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The Miranda Case Fifty Years Later

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CLOSING KEYNOTE ADDRESS

THE *MIRANDA* CASE FIFTY YEARS LATER

YALE KAMISAR*

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I. A LOOK BACK AT *MIRANDA*

A decade after the Supreme Court decided *Miranda v. Arizona*,¹ Geoffrey Stone took a close look at the eleven decisions the Court had handed down “concerning the scope and application of *Miranda*.”² As Stone observed, “[i]n ten of these cases, the Court interpreted *Miranda* so as not to exclude the challenged evidence.”³ In the eleventh case, the Court excluded the evidence on other grounds.⁴ Thus, Stone noted, ten years after the Court decided the case, “the Court ha[d] not held a single item of evidence inadmissible on the authority of *Miranda*.”⁵ Not a single item. To use baseball terminology, in *Miranda*’s first eleven “at bats,” it went zero for eleven.

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¹ 384 U.S. 436 (1966).

² Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 100; *see also* *United States v. Washington*, 431 U.S. 181 (1977); *United States v. Wong*, 431 U.S. 174 (1977); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam); *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Mandujano*, 425 U.S. 564 (1976); *Beckwith v. United States*, 425 U.S. 341 (1976); *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Oregon v. Hass*, 420 U.S. 714 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971).

³ Stone, *supra* note 2, at 100.

⁴ *Id.* (citing *Doyle*, 426 U.S. at 619).

⁵ *Id.* at 100-01. I agree with Frank Allen, who stated that:

For those of us who welcomed *Miranda*, this turned out to be deeply disappointing. But it would not have come as much of a surprise to those who remember the four Justices President Nixon appointed to the Supreme Court during his first term of office: Chief Justice Burger, Justice Blackmun, Justice Powell, and Justice Rehnquist.⁶

Before being appointed Chief Justice of the Supreme Court, then-Judge Burger of the Court of Appeals for the District of Columbia Circuit left no doubt, both in his dissenting opinions⁷ and in public speeches,⁸ that he was extremely unhappy with the Warren Court's criminal procedure cases.⁹

Chief Justice Burger may have been the most police-friendly Supreme Court Justice of all time—only with the possible exception of another Nixon appointee, William Rehnquist.¹⁰ In fact, shortly after Rehnquist became Assistant Attorney

[S]urely the most fundamental reasons for the [Warren] Court's loss of impetus lies in the social and political context of the Court in the late 1960's. That period was a time of social upheaval, violence in the ghettos, and disorder on the campuses. Fears of the breakdown of public order were widespread. Inevitably, the issue of law and order were [sic] politically exploited. In the presidential campaign of 1968 the bewildering problems of crime in the United States were represented simply as a war between the "peace forces" and the "criminal forces." The decision in *Miranda* evoked a chorus of criticism of the Court, ranging from the excited to the psychotic. Congress responded with the Omnibus Crime Control and Safe Streets Act of 1968, some provisions of which were obviously retaliatory. These events combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases.

Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 538-39 (footnotes omitted).

⁶ See Stone, *supra* note 2, at 99 n.2; see also Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965, 974-91 (2012).

⁷ See, e.g., *Frazier v. United States*, 419 F.2d 1161, 1176 (D.C. Cir. 1969) (Burger, J., concurring in part and dissenting in part) ("We are well on our way to forbidding any utterance of an accused to be used against him unless it is made in open court. Guilt or innocence becomes irrelevant in the criminal trial as we flounder in a morass of artificial rules poorly conceived and often impossible of application."); *Borum v. United States*, 380 F.2d 595, 602 (D.C. Cir. 1967) (Burger, J., dissenting) ("I suggest that the kind of nit-picking appellate review exhibited by reversal of this conviction may help explain why the public is losing confidence in the administration of justice. I suggest also that if we continue on this course we may well come to be known as a society incapable of defending itself—the impotent society.").

⁸ See, e.g., Warren E. Burger, *Who Will Watch the Watchmen?*, 14 AM. U. L. REV. 1, 23 (1964) ("We can all ponder whether any community is entitled to call itself an 'organized society' if it can find no way to solve this problem except by suppression of truth in the search for truth.").

⁹ See Kamisar, *supra* note 6, at 976-98 (chronicling then-Judge Burger's contempt for the Warren Court's criminal procedure jurisprudence, and describing how his views caught the attention of President Nixon).

¹⁰ See *id.* at 980-91 (describing the prominent roles Chief Justice Burger and Chief Justice Rehnquist played in "the downsizing and dismantling of *Miranda*").

