by later Courts. The final option, like the first one, leaves the case law undisturbed. It is to find another constitutional "home" for *Miranda*, to drop the pretense that everything about *Miranda* is an extension of one kind or another of the Fifth Amendment privilege. *Miranda* is, I have argued, about fairness. Its logical home is in the Due Process Clause. If *Miranda* is viewed as creating a due process notice requirement, it makes perfect sense (whether or not it is the right approach for policy reasons) to have a public safety exception, to permit the use of statements taken in violation of *Miranda* for impeachment purposes, and to decide that *Miranda* has no derivative evidence consequences.

The due process option is a bit more jarring than accepting *Miranda* as a "weak force" privilege. I can, however, reduce the dislocation. If the reader is wedded to the idea that *Miranda* is about the Fifth Amendment privilege, I have argued that the Court's "weak force" doctrine, in which the *Miranda* presumption does not apply to certain categories of cases, is best understood as using a due process theory to decide when to withdraw the presumption of compulsion. Thus, whether *Miranda*'s notice requirement is wholly located in the Due Process Clause or whether the Clause simply tells the Court when not to suppress evidence obtained in violation of *Miranda*'s presumption of compulsion, it is the Due Process Clause that is doing the heavy lifting.

V. FITTING *MIRANDA* INTO DOCTRINAL DUE PROCESS

In this Part, I offer some tentative thoughts about how to fit *Miranda* into established due process doctrine. I begin with the *Miranda* opinion. While the Court relies heavily on the Fifth Amendment privilege, it does so in a way that stresses autonomy and human dignity, as well as the inherently compelling pressures of police interrogation. The denial of autonomy and human dignity by custodial interrogation might constitute a deprivation of a due process liberty interest.

In describing the cases before the Court, the *Miranda* opinion noted that, "[i]n each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation

140. *See* Paul G. Cassell, *The Statute That Time Forgot, 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175 (1999).

procedures. The *potentiality* for compulsion is forcefully apparent [in two of the cases]."[141] While there was no evidence of "physical coercion or patent psychological ploys . . . in none of these cases did the officers undertake . . . appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice."[142]

Still talking about the cases before the Court, the majority noted that the "interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. . . . not physical intimidation, but it is equally destructive of human dignity."[143] Perhaps most squarely relevant to my due process point, the Court concluded that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[144] These descriptions of the interrogation procedure persuade me that forcing a suspect to endure that procedure amounts to a deprivation of a due process interest in liberty.

The Fourteenth Amendment sometimes requires notice before the State imposes a restriction on liberty. A parolee, for example, has a right to notice of the potential revocation of his parole.[145] A prisoner has a right to notice that the prison officials intend to deprive him of good time credit on his sentence.[146] In the custodial interrogation context, the suspect might have a due process liberty interest not to be forced to endure interrogation. Even though the suspect is in custody, the police interrogation is a further deprivation of his liberty. To be sure, the marginal deprivation of liberty associated with enduring police interrogation is not as great as the marginal deprivation of liberty associated with loss of parole or good time credits. It is not clear, however, that the extent of the marginal deprivation is necessarily dispositive.

If interrogation intrudes on a due process liberty interest, the due process liberty cases seem to require warnings that a suspect has a right to remain silent and a right to consult with counsel, both of which permit the suspect to terminate the procedure that is depriving her of liberty. The warning that the answers can be used against her in court is more difficult to justify under this conception of the liberty interest that is at stake. Perhaps it can be justified as informing the suspect of

141. Miranda v. Arizona, 384 U.S. 436, 457 (1966) (emphasis added).

142. *Id.*

143. *Id.*

144. *Id.* at 455.

145. *See* Morrissey v. Brewer, 408 U.S. 471 (1972).

146. *See* Wolff v. McDonnell, 418 U.S. 539 (1974).

reasons why she might want to terminate the interrogation. Due process is, as I have said, flexible.

A second sort of due process liberty interest is the suspect's option to make an informed choice whether to answer police questions and risk providing the state with evidence against him that increases the risk of conviction. This is perhaps analogous to the parolee's interest in notice and a chance to contest the parole revocation hearing or the prisoner's right to notice and a chance to contest the loss of good time credits. The suspect has both a stronger and a weaker argument than the parolee or prisoner. It is stronger because a suspect is not yet convicted. He still benefits from the presumption of innocence, and the scope of his potential loss of liberty is almost total, rather than incremental as in the case of the parolee and, particularly, the prisoner, both of whom are already under state control. The suspect's argument is weaker because the notice given the prisoner and the parolee permits them to challenge directly the grounds the state has for a further deprivation of liberty. The suspect has to make a more attenuated causal argument that this liberty interest is threatened. He faces deprivation of liberty by means of a conviction only at a later proceeding, where the state has the burden of proving him guilty beyond a reasonable doubt, and where the state likely has evidence other than the statement he gave without making a fully informed choice to answer.

