MIRANDA V. ARIZONA: BE GRATEFUL FOR SMALL FAVORS

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I am happy to be here and to be part of another Arnold Loewy symposium. Arnold always invites scholars to Texas Tech for thoughtful discussion. We have a good time, too. This morning we had a thoughtful keynote address by Judge Bernice Donald and a terrific panel, and I am sure the afternoon panels will be great, as well. But this is lunch, a time to munch and relax. So, I do not intend to offer some pieces of wisdom, even if I were capable of it, in my allotted twenty minutes. Rather, I am just going to think aloud. I want to ask a "what if" question or two and reflect on the more general question: Is the criminal justice system any better off because of *Miranda v. Arizona*?[1]

Let me start with a very negative answer to this question. Nearly two decades ago, Professor Alfredo Garcia wrote this:

> In the more than three decades since its genesis, the [*Miranda*] opinion has been transformed into a relic of a bygone era . . . . [T]he very Supreme Court that handed down the opinion has rendered *Miranda* meaningless through a series of contradictory and baffling interpretations. This . . . has not only damaged the Court's credibility, it has stripped the decision of its allure as the symbol of an attempt to balance individual rights against potential law enforcement abuse . . . . In short, *Miranda* is dead, it has been overruled, either directly or implicitly, and is irrelevant.[2]

Dead and irrelevant, he said.[3] One can infer from Professor Garcia's comments that he believed that, if *Miranda* had not been subjected to the "contradictory and baffling interpretations" that rendered it dead and

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* Distinguished University Professor and Frank R. Strong Chair in Law, The Ohio State University, Michael E. Moritz College of Law. This is a slightly revised version of my lunch comments on March 31, 2017 at the *Entering the Second Fifty Years of* Miranda Symposium. As such, this is meant to be read informally. Imagine yourself sitting at a table eating chicken or fish, some tasty vegetables, and having a non-alcoholic drink. I thank Professor Arnold Loewy for inviting me to participate at the conference. I am also grateful to George Thomas—my casebook partner, close friend, St. Louis Cardinals fan, and *Miranda* scholar—for his input. All errors are mine and not his (except for his being a Cardinals, rather than a Dodgers, fan).

1. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

2. Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 463 (1998).

3. *Id.* at 462.

irrelevant, *Miranda* might have brought about a proper balance in the interrogation room and a significant reduction in law enforcement abuse.[4]

I will leave aside, for right now, the question of whether the *Miranda* of 1966, left untouched, would have had the profound effect that its critics feared and supporters wished. What is certainly clear is that the *Miranda* of 1966 is neither the *Miranda* that existed when Professor Garcia metaphorically eulogized it, nor the one we know now.[5]

I will only mention two of the more obvious ways that the post-*Miranda*, anti-*Miranda* Court undermined the case. First, and most obviously, *Miranda* was essentially de-constitutionalized.[6] We went from the Warren Court rhapsodizing about the Fifth Amendment,[7] and seemingly suggesting to friend and foe alike that custodial interrogation in the absence of warnings violated the Fifth Amendment, to the later declaration that *Miranda* did nothing more than create a prophylaxis—meaning a violation of *Miranda* was not in itself a violation of the Fifth Amendment.[8] And with *Miranda* effectively severed from the Constitution in this way, the Supreme Court could later make it possible for prosecutors to use the fruits of *Miranda* violations in nearly all circumstances, thereby weakening its deterrent value.[9]

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4. *See generally id.*

5. *Compare Miranda*, 384 U.S. 436, *with* Garcia, *supra* note 2 (illustrating how subsequent Supreme Court cases have contradicted the Court's holding in *Miranda*).

