FIFTY YEARS LATER: *MIRANDA* & THE POLICE

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"The king stay the king."
-D'Angelo Barksdale, The Wire[1]

Fifty years ago, the United States Supreme Court created a watershed moment in Fifth Amendment jurisprudence when it handed down its decision in *Miranda v. Arizona*.[2] Having declared "third degree" police tactics—those involving physical brutality such as beatings, whippings, and other forms of violence and torture—unconstitutional thirty years earlier in *Brown v. Mississippi*,[3] the Court turned, in *Miranda*, to psychological coercion in custodial interrogations.[4] More specifically, the Court sought to address "what in fact goes on in [police] interrogation rooms"[5] and to protect the Fifth Amendment rights of suspects by combatting the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[6]

This Symposium asked us to reflect upon the subsequent fifty years—the years during which the Supreme Court's dictates in *Miranda* presumably went into effect and became a part of policing in the United States—and to assess the impact the Court's dictates have had on law enforcement in this

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1. *The Wire: The Buys* (HBO television broadcast June 16, 2002).
2. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).
3. *See id.* at 447; Brown v. Mississippi, 297 U.S. 278, 286 (1936).
4. *Miranda*, 384 U.S. at 448.
5. *Id.*
6. *Id.* at 467.

country. More colloquially, the Symposium asked whether, on balance, *Miranda* has been "good news" or "bad news" for the police. As I began to work on answering this question, however, I was troubled by the assumptions seemingly lurking within it: (1) the assumption that *Miranda* has *mattered at all* to the police; (2) the assumption that it has mattered because it has somehow changed the behavior of police and/or the behavior of suspects; and (3) the assumption that, because of those changes, *Miranda* must have either helped or hampered the ability of the police to do their jobs successfully. All of those assumptions are worth addressing and, in fact, *must* be addressed if the underlying question is to be answered accurately and completely.

In this Article, therefore, I examine the assumptions behind the question of whether *Miranda* has had a net positive or net negative impact on the police. After a brief overview of the *Miranda* decision in Part I, I set out to answer three questions.[7] In Part II, I examine whether *Miranda* has impacted police behavior at all.[8] Specifically, I analyze whether the police have complied with both the "letter" and the "spirit" of *Miranda*, or whether the police have managed to circumvent the requirements set forth in the decision.[9] In Part III, I address whether *Miranda* has impacted the behavior of suspects: whether and how often they appear to understand the protections of *Miranda* and how often they choose to avail themselves of those protections or waive them entirely.[10] In Part IV, I discuss whether *Miranda* offers the police any benefits or whether it undermines effective interrogation practices and thus the ability to secure the convictions of guilty suspects.[11] I conclude the Article by arguing that, on balance, *Miranda* has been far more beneficial than detrimental to the police in the United States, that its protections have been largely meaningless or unclaimed by all but the most experienced of criminals, and that, consequently, it has hampered the pursuit of justice as a whole.[12]

I. THE DECISION

The Supreme Court issued its decision in *Miranda v. Arizona* in 1966.[13] The Court was concerned "with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation" and thus was convinced of "the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not

7. *See infra* Part I.
8. *See infra* Part II.
9. *See infra* Part II.
10. *See infra* Part III.
11. *See infra* Part IV.
12. *See infra* Part V.
13. Miranda v. Arizona, 384 U.S. 436, 439 (1966).

to be compelled to incriminate himself."[14] The Court had begun examining custodial interrogation in earnest two years earlier in *Escobedo v. Illinois*.[15] There, the Court held that once a police "investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect," the police violate the Sixth Amendment if a suspect is not permitted to consult with his or her attorney and is not advised, prior to interrogation, of his or her right to remain silent.[16] In *Miranda*, however, the Court changed tack, arguing this time that when police do not warn suspects of their rights prior to pre-indictment custodial interrogations, they have violated the Fifth Amendment—rather than the Sixth Amendment—rights of that suspect.[17]

The Court expressed grave concern about what Chief Justice Warren, writing for the majority, described as the "incommunicado interrogation of individuals in a police-dominated atmosphere."[18] Custodial interrogation, the Court worried, was likely to result in self-incriminating statements if the police did not fully warn suspects of their constitutional rights.[19] Indeed, the Court noted, while police had almost entirely abandoned the violent "third degree" tactics they had used earlier in the century, they had moved to using psychological coercion to induce unwitting suspects to confess.[20] The Court quoted at length from police manuals detailing psychological coercion tactics that were likely to be effective in convincing suspects to confess.[21] Such tactics included: (1) interrogating suspects in private and unfamiliar surroundings, away from friends and family;[22] (2) "dominat[ing] . . . and overwhelm[ing] [suspects] with [the police officer's] inexorable will to obtain the truth;"[23] (3) offering the suspect "legal excuses for his actions in order to obtain an initial admission of guilt;"[24] (4) using good-cop and bad-cop tactics;[25] (5) inducing confessions using "trickery[;]"[26] and (6) "point[ing] out the incriminating significance of [a] suspect's refusal to talk."[27] In sum, the Court noted:

