ARNOLD LOEWY, ERNESTO MIRANDA, EARL WARREN, AND DONALD TRUMP: CONFESSIONS AND THE FIFTH AMENDMENT

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I. INTRODUCTION

In *The Supreme Court, Confessions, and Judicial Schizophrenia*, Professor Loewy argued that the Supreme Court's existing precedent dealing with confessions demonstrates schizophrenia with "many of the inconsistent statements [that] remain good law."[1] I agree. Much of that schizophrenia springs from battles over *Miranda v. Arizona*,[2] but also comes from the Fifth Amendment itself and from its evolving meaning.[3]

Indeed, many in the legal academy and elsewhere find something to hate about *Miranda* and the Fifth Amendment.[4] Or as the editors of the *Boston University Law Review* observed in their introduction to a volume commemorating *Miranda*'s fiftieth anniversary, "the development and application of *Miranda* doctrine have been attacked from all quarters of the ideological spectrum."[5]

Critics on the right and the left see *Miranda* as a failure for different reasons; perhaps because it was an illegitimate intrusion into state power or

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1. Arnold H. Loewy, *The Supreme Court, Confessions, and Judicial Schizophrenia*, 44 SAN DIEGO L. REV. 427, 427 (2007).

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

3. *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2626–27 (1996) [hereinafter Alschuler, *Peculiar Privilege*]; *see also* Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849, 850–54 (2017) [hereinafter Alschuler, Miranda*'s Fourfold Future*] (arguing the decision of the Court in *Miranda* shows a misunderstanding of the Fifth Amendment).

4. *See* FRED P. GRAHAM, THE SELF-INFLICTED WOUND 158–59 (1970).

5. Symposium, *Foreword* to *The Fiftieth Anniversary of* Miranda v. Arizona, 97 B.U. L. REV. 681, 681 (2017).

because the post-Warren Courts undercut its vitality.[6] Some *Miranda* foes continue to argue that it unnecessarily ties the hands of the police.[7] Others, and I include myself in this group, see the post-*Miranda* case law as an assault on its central premises, rendering its protections limited at best.[8]

We tend to forget that Chief Justice Warren's slim *Miranda* majority was trying to solve a very real problem. Between 1936 and 1963, the Court repeatedly intervened in cases involving defendants who confessed under questionable circumstances and who often faced the death penalty.[9] In addition, in many of those cases, the defendants were African-Americans, found guilty in the South, where the fear of racial injustice was palpable.[10] The Court's involuntariness case law provided little meaningful guidance to lower courts, requiring the Court to intervene repeatedly.[11]

Further, although Dean Gerald Caplan saw this as reason to criticize *Miranda*, he observed that the Court was concerned about equality.[12] The Court wanted to level the playing field between the state and the suspect.[13] The Court was also motivated by concerns that wealthy suspects came armed with legal advice, unlike indigent defendants unable to negotiate with the police in the police-dominated environment.[14] As I argue below, *Miranda* was a noble experiment.[15] Equality does matter in the criminal justice system.[16]

At the same time, *Miranda* has failed in so many ways. Almost certainly for reasons anticipated by Justice White's *Miranda* dissent, *Miranda* has protected relatively few criminal defendants.[17] As one *Miranda* critic observed, "[f]or criminal suspects, the law rewards obstruction and

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6. *See* Dickerson v. United States, 530 U.S. 428, 445 (2000) (Scalia, J., dissenting); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1057 (1998).

7. *See* Cassell & Fowles, *supra* note 6, at 1062–63; *see also* Paul G. Cassell & Richard Fowles, Opening Keynote Address, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of* Miranda*'s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685, 848 (2017) (concluding restraints placed on law enforcement by *Miranda* have made law enforcement less effective).

8. *See* Alschuler, *Peculiar Privilege*, *supra* note 3, at 2629–30; Loewy, *supra* note 1, at 434–35; *infra* Part III (discussing the post-*Miranda* case law).

9. *See* Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 746–47 (1987).

10. *See id.* at 747.

11. *Id.* at 746.

12. Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1457–58 (1985).

13. *Id.* at 1419.

14. *See id.* at 1448–49. As I have argued in *Reflections on an Extraordinary Career: Thoughts About Gerald Caplan's Retirement*, unlike some *Miranda* critics, Caplan's proposals if followed would provide suspects meaningful protections. Michael Vitiello, *Reflections on an Extraordinary Career: Thoughts About Gerald Caplan's Retirement*, 46 MCGEORGE L. REV. 459, 478–81 (2014).

15. *See infra* Part II (discussing how *Miranda* came into the Court).

16. *E.g.*, Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 701–03 (2016).

17. Miranda v. Arizona, 384 U.S. 436, 534–35 (1966) (White, J., dissenting).

concealment."[18] Many of the suspects who need *Miranda* protections fail to invoke them; many who do invoke its protections are hardened criminals—not a particularly deserving group of offenders.[19]

Given *Miranda*'s failure, some commentators have suggested alternatives to *Miranda*.[20] Indeed, Professor Loewy has argued that the criminal justice system would be better off had the Court followed its pre-*Miranda* approach.[21] Beginning with *Spano v. New York*,[22] Justices seemed prepared to hold that the Sixth Amendment right to counsel should begin in the custodial interrogation setting.[23] The Court came close to this holding in *Escobedo v. Illinois*.[24] While I agree with Professor Loewy that the pre-*Miranda* approach has some advantages, I propose a different alternative. The Court should outlaw all custodial interrogation. One might ask how the Court could do that as a matter of constitutional law and sound policy. Let me explain.