6. Garcia, *supra* note 2, at 462.

7. *Miranda*, 384 U.S. at 458–66. Part II of *Miranda*, is well worth reading or re-reading. *See id*. Chief Justice Warren provides a classic and eloquent summary of the history leading to the inclusion of the privilege against compulsory self-incrimination in the Bill of Rights. *Id.* He wrote: "We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times." *Id.* at 458. Quoting and citing earlier Supreme Court opinions, Chief Justice Warren described the privilege as a "noble principle," a "hallmark of our democracy," and "[an] essential mainstay of our adversary system . . . founded on a complex of values." *Id.* at 460. That "complex of values," he wrote, "point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Id.*

8. In *Michigan v. Tucker*, the Court per Justice Rehnquist, stated that *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead measures to ensure that the right against compulsory self-incrimination [is] protected." Michigan v. Tucker, 417 U.S. 433, 444 (1974). The Court distinguished between police conduct that "directly infringe[s] upon [a person's] right against compulsory self-incrimination" and "the prophylactic rules [in *Miranda*] developed to protect that right." *Id.* at 439. Likewise, in *Oregon v. Elstad*, Justice O'Connor observed that the "*Miranda* exclusionary rule . . . serves the Fifth Amendment *and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.*" Oregon v. Elstad, 470 U.S. 298, 306 (1985) (emphasis added). It should be observed that, in *Dickerson v. United States*, Chief Justice Rehnquist characterized *Miranda* as a "constitutional decision," but the rules treating *Miranda* like a mere prophylaxis, rather than a full-fledged constitutional doctrine, continued to be recognized. Dickerson v. United States, 530 U.S. 428, 432 (2000).

9. The "fruit of the poisonous tree" doctrine "assumes the existence of a constitutional violation." *Elstad*, 470 U.S. at 305 (distinguishing *Miranda* violations from fruit of the poisonous tree Fourth Amendment violations). Because a person whose *Miranda* rights are violated "has suffered no identifiable constitutional harm," the fruit of a *Miranda* violation is admissible, whether that fruit is a third party's testimony, an article of evidence, or even the accused's subsequent voluntary statements. *Id.* at 307–08. Similarly, a statement obtained in violation of *Miranda* may be used to impeach the defendant's testimony,

But the fruit of the poisonous tree doctrine only comes into play if there is a *Miranda* violation in the first place,[10] and the anti-*Miranda* Court has made it nearly impossible for the police to violate *Miranda*.[11] All the police must do now is read the *Miranda* warnings to a custodial suspect in a perfunctory fashion, perhaps ask the suspect if she understands what she has been told, receive some sort of positive acknowledgement from the suspect, and then seek a waiver. And what does it take to prove a valid waiver beyond an acknowledgement of comprehension? According to *Miranda*—that is, the 1966 version—"[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."[12] How heavy is that burden? The anti-*Miranda* Court later announced that the burden is "preponderance of the evidence," the *lightest* level of burden of proof.[13] Continuing, *Miranda* stated:

> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a . . . waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.[14]

So we were told that an express statement *could* constitute a waiver, but it will not be presumed from silence.[15] We subsequently learned, however, that a waiver of the rights to counsel and silence may lawfully be proven—by the "heavy burden" of preponderance of the evidence—by implication.[16] And perhaps most stunningly, we have now learned that the suspect must expressly and unambiguously invoke her wish for an attorney *and her right to silence*.[17] Remaining silent for a long time, but not expressly invoking the

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whereas a compelled statement—a true violation of the Fifth Amendment—cannot be used to impeach a defendant. New Jersey v. Portash, 440 U.S. 450, 459 (1979); Harris v. New York, 401 U.S. 222, 225–26 (1971).

10. *See* United States v. Patane, 542 U.S. 630 (2004).

11. *See* Berghuis v. Thompkins, 560 U.S. 370 (2010).

12. *Miranda*, 384 U.S. at 475.

13. Colorado v. Connelly, 479 U.S. 157 (1986).

14. *Miranda*, 384 U.S. at 475.