General in charge of the Office of Legal Counsel, he urged the President to appoint a commission to consider whether such cases as *Miranda* needed to be corrected by a constitutional amendment.¹¹

As for Justice Blackmun and Justice Powell, neither one's appointment to the Court should have come as much of a surprise either. Chief Justice Burger had recommended then-Judge Blackmun, a close friend since their childhood days, to President Nixon for a nomination to the Court.¹² It was widely assumed that Justice Blackmun would follow the new Chief Justice's lead.¹³ As for Justice Powell, when the National Crime Commission issued its report in 1967, the future Justice turned out to be one of seven members of the Commission to sign a supplemental statement underscoring the need to return to the pre-*Miranda* "voluntariness" test¹⁴—even "[i]f, as now appears likely, a constitutional amendment is required."¹⁵

In retrospect, I think it is fair to say that *Miranda* never recovered from Nixon's four Supreme Court appointments.¹⁶

¹¹ Memorandum from William H. Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, to John W. Dean III, Assoc. Deputy Att'y Gen. (Apr. 1, 1969).

¹² See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 9-46 (2005).

¹³ See JOHN D. EHRlichman, WITNESS TO POWER: THE NIXON YEARS 129 (1982) (noting that Justice Blackmun "could be expected to follow closely the new Chief Justice's lead"). Indeed, in his first five years on the Court, Justice Blackmun voted with Justice Burger in over eighty-five percent of the closely divided cases. GREENHOUSE, *supra* note 12, at 186. In the next ten years, however, Justice Blackmun voted more often with Justice Brennan than with the Chief Justice. *Id.* ("By the next five-year period, 1975 to 1980, Blackmun was joining Brennan in 54.5 percent of the divided cases and Burger in 45.5 percent. During the final five years that he and Burger served together, he joined Brennan in 70.6% of the close cases and Burger in only 32.4 percent.").

¹⁴ PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 303 (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf> [<https://perma.cc/FUT4-UC2N>].

¹⁵ *Id.* at 308. The supplemental statement also emphasized the need to allow "for comment on the failure of [a defendant] to take the stand" in his or her own defense. *Id.*

¹⁶ I should recognize, however, that some thoughtful commentators have reached very different conclusions than I have regarding the impact of President Nixon's four appointments. See, e.g., JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 398 (1994) ("With the appointments of Burger and Blackmun and the later addition of Powell and Rehnquist, the conservatives had a decisive majority on most questions of criminals' rights. But to the distress of some and the relief of others, there was no sudden about-face. The conservative majority generally accepted the achievements of the Warren Court—but refined them, constrained them, and reduced their scope. The result was a new synthesis, based partly on the insights and innovations of the Warren Court and partly on the doubts and objections of its critics.").

II. THE THREE DISSENTS IN *MIRANDA*

Returning to the case itself, four Justices wrote three separate dissenting opinions in *Miranda*.¹⁷ In one way or another, each dissent assumed that *Miranda* would be a criminal justice disaster—that very few suspects, if any, would waive their rights.

Justice Clark was the most senior Justice to dissent in *Miranda*, but he spoke only for himself. Justice Clark maintained that there was “no significant support” for the view that “the Fifth Amendment privilege, in effect, forbids custodial interrogation.”¹⁸ This is an odd statement about *Miranda*—the majority never said anything like that—and it is unsupported by any plausible interpretation of the case. Rather, the majority in *Miranda* took some time spelling out what is, and what is not, “custodial interrogation.”¹⁹ Shortly after *Miranda* was decided, it remained to be seen what impact it would have on custodial interrogation. But *Miranda* did permit *some* still-to-be-determined interrogation to take place.²⁰

Justice Harlan, joined by Justices Stewart and White, wrote a long dissent.²¹ At one point, Harlan claimed (without any explanation) that “to *suggest* or *provide* counsel for the suspect simply invites the end of the interrogation.”²² It is not at all clear what Justice Harlan meant.²³

But, before getting to the final dissent, another word about the police and the right to a lawyer. *Miranda* does not automatically (or routinely) provide for

¹⁷ See *Miranda v. Arizona*, 384 U.S. 436, 499-504 (1966) (Clark, J., dissenting); *id.* at 504-26 (Harlan, J., dissenting); *id.* at 526-45 (White, J., dissenting).

¹⁸ *Id.* at 503 n.4 (Clark, J., dissenting).

¹⁹ See, e.g., *id.* at 444 (majority opinion) (“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”); *id.* at 477 (“The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way.”). The *Miranda* majority does tell us that “[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding.” *Id.* at 477. The majority added, however, that “[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.” *Id.* at 477-78.