So back to my title: what does Donald Trump have to do with this? As I write this paper in the fall of 2018, Special Prosecutor Robert Mueller is still negotiating with Trump and his lawyers about providing testimony in the Russia investigation.[25] Many Americans wonder why Mueller cannot compel the President to testify in open court before a grand jury or elsewhere.[26] There is a powerful need for his testimony to resolve whether he participated in efforts to undercut our democracy.[27] Indeed, the Supreme Court endorsed the view that our system requires the testimony of every citizen, including a sitting president.[28] Shouldn't we be able to hear from anyone with relevant evidence?

How can one reconcile the Fifth Amendment and its underlying values with the need for every citizen's testimony that is relevant to the administration of justice? *Miranda* does not prevent the state from securing

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18. Scott W. Howe, *Moving Beyond* Miranda*: Concessions for Confessions*, 110 NW. U. L. REV. 905, 905 (2016).

19. *Id.* at 939 (first citing Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996); then citing William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 977 (2001)).

20. Alschuler, *A Peculiar Privilege*, *supra* note 3, at 2669–70; Caplan, *supra* note 12, at 1474–75; Loewy, *supra* note 1, at 435.

21. *See* Loewy, *supra* note 1.

22. *See* Spano v. New York, 360 U.S. 315 (1959).

23. *Id.* at 324–25 (Douglas, J., concurring).

24. *See* Escobedo v. Illinois, 378 U.S. 478 (1964).

25. Michael S. Schmidt & Maggie Haberman, *Trump's Lawyers Counter Mueller's Interview Offer, Seeking a Narrower Scope*, N.Y. TIMES (Aug. 8, 2018), https://www.nytimes.com/2018/08/08/us/politics/trump-mueller-interview.html.

26. David Jackson, *Can Robert Mueller Subpoena Donald Trump? Only the Supreme Court Would Know for Sure*, USA TODAY (May 2, 2018, 7:35 PM), https://www.usatoday.com/story/news/politics/2018/05/02/can-mueller-subpoena-trump-only-supreme-court-would-know-sure/573185002/.

27. Norman Eisen, *Unpacked: Will Trump Testify in Mueller's Russia Investigation?*, BROOKINGS (July 16, 2018), https://www.brookings.edu/blog/unpacked/2018/07/16/unpacked-will-trump-testify-in-muellers-russia-investigation/.

28. Clinton v. Jones, 520 U.S. 681, 705–06 (1997).

information from a suspect.[29] In fact, Chief Justice Warren suggested that the warnings would not eliminate confessions;[30] instead, they would improve fact-finding reliability.[31] If one remembers the Court's goal in *Miranda*, one can make sense of the Chief Justice's assertions.[32]

Importantly, the *Miranda* Court was legitimately concerned with equality and the inherent pressure of custodial interrogation.[33] Those concerns are not inconsistent with the need to secure everyone's relevant evidence. This Article asks the following question: Can we have a system that bans custodial interrogation but can still require suspects to tell their version of the facts? The answer is, of course we can.[34] *Miranda*'s goals of equality and clarity could be achieved if the police could not engage in custodial interrogation, but instead had to bring a suspect before a judge for appointment of counsel.[35] That would be the case as long as the suspect could be examined, as any other witness with relevant information.

Part II explores the pre-*Miranda* voluntariness cases and the Court's search for a remedy to the problem of police abuse in the custodial setting.[36] Part III reviews *Miranda*'s impact on the 1968 election and reviews some of the post-Warren Court decisions that have narrowed *Miranda* almost beyond recognition.[37] Part IV develops my core thesis: *Miranda* was motivated by concerns about equality and putting indigent defendants on equal footing with wealthy defendants.[38] That is a worthwhile goal. Further, those goals can be advanced by abandoning custodial interrogation entirely.[39] Bona fide law enforcement interests can be met as long as suspects are subject to questioning with counsel present and the fact finder can draw an inference of guilt from a suspect's invocation of the Fifth Amendment.[40] That would, of course, require the Court to overrule *Griffin v. California*.[41] But the resulting

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29. *See* Miranda v. Arizona, 384 U.S. 436, 478 (1966).
30. *Id.*
31. *Id.* at 477.
32. *See id.*
33. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* POLICE INTERROGATION AND CONFESSIONS 27 (1980).
34. *See infra* Part IV (explaining how to ban custodial interrogation and require suspects to reveal their version of the facts).
35. *See infra* Part IV (discussing that the alternative to custodial interrogation is to bring the suspect before a judge for appointment of counsel).
36. *See infra* Part II (exploring pre-*Miranda* cases).
37. *See infra* Part III (reviewing the effects of the *Miranda* decision and the narrowing of the decision thereafter).
38. *See infra* Part IV (speaking to the policy of the *Miranda* decision as to put defendants with different socioeconomic statuses in the same position).
39. *See infra* Part IV (stating the goals of the *Miranda* decision can be met by getting rid of all custodial interrogation).
40. *See infra* Part IV (advancing how law enforcement interests may still be met when custodial interrogation is abandoned).
41. Griffin v. California, 380 U.S. 609 (1965).