15. *Id.*

16. North Carolina v. Butler, 441 U.S. 369, 373 (1979) (stating that, despite the language from *Miranda*, the court "did not hold that such an express statement is indispensable to a finding of waiver"). The Court subsequently conceded that "[s]ome language in *Miranda* could be read to indicate that waivers are difficult to establish absent an explicit written waiver or a formal, express oral statement," but "[t]he course of decisions since *Miranda* . . . demonstrates that waivers can be established even absent formal or express statements of waiver . . . ." *Berghuis*, 560 U.S. at 383.

17. Davis v. United States, 512 U.S. 452, 459 (1994) (stating that "the suspect must unambiguously request counsel," otherwise an officer need not cease questioning the suspect in the absence of counsel); *see also Berghuis*, 560 U.S. at 381–82 (invoking the *Davis* rule in the context of the right to remain silent).

right to silence, does not constitute an automatic invocation of the Fifth Amendment right.[18] Put differently, after a suspect is informed that she has a right to remain silent, that right is probably not invoked unless she is *not* silent. Rather, it is invoked when she speaks up to assert her right to remain silent.[19]

So even if we do not go so far as to say that *Miranda* died at some point many years ago, Professor Garcia is certainly correct that the post-*Miranda* Court severely cut it down.[20] That leads me to my primary question for today, a what-if question that I realize is entirely unanswerable.[21] But it is one that plagues me more than you might imagine for a number of reasons not entirely related to today's topic. My out-of-the-blue question is: What if Hubert Humphrey, rather than Richard Nixon, had become President of the United States in 1968?[22] Would what goes on in the interrogation room be all that different than it is today?

I want to come clean about this, sort of Oprah-style. I feel ashamed of the fact that, in my first opportunity to vote in 1968, my opposition to the Vietnam War and Hubert Humphrey's all-too-exuberant support of it, made me vote—to demonstrate my purist principles—for a meaningless third-party candidate. Consequently, other Vietnam War opponents and I helped Richard Nixon, in what was a very close election,[23] defeat a man who, except for Vietnam, shared many of my progressive principles. *Mea culpa*. Okay, now, let me proceed.

We should not forget that *Miranda*, decided only by a 5-4 margin, was announced during the hey-day of the Warren Court era.[24] At this time in our constitutional history, the Court was more inclined to protect the rights of the accused than ever before—or ever since.[25] The "ever since," however, was not inevitable. Richard Nixon had the opportunity to fill four seats on the

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18. In *Berghuis v. Thompkins*, the custodial suspect remained "'[l]argely' silent during the interrogation, which lasted about three hours," until he finally made incriminating statements. *Berghuis*, 560 U.S. at 375. The Court held that the suspect's silence did not constitute an invocation of his Fifth Amendment privilege. *Id.*

19. *Id.*

20. *See* Garcia, *supra* note 2.

21. *Id.*

22. As I said, that question is unanswerable. I might as well ask: Who would have been elected President in 2016 if Donald Trump had been born into a middle-class family rather than receiving a "small" gift/loan of fourteen million dollars from his father? *Donald Trump Says He Got Only a 'Small Loan' from His Father. Depends on Your Definition of 'Small'*, FORTUNE (Sept. 26, 2016, 9:56 PM), http://fortune.com/2016/09/26/presidential-debate-donald-trump-business/.

23. *See 1968 Presidential General Election Results*, U.S. ELECTION ATLAS, http://uselectionatlas.org/RESULTS/national.php?year=1968 (lasted visited Nov. 29, 2016). The Nixon-Agnew ticket received 43.42% of the popular vote, compared to 42.72% for Humphrey-Muskie (George Wallace ran as a strong third-party candidate). *Id.*

24. *See* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT–A JUDICIAL BIOGRAPHY 588–95 (1983).

25. *Id.* at 586–95.

Supreme Court before he was forced out of the White House by his crimes—four seats that Hubert Humphrey would have filled had he been elected.