²⁰ See Kamisar, *supra* note 6, at 971-72 (discussing some of the misperceptions pervasive in public opinion in the wake of *Miranda*).

²¹ See *Miranda*, 384 U.S. at 504-26 (Harlan, J., dissenting).

²² *Id.* at 517 (emphasis added).

²³ Of course, there is a huge gap between “suggesting” counsel and “providing” it.

one.²⁴ Rather, the suspect must ask for one.²⁵ In recent years it has become quite clear that most suspects wind up deciding *not* to ask for one.²⁶

Justice Harlan was not the only Justice who wrote a long dissenting opinion. Justice White, joined by Justices Harlan and Stewart, did so as well.²⁷ Of the three dissenting opinions written in *Miranda*, Justice White's struck me as the most powerful. At one point, however, Justice White simply skipped over the fact that those taken into custody were free to waive their rights *without ever meeting with a lawyer*.²⁸ The second time around, Justice White made a correction. He *did* say that a suspect could waive his right to counsel without ever meeting with a lawyer.²⁹ But his conclusion was still misleading because Justice White seemed to assume that a lawyer could still "advise the accused to remain silent"—could still rescue the suspect—*even though* the accused had already waived his right to counsel:

As the Court declares that the accused may not be interrogated without counsel present, *absent a waiver of the right to counsel*, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, *whether compelled or not*.³⁰

Justice White failed to make it clear that once the suspect waives his right to obtain the advice of a lawyer, the lawyer drops out of the picture *completely*. That is, *there is no longer any lawyer* to advise the accused to remain silent. To put it another way, once a suspect no longer seeks the advice of a lawyer, only two things can happen: (1) the suspect can remain silent, not saying anything to anyone; or (2) the suspect can start talking to other people in the vicinity (most likely other police officers or other prosecuting attorneys—because nobody else is likely to be in the vicinity).³¹

²⁴ See *Miranda*, 384 U.S. at 474 (majority opinion) (stating that the Court's decision did not mean "that each police station must have a 'station house lawyer' present at all times to advise prisoners"); Kamisar, *supra* note 6, at 979 (noting that "the *Miranda* Court plainly rejected" a rule "requiring the police to make sure that a custodial suspect *actually confers with a lawyer* before he can be questioned").

²⁵ See Kamisar, *supra* note 6, at 979 ("[T]he rule *Miranda* actually adopted . . . only calls for the police to *advise* a custodial suspect he has a right to a lawyer, and only grants him the right to a lawyer if he asks for one . . .").

²⁶ See *infra* note 44; see also Kamisar, *supra* note 6, at 980.

²⁷ See *Miranda*, 384 U.S. at 526-45 (White, J., dissenting).

²⁸ See *id.* at 536 ("[T]he Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel.").

²⁹ Compare *id.*, with *id.* at 537-38 (acknowledging the potential for suspects to waive their right to an attorney).

³⁰ *Id.* at 537-38 (emphasis added).

³¹ In recent years, numerous studies have concluded that approximately eighty percent of suspects do waive their rights. See *infra* note 44 and accompanying text (discussing the statistical impacts of *Miranda*).

III. WHAT IS WRONG IF THE POLICE ASK ONE OR TWO QUESTIONS?

At one point in his dissenting opinion, Justice White wondered what is wrong or inappropriate if the police ask a murder suspect a *single* question *without giving* any warning: “Did you kill your wife?”³² But if the police can ask only a single question, this is unlikely to be the one they will ask. The police realize that in order to be successful they must first build a rapport with the suspect. It takes a number of questions (and an appreciable amount of time) to achieve that. Moreover, if one question is unlikely to produce a “compelled” answer,³³ neither are *two* or *three* questions. They, too, do *not* produce a “compelled” confession. So, what’s wrong with asking a few questions, such as the following: “(1) How long were you married? (2) How many children do you have? (3) Was it a happy marriage? (4) Did you kill your wife?” If two or three questions were permitted, the issue would soon become whether the police questioning amounted to *sustained* or *persistent* questioning. This issue would give trial judges considerable room to maneuver—as trial judges once had.³⁴ I do not believe we want to return to the old days (especially when most police questioning is still not videotaped or tape-recorded).³⁵

³² See *Miranda*, 384 U.S. at 533-34 (White, J., dissenting) (arguing that under the majority’s decision, a suspect’s response to such a question, “if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent”).