system, effectively paralleling the Federal Rules of Civil Procedure,[42] would accommodate both the needs of effective law enforcement and the legitimate interests that motivated the *Miranda* Court.[43]

II. THE ROAD TO *MIRANDA*

In 1936, for only the second time in its history, the Court overturned a state criminal case.[44] In *Brown v. Mississippi*, the state secured murder convictions for African-American defendants, who were subsequently sentenced to death based only on their confessions.[45] In commenting on the evidence, Chief Justice Hughes stated one of the sheriff's deputies admitted he beat one of the suspects: "It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a negro; not as much as I would have done if it were left to me.'"[46] Other officials admitted to participating in the beatings, and no one denied the beatings.[47] The Court held securing a confession by use of torture violates the Fourteenth Amendment because such a statement is involuntary.[48]

Over the next thirty years, the Court frequently revisited the meaning of involuntariness.[49] Most often, the cases involved the death penalty, and often in cases arising in the South, involved African-American defendants.[50] In fact, over a thirty-year period after *Brown*, "the Supreme Court granted review in over thirty-five cases in which confessions had been held voluntary."[51] After *Brown*, the Court seldom faced instances where officers admitted to using violence towards the defendant.[52] Instead, police used a host of other techniques, including: the "third degree," use of trickery, good-cop-bad-cop interrogations, threats, and other devices to erode a suspect's confidence even in one's own innocence.[53] In most of the cases the Court reviewed, it reversed the convictions.[54]

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42. FED. R. CIV. P. 26–37; *see* Donald L. Edgar, Comment, *Discovery of Documents and Things: The Federal Rules and the California Law*, 42 CALIF. L. REV. 829 (1954).

43. *See infra* Part IV (arguing that both law enforcement interests and the interests of the *Miranda* Court would be met by mirroring the Federal Rules of Civil Procedure).

44. PAUL FINKELMAN & CARY D. WINTZ, ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1896 TO THE PRESENT: FROM THE AGE OF SEGREGATION TO THE TWENTY-FIRST CENTURY 509 (2009); *see* Powell v. Alabama, 287 U.S. 45 (1932).

45. Brown v. Mississippi, 297 U.S. 278, 279 (1936).

46. *Id.* at 284.

47. *Id.* at 284–85.

48. *Id.* at 287.

49. Herman, *supra* note 9, at 749.

50. *See id.*

51. *Id.* at 754.

52. *See* Wilfred J. Ritz, *State Criminal Confession Cases: Subsequent Developments in Cases Reversed by U.S. Supreme Court and Some Current Problems*, 19 WASH. & LEE L. REV. 202, 204 (1962).

53. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966).

54. Herman, *supra* note 9, at 754.

Voluntariness cases posed additional problems as well. Commentators identified some of those problems: How does one define involuntary?[55] Even an offender facing torture in some sense has a choice: undergoing physical pain or confessing.[56] How does one assess causation when an offender confesses?[57]

In light of questions like those posed above, the Court's rationales for suppressing confessions varied over time.[58] Was the goal to keep unreliable evidence from the jury?[59] To control police misconduct?[60] To assure that the offender has some level of freedom of choice in condemning himself?[61] The case law seemed to create an "analytical stew."[62]

Spano v. New York provided an insight into the complexity (or perhaps, incomprehensibility) of the Court's test.[63] There, a young, foreign-born man with no history of criminal activity or familiarity with the police shot a much larger man who was also a former professional boxer.[64] The victim took money from the defendant, and when the defendant confronted him, the victim knocked him down and kicked him in the head repeatedly.[65] Shortly thereafter, the defendant returned to the area, now with a firearm, and shot the victim to death.[66]

The police were able to secure a confession from the defendant only after several hours of interrogation and after using a friend of the defendant's to cajole him into confession.[67] Gaspar Bruno, the defendant's close personal friend and a "fledgling police officer," received a call from the defendant explaining the circumstances of the killing.[68] The police eventually used Bruno to get him to confess.[69] The police were able to get the defendant to confess to facts that, despite a possible reduction of his crime to voluntary manslaughter, allowed the state to secure a first-degree murder conviction and the imposition of the death penalty.[70]

In resolving the issue, the Supreme Court cited no single reason why the confession was involuntary.[71] Instead, it listed over a dozen facts that

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55. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 600 (6th ed. 2017).
56. *Id.* at 590.
57. *Id.*; *see* Lisenba v. California, 314 U.S. 219, 236 (1941).
58. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157 (1986); Spano v. New York, 360 U.S. 315 (1959).
59. DRESSLER & THOMAS, *supra* note 55, at 603.
60. *Id.*; *see Connelly*, 479 U.S. at 163.
61. DRESSLER & THOMAS, *supra* note 55, at 603.
62. *Id.*
63. *Spano*, 360 U.S. at 315.
64. *Id.* at 316.
65. *Id.*
66. *Id.*
67. *Id.* at 318–19.
68. *Id.* at 317.
69. *Id.* at 318–19.
70. *Id.* at 327 (Stewart, J., concurring); *see* Knight v. State, 73 Ga. App. 556 (1946).
71. *Spano*, 360 U.S. at 324.