Dicta in some of the due process cases support this kind of causal chain. In *Mullane v. Central Hanover Bank & Trust Co.*,[147] the Court noted that "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[148] Given the frequent expression of concern in *Miranda* about free choice to decide whether to answer questions, it is conceivable that the lack of notice about the effect of answering infringes on the suspect's liberty interest in deciding whether to cooperate in his own conviction. The focus in the *Miranda* opinion is on the harm that would result from a statement that "was not made knowingly or competently because of the failure to apprise him of his rights."[149] If this argument is right, it provides ample justification not only for a duty to warn of the right to silence and to counsel but also for a duty to warn a suspect that his answers can be used against him in court.

Police interrogation threatens a suspect's liberty in another, more fundamental way. One historical explanation of the Fifth Amendment privilege asserts that it is wrong to compel someone to reveal his innermost self, his conscience, his beliefs. At least when the privilege

147. 339 U.S. 306 (1950).

148. *Id.* at 314.

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

was taking shape in England and colonial America, religious beliefs were constitutive of persons. To compel someone to disclose his religious belief was thus to "take" an aspect of his liberty.

Miranda quoted with enthusiastic approval language that the privilege grants a defendant the "right to a private enclave where he may lead a private life."[150] If the police do not warn the suspect that he has no duty to answer questions, they are intruding on this private enclave and infringing on the suspect's liberty interest in choosing whether to reveal his innermost thoughts. Of course, suspects today are not in any way like the religious dissenters of Tudor England. Rather, my claim is that we view state compelled responses to questions as an invasion of the liberty interest not to disclose what we wish to keep secret. If the police warn a suspect that he has no duty to answer questions and the suspect proceeds to give a statement, then it is fair to presume that the suspect chose to disclose his private thoughts. There is, then, no infringement of liberty.

The Framers of the Fourteenth Amendment might have contemplated a similar liberty interest. There is abundant evidence that the Fourteenth Amendment was understood to protect the free expression of ideas and, thus, to protect the person who utters words.[151] A colorful example of this concern was Congressman Price's observation that "if a citizen of a free State visiting a slave State expressed his opinion in reference to slavery he was treated without much ceremony to a coat of tar and feathers and a ride upon the rail."[152] Though these remarks referenced the time before the abolition of slavery, the speaker made clear that nothing had changed in the post-bellum South. Others in Congress echoed the concern about the lack of free speech in the South. Representative Mann of Pennsylvania noted that whoever "went down South was obliged to put a padlock on his mouth."[153] The South's repression of dissent on the race question was an issue of national importance. Michael Curtis has concluded, "Denial of First Amendment rights [by the Southern states] was a recurring theme" of the election of 1866.[154] The benevolent effect of protecting free speech in the South appears occasionally in the sparse records of the ratification debates in the state legislatures.[155]

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150. *Id.* at 460 (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

151. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 36-41, 50, 56 (1986).

152. CONG. GLOBE, 39th Cong., 1st Sess. 1066 (1868).

153. CURTIS, *supra* note 151, at 148. *See also id.* at 148-49 (quoting Representative M'Camant, also of Pennsylvania).

154. CURTIS, *supra* note 151, at 138. In Curtis's fascinating account of speeches, newspaper accounts, and reports from the election of 1866, covering fifteen pages, there is a single reference to problems in the criminal systems and dozens of references to deprivation of First Amendment freedoms. *See id.* at 131-45.

155. *See id.*

We can thus accept that the Framers and ratifying legislatures wished to require the states to permit freedom of speech and expression. When the Court began to entertain the idea that Fourteenth Amendment due process protected freedom of expression from state infringement, the analytical structure centered on the "liberty" protected by the Due Process Clause.[156] Although the liberty to decide whether to answer police questions is different from the liberty to express opinions without penalty, there are common threads. In both cases, the one claiming the liberty interest is facing the power of the state, and the state is seeking to use speech to harm the interests of the speaker/suspect.