³³ See, e.g., *id.* at 534 (“While one may say that the response was ‘involuntary’ in the sense the question provoked or was the occasion for the response and thus the defendant was induced to speak out when he might have remained silent if not arrested and not questioned, it is patently unsound to say the response is compelled.”).

³⁴ See Paul Marcus, *It’s Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 643-44 (2006) (asserting that “[t]he due process test offers almost no guidance for lawyers and judges,” and concluding that the voluntariness rules are “just as poorly and inconsistently applied as they were in the 1950s and 1960s,” and that “[i]n comparison, the imprecisely bright line rules of *Miranda* look very good”); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869-70 (1981) (observing that under the voluntariness test, “[n]ot only were conscientious trial judges left without guidance for resolving confession claims but they were virtually invited to give weight to their subjective preferences when performing the elusive task of balancing”); William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 980 (2011) (conceding that “the three decades before *Miranda* showed that a case-by-case voluntariness inquiry sorted badly, and at least part of the reason was that courts had a very hard time judging, case by case, the difference between good and bad police interrogation tactics”).

³⁵ As do many other commentators, George Thomas and Richard Leo favor “recording the relevant contact between the police and the suspect.” GEORGE C. THOMAS III & RICHARD A. LEO, *CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND* 220-21 (2012). “Perhaps one hundred other writers,” point out Thomas and Leo, “are on record recommending some form of recording.” *Id.* at 221. So far as I know, only one commentator has declined to add his name to the list: Lawrence Rosenthal. See Lawrence Rosenthal, *Against Orthodoxy: Miranda Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 607 (2007) (“[W]e cannot expect videotaping to curb what are already deemed abuses under current law . . .”).

IV. THE ROLE OF TELFORD TAYLOR

Of all the lawyers involved in *Miranda* and its companion cases, Telford Taylor was probably the most impressive. Shortly after the end of World War II, he had been a high-ranking Nuremberg prosecutor.³⁶ At the time he argued *Miranda*, he was a professor at Columbia Law School.³⁷

Taylor was the principal author of an amicus brief filed on behalf of twenty-seven states.³⁸ He also argued the case in the Supreme Court on behalf of these states. When it came to the waiver of rights, Taylor turned out to be even more emphatic—even more extreme—than any of the dissenting Justices in *Miranda* had been. Taylor, too, skipped over the possibility that suspects could and would waive their rights. In fact, he came close to ridiculing the idea that a significant number of suspects would do so. To quote from Taylor's brief:

Assuming that the privilege against self-incrimination is the principal legal element in the interrogation problem, virtually the only function of the station-house counsel will be to paste adhesive tape over his new clients' mouths. It is at best dubious whether such a practice would attract the cream of the bar.³⁹

V. THE LIMITED ROLE OF THE LAWYER

If one takes the Justices who dissented in the *Miranda* case seriously, one comes away with the impression that *the lawyer* decides whether there is a meeting between lawyer and client—not the suspect. Justice White's views to the contrary notwithstanding, *the suspect* "calls the shots"—not the lawyer. The lawyer plays no role whatever *unless* and *until* the suspect asks to meet with a lawyer if it ever gets that far. The lawyer may ultimately decide to paste tape over her new client's mouth,⁴⁰ but she does not get the opportunity to do so unless and until the potential client invokes her right to counsel. Thus, the lawyer is unable to do anything unless and until the suspect *makes the decision* to meet with a lawyer. The suspect never even finds out who his or her lawyer might have been—unless she makes the decision to meet with one.

VI. THE "COMPROMISE" STRUCK IN *MIRANDA*

As it turned out, the *Miranda* majority was listening to the four dissenters more closely than the *Miranda* dissenters themselves realized. As a result, the

³⁶ See Richard Severo, *Telford Taylor, Who Prosecuted Top Nazis at the Nuremberg War Trials, Is Dead at 90*, N.Y. TIMES (May 24, 1998), <http://www.nytimes.com/1998/05/24/nyregion/telford-taylor-who-prosecuted-top-nazis-nuremberg-war-trials-dead-90.html> [<https://perma.cc/X3N8-8M28>].

³⁷ See *id.*

³⁸ See Brief for New York et al. as Amici Curiae Supporting Respondents, *Miranda v. Arizona*, 384 U.S. 436 (1966) (Nos. 759-62, 584).

³⁹ *Id.* at 30.