supported its conclusion that the statement was involuntary.[72] As one commentator observed, in cases like *Spano*, no single fact was controlling, but almost everything was relevant to the conclusion.[73]

Other problems with the Court's voluntariness case law existed as well. Apart from the difficulty in implementing its multi-factored test, a trial court's factual findings could prevent effective review if an appellate court gave traditional deference to such findings.[74] Instead, the Court developed a greater level of scrutiny, reviewing the voluntariness finding itself de novo.[75]

At least as early as *Spano*, members of the Court flirted with finding that the Sixth Amendment right to counsel should attach at an earlier stage than the Court had held.[76] Moving the Sixth Amendment right to counsel to the stationhouse would presumably address the Court's concerns about police overreaching. Instead, *Miranda* grounded the right to counsel in the Fifth Amendment.[77] Influenced by Professor Yale Kamisar's important analysis,[78] the Court recognized that the right to remain silent at trial is meaningless if the defendant has already confessed in the stationhouse.[79]

Chief Justice Warren's opinion reads more like a legislative report than a decision of a specific legal question.[80] It defined the larger legal issues that the Court faced and developed a set of procedural rules designed to protect the underlying Fifth Amendment right.[81] In contrast to the fact-laden voluntariness cases,[82] the Chief Justice barely addressed the facts of the four

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72. *Id.* at 320–21.

73. *See* Herman, *supra* note 9. Lawrence Herman described the matter well:

> It violates due process of law for the prosecution in a criminal case to use the defendant's involuntary confession against him. Whether a confession is involuntary must be determined by considering the totality of the circumstances—the characteristics of the defendant and the environment and technique of interrogation. Under the "totality of the circumstances" approach, virtually everything is relevant and nothing is determinative. If you place a premium on clarity, this is not a good sign . . . . The point is that the *Miranda* dissenters in 1966 and the Attorney General in 1985 were simply wrong in their claim that we got along well with the law that antedated *Miranda*.

Id. at 745 (footnotes omitted).

74. Peter B. Rutledge, *The Standard of Review for the Voluntariness of a Confession on Direct Appeal in Federal Court*, 63 U. CHI. L. REV. 1311, 1312 (1996).

75. *See* Brown v. Mississippi, 297 U.S. 278, 286–87 (1936).

76. *Spano*, 360 U.S. at 320–21.

77. Miranda v. Arizona, 384 U.S. 436, 457 (1966).

78. Kamisar, *supra* note 33.

79. *Id.* at 31; William T. Pizzi, *Revisiting the Mansions and Gatehouses of Criminal Procedure: Reflections on Yale Kamisar's Famous Essay*, 12 OHIO ST. J. CRIM. L. 633, 635 (2015).

80. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988).

81. *Miranda*, 384 U.S. at 487–89. In effect, *Miranda* created a double prophylaxis. *Id.* at 463. The Fifth Amendment does not explicitly protect one from remaining silent, but only from being compelled to be a witness against oneself. *Id.* at 461. *Miranda*'s theory is that a suspect need to be able to invoke silence to protect himself from being compelled by the coercive environment from being a witness against himself. *Id.* at 475. In addition, counsel's role is to protect the suspect in the coercive setting. *Id.* at 472.

82. *See* Spano v. New York, 360 U.S. 315 (1959); *see also* Lisenba v. California, 314 U.S. 219 (1941) (dealing with a fact-laden voluntariness case).

cases on review.[83] His opinion made clear that he wanted to get the Court out of the business of assessing voluntariness on a case-by-case basis.[84] As the Chief Justice stated, "Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact."[85]

Miranda left many questions open. But the Chief Justice seemingly expected two things to happen in a world where suspects have *Miranda* rights.[86] The first was that suspects would routinely ask for advice of counsel.[87] The second, however, was that the police would still be able to talk to the suspect.[88] The Chief Justice asserted that confessions would not dry up and that fact-finding would be more reliable in a post-*Miranda* world.[89] Seemingly, he envisioned continued discussions with the police after counsel arrived.[90]

Along the way, the *Miranda* Court made two statements that would give fuel to its critics: the first was an acknowledgement that under its traditional voluntariness case law, at least some of the confessions before the Court would not have been excluded at trial.[91] In addition, apparently at Justice Brennan's suggestion, the Chief Justice included a suggestion that Congress or state legislatures might come up with alternative remedies to the Court's warnings.[92] Given the Court's limited authority over state court judgments, critics argued that the Court lacked constitutional authority to impose warnings because states did not have to follow them.[93] But that is part of the post-*Miranda* story.

83. *Miranda*, 384 U.S. at 491.
84. *Id.* at 524.
85. *Id.* at 468–69.
86. *See id.* at 472, 481.
87. *See id.* at 472.
88. *Id.* at 481.
89. *Id.* at 478–79.
90. *See id.* In practice, neither happens. Cassell & Fowles, *supra* note 7, at 829.
91. *Miranda*, 384 U.S. at 462–63.
92. *Id.* at 467; *see also* Yale Kamisar, *From* Miranda *to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 886 (2001) (discussing state legislatures could come up with alternative remedies).
93. *See* Donald Dripps, *Is the* Miranda *Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, CONST. COMMENT. 19, 20 (2000).