Earl Warren sent a retirement letter (but without a retirement date) to President Lyndon Johnson on June 13, 1968.[26] It was apparently Earl Warren's intention to have Johnson fill his seat rather than run the risk that Nixon, whom Republican Warren considered contemptible, might win the election and fill the vacancy.[27] However, politics and Johnson's unfortunate choice of Abe Fortas to fill Warren's seat prevented that succession from occurring in the Summer of 1968.[28] Instead, with the new Court term about to commence with only eight justices, President Johnson asked Warren to hang on as Chief Justice until after the election, which Warren did.[29] Thus, we ended up with Richard Nixon—who ran for office on a law-and-order agenda, who accused the Supreme Court of being soft on crime, and who promised voters to fill vacancies on the Court with those who would not "weaken[] the peace forces as against the criminal forces in this country"[30]—appointing Chief Justice Burger to fill Earl Warren's seat.[31]

A year later, Nixon appointed Harry Blackmun to replace Abe Fortas. Thus, after little more than a year in office, President Nixon lived up to his promise: the 5-4 *Miranda* decision had lost two members of the majority, including its spokesman.[32] Essentially, the *Miranda* of 1966 was dead by 1970, even if we did not know it yet. It was waiting to become the victim of the minor and not-so-minor knife cuts that would follow. And of course, with the Nixon appointments in 1972 of Justice Lewis Powell (replacing Justice Hugo Black) and Justice William Rehnquist (replacing thoughtful conservative Justice John Marshall Harlan II), Nixon was able to harden opposition to *Miranda* by bringing on younger dissenters.[33]

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26. *See generally* Anthony Lewis, *Warren Firm on Retiring; Leaves Date Up to Nixon*, N.Y. TIMES (Nov. 15, 1968), http://jfk.hood.edu/Collection/White%20Materials/White%20Assassination%20Clippings%20Folders/Warren%20Resignation/Warren%20054.pdf ("[Warren] wrote President Johnson last June 13 . . . invoking the provision of law under which Federal judges may retire.").

27. *See generally* Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 927 (1983) ("Warren announced his retirement in 1968 in order to prevent the appointment to the Chief Justiceship from going to Nixon.").

28. *See generally* Linda Greenhouse, *Ex-Justice Abe Fortas Dies At 71; Shaped Historic Rulings on Rights*, N.Y. TIMES (Apr. 7, 1982), www.nytimes.com/1982/04/07/obituaries/ex-justice-abe-fortas-dies-at-71-shaped-historic-rulings-on-rights.html?.

29. *See* SCHWARTZ, *supra* note 24, at 720–22 (discussing these events fully).

30. LIVA BAKER, *MIRANDA*: CRIME, LAW AND POLITICS 245–46 (1st ed. 1983).

31. *See* Greenhouse, *supra* note 28 ("The post that was to have been Justice Fortas's went to Warren E. Burger a year later.")

32. *See id.*

33. *See generally* Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 90*, N.Y. TIMES (Aug. 26, 1998), www.nytimes.com/1998/08/26/US/lewis-powell-crucial-centrist-justice-dies-at-90.html; Linda Greenhouse, *William H. Rehnquist, Chief Justice of Supreme Court, Is Dead at 80*, N.Y. TIMES (Sep. 4, 2005), www.nytimes.com/2005/09/04/politics/william-h-rehnquist-chief-justice-of-supreme-court-is-deat-at-80.html.

I return to my question: What if? Hubert Humphrey's background suggests that there is an excellent chance he would have filled the four[34] seats with persons reasonably sympathetic to the rights of the accused.[35] He came from Minnesota's then highly progressive Democratic Farmer-Labor (DFL) Party,[36] the party of fellow Minnesotan Walter Mondale. Mondale was instrumental in organizing state attorneys general to file an *amicus* brief in *Gideon v. Wainwright*[37] in support of the constitutional right of indigent defendants to trial counsel.[38] So it is likely that the *Miranda* majority would have been maintained and even strengthened in numbers.[39]

So, what then? This scenario probably would have meant not just that *Miranda*'s core would have been preserved, but that it would gradually have been strengthened by a tribunal that believed in it.[40] And the stronger version of *Miranda* might have been strong enough to survive the Reagan and now, Trump years. After all, it is harder to chop down or seriously damage a mature tree than one in its infancy.