⁴⁰ See *id.*

Miranda majority had worked out a compromise that the *Miranda* dissenters—based on what they wound up writing in their dissenting opinions—failed to fully appreciate. Peter Arenella has explained it well:

If the Court had followed the logic of its “inherently coercive” rationale [pertaining to police interrogation] to its bitter end, it would not have permitted suspects to waive their *Miranda* rights without the advice of counsel. But requiring the advice of counsel *before permitting* a valid *Miranda* waiver would have seriously eroded the police’s ability to engage in successful custodial interrogations. To avoid this law enforcement nightmare, the Court compromised by permitting waivers of *Miranda* rights *before* consultation with counsel.⁴¹

VII. SHOULD THERE BE MORE WARNINGS?

Convinced that a major reason Mirandized suspects talk to the police is the belief “that remaining silent will make them ‘look guilty’ and will be used against them as evidence of guilt,” Mark Godsey has proposed that the first two warnings “should be buttressed by a new ‘right to silence’ warning that provides something to the effect of: ‘If you choose to remain silent, your silence will not be used against you as evidence to suggest that you committed a crime simply because you refused to speak.’”⁴² There is something to be said for such a warning. The *Miranda* Court might have required the warning if it had focused on this specific issue in 1966. Since then, however, I would have to say that the “balance of power” between the suspect and the police has been worked out and the Court is unlikely to change it any more.

VIII. ONE REASON FOR SAYING THAT *MIRANDA* HAS FAILED

Fifteen years ago, George Thomas maintained that “by most accounts, *Miranda* has been a spectacular failure.”⁴³ One reason Thomas arrived at this conclusion is probably the high rate of “waiver of rights” when suspects are given the *Miranda* warnings—approximately eighty percent.⁴⁴ Very few so-

⁴¹ Peter Arenella, *Miranda Stories*, 20 HARV. J.L. & PUB. POL’Y 375, 384 (1997) (emphasis added).

⁴² Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 793 (2006).

⁴³ George C. Thomas III, *Miranda’s Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1092 (2003) (reviewing WELSH S. WHITE, *MIRANDA’S WANING PROTECTIONS* (2001)).

⁴⁴ See, e.g., DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE 224-25 n.117 (2003); THOMAS & LEO, *supra* note 35, at 188; LAWRENCE S. WRIGHTSMAN & MARY L. PITMAN, THE *MIRANDA* RULING 4 (2010); Godsey, *supra* note 42, at 792; Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 468 (1999); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996); Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1547-63 (2008); Tracey Maclin, *A Comprehensive Analysis*

called “Supreme Court experts” (and I was one of them fifty years ago) expected anything like that figure when *Miranda* was first decided.⁴⁵ It has become increasingly clear that some system of recording or videotaping how the warnings are delivered should be required. Indeed, support for such an approach now seems close to overwhelming.⁴⁶

IX. WHAT THOSE WHO STUDY HOW THE WARNINGS
ARE DELIVERED TELL US

In the meantime, those relatively few experts who have actually studied how the warnings are delivered should be taken quite seriously. One such expert reports the following:

Transcripts of modern interrogations indicate that police interrogators are often so overwhelmingly in control of the interrogation—dictating the pace of the questioning and the topics under discussion—that the suspect has no practical opportunity to invoke his rights during the most critical parts of the interrogation. In addition, the interrogator’s ability to connect with the suspect . . . often renders the suspect unable or disinclined to break the connection by asserting his rights. In many cases, the *Miranda* warnings are therefore inadequate to counteract the pressures generated by sophisticated interrogators.⁴⁷

Sometimes, for example, the interrogator will launch directly “into the interrogation without first asking the suspect whether he wished to waive his rights or even whether he was willing to speak to the police.”⁴⁸ Other times, the interrogator may maintain that “she can only inform the suspect of the charges against him and the likely disposition of the case *if* the suspect waives his *Miranda* rights.”⁴⁹ Still other times, the interrogator “may simply assert either

of the History of Interrogation Law, with Some Shots Directed at Miranda v. Arizona, 95 B.U. L. REV. 1387, 1410 (2015) (book review). Other studies corroborate this figure. According to one recent analysis, a study of prosecutions in the seventy-five largest counties in the country concluded that eighty-two percent of state felony defendants were indigent and, therefore, provided counsel by the state: “While the percentage may be somewhat lower in some states, court-provided counsel clearly dominates in felony cases.” See WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 11.4(f) (4th ed. 2015).

⁴⁵ However, based on their prior experience as Assistant United States Attorneys, two commentators did predict, only a year after *Miranda*, that many suspects *would* waive their rights. See Sheldon H. Elsen & Arthur Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645, 654 (1967) (noting that “it would seem that frequent assertion of rights by suspects is unlikely” and suggesting that “the ease of obtaining waivers may be a partial explanation”).

⁴⁶ See *supra* note 35 and accompanying text.