> From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In

14. *Id.*
15. *See generally* Escobedo v. Illinois, 378 U.S. 478 (1964).
16. *Id.* at 490–91.
17. *Miranda*, 384 U.S. at 467–68.
18. *Id.* at 445.
19. *Id.*
20. *Id.* at 447–48.
21. *Id.* at 445–57.
22. *Id.* at 449–50.
23. *Id.* at 451.
24. *Id.*
25. *Id.* at 452.
26. *Id.* at 453.
27. *Id.* at 454.

> essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.[28]

Thus, the Court concluded, "Even without employing brutality [or] the 'third degree' . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[29]

The Court believed the solution was to "adequately and effectively" apprise suspects of their rights and to "fully honor[]" a suspect's choice to exercise those rights.[30] In the section of the opinion detailing the now-famous "*Miranda* rights," which must be administered to suspects prior to custodial interrogation, the Court set forth the information that must be provided.[31] Suspects, the Court ruled, must be informed: (1) of their right to remain silent;[32] (2) "that anything said can and will be used against them in court;"[33] (3) that they have the right to have counsel present at the interrogation;[34] and (4) "that if he is indigent a lawyer will be appointed to represent him."[35] In subsequent cases, the Court clarified that these warnings need not be a "talismanic incantation" and that variations are permitted as long as they function as "fully effective equivalent[s]."[36]

The Court also mandated that, "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[37] In a subsequent case, the Court reaffirmed that a suspect's decision to remain silent must be "scrupulously honored."[38] The Court also ruled that police can only resume questioning

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28. *Id.* at 455 (quoting FRED E. INBAU & JOHN E. REID, LIE DETECTION AND CRIMINAL INTERROGATION 185 (3d ed. 1953)).

29. *Id.*

30. *Id.* at 467.

31. *Id.* at 467–73.

32. *Id.* at 467–68.

33. *Id.* at 469.

34. *Id.*

35. *Id.* at 473.

36. California v. Prysock, 453 U.S. 355, 359–60 (1981) (emphasis omitted) (quoting *Miranda*, 384 U.S. at 476); *see also* Duckworth v. Eagan, 492 U.S. 195, 202–03 (1989).

37. *Miranda*, 384 U.S. at 473–74.

38. Michigan v. Mosley, 423 U.S. 96, 103 (1975) (quoting *Miranda*, 384 U.S. at 479).

after some passage of time with the administration of "fresh" warnings, and only on a separate topic.[39] If the suspect invokes his or her right to counsel, however, *all* questioning must cease until counsel is present unless the suspect initiates conversation with the police.[40]

Finally, the Court explicitly stated that there were to be no exceptions to the warning requirement; police must provide these warnings to every suspect regardless of his or her "age, education, intelligence, or prior contact with authorities."[41] Moreover, the burden would "rest[] 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."[42] That waiver must be explicit rather than "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."[43]

In his dissent, Justice Clark insisted that the majority opinion went "too far on too little," and expressed concern that it could harm law enforcement.[44] Justice Clark explained that he was significantly less concerned about psychological coercion during custodial interrogations, noting that the manuals quoted by the majority were not "the official manual of any police department, much less in universal use in crime detection," and that he believed that police brutality was "rare."[45] He believed that the admission of confessions should be based on the totality of the circumstances rule used prior to *Miranda* because it did a better job of "balancing individual rights against the rights of society."[46] Clark's underlying concern seemed to be that, in setting forth more stringent requirements to protect the Fifth Amendment rights of suspects, the Court was undermining the ability of law enforcement to obtain the confessions needed to secure convictions of guilty parties.[47]

Clark's concerns about the impact of the decision on law enforcement were echoed in the dissent of Justices Harlan, Stewart, and White.[48] Harlan complained:

> What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it. There can be little doubt that the Court's new code would markedly

39. *Id.* at 106.
40. Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).
41. *Miranda*, 384 U.S. at 479.
42. *Id.* at 475.
43. *Id.*
44. *Id.* at 499 (Clark, J., dissenting).
45. *Id.* at 499–500.
46. *Id.* at 503.
47. *See id.* at 500–03.
48. *Id.* at 504–05, 516–17 (Harlan, J., dissenting).

> decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation.[49]

Thus, he concluded: "The social costs of crime are too great to call the new rules anything but a hazard[] . . . ."[50]

Were the dissenting Justices correct? Has *Miranda* hampered law enforcement over the last fifty years? The evidence strongly suggests that it has not.[51]

II. HAS *MIRANDA* IMPACTED POLICE BEHAVIOR?

Any analysis of the long-term impact of *Miranda* must start with an inquiry into whether police in the United States have actually complied with the terms of the opinion. Merely assuming that such compliance is taking place would be risky at best. Indeed, the *Miranda* opinion itself acknowledges that people outside of the police force tend to know very little about police conduct, particularly in-custody interrogation which has "largely taken place incommunicado."[52] The majority observed that "[i]nterrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms."[53] Fifty years later, I argue that civilians *still* know relatively little about custodial interrogations, although the increasing frequency with which such interrogations are videotaped should reduce this information gap over time.[54] Currently, the best place to turn in examining police compliance with *Miranda* is to the very small number of empirical studies on the issue.[55]

The limited amount of empirical data about police compliance with *Miranda* that exists *fifty years* after the decision was handed down is somewhat surprising. Immediately after the decision, there was a flurry of small quantitative and qualitative studies about whether and how the police

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49. *Id.* at 516–17 (citations omitted).

50. *Id.* at 517.

51. *See infra* Part II (suggesting that police behavior has remained largely unchanged even though suspects have invoked their *Miranda* rights).

52. *See Miranda*, 384 U.S. at 445.

53. *Id.* at 448.

54. *See* Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J.L. & SOC. POL'Y 400, 401 (2012).

55. *See* discussion *infra* Sections II.A–II.B (providing evidence that police have followed the letter of *Miranda*, while not complying with its spirit).

were complying with *Miranda*,[56] but it took a full thirty years for there to be a large-scale empirical study on the effects of *Miranda* on police conduct: Richard Leo's seminal 1996 study, the results of which were published in his famous article*, Inside the Interrogation Room*, and which seemingly has not been replicated since.[57] During his study, Leo spent more than 500 hours inside the investigative division of "a major, urban police department," during which he "observed 122 interrogations involving forty-five different detectives" and viewed sixty videotaped custodial interrogations from two other police departments.[58] His findings were significant, particularly because they indicated that, in assessing police compliance with *Miranda*, there is a difference between compliance with the *letter* of *Miranda* and compliance with the *spirit* of *Miranda*.[59]

A. The Letter of Miranda

Leo's study found that police officers are extremely compliant with the *technical* requirements of *Miranda*, namely, informing suspects of their constitutional rights and scrupulously honoring a suspect's decision to invoke those rights.[60] Leo reported that police officers read each of the four *Miranda* warnings "verbatim from a standard form prior to virtually every interrogation [he] observed."[61] The only exceptions were seven (close to 4%) of the interrogations he observed during which the police officer did not provide warnings because the suspect was not technically in custody and thus was not required to be "mirandized."[62] This near 100% compliance rate is both admirable and remarkable.[63]

The police were slightly less compliant with regard to scrupulously honoring a suspect's invocation of his constitutional rights.[64] Leo found that police officers promptly terminated the interrogation in 82% of all cases in which a suspect invoked a *Miranda* right during questioning.[65] In seven of those cases, the officers "informed the suspect that any information the suspect provided . . . could not and therefore would not be used against him in a court of law," an assurance that was only partially true.[66] Still, an 82%

56. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 267 (1996).
57. *See id.*
58. *Id.* at 268.
59. *See* discussion *infra* Sections II.A–II.B.
60. *See* Leo, s*upra* note 56, at 275–76.
61. *Id.* at 276.
62. *Id.* at 275–76.
63. *See id.*
64. *See id.* at 276–77.
65. *Id.*
66. *Id.* at 276 (statement of Richard A. Leo) ("Although the prosecution could not use such evidence as part of its case-in-chief, any information the suspect provided to the detective nevertheless could be used in a court of law to impeach the suspect's credibility, and indirectly incriminate the suspect if he

compliance rate is arguably higher than one might expect given the secretive nature of custodial interrogations and the unlikeliness of officers getting caught violating the technical requirements of *Miranda*.[67]

The police, therefore, appear to be doing a good job of following the letter of *Miranda*. Leo's study suggests that they are providing *Miranda* warnings prior to virtually every custodial interrogation and that they honor a suspect's invocation of his or her Fifth Amendment rights in a strong majority of cases.[68] However, Leo's study showed something much more troubling: The police are doing very little to comply with the *spirit* of the decision.