So, how might *Miranda* have been strengthened? Perhaps a post- and pro-*Miranda* Supreme Court might have taken a step that the five-member majority in *Miranda* did not.[41] Consider: Custodial interrogations are inherently coercive, *Miranda* said. OK, fine. But we were also told that suspects may voluntarily waive their rights to silence and counsel in this

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34. *See supra* text accompanying notes 31–33 (discussing the four Supreme Court appointments made during Nixon's presidency). In fact, if Humphrey had served two terms, he would have had a fifth seat to fill: that of William Douglas, another member of the *Miranda* majority. *See William O. Douglas: United States Jurist*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/william-o-douglas (last visited Oct. 10, 2017) (detailing Justice Douglas's retirement in 1975). President Gerald Ford filled that seat after Nixon's resignation. *See generally* Bob Schieffer, *The Legacies of Stevens, and Gerald Ford*, CBS NEWS (Apr. 11, 2010, 11:05 AM), https://www.cbsnews.com/news/the-legacies-of-stevens-and-gerald-ford/ (discussing Ford's appointment of Justice Stevens).

35. *See generally Hubert H. Humphrey, 38th Vice President (1965-1969)*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/VP_Hubert_Humphrey.htm (last visited Jan. 2, 2017) (discussing Humphrey's liberalism throughout his career).

36. *See Overview & DFL History*, MINN. DFL, https://www.dfl.org/overview-dfl-history1/ (last visited Oct. 10, 2017). The DFL Party was the party that elected such strong liberals to the Senate as anti-war advocate Eugene McCarthy, Paul Wellstone, and Walter Mondale.

37. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963).

38. Yale Kamisar, Miranda*, the Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1082 (1984) (reviewing BAKER, *supra* note 30, and recounting that Mondale "approached virtually every one of [his] counterparts and urged them to support Gideon's claim").

39. *See* Steven Franklin, *How Would America Be Different If Humphrey Had Beaten Nixon in 1968?*, QUORA (Apr. 4, 2015), https://www.quora.com/How-would-America-be-different-if-Humphrey-had-beaten-Nixon-in-1968 ("In the eight years of the Nixon and Ford Administrations, five vacancies on the U.S. Supreme Court were filled . . . . Clearly a President Humphrey would have made different selections—men and perhaps women with more liberal leanings—and certain landmark cases might have been resolved quite differently.").

40. *See generally id.* (hypothesizing that, with a Humphrey victory in 1968, "certain landmark cases might have been resolved quite differently").

41. Garcia, *supra* note 2.

"inherently coercive" atmosphere.[42] Now, telling a person he has rights may help reduce the coercion, but if we accept the *Miranda* Court's premise, does it seem likely that intoning those warnings, by itself, dispels the coercion so as to legitimize a waiver of rights? I doubt it, and I wonder if a stronger *Miranda* Court, one that could have afforded to lose a vote and still maintain a majority, might have said that the only genuine way to ensure a citizen's Fifth Amendment privilege is to have a lawyer present in the interrogation room before any waiver occurs. Then, if the suspect wants to waive his rights after speaking to a lawyer, he could do so.[43] In England, I believe that at least in the major cities there is a "police station duty solicitor," stationhouse lawyers, immediately available to advise suspects.[44] Why not here?

If the *Miranda* Court or my imaginary Humphrey Court required a lawyer to be present before a waiver could be taken, that would truly have changed the way criminal investigations are conducted.[45] Of course, any competent lawyer would advise her client to keep his mouth shut, at least until they could talk more fully and the lawyer could determine what is in the longer-term best interests of her client.[46] This would have required police officers to turn to other investigatory means—that is, technological surveillance, DNA, and other reliable forms of forensic evidence—rather than rely so heavily on confessions.[47]