⁴⁷ Welsh S. White, *Miranda’s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1215 (2011) (footnotes omitted).

⁴⁸ Leo & White, *supra* note 44, at 438.

⁴⁹ *Id.* at 440 (emphasis added).

that the suspect will be in greater jeopardy if he does not waive *Miranda*, or that he will receive more lenient treatment if he does.”⁵⁰ Of course, none of this is permissible.

Sometimes, if the suspect cooperates, the police might even say that they will do their best to improve the suspect’s image. In one case, in an effort to get the suspect to waive his rights, the interrogator told him that if he did so the police would do their best to *improve* his image—he would no longer be viewed as “maniacal,”⁵¹ or as “a cold-hearted, stone killer.”⁵² Indeed, “if he spoke to the police and offered an explanation for his actions,” the police told him, “he would be viewed more favorably and in the end receive more lenient punishment from the system.”⁵³

We shall never know whether the world no longer considered this suspect a cold-hearted, maniacal killer when the police finished with him. But he *did* waive his *Miranda* rights, *did* make a statement admitting the killings, and *was convicted* of first-degree murder and sentenced to life in prison *without the possibility* of parole.⁵⁴ So in this case, as in an untold number of others, the interrogator ultimately prevailed.

X. *SALINAS v. TEXAS*

Over the decades, the Court has often (but *not* always) given *Miranda* a grudging reception. A recent example is the case of *Salinas v. Texas*.⁵⁵

This case seems to tell us that when a person is *not* in custody (and therefore *not* given any *Miranda* warnings at all), but is asked questions by the police that might incriminate him, he cannot simply remain silent. That is not enough. He or she must do something more. As the three-Justice plurality opinion told us: “A witness’ constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim.”⁵⁶

In response to the *Salinas* case, Tracey Maclin observed: “[T]he *Salinas* plurality contrasts the Fifth Amendment rights of an arrestee with the Fifth

⁵⁰ *Id.*

⁵¹ *Id.* at 441.

⁵² *Id.* at 443.

⁵³ *Id.* at 441.

⁵⁴ *Id.* at 444 & n.208.

⁵⁵ 133 S. Ct. 2174 (2013). Justice Alito wrote the principal opinion, which Chief Justice Roberts and Justice Kennedy joined. Because Justice Thomas, joined by the late Justice Scalia, concurred in the judgment on the ground that “[Genovevo] Salinas’ claim would fail even if he had invoked the privilege because the prosecutor’s comments regarding his precustodial silence did not compel him to give self-incriminating testimony,” *id.* at 2184 (Thomas, J., concurring), there was no opinion for the Court. Moreover, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented. *See id.* at 2185 (Breyer, J., dissenting).

⁵⁶ *Id.* at 2183 (plurality opinion).

Amendment rights of someone who voluntarily comes to the police station. The arrestee enjoys a right to silence, but the citizen who freely appears at the police station does not.”⁵⁷ However, continues Maclin: “[I]f the Fifth Amendment does not afford an absolute right to remain silent for someone like Salinas, why would an express invocation of the Fifth Amendment matter? . . . While the plurality opinion implies that an express invocation would make a constitutional difference, it never explains why.”⁵⁸

The essential facts of the *Salinas* case are as follows: Two brothers were killed.⁵⁹ There were no eyewitnesses.⁶⁰ But the police found six shotgun shell casings at the scene of the double-murder.⁶¹ The investigation led the police to the defendant.⁶² Eventually, Salinas agreed to give his shotgun to the police for shotgun testing and accompany them to the police station for questioning.⁶³ There was general agreement that the defendant’s interview with the police at the station lasted about one hour.⁶⁴ It was also agreed that the interview was “noncustodial”⁶⁵—that is, the defendant was free to leave and was told so.⁶⁶ Therefore, he was not given any *Miranda* warnings.⁶⁷

As Richard Leo has observed, “often police detectives do not need to give any *Miranda* warnings in order to interrogate criminal suspects.”⁶⁸ Leo explains, “[t]hey do this by simply telling the suspect that he is not under arrest and is free to leave.”⁶⁹ This is what happened in the *Salinas* case.⁷⁰

At one point during the interaction with police in *Salinas*, the interrogator asked the defendant “whether his shotgun ‘would match the shells recovered at the scene of the murder.’”⁷¹ The defendant declined to answer: “Instead, [he] ‘[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his

⁵⁷ Tracey Maclin, *The Right to Silence v. the Fifth Amendment*, 2016 U. CHI. LEGAL F. 255, 264.