B. The Spirit of Miranda

While, on its face, the *Miranda* decision only requires the police to inform suspects of their Fifth Amendment rights prior to custodial interrogation and to honor any invocation of those rights, it does so for a very specific reason: to minimize psychological coercion of suspects during custodial interrogation.[69] The Court believed that this kind of coercion has the ability to undermine the Fifth Amendment's protections against compelled self-incrimination in much the same way that the "third degree" tactics of the past did.[70] Accordingly, the Court noted that "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[71] In the Court's view, providing warnings prior to custodial interrogation is the means by which psychological coercion can be minimized rather than an end in itself because it empowers suspects to resist the coercive tactics of the police.[72]

Complying with the *spirit* of *Miranda*, however, arguably entails doing more than merely providing warnings and honoring the right of suspects to remain silent or to have counsel present. It *also* entails taking steps to reduce psychological coercion in custodial interrogations—the fundamental issue with which the Court was concerned in *Miranda*.[73] Indeed, as discussed at greater length above, the Court cited police manuals at length and expressed grave concerns about the coerciveness of the techniques detailed within.[74]

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chose to testify at trial.").

67. *See generally id.* at 276–77.
68. *Id.* at 275–77.
69. *See* Miranda v. Arizona, 384 U.S. 436, 448–49 (1966).
70. *See id.* at 454–58.
71. *Id.* at 458.
72. *See id.*
73. *See id.*
74. *Id.* at 445–57.

So, have police departments taken these concerns to heart over the last fifty years and changed their interrogation tactics? No. In fact, most police departments are teaching those very same interrogation tactics to their officers and have done little to change their overall approach to interrogating suspects.[75] Reflecting on the responses of police departments to *Miranda*, Jim Trainum, a veteran law enforcement officer, writes:

> The reaction of law enforcement personnel and prosecutors to now having to advise suspects in custody of their rights to have an attorney was predictable. Once again, they said, the hands of law enforcement are being tied. No one will ever confess now. But as each time before, investigators adapted in response to the new regulations (just not the way we would hope). As interrogation manuals changed to address the *Miranda* "problem," investigators creatively developed new ways to get around it. As an example, since the new laws stipulated that investigators only had to give a suspect their *Miranda* warning if they were in custody, "noncustodial interrogations" became popular. The interrogation took place in the same room, and the same tactics were used, but the investigators were careful to work in the words "you are free to leave" somewhere in the conversation. Otherwise there was little change.[76]

Police, in essence, have opted to move around *Miranda* rather than to reform their tactics.

In fact, in training new recruits in interrogation tactics, most police departments are still using only marginally updated versions of the very same manuals to which the Court cites in *Miranda*.[77] The so-called "Reid Technique," which "expands on the methodology initially explained in the very first edition of the Inbau and Reid text, which was discussed in *Miranda*" is still the dominant interrogation method used by an overwhelming majority of police departments in the United States.[78] One scholar explains:

> The acknowledged leader among interrogation manuals both before and after *Miranda*, the tome some reverently call "The Interrogator's Bible," is *Criminal Interrogation and Confessions*, a text initially co-authored by the

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75. *See* Tonja Jacobi, Miranda *2.0*, 50 U.C. DAVIS L. REV. 1, 65 (2016); Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1530–31 (2008).

76. JAMES L. TRAINUM, HOW THE POLICE GENERATE FALSE CONFESSIONS: AN INSIDE LOOK AT THE INTERROGATION ROOM 29 (2016).

77. Weisselberg, *supra* note 75.

78. *Id.* One study found that over 80% of police officers report "receiving specialized training on interviews and interrogations" that, if not specifically identified as the Reid Technique, utilizes many if not most, of the same tactics utilized in that technique. *Id.* at 1536–37 (citing Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & HUM. BEHAV. 381, 389 (2007)).

> late Fred Inbau and the late John Reid, and now regularly updated by their once-junior colleagues, Joseph Buckley and Brian Jayne. Although (or, come to think of it, because?) Earl Warren and his colleagues singled out this text for special criticism in *Miranda*, the Inbau book "is the definitive police training manual in the United States, if not the western world," with "[t]housands of American police . . . trained by the Inbau and Reid materials each year" . . . . These interrogation protocols are known throughout the law enforcement world as the "Reid Technique."[79]

Moreover, the techniques in this manual have "remained virtually unchanged in the forty-five years since it was first published."[80] Another scholar observes:

> For instance, the familiar "Mutt and Jeff" routine, minimization of moral blame, pitting suspects against each other, and the pretended friend technique are all elements of the Reid Technique that have been passed down through the decades. Investigators are prohibited from making direct or indirect threats of violence or questioning the suspect after he has invoked his Fifth Amendment right to silence. But, interrogators are permitted to use most of the techniques the *Miranda* Court impliedly condemned, including prolonged interrogation, trickery, and outright lying.[81]

Additionally, Leo's study found that the police are not only *using* these tactics in most custodial interrogations, they are using them in combinations designed to extract confessions from suspects.[82] Leo reports that, "The number of tactics a detective employed per interrogation ranged from zero (e.g., the suspect spontaneously confessed or the detective did not genuinely try to elicit a confession) to fifteen" and that "detectives employed a median of 5 and a mean of 5.62 tactics per interrogation."[83] These tactics included: (1) "[a]ppeal[ing] to the suspect's self-interest;" (2) "confront[ing] [the] suspect with existing evidence of guilt;" (3) "undermin[ing] [the] suspect's confidence in denial of guilt;" (4) confronting the suspect with "false evidence of guilt;" (5) "offer[ing] moral justifications/psychological excuses" for the suspect's behavior; (6) "[m]inimiz[ing] the moral seriousness of the offense;" and (7) employing a "[g]ood cop/[b]ad cop

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79. Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1641–42 (2009) (citations omitted).

80. Tracy Lamar Wright, *Let's Take Another Look at That: False Confession, Interrogation, and the Case for Electronic Recording*, 44 IDAHO L. REV. 251, 261 (2007).

81. *Id.* (citations omitted).

82. *See* Leo, *supra* note 56, at 277.

83. *Id.*

routine"—all of which are either identical or extremely similar to the tactics discussed in *Miranda*.[84]

Thus, far from reforming their techniques, law enforcement officers in this country are utilizing the same coercive techniques discussed by the Court fifty years ago and doing so in large numbers.[85]

III. HAS *MIRANDA* IMPACTED SUSPECT BEHAVIOR?

In conducting a thorough analysis of the impact of *Miranda* on the police, one must also examine whether *Miranda* has impacted the behavior of *suspects*. More specifically, one must assess whether *Miranda* has impacted suspect behavior in a manner detrimental to police officers when solving crimes and obtaining convictions of guilty parties. Here, too, the answers are fairly clear: *Miranda* has had very little impact on suspect behavior outside of suspects with significant amounts of experience with the criminal justice system (that is, experienced criminals).[86]

A number of studies in recent years have shown that suspects waive their *Miranda* rights at very high rates. In Leo's study, for example, over 78% of suspects "ultimately waived their *Miranda* rights, while 22% invoked one or more of their *Miranda* rights, thus indicating their refusal to cooperate with police questioning."[87] A more recent study published in the Idaho Law Review found that over 90% of suspects waived their *Miranda* rights.[88]

A 2004 study by Kassin and Norwick found similar rates of waiver; but, the study also found something significant: Innocent suspects were significantly more likely to waive their *Miranda* rights than guilty ones.[89] The researchers report that there was "a striking effect for guilt or innocence, as 81% of all innocent suspects waived their rights compared to only 36% of those who were guilty."[90] These results mirror Leo's finding that only 70% of suspects with a felony record waived their *Miranda* rights compared with 89% of suspects with a misdemeanor record and 92% of suspects without any record at all.[91] These waiver rates make sense in light of what appears to be a common belief among suspects that exercising their Fifth Amendment

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84. *Id.* at 278; *see also supra* text accompanying notes 19–29 (summarizing the Court's discussion of interrogation tactics and police manuals).

85. *See supra* text accompanying notes 75–83 (explaining the police's failure to reform interrogation techniques).

86. *See infra* text accompanying notes 88–93 (discussing how *Miranda* has impacted the behavior of suspects).

87. Leo, *supra* note 56, at 276.

88. Anthony J. Domanico et al., *Overcoming* Miranda*: A Content Analysis of the* Miranda *Portion of Police Interrogations,* 49 IDAHO L. REV. 1, 13 (2012).

89. Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 L. & HUM. BEHAV. 211, 215 (2004).