Perhaps, a "no-waiver-without-a-lawyer" rule would have been too radical for the Supreme Court, even one emboldened by a larger majority.[48] However, there is one change in the law of *Miranda* I think almost certainly would have occurred. Given what the *Miranda* opinion itself said about waiver, there is a good chance that the Supreme Court ultimately would have required that waivers be expressed, in writing, or perhaps today, by videotape.[49] Implied waivers would have been rejected.[50]

Assuming this prediction is correct, another question arises: How fewer waivers would there be in this imagined world in which waivers could only be expressed in writing (or by video recording)? I have come to the view that the *Miranda* of 1966 left unharmed (or even a *Miranda* strengthened by a

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42. *See* Miranda v. Arizona, 384 U.S. 436, 534 (1966); Escobedo v. Illinois 378 U.S. 478, 490 (1964).

43. Garcia, *supra* note 2, at 471.

44. Nicola Morgan, *The Role of a Duty Solicitor*, CNL, https://enllegal.co.uk/news/the-role-of-a-duty-solicitor/ (last visited Nov. 8, 2017) (explaining that this solicitor is available while in police custody either in person, by telephone, or both).

45. *See* Kamisar, *supra* note 38, at 1077.

46. Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1424 (1985).

47. *See* Kamisar, *supra* note 38, at 1084.

48. *See id.* at 1077.

49. *Cf.* Miranda v. Arizona, 384 U.S. 436, 475–76 (1966) (explaining that the Court imposed the burden on the government of proving that a defendant voluntarily waived his rights to silence and retained or appointed counsel due to the isolated nature of the interrogations and because the state alone has evidence that the defendant waived his rights).

50. *See generally id.*

larger majority requiring express waivers, but not requiring a lawyer in the interrogation room pre-waiver) would have done little to reduce the number of confessions secured. The fears of *Miranda* opponents were probably unnecessary.

Here is my somewhat convoluted reason for thinking this. The Supreme Court in *Schneckloth v. Bustamonte*[51] held that the police seeking consent to conduct a warrantless search need not inform an individual of her right to refuse consent.[52] Subsequently, however, in *State v. Johnson*, the New Jersey Supreme Court rejected *Schneckloth* pursuant to its state constitution.[53] In response to *Johnson*, New Jersey state police developed a written consent form that an individual was required to sign before the police could conduct a consent-based search.[54] Thus, in this search-and-seizure context, New Jersey law comes pretty close to the waiver rule I am hypothesizing for my *Miranda*-plus world.

What happened in New Jersey? Happily, we have some data because years later, as part of a consent decree to settle a federal racial profiling lawsuit, New Jersey agreed to collect and regularly report various sorts of data on police-conducted automobile stops—including data on consent requests.[55] And we learned that, for one reported period cited by the New Jersey Supreme Court, 95% (yes, 95%) of automobile drivers from whom consent was requested—and who presumably knew that they could say no—granted consent expressly and in writing to have their car searched.[56]

Is this because those granting consent had nothing to hide? Hardly. Looking at other data made available as a result of the consent decree, Professor George Thomas has demonstrated that in approximately 85% of cases in which a driver consented to a car search, incriminating evidence was discovered.[57] That means that 85% of guilty drivers, presumably almost all of whom knew their vehicle contained evidence of guilt, nonetheless consented to searches that they were told they could refuse.[58] Further analysis by Professor Thomas, based on a random sampling of cases, suggests that, even when one discounts cases of involuntarily-obtained

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51. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

52. *Id.*

53. State v. Johnson, 346 A.2d 66, 68 (N.J. 1975). The New Jersey Supreme Court later went further and held that the police may not seek consent to search an automobile unless they have reasonable suspicion of criminal wrongdoing. State v. Carty, 790 A.2d 903, 908 (N.J. 2002).

54. *Id.* at 907.

55. *See* Noah Kupferberg, *Transparency: A New Role for Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 138–41 (2008).