⁵⁸ *Id.*

⁵⁹ *Salinas*, 133 S. Ct. at 2178 (plurality opinion).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 2180.

⁶⁷ *Id.* at 2178.

⁶⁸ Richard A. Leo, *False Confessions and the Constitution: Problems, Possibilities, and Solutions*, in *THE CONSTITUTION AND FUTURE OF THE CRIMINAL JUSTICE IN AMERICA* 169, 177 (John T. Parry & L. Song Richardson eds., 2013).

⁶⁹ *Id.*

⁷⁰ I have often wondered how frequently the suspect will be allowed to leave the area if he chooses to do so. But there seems to be no data on this.

⁷¹ *Salinas*, 133 S. Ct. at 2178 (plurality opinion).

hands in his lap, [and] began to tighten up.”⁷² After this line of questioning, the defendant remained silent for a few moments—the officer then proceeded to ask other questions, which the defendant *did* answer.⁷³

During his closing argument, the prosecutor reminded the jury that Salinas had remained silent when asked about the shotgun.⁷⁴ Specifically, “[t]he prosecutor told the jury . . . that ‘an *innocent* person’” would not have reacted the way Salinas did.⁷⁵ Instead, an innocent person, the prosecutor told the jury, would have said something like: “I didn’t do that. I wasn’t there.”⁷⁶ But Salinas “wouldn’t answer that question.”⁷⁷ In the end, Salinas was convicted of murder.⁷⁸

According to the plurality opinion by Justice Alito, the question presented was relatively simple:

The critical question is whether under the “circumstances” of this case, petitioner was deprived of the ability to voluntarily invoke the Fifth Amendment. He was not. . . . [I]t would have been a simple matter for [the defendant] to say that he was not answering the officer’s question on Fifth Amendment grounds. Because he failed to do so, the prosecution’s use of his noncustodial silence did *not* violate the Fifth Amendment.⁷⁹

The plurality seemingly thought the result of the case was straightforward as well, asserting that “a suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege,”⁸⁰ and stating that one’s “constitutional right to refuse to answer questions depends on his reasons for doing so, and *courts need to know those reasons to evaluate the merits of a Fifth Amendment claim.*”⁸¹

In discussing the *Salinas* case, I have had the benefit of reading two first-rate articles about this case, one by Brandon Garrett,⁸² and the other by Tracey Maclin.⁸³ As Garrett aptly observes:

The *Salinas* ruling . . . pos[es] special dangers for the innocent suspect. Informal or noncustodial questioning is often not carefully documented by

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 2185 (Breyer, J., dissenting) (quoting *Salinas v. State*, 368 S.W.3d 550, 556 (Tex. Crim. App. 2011)).

⁷⁶ *Id.* (quoting *Salinas*, 368 S.W.3d at 556).

⁷⁷ *Id.* (quoting *Salinas*, 368 S.W.3d at 556).

⁷⁸ *Id.* at 2178 (plurality opinion).

⁷⁹ *Id.* at 2180 (emphasis added).

⁸⁰ *Id.* at 2182.

⁸¹ *Id.* at 2183 (emphasis added).

⁸² Brandon L. Garrett, *Remaining Silent After Salinas*, 80 U. CHI. L. REV. DIALOGUE 116 (2013).

⁸³ Maclin, *supra* note 57.

police, just as in the *Salinas* case itself. As a result, such informal questioning poses special dangers that false confessions may result, even unintentionally, and may prove very difficult to uncover after the fact.⁸⁴

Garrett, and even more so Leo, are worried that a number of confessions have turned out to be false “to near or absolute certainty.”⁸⁵ Maclin, too, has made an apt observation, noting that “[t]here was no need to provide government officials ‘notice’ that *Salinas* was relying on the Fifth Amendment. The police knew [or could readily have assumed] that *Salinas*’s answer to the question regarding the ballistics test of the shotgun would be incriminating; that is why they asked the question.”⁸⁶

One of the lawyers who took part in the *Salinas* Supreme Court oral arguments was Ginger Anders, a member of the Solicitor General’s office.⁸⁷ As a general matter, Anders supported Texas’s position, but I found some of her statements difficult to reconcile with the position taken by Texas. At one point during oral arguments, Justice Kagan asked Anders, “[H]ow about if [the suspect] just says, you know, I don’t really want to answer that question?”⁸⁸

⁸⁴ Garrett, *supra* note 82, at 124. Garrett is understandably troubled by the *Salinas* case because rules requiring or encouraging the police to produce a record of interrogation might be “subverted” if the police were “encouraged to question first in noncustodial and undocumented settings.” *Id.* at 126.