If we understand the relevant liberty interest as a right to decide what the state is permitted to learn about our thoughts, it helps explain *Schmerber v. California*.[157] The issue in *Schmerber* was whether, by forcing the extraction of Schmerber's blood and thus revealing that he was intoxicated, the state was compelling him to be a witness against himself. The Court held that Schmerber's blood was not being a witness against him even though, as Justice Black pointed out in his dissent, the blood was "testifying" against Schmerber just as surely as if it had taken the witness stand.

Justice Black commented that it was a "strange hierarchy of values that allows a State to extract a human being's blood to convict him of a crime but proscribes compelled production of his lifeless papers."[158] At one level, there is much to commend Black's view that compelling a defendant to bear witness against himself violates the Fifth Amendment without regard to whether the human will is involved in the act of witnessing. One response to Justice Black is that when the state requires the human actor to choose to incriminate himself, it forces him to give up some aspect of the human personality, some dimension of autonomy or dignity.

This is a satisfying explanation for why the Court refused to accept Black's argument that Schmerber's blood was a witness against Schmerber. On this view of the Fifth Amendment privilege, it creates a kind of liberty interest in not facing compelling pressures to provide answers at trial. There is no particular reason why the Due Process Clause could not embody a similar liberty interest as applied

156. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925).

157. 384 U.S. 757 (1966).

158. *Id.* at 775 (Black, J., dissenting). The reference to "compelled production of his lifeless papers" was to *Boyd v. United States*, 116 U.S. 616 (1886), the Fifth Amendment aspect of which the Court has subsequently overruled. *See* Fisher v. United States, 425 U.S. 391 (1976). Nonetheless, sometimes the act of producing papers can itself be a testimonial act (as by implicitly authenticating documents) that cannot be compelled. Thus, Justice Black's larger point remains valid.

to police interrogation. This liberty interest would likely require a warning that the suspect need not answer.

I have tried to demonstrate that custodial interrogation without warnings directly infringes a due process liberty interest in deciding what information to provide police interrogators during custodial interrogation. I have also argued that a suspect should have a right to terminate the police interrogation, which is, itself, a deprivation of his due process liberty interest. If the reader is unpersuaded by either of these "pure" due process arguments, I am prepared to fall back on an alternative argument — one that least roils the waters of the *Miranda* doctrine. Even if *Miranda*'s presumption of compulsion is based on the Fifth Amendment privilege, when the Court decides whether to apply the *Miranda* exclusionary rule, it must engage in a due process balance that puts fairness to the suspect on one side and the interests of the state in accurate fact-finding on the other.

I concede that my arguments might not be adequate to justify creating a *Miranda* due process liberty interest if we were starting from scratch. Nor do I think that the *Miranda* Court intended to create a due process right to notice. I take the Court at its word that it sought to apply the Fifth Amendment privilege to the police interrogation room. The timidity of the application, however, coupled with a fairly hostile reaction to *Miranda* by later Courts, has, I believe, transformed *Miranda* into a due process case. To be sure, Professor Klein is right to claim that my theory mixes up procedural and substantive due process, producing a mulligan stew unrecognizable in the Court's current due process doctrine.[159] My reply, of course, is that it is the Court that has done the mixing, but that the stew is reasonably tasty.

VI. A FEW THOUGHTS ABOUT SUSAN KLEIN'S ARTICLE

I applaud Professor Klein's account of prophylactic rules. She argues that these rules should be considered temporary place holders necessary to protect an underlying constitutional right but "fully open to revision by Congress, federal executive action, and state legislative, executive or judicial action."[160] This account is consistent with the distinction I have drawn between "weak force" application of the privilege and a true prophylactic protection. It contemplates a rich and continuing dialogue among the Court, Congress, state legislatures, state and federal law enforcement agencies, and social scientists. The social scientists will tell us whether a particular right needs prophylactic protection and the shape and scope of the prophylaxis, and the other groups will contribute their expertise and communicate their political needs.

159. *See* Klein, Miranda*'s Exceptions*, *supra* note 28.

160. Klein, *supra* note 23, at 1054.

The frank recognition that the Court often creates rules designed to protect constitutional values, rather than always interpreting the Constitution itself, would go far toward creating a legitimacy for criminal procedure doctrine that has been largely missing since the Warren Court began to expand the criminal protections available in state court. Professor Klein apologizes for not being sufficiently cynical,[161] but I think she's right to call for this kind of dialogue. She admits to a concern about whether the Court is institutionally capable of doing a good job with empirical data — a concern that I share. The reliance on empirical data, however, provides a more satisfactory anchor than mere reliance on the intuition of the Court. Moreover, it finds a robust role for other institutions in protecting constitutional rights, a refreshing change from the Court's usual approach to the task of protecting rights.