56. *Carty*, 790 A.2d at 910–11 (compiling data sets found in *Monitor's Second Report: Long-term Compliance Audit*, at 8 (Jan. 10, 2001), *Monitors' Third Report: Long-Term Compliance Audit*, at 8 (Apr. 2001), and *Monitors' Fourth Report: Long-Term Compliance Audit*, at 8 (July 17, 2001)).

57. George C. Thomas III, Miranda*'s Spider Web*, 97 B.U. L. REV. 1215, 1225 (2017).

58. *Id*.

consent, at least 60% of guilty suspects voluntarily consented to a search of their vehicle.[59]

Car searches on the road seem like a rather straightforward situation, particularly compared to *Miranda* cases.[60] Drivers who consent are not being held in a police station, they are standing on a public street or highway, in the open, which should make denying consent somewhat easier than for custodial suspects held in the foreign atmosphere of an interrogation room.[61] Moreover, some of these drivers certainly had passengers—friends or family—nearby to buttress their self-confidence, unlike interrogation suspects held incommunicado. Finally, the suspect in the interrogation room may unwisely believe that she can resist the interrogation officers' tactics and keep her guilty secrets to herself, but guilty drivers who consent to a full car search presumably know that their consent guarantees that what they have hidden will be discovered.[62] But, consent they often do.[63]

Why would this be?[64] Of course, I do not know. Maybe there is a built-in deference to authority. Perhaps it is just plain rashness. Or it may be that too many suspects do not actually understand what they have been told.[65] Whatever the answer or answers, it leads me to believe that even a robust waiver rule in *Miranda* would not appreciably change the rate of confessions from the rates we have seen under the less-robust *Miranda* we know.[66] The battle was lost, if you will, once the Justices gave up the idea of stationhouse lawyers.

Let us assume all of this is true, although perhaps it is not. Can we say, therefore, that *Miranda* was a bust, and we would be just as well (or better) off without it? I do not think so. In my view, *Miranda* has had some salutary effects. First, *Miranda* critic Jerry Caplan said in his classic article on the subject that, before the Warren Court became involved in police interrogation practices, the public saw the police as the good guys, and saw the criminals "as a species apart rather than members of the community who had gone

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59. *Id.* at 1227–29.

60. *Carty*, 790 A.2d at 908, 913–14; *see also* Thomas, *supra* note 57, at 1223–24.

61. *See* Berkemer v. McCarty, 468 U.S. 420, 436–38 (1984); *see also* Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1467 (2000).

62. *See* Thomas, *supra* note 57, at 1229–30.

63. *See id.*

64. I am sure a few drivers consent to a search because they forget there is incriminating evidence in the car, or they believe it is well secreted or that the police will not appreciate the incriminating nature of the evidence discovered. But those cases must surely be a small percentage of those in which consent is granted and evidence is discovered. *See* Oliver, *supra* note 61, at 1464–66.

65. *See id.*

66. According to one study, 78% of custodial suspects waived their *Miranda* rights. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996). Sixty-four percent of these suspects ultimately provided incriminating information to the police. *Id.* at 280. In another study, the waiver rate was even higher, 87.9%. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 868–69 (1996) (noting that 12.1% of suspects interviewed by police immediately invoked *Miranda*).

astray."[67] Caplan said that the Warren Court cases of the time—most particularly, *Miranda*—caused the public to see police interrogations "darkly as the product of police coercion, trickery, or deception,"[68] rather than as they did before; namely, that "criminal suspects must be dealt with [by the police] 'in a somewhat lower moral plane than that in which ethical, law-abiding citizens are expected to conduct their everyday affairs.'"[69]

To the extent that Caplan's observations are accurate, I view this as a good feature of *Miranda* and the other Warren Court interrogation cases. The image of the police as saviors and persons suspected of crime as some sort of vermin is an over-simplification of the real world.[70] Moreover, at least in my view, nobody deserves to be the victim of coercion, trickery, or deception. When the public demands better behavior from its police departments, we are more apt to get it. I think more people would agree that police procedures in the interrogation room are better today than they were in the pre-Warren Court era. Of course, *Miranda* does not get all of the credit, but it surely sent a message to police departments that they needed to treat suspects less deploringly than they did before.[71]

A second point: As a normative matter, justice systems are more just when people know their rights than when they do not. Yes, informing people of their rights does not guarantee that they truly understand them, so the benefit is incomplete, but this is still better than before *Miranda*.[72] And I would bet that most people now do know, at least in a rudimentary fashion, even without the warnings, that they have rights in the interrogation room. *Miranda* has served as an educational tool for the public.[73] It has been a bit of a democracy lesson in how a government should treat its citizens.