90. *Id.*

91. Leo, *supra* note 56, at 286.

rights will work against them and confirm their guilt to the police.[92] The Court in *Miranda* acknowledged this phenomenon, quoting Lord Devlin in saying, "[I]t is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not."[93]

What does this high rate of waiver mean for police? This question has been heavily debated, most notably by Paul Cassell and Stephen Schulhofer, and it is a debate that has contours beyond the scope of this Article.[94] Suffice it to say, however, that it does not appear to be debatable that *Miranda* has benefited the most sophisticated or criminally experienced suspects (who are likely to avail themselves of their rights and thus avoid custodial interrogation) but has done very little for innocent or less sophisticated criminals who waive their rights in high numbers, and thus find themselves in the same coercive interrogation atmosphere discussed by the Court in *Miranda*.[95]

If we assume that it is sub-optimal for police when suspects invoke their Fifth Amendment rights (presumably, because it greatly diminishes the likelihood of a confession, and thus increases the amount of work police officers must do to solve crimes and secure sufficient evidence for a successful prosecution), we can thus conclude that *Miranda* has been "bad" for the police because it has changed the behavior of suspects for the worse in the roughly 30% of cases in which felons invoke their *Miranda* rights, the 11% of cases in which misdemeanants invoke their rights, and the 8% of cases in which suspects without a criminal record do so.[96] It is questionable how much more work police must do in these cases, but it seems reasonable to assume that there is some net negative effect on the ability of police to solve crimes and some increase in the effort that they must put into doing so. This effect, however, manifests itself in only a minority of cases.[97]

Importantly, this net negative effect may also be offset by corresponding benefits offered to the police by *Miranda*. Whether those benefits exist and whether they outweigh the "cost" of *Miranda* previously discussed are the

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92. Kassin & Norwick, *supra* note 89, at 216.

93. *See* Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966) (quoting PATRICK DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 32 (1958)).

94. *See generally* Paul G. Cassell, Miranda*'s "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL'Y 325 (1997); Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950 (1987); Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987);.

95. *See supra* notes 86–93 (citing multiple studies that show a high number of suspects waiving *Miranda* rights).

96. *See* Leo, *supra* note 56, at 286.

97. *See generally id.*

last major inquiries that must be made in assessing *Miranda*'s full impact on the police.

IV. DOES *MIRANDA* OFFER THE POLICE ANY BENEFITS?

Miranda and its progeny cases, I argue, have been incredibly helpful to the police because they "sanitize" even the most dubious of confessions.[98] When suspects choose to waive their rights, which, as discussed, suspects do in extremely large numbers, the *Miranda* line of cases sets the bar so high in terms of what constitutes an involuntary confession that virtually *every* self-incriminating statement made by that suspect will be admissible at trial as long as the police administered *Miranda* warnings to them prior to the start of the custodial interrogation.[99] Richard Leo argues:

> It is even possible that *Miranda*—despite its high-minded intentions—has undermined any protection the law might have otherwise offered against the admission of false confessions into evidence. For *Miranda* has de facto displaced the due process voluntariness standard as the primary test of a confession's admissibility, shifting the court's analysis from the voluntariness of a confession to the voluntariness of the *Miranda* waiver. Though the *Miranda* holding is logically independent of the due process voluntariness standard, my own empirical observations suggest that trial judges will almost always declare a confession voluntary if the *Miranda* procedures appear to have been properly followed. To put it differently, by focusing on the proper reading and waiver of the simple *Miranda* formula, trial judges often appear to avoid the more difficult and elusive task of analyzing whether police pressures have overborne the suspect's [decision-making] capacity.[100]

Indeed, only the most egregiously coerced statements are at any risk of being excluded by a court.[101] *Miranda*, then, essentially protects the police and

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98. Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 478 (1998) ("[T]he *Miranda* majority may have launched a trend it could not have envisioned; that is, by decreeing talismanic warnings designed to dispel the pressure inherent in custodial interrogation, the Court furnished law enforcement with a potent weapon to sanitize otherwise questionable confessions."); Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1027 (2001) ("And trial judges have learned to use *Miranda* to simplify the decision to admit interrogation-induced statements and to sanitize confessions that might otherwise be deemed involuntary if analyzed solely under the more rigorous Fourteenth Amendment due process voluntariness standard.").

99. *See* Richard A. Leo, Miranda *and the Problem of False Confessions* (1998), *in* THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING 271, 271–82 (Richard A. Leo & George C. Thomas III, eds., 1998).

100. *Id.*

101. *See* Michael J. Sydney Mannheim, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 71–76 (2002).

gives them cover for the exact same interrogation tactics that concerned the majority fifty years ago.[102]

Worst yet, those interrogation tactics tend to be very effective at getting suspects to make incriminating statements.[103] The Reid Technique is popular with police because it is effective.[104] It works.[105] In Leo's study for instance, suspects provided detectives with "at least some incriminating information" in "almost two-thirds (64%) of the interrogations . . . observed" and full confessions in nearly a quarter (24.18%) of the interrogations observed.[106] In cases "in which the police terminated questioning upon the invocation of a *Miranda* right . . . more than three-fourths (76%) of the interrogations . . . observed produced a successful result."[107]