III. *MIRANDA*'S BACKLASH

The public and professional reaction to *Miranda* was almost universally negative.[94] Law enforcement officials contended that it would limit their ability to solve crimes.[95] *Miranda* critics claimed confessions would dry up.[96]

Race riots in many American cities in the late 1960s made law and order a major campaign issue in the 1968 presidential election.[97] Vice President Humphrey did not defend the Court.[98] George Wallace, who won the American Independent Party nomination, was openly hostile to the Court.[99] For example, in one speech, he called the Court a "sorry, lousy, no-account outfit."[100] While Wallace's open race baiting alienated many voters, Richard Nixon used a more subtle appeal to racial animosity and fear.[101] His campaign focused on law and order, an issue that allowed him to raise fears about racial issues without explicitly discussing race.[102] A large part of Nixon's explanation for the rise in crime was the Warren Court's liberal rulings.[103]

Miranda may not have been the only ruling that alienated voters but it was, almost certainly, the most important one. As Fred Graham observed, *Miranda* "impose[d] limits on police interrogation that no state had ever approached."[104] Nixon promised legislation to shift the balance back to the police, away from criminal elements; the strategy worked.[105]

Even before Nixon took office, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968.[106] One of its most important provisions was codified at 18 U.S.C. § 3501, which effectively reinstated the voluntariness test and overruled *Miranda*.[107]

The Court did not address the legality of § 3501 for thirty-two years,[108] largely because members of the Justice Department believed that it was

94. DRESSLER & THOMAS, *supra* note 55, at 646.
95. Victor Li, *50-Year Story of the* Miranda *Warning Has the Twists of a Cop Show*, A.B.A. J. (Aug. 1, 2016, 4:30 AM), http://www.abajournal.com/magazine/article/miranda_warning_history.
96. William W. Berry, *Magnifying* Miranda, 50 TEX. TECH. L. REV. 97, 100 (2017); *see also* Cassell & Fowles, *supra* note 6, at 1060 (claiming *Miranda* undercut the abilities of law enforcement).
97. DRESSLER & THOMAS, *supra* note 55, at 647.
98. *Id.*
99. *Id.*
100. *Id.* at 646.
101. *Id.* at 647.
102. *Id.*
103. *Id.*
104. FRED P. GRAHAM, THE SELF-INFLICTED WOUND 158 (1970).
105. DRESSLER & THOMAS, *supra* note 55, at 648.
106. 34 U.S.C. § 10101 (1968).
107. 18 U.S.C. § 3501 (1968).
108. Dickerson v. United States, 530 U.S. 428 (2000).

unconstitutional.[109] But between 1969 and 1971, Nixon made four appointments to the Court with an eye towards overruling *Miranda*.[110]

Instead of directly overruling *Miranda*, the Court began to narrow the decision in almost every instance.[111] For example, while *Miranda* insisted the state carried a heavy burden to prove that a suspect waived his rights,[112] the Court held that the state merely had to prevail based on a preponderance of the evidence standard.[113] During the 1970s, the Court began characterizing *Miranda* protections as merely prophylactic, broader than the underlying constitutional right.[114] That line of argument continued into the 1980s in cases like *New York v. Quarles* (creating the public safety exception to the requirement of giving the warnings)[115] and *Oregon v. Elstad* (holding that a mere *Miranda* violation had no evidentiary fruit).[116] Because *Miranda*'s protections are merely prophylactic, the Court explained that it could balance competing interests against the interests protected by the warnings.[117]

While many legal academics praised *Miranda*,[118] important critics emerged.[119] Dean Caplan argued that the Court was wrong in adopting "'the sporting theory' of justice": fairness in the *Miranda* context "dictates that neither side should have an undue advantage; the police and the criminal should be on roughly equal footing and the rules of the game should be drawn to avoid favoring one side or the other."[120]

According to Caplan, the Court was not only concerned with leveling the playing field between the state and the suspect, but it was also concerned with the disparate treatment between indigent, untrained suspects, and wealthier or more sophisticated suspects.[121] For example, a wealthy suspect would appear before the police with an attorney at his side, capable of dealing with police questioning.[122] Caplan posited that making confessions harder to get from weak suspects was not the right solution; perhaps, the answer was

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109. Pierre Thomas, *Justice Seeks to Overturn Recent* Miranda *Ruling*, CNN (Mar. 10, 1999, 11:06 AM), http://www.cnn.com/ALLPOLITICS/stories/1999/03/10/miranda/.

110. Yale Kamisar, *The* Miranda *Case Fifty Years Later*, B.U. L. REV. 1293, 1295 (2017).

111. *But see* Edwards v. Arizona, 451 U.S. 477 (1981).

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

113. Lego v. Twomey, 404 U.S. 477, 489 (1972).

114. New York v. Quarles, 467 U.S. 649, 654 (1984).

115. *Id.* at 649.

116. Oregon v. Elstad, 470 U.S. 298 (1985).

117. *Quarles*, 467 U.S. at 657–58.

118. *See* Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 502 (1996).

119. *See, e.g.*, Caplan, *supra* note 12; Paul Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175 (1999).

120. Caplan, *supra* note 12, at 1441–42.

121. *Id.* at 1455–58.