Third, *Miranda* did not just require the police to tell us our rights: the Court *created* rights that did not exist before *Miranda*,[74] as critics of the case have rightly noted. The Fifth Amendment does not say we have a right to

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67. Caplan, *supra* note 46.

68. *Id.* at 1425.

69. *Id.* at 1423 (quoting FRED E. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 149 (2d ed. 1948), the police training manual for that time).

70. *See id.* (describing criminals as a species).

71. *Id.* I find it ironic (and sad) that, despite improvements in the real-world interrogation rooms, some modern television shows, such as *Blue Bloods* and *Hawaii Five-0*, portray the police "heroes" acting in quite abusive ways, and thus appearing to suggest that this conduct is acceptable. *See generally Blue Bloods* (CBS); *Hawaii Five-O* (CBS).

72. *See* Caplan, *supra* note 46.

73. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) (observing that the *Miranda* warnings "have become part of our national culture"). "[V]irtually every schoolboy is familiar with the concept [of the right to remain silent], if not the language." Michigan v. Tucker, 417 U.S. 433, 439 (1974). Indeed, *Miranda*'s educational effect does not stop at our borders. *Id.* Years ago, when I lived in Detroit and happily could pick up Canadian television stations, I watched a Canadian tongue-in-cheek "cop show." I cannot remember the name of the show, but I remember the incident portrayed: An officer is putting a suspect in the police vehicle; the suspect says to the officer, "you haven't told me my *Miranda* rights;" the officer responded, "You are in Canada. You have no rights."

74. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

remain silent. It says we have a privilege not to be "compelled in any criminal case to be a witness against [one]self."[75] That is not the same thing.[76] As a matter of policy—I am putting aside weighty constitutional-interpretation debates—in my view, it is good that the privilege now applies before trial and entitles a person to refuse to answer any and all questions. We have *Miranda* to thank for that.

Additionally, *Miranda* tells us we have a right to counsel, including appointed counsel if necessary, to help us in the interrogation room.[77] But that is not what the Sixth Amendment "right to counsel" provision says, which applies only to criminal prosecutions, which rarely have commenced at the time custodial interrogation occurs.[78] The right to counsel of *Miranda* is an entirely separate right to counsel, one intended for the limited but important purpose of protecting a person's Fifth Amendment rights during custodial interrogation.[79] Again, to me this is a plus, even if suspects unwisely waive their right far too often.

I admit this is small pickings for those of us who wanted or predicted a lot from the case. But I have grown old enough—and have lived through the recent election—to be philosophical (or, is it just despondent?) enough to say: Let's be grateful for small favors.

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75. U.S. CONST. amend. V.

76. "[P]opular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be 'compelled in any criminal case to be a witness against himself;' it does not establish an unqualified 'right to remain silent.'" Salinas v. Texas, 133 S. Ct. 2174, 2182–83 (2013) (Alito, J., plurality opinion). The Fifth Amendment "does not protect an accused's ability to remain silent but instead protects him only from improper methods of interrogation." Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2626 (1996). Professor Tracey Maclin characterizes this as the "'textual' interpretation of the Fifth Amendment." Tracey Maclin, *The Right to Silence v. the Fifth Amendment*, 2016 U. CHI. LEGAL F. 255, 260 (2016).

77. *Miranda*, 384 U.S. at 473 (1966).

78. U.S. CONST. amend. VI.

79. *Miranda*, 384 U.S. at 473.