In fact, the tactics taught as part of the Reid Technique are not only effective at extracting confessions and incriminating statements from guilty suspects, they are effective at extracting confessions and incriminating statements from *innocent* suspects as well.[108] While it is difficult to identify the precise rate at which suspects give false confessions, the available research on this issue is troubling:

> The National Registry of Wrongful Convictions, run by the Northwestern University School of Law, works to identify wrongful conviction cases nationally and studies their causes. As of December 15, 2015, they had identified 1,717 wrongful convictions, of which 218, or 13 percent, involved a false confession. Other studies include self-reporting surveys of inmates (12 percent report having made a false confession at some time in their lives) and laboratory experiments with college students (1 percent to 7 percent). One very interesting survey was done of over six hundred North American police officers, a group that is usually very skeptical of the false confession phenomena. In that survey the officers reported that, based on their personal experience, false confessions resulting from interrogations occur 4.78 percent of the time.[109]

The Innocence Project, moreover, reports that more than 25% of people wrongfully convicted, and later exonerated by DNA evidence, made a false confession or incriminating statement.[110] Yet, nothing about *Miranda*, or its

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102. *See supra* text accompanying notes 75–85 (explaining that most modern police officers employ coercive interrogation techniques nearly identical to those at issue in *Miranda*).

103. *See* Leo, *supra* note 56, at 277–78.

104. *Id.* at 280.

105. *Id.*

106. *Id.*

107. *Id.* at 280–81.

108. TRAINUM, *supra* note 76, at 44.

109. *Id.*

110. *False Confessions or Admissions*, INNOCENCE PROJECT, https://www.innocenceproject.org/causes/false-confessions-admissions/ (last visited Aug. 30, 2017).

progeny cases, have required the police to do anything different than they did fifty years ago with regard to custodial interrogations. Thus, these cases have done virtually nothing to reduce the risk of such false confessions.[111]

The *Making a Murderer* documentary series on Netflix, which received a great deal of popular attention in 2016, highlighted this issue very poignantly.[112] Episode three of the series showed viewers the videotaped interrogation and confession of Brendan Dassey, the teenage nephew of Steven Avery, the primary person-of-focus on the series.[113] At the time of the interrogation, Brendan was a sophomore in high school.[114] He was quiet, introverted, and had a low IQ.[115] He waived his *Miranda* rights and was interrogated on four separate occasions over a 48-hour time frame.[116] During all four occasions, the police used classic Reid Technique tactics.[117] The results are horrifying to watch. The police essentially fed an increasingly confused and tired Brendan the information they wanted him to provide, and he seemingly had little idea of what was happening or the consequences of his statements.[118] The following is a representative portion of the transcript of one of the interrogations of Brendan Dassey by Detectives Fassbender and Wiegert:

> WIEGERT: Where did he get the clothes from?
> BRENDAN: His garage.
> WIEGERT: Where in the garage?
> BRENDAN: …….
> WIEGERT: Where in the garage were they?
> BRENDAN: …in the back.
> WIEGERT: Back and on the side?
> FASSBENDER: Was her car still in there when you went in there? Tell us the truth.
> BRENDAN:
> FASSBENDER: OK. Did you see some undergarments or anything like that? Bra?
> WIEGERT: How about any shoes?
> BRENDAN: …….

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111. *See* Leo, *supra* note 99.
112. *Making a Murderer* (Netflix Dec. 18, 2015).
113. *Making a Murderer: Indefensible* (Netflix Dec. 18, 2015).
114. *Id.*
115. *Id.* (reporting that Brendan Dassey's verbal IQ is 69 and his overall IQ is 73).
116. *Id.*
117. Jesse Singal, *The Science Behind Brendan Dassey's Agonizing Confession in* Making a Murderer, N.Y. MAG.: THE CUT (Jan. 11, 2016, 8:13 AM), https://www.thecut.com/2016/01/science-behind-brendan-dasseys-confession.html.
118. *See* Lauren Rogal, *Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act as a Safeguard*, 47 N.M. L. REV. 64, 65 (2017).