122. *See id.* at 1456–58.

making it easier to convict hardened criminals.[123] Most importantly, "guilt is personal. . . . To hold otherwise is to confuse justice with equality."[124]

At various times, the Court had seemingly teed up *Miranda* to be overruled.[125] Notably in *Brewer v. Williams*, a case involving a brutal murder of a young girl, the Court seemed on the verge of abandoning *Miranda*.[126] In a 5–4 decision written by Justice Stewart, a *Miranda* dissenter,[127] the Court held that the state violated Williams' Sixth Amendment right to counsel.[128]

Professor Paul Cassell led efforts to force the government to enforce 18 U.S.C. § 3501.[129] Cassell, a strong victims' rights advocate, has argued that *Miranda* has impaired the states' ability to convict guilty defendants.[130] He believed that the government should test the constitutionality of § 3501.[131]

By 2000, when the government finally attempted to rely on § 3501 in the Supreme Court, the Court upheld *Miranda* as based on the Constitution.[132] Chief Justice Rehnquist, appointed in effect to overrule the decision[133] and a settled *Miranda* foe, wrote the majority opinion in *Dickerson v. United States*.[134] The decision was noteworthy for a number of reasons beyond Rehnquist's authorship.[135] He wrote for seven Justices; he also wrote a remarkably tepid "endorsement" of *Miranda*'s constitutional foundation.[136] Nonetheless, *Miranda* survived.[137]

Or did it? By 2000 (and since), the Court has repeatedly narrowed the decision.[138] Indeed, many law enforcement officials now support the case.[139] Law enforcement officials know what they have to do to comply with the law, and although voluntariness issues may still arise, they have to do

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123. *Id.* at 1467.

124. RICHARD A. LEO & GEORGE C. THOMAS III, THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 126 (1998).

125. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 394–95 (1977).

126. *Id.* at 397–98.

127. Miranda v. Arizona, 384 U.S. 436, 504–45 (1966) (Harlan & Stewart, JJ., dissenting) (White & Stewart, JJ., dissenting).

128. *See Brewer*, 430 U.S. at 401–03.

129. Cassell, *supra* note 119, at 178.

130. *Id.* at 255.

131. *Id.*

132. Dickerson v. United States, 530 U.S. 428, 444 (2000).

133. *See* Kamisar, *supra* note 110, at 1294–95.

134. *Dickerson*, 530 U.S. at 431.

135. *See* Yale Kamisar, Miranda*'s Reprieve*, 92 A.B.A. J. 48, 51 (2006) (discussing how Justice Rehnquist weakened *Miranda*).

136. *Dickerson*, 530 U.S. at 431; *see* Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding* Dickerson v. United States, 149 U. PA. L. REV. 287, 288–89 (2000).

137. *Dickerson*, 530 U.S. at 444.

138. Kit Kinports, *The Supreme Court's Love-Hate Relationship with* Miranda, 101 J. CRIM. L. & CRIMINOLOGY 375, 376 (2011); *see, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 387–91 (2010); Maryland v. Shatzer, 559 U.S. 98 (2010); Florida v. Powell, 559 U.S. 50, 64 (2010).

139. Brief for Amicus Curiae the American Civil Liberties Union in Support of Petitioner, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525), 2000 WL 122085.

relatively little beyond mere formal compliance with *Miranda*.[140] Not long after *Dickerson*, for example, Chief Justice Rehnquist joined an opinion characterizing *Miranda* as merely a prophylactic rule.[141]

The Court's case law has continued to chip away at the core protections. One extreme example of the clear gutting of *Miranda*'s core is the Court's treatment of waiver in *Berghuis v. Thompkins*.[142] There, the Court held that an offender had to make an express request for silence.[143] Beyond that, the Court upheld a waiver of the suspect's *Miranda* rights based largely on a record devoid of any facts, other than the confession itself, supporting the waiver.[144] That is a far cry from *Miranda*'s insistence that a waiver would not be lightly inferred from a silent record, and that the state carried a heavy burden to establish the waiver.[145]

Many liberal legal academics have abandoned support for *Miranda.*[146] I may have summarized much of that sentiment in the title of a presentation that I did at Bicocca Law School in Milan: Miranda v. Arizona*: Sounds and Fury Signifying Nothing?*[147] In almost every instance, *Miranda*'s promise seems to have failed; large numbers of suspects confess—[148] many of those are likely suspects who are most in need of counsel's help, perhaps out of fear or out of lack of intellectual acumen.[149] As one commentator has observed, *Miranda* "protect[s] noncooperation and cover-up by the most knowledgeable, cunning, and steely criminals, while providing only minimal safeguards for those who are uneducated, unintelligent, or easily coerced."[150] Followers of *Making a Murderer* are all too familiar with Brendan Dassey, a

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140. Bruce Peabody, *Fifty Years Later, the* Miranda *Decision Hasn't Accomplished What the Supreme Court Intended*, WASH. POST (June 13, 2016, 4:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/13/your-miranda-rights-are-50-years-old-today-heres-how-that-decision-has-aged/?utm_term=.ad2511b6b819.

141. *See* United States v. Patane, 542 U.S. 630, 643 (2004).

142. *Thompkins*, 560 U.S. 382.

143. *Id.* at 388–89.

144. *Id.* at 388.