Dickerson is, of course, inconsistent with Professor Klein's project. Rather than admit *Miranda* is prophylactic, and invite Congress to have another go at creating an alternative remedy, the Court woodenly insisted that *Miranda* was constitutional even though it gave no explanation of its relationship to the Fifth Amendment privilege. On Professor Klein's account, *Dickerson* is a missed opportunity for dialogue.[162] I agree with her, though on my account, the Court owed us no explanation of how *Miranda* is connected to the Fifth Amendment privilege because the Court has, in effect, already provided an explanation by moving *Miranda* to the Due Process Clause.

I don't claim that my *Miranda*-as-notice explanation fits perfectly with the entire opinion in *Miranda* or with all the language and analysis in the cases that followed. I like very much Susan Klein's alternative explanation of the *Miranda* exceptions. On her account, most of the *Miranda* exceptions can be explained as a sort of collective good-faith exception to the *Miranda* exclusionary rule. Except for *Quarles*,[163] the cases finding exceptions to *Miranda*'s rule of suppression involve failures to comply through inadvertence, rather than an attempt to gain an advantage over the suspect. In *Elstad*, the Court even stressed the minor, good-faith nature of the failure to provide *Miranda* warnings during the initial interaction.[164]

On this attractive account, the various collateral uses to which the state may put statements taken in violation of *Miranda* crucially depend on the good-faith nature of the violation. Should the police intentionally violate *Miranda* to gain an advantage, the state could then

161. *See* Klein, Miranda*'s Exceptions*, *supra* note 28.

162. *See* Klein, *supra* note 23, at 1077.

163. New York v. Quarles, 467 U.S. 649 (1984).

164. The Court noted that the violation was a "simple failure to administer the warnings," to be contrasted with "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will." Oregon v. Elstad, 470 U.S. 298, 309 (1985).

not benefit from the *Miranda* exceptions. This solves the problem of "questioning outside *Miranda*" that Professor Charles Weisselberg has documented.[165]

As intuitively appealing as this explanation is, its connection with the Fifth Amendment privilege is tenuous. It is hard to figure out what the officer's intentions have to do with the Fifth Amendment privilege not to be compelled to give answers unless we assume, as Professor Klein does, that an intentional violation of *Miranda* is more likely to be part of a coercive environment. But compulsion depends on the perception of the suspect, not the intent of the interrogator. To tell Elstad, "I think you were involved in a robbery" might or might not be compelling.[166] That the officer intended to evade *Miranda* does not make it more compelling. Whatever the value of the officer's intent as a bright line for locating violations of the Fifth Amendment privilege, that intent should be part of a due process balance. Perhaps Professor Klein has simply provided a better description of how the Court conducts the *Miranda* due process balance than I have managed to do!

CONCLUSION

It should not surprise us that no theory fits perfectly with all the *Miranda* "data." The *Miranda* doctrine has evolved over three decades, often with Courts that were at least somewhat hostile. I have attempted to show, throughout this Article, that a due process explanation of *Miranda* and its progeny is basically consistent with the thrust of the Court's *Miranda* opinion itself and is a better fit with the prescribed remedy, the waiver standard, and the subsequent case law than the two traditional explanations of *Miranda* — that it is co-extensive with the Fifth Amendment privilege or that it is a weak force application of the Fifth Amendment that sometimes does not function the same as the strong force version of the privilege. Professor Klein's theory of the *Miranda* exceptions is also a worthy alternative to these standard explanations, though I think her theory partakes of due process more than she admits.

When I was in law school, the seminal due process notice case in civil procedure was *Mullane v. Central Hanover Bank and Trust Co.*,[167] holding that the bank had to provide actual notice of a judicial settle-

165. This practice consists of obtaining statements by telling suspects that what they say cannot be used against them in court because they have not been given *Miranda* warnings. The police hope to get a statement that can be used to impeach or to find other evidence. Here the intentional nature of the violation is manifest. *See* Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121 (2001); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998).

166. *See Elstad*, 470 U.S. at 301 (describing an officer testifying that "I told Mr. Elstad that I felt he was involved in that [robbery]").

167. 339 U.S. 306 (1950).

ment to beneficiaries of a common trust fund if the bank knew their place of residence. At the time, and for decades thereafter, it never occurred to me that *Mullane* could have anything to do with *Miranda.* But that was, of course, because they were separated at birth. Today I see the family resemblance. *Miranda*, meet *Mullane*, your long-lost sibling.