> WIEGERT: Was there blood on those clothes? Be honest Brendan. We know. We already know you know. Help us out. Think of yourself here. Help that family out.
> FASSBENDER: It's gonna be all right, OK.
> WIEGERT: Was there blood on those clothes?
> BRENDAN: A little bit.
> WIEGERT: OK. Where was the blood?
> BRENDAN: Like…….
> WIEGERT: Blood on the shirt?[119]

Not surprisingly, Dassey wound up "confessing" and was subsequently charged and convicted of both sexual assault and murder.[120]

While the interrogation of Dassey may be "infuriating," and arguably involved tactics that made the validity of his confession highly dubious at best, nothing about the interrogation was a violation of *Miranda*.[121] Indeed, neither the trial court nor the Wisconsin Court of Appeals thought that it was a violation.[122] Why? The court of appeals noted that "Dassey was read his *Miranda* rights and signed a waiver.[123] Upon arriving [at the Manitowoc County Sheriff's Department], Dassey acknowledged that he remembered the advisories and still wanted to talk to the interviewers."[124] The court also noted that Dassey "was interviewed while seated on an upholstered couch, never was physically restrained and was offered food, beverages and restroom breaks . . . and did not appear to be agitated or intimidated at any point in the questioning."[125] Accordingly, the court ruled, there was no coercion.[126]

The *Dassey* case sharply highlights the state of affairs fifty years after *Miranda*: Police utilize the same techniques they utilized back then—only now, the confessions that they are able to extract are given an extra layer of legal sanction. In this way, *Miranda* offers a tremendous benefit to the police: Rote recital of *Miranda* warnings prior to custodial interrogation almost guarantee that any statements the police gather will be admissible in court, even if the police obtained those statements using the same

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119. Transcript of The Interview of Brendan Dassey with Special Agent Tom Fassbender and Investigator Mark Wiegert (Feb. 27, 2006), *in* Calumet County Sheriff's Department Complaint No. 05-0157-955, at 448–49, http://www.stevenaverycase.org/wp-content/uploads/2016/02/Brendan-Dassey-Interview-at-School-Transcript-2006Feb27_text.pdf.

120. *Id.*

121. *See* Singal, *supra* note 117.

122. State v. Dassey, No. 2010AP3105-CR, 2013 WL 2163741, at *1–2 (Wis. Ct. App. Jan. 30, 2013).

123. *Id.* at *1 (citation omitted).

124. *Id.*

125. *Id.* at *2.

126. *Id.*

psychologically coercive tactics that the Court worried about in its *Miranda* decision.

V. CONCLUSION

Fifty years after *Miranda*, several things are clear. First, while police officers in the United States have done an admirable job of complying with the *letter* of *Miranda*, both providing warnings prior to custodial interrogations and honoring a suspect's invocation of his or her Fifth Amendment rights with a high degree of regularity, the police have done very little to comply with the *spirit* of the Court's decision.[127] Rather than abandoning the psychologically coercive tactics about which the Court expressed concern in its *Miranda* decision, the police have continued to utilize them and do so often.[128]

On the flip side, *Miranda* has done very little to change the behavior of suspects.[129] A strong majority of suspects, particularly those who have little or no experience with the criminal justice system, waive their *Miranda* rights and choose to proceed with custodial interrogation. The only suspects that *Miranda* appears to have made more savvy are those with prior felony convictions.[130] Even with these experienced suspects, however, it is questionable whether it is the provision of *Miranda* warnings or simply the suspects' more extensive experiences with the criminal justice system that lead them to invoke their Fifth Amendment rights far more often than their rookie counterparts.

Perhaps most troubling is the way in which *Miranda* allows police officers to sanitize confessions and incriminating statements.[131] Simply providing *Miranda* warnings and obtaining a waiver from suspects virtually guarantees that anything they say subsequently will be admissible in court, barring only the most extreme situations. Far from reducing the coercive atmosphere in interrogation rooms, *Miranda* has actually protected the coercive atmosphere from judicial scrutiny and provided greater protection for police practices that might otherwise be successfully challenged by defendants in criminal cases.

In sum, the great tragedy of *Miranda* lies in the fact that the Court identified the correct problem but provided the wrong solution. The Court tried to combat psychological coercion on the part of the police by empowering *suspects* rather than by barring the problematic interrogation tactics outright. This misstep has created the current situation in the criminal

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127. *See supra* Part II (discussing *Miranda*'s impact on police behavior).

128. *See supra* text accompanying note 75–85 (discussing police interrogation tactics).

129. *See supra* text accompanying note 87–92 (examining studies about suspect behavior).

130. *See supra* text accompanying note 86–92 (explaining the effect of *Miranda* warnings on experienced offenders).

131. *See generally* Leo, *supra* note 99.

justice system, a situation in which the vast majority of suspects are *not* empowered—police continue to use the same tactics they used fifty years ago, but now with the near guarantee of a Fifth Amendment stamp of approval as long as *Miranda*'s minimal requirements have been met.

My answer to the question posed by this Symposium, therefore, is that *Miranda* has been great news for the police, bad news for mostly everyone else, and terrible news for the pursuit of justice as a whole. It is my great hope that the Fifth Amendment jurisprudence of the *next* fifty years will redress this imbalance.