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

146. *See* Carol S. Steiker, *Two Cheers for* Miranda, 97 B.U. L. REV. 1197, 1197 (2017) ("Many commentators, including some of the contributors to this Symposium, have few kind words for *Miranda*, either as a decision or as a body of doctrine operationalized in the world.").

147. Michael Vitiello, Presentation at Bicocca School of Law in Milan: *Miranda v. Arizona*: Sounds and Fury Signifying Nothing? (Spring 2017).

148. DRESSLER & THOMAS, *supra* note 55, at 714.

149. Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 335 (2009), http://jaapl.org/content/jaapl/37/3/332.full.pdf.

150. Howe, *supra* note 18, at 906.

developmentally slow defendant, whose confession helped convict him and his uncle Steven Avery.[151] *Miranda* warnings did little to protect him.[152]

As Professor Al Alschuler has written, *Miranda* has been criticized as "a doctrinal failure, an ethical failure, a jurisprudential failure, and an empirical failure."[153] His argument is persuasive. Here are a few of his criticisms: the Court misconstrued the Fifth Amendment; its rules have produced "a mountain of nonsense law;" and it "promised legal assistance at the stationhouse while ensuring that suspects would not get it."[154]

Miranda contained a fatal flaw, as Justice White argued in his dissent.[155] Any unwarned statement would be inadmissible no matter how nonthreatening the questions were.[156] But if the majority's theory was that the custodial setting was so inherently coercive that one could not trust such easily procured confessions, why did the *Miranda* Court trust waivers of the offender's rights made in that inherently coercive environment?[157] As an empirical matter, Justice White's point may explain why such large percentages of offenders waive their *Miranda* rights.[158]

As indicated, legal commentators across a broad spectrum find a great deal to dislike about *Miranda*.[159] Of course, arguments against *Miranda* come in many different shapes and sizes. But imagine a world without *Miranda*; what might it look like?[160] That is the subject of the next section.

IV. REIMAGINING *MIRANDA*

As suggested above, the *Miranda* Court hoped to resolve real problems.[161] It eventually adopted *Miranda* as an alternative to its voluntariness case law and its Sixth Amendment cases.[162] The Court's

151. Seth Abramovitch, *'Making a Murderer': The Brendan Dassey Confession Viewers Didn't See*, HOLLYWOOD REP. (Jan. 16, 2016, 9:00 AM), https://www.hollywoodreporter.com/news/making-a-murderer-brendan-dassey-856343.

152. *See* Dassey v. Dittmann, 201 F. Supp. 3d 963 (E.D. Wis. 2016), *rev'd en banc*, 877 F.3d 297 (7th Cir. 2017). Dassey received *Miranda* warnings at various points. *Dassey*, 877 F.3d at 306–10. Later, in part because the police videotaped Dassey's interviews, a federal district court found that his confession was involuntary. *Id.* at 315. The court of appeals reversed. *Id.* at 318.

153. Alschuler, Miranda*'s Fourfold Failure*, *supra* note 3, at 891.

154. *Id.* at 850.

155. Miranda v. Arizona, 384 U.S. 436, 532–33 (1966) (White, J., dissenting).

156. *Id.*

157. *Id.* at 534.

158. *See* Paul G. Cassell & Brett S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 842 (1996); *see also* Leo, *supra* note 19, at 282–83 (discussing defendants waiving their *Miranda* rights).

159. *See* Steiker, *supra* note 146.

160. *See infra* Part IV (exploring what the legal system would be like if *Miranda* were to be abandoned).

161. *See supra* Part I (explaining how the Court intervened in cases with questionable confessions).

162. *Miranda*, 384 U.S. at 464–66; *see* Arnold H. Loewy, *Distinguishing Confessions Obtained in Violation of the Fifth Amendment from Those Obtained in Violation of the Sixth Amendment*, 50 TEX. TECH L. REV. 145, 152 (2017).

concerns were real then and remain real today: for so many reasons, the police should not be able to extract statements from suspects, but assessing voluntariness is exceedingly difficult at best.[163] And equality matters: unequal treatment of suspects has profound social consequences.[164] But as many on the left now recognize, *Miranda* failed to achieve those goals and has created other bad consequences, including providing protection to the wrong suspects.[165]

Here, I want to return to Professor Loewy's work. He would have preferred a Sixth Amendment right to counsel solution to custodial interrogation.[166] Currently, the state has no obligation to provide Sixth Amendment counsel until formal proceedings begin.[167] In *Escobedo v. Illinois*, the Court seemed to place the beginning of Sixth Amendment criminal proceedings at the moment when an offender became a suspect, not merely a witness—or as *Escobedo* discussed, at the moment when the state began to focus on the offender as a suspect.[168] *Miranda* rejected the Sixth Amendment as the source for the right to counsel.[169] As a result, today the formal right to counsel begins only after some indication that the state is commencing formal proceedings.[170]

The distinction between informal and formal proceedings can be quite artificial.[171] Thus, an offender who is arrested pursuant to an arrest warrant is not yet entitled to Sixth Amendment counsel.[172] Instead, the right attaches at the time of arraignment on the warrant.[173] Assume that the Court had eventually equated *Miranda* and Sixth Amendment counsel: Would Sixth Amendment protection of a suspect in the custodial setting have been more robust than *Miranda* protection? The answer depends. The Court would have had to struggle with other issues: notably, could offenders waive their Sixth

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163. *See* Spano v. New York, 360 U.S. 315 (1959); Wadie E. Said, *Coercing Voluntariness*, 85 IND. L.J. 1, 6 (2010).