⁸⁵ See Leo, *supra* note 68, at 171. In a recent book, Garrett points out that of the first 250 DNA exonerees, forty innocent people had falsely confessed. See BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 18 (2011). Consider, too, Leo’s recent comments on false confessions and wrongful convictions:

In the last two decades, scholars have documented several hundred confessions that have been *proven false to near or absolute certainty, as well as many others* that are probable or highly probable to be false. . . . No well-founded estimates have ever been published; nor is it presently possible for social scientists to provide one. Nevertheless, because most cases of disputed confessions are rarely publicized and likely to be unreported by the media, unacknowledged by police and prosecutors, and unrecognized by researchers, the documented cases of interrogation-induced false confessions almost certainly understate the true extent of the phenomenon and are thus likely to represent only the tip of a much larger problem.

Regardless of the frequency at which they occur, false confessions remain highly consequential because confession evidence itself is considered such incriminating and persuasive evidence of guilt. . . . Confessions strongly bias the perceptions and decision making of criminal justice officials and jurors alike because most people assume that a confession by its very nature must be true. Police, prosecutors, judges, jurors, and the media all tend to view confessions as self-authenticating while discounting false confessions as contrary to common sense, irrational, and self-destructive.

Leo, *supra* note 68, at 171 (emphasis added) (footnotes omitted).

⁸⁶ Maclin, *supra* note 57, at 281.

⁸⁷ See *Supreme Court Watch: Summary of Oral Argument in Salinas v. Texas*, FED. EVIDENCE REV.: EDITOR’S BLOG (Apr. 19, 2013), <http://federalevidence.com/blog/2013/april/supreme-court-watch-summary-oral-argument-salinas-v-texas> [<https://perma.cc/Q25P-9UVM>].

⁸⁸ Transcript of Oral Argument at 54-55, *Salinas v. Texas*, 133 S. Ct. 2174 (2013) (No. 12-

Anders replied: “I think, if [the suspect] expresses the desire not to answer the question, that is sufficient because he is saying, I’m not going to answer that, and, implicitly, he has a right not to do that.”⁸⁹ Later in the questioning, Justice Kagan asked: “[Suppose the suspect] realizes . . . that the police really do see him as a suspect. And he says to himself, I better stop answering, right? So he says, okay . . . I don’t want to answer any more questions. Is that an invocation [of the privilege against self-incrimination]?”⁹⁰ Anders replied: “I think that would be sufficient, yes . . .”⁹¹ Finally, Justice Kagan asked: “Or, if [the suspect] says, I don’t want to answer questions about *a particular topic*; is that an invocation?”⁹² Once again, Anders’s answer was: “I think that would be sufficient to invoke with respect to questions *on that topic*.”⁹³ At this point—I would say—Justice Alito’s arguments collapse!

Justice Kagan was not finished. She had something more to say. But from my vantage point, she was too gentle. All she said was: “That doesn’t sound like a clear rule. . . . [The rule being a suspect must state] I don’t want to answer those questions on a particular topic.”⁹⁴

May suspects who are not in custody, and thus not entitled to *Miranda* warnings, tell the police that certain topics are, in effect, “off limits”? According to the Solicitor General’s Office, the answer seems to be in the affirmative.⁹⁵

Justice Alito’s observation that “it would have been a simple matter for [Salinas] to say that he was not answering the officer’s question on Fifth Amendment grounds”⁹⁶ is true—as far as it goes. But it is also true that it “would have been a simple matter” *for the police* to tell Salinas that if he declined to answer any questions on Fifth Amendment grounds all he had to do was to say so.⁹⁷

As I have already noted, at another point, Justice Alito told us that “[a] witness’ constitutional right to refuse to answer questions depends on his reason for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim.”⁹⁸ But there are bound to be situations where (1) the suspect does not understand that he has *a right* not to be compelled to incriminate himself and/or (2) the suspect does not realize that he is in the process of *being*

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⁸⁹ *Id.* at 55.

⁹⁰ *Id.* at 56-57.

⁹¹ *Id.* at 57.

⁹² *Id.* (emphasis added).

⁹³ *Id.* (emphasis added).

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ *Salinas*, 133 S. Ct. at 2180 (plurality opinion).

⁹⁷ If *Salinas* had been in custody, as many are when they are being questioned, all the police had to do was to give *Salinas* one additional warning.

⁹⁸ *Salinas*, 133 S. Ct. at 2183 (plurality opinion).

compelled to incriminate himself. In those cases, shouldn't *somebody* tell the suspect *something*?