164. *See* Bender, *supra* note 16; Tanner Colby, *Affirmative Action: It's Time for Liberals to Admit it Isn't Working*, SLATE (Feb. 10, 2014, 11:52 PM), http://www.slate.com/articles/life/history/features/2014/the_liberal_failure_on_race/affirmative_action_it_s_time_for_liberals_to_admit_it_isn_t_working.html.

165. *See* Peabody, *supra* note 140.

166. Loewy, *supra* note 1, at 435; Loewy, *supra* note 162, at 147.

167. *See* Coleman v. Alabama, 399 U.S. 1, 9–10 (1970) (asserting that the right to counsel attaches at preliminary hearings); United States v. Wade, 388 U.S. 218, 236–37 (1967) (holding that the right to counsel attached to the post-indictment lineup); Powell v. Alabama, 287 U.S. 45, 57 (1932) (discussing that the right to counsel begins at arraignment).

168. Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964).

169. *See* Miranda v. Arizona, 384 U.S. 436, 469–72 (1966).

170. *See* Danielle Lenth, Comment, *Life, Liberty, and the Pursuit of Justice: A Comparative Legal Study of the Amanda Knox Case*, 45 MCGEORGE L. REV. 347, 361 (2014).

171. *See* Karen Akst Schecter, Comment, *The Right to Counsel: Attachment Before Criminal Judicial Proceedings*, 47 FORDHAM L. REV. 810, 812 (1979).

172. *See id.*

173. Brewer v. Williams, 430 U.S 387, 398 (1977).

Amendment right to counsel in the stationhouse?[174] Even if the Sixth Amendment right to counsel attached at the custodial interrogation setting, if the Court were to allow waiver, then the results would seem similar to the *Miranda* world.[175]

As Justice White intimated in his *Miranda* dissent, if the primary concern in *Miranda* was the inherently coercive environment in the custodial setting, then the best approach might have been to hold that no waiver could take place absent consultation with counsel.[176] Or framed differently, once an offender's Sixth Amendment right to counsel attached, the offender was then functionally represented by counsel and could be approached only through counsel.[177] Perhaps suspects would not be able to waive their Sixth Amendment counsel as easily as one can waive *Miranda* counsel.[178]

The answer to the waiver question depends on a number of variables. Cases like *McNeil v. Wisconsin*[179] and *Patterson v. Illinois*,[180] which distinguished *Miranda* and Sixth Amendment counsel, turned on the Court's perception that counsel in the stationhouse and counsel in the courtroom serve different functions.[181] Suspects in the stationhouse who invoke counsel are signaling that they cannot negotiate the coercive environment without counsel.[182] Sixth Amendment counsel, by contrast, is the person who appears in open court and performs more traditional lawyer functions.[183] But were the Court to recognize that custodial interrogation is part of a criminal proceeding, and therefore within the ambit of the Sixth Amendment, one might argue that counsel is not just a backbone against the coercive influence

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174. My proposal would be ineffective if the police could get a waiver of Sixth Amendment counsel in the stationhouse, largely for the reasons that *Miranda* has been ineffective.

175. *See also* Massiah v. United States, 377 U.S. 201, 204 (1964) (holding that the defendant's Sixth Amendment rights were violated when the government deliberately elicited incriminating statements from him after he had been indicted and without counsel); *cf.* Illinois v. Perkins, 496 U.S. 292, 300 (1990) (holding that *Miranda* warnings are not required when a suspect gives an incriminating statement to undercover law enforcement).

176. *See* Edward Gregory Mascolo, Miranda v. Arizona *Revisited and Expanded: No Custodial Interrogation Without the Presence of Counsel*, 68 CONN. B.J. 305, 307 (1994).

177. *See id.* My argument parallels the theory adopted by some members of the Court; most notably, Justice Stevens. *See, e.g.*, Patterson v. Illinois, 487 U.S. 285, 301–11 (1988) (Stevens, J., dissenting); Michigan v. Jackson, 475 U.S. 625, 626–37 (1986). In Justice Stevens's majority opinion in *Michigan v. Jackson* and his dissenting opinion in *Patterson v. Illinois*, he adopted the lawyer-as-medium theory, akin to professional rules of responsibility. *Patterson*, 487 U.S. at 285; *Jackson*, 475 U.S. at 625; *see* MODEL RULES OF PROF'L CONDUCT R. 4.2 (AM. BAR. ASS'N 2018).

178. *See* C. Allen Parker, Jr., *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 COLUM. L. REV. 363, 364 (1982).

179. McNeil v. Wisconsin, 501 U.S. 171 (1991).

180. *Patterson*, 487 U.S. 285.

181. *See* Justin Bishop Grewell, *A Walk in the Constitutional Orchard: Distinguishing Fruits of Fifth Amendment Right to Counsel from Sixth Amendment Right to Counsel in* Fellers v. United States, 95 J. CRIM. L. & CRIMINOLOGY 725, 727 (2005).

182. *Id.* at 728–29.

183. *Id.* at 730–31.

of custody.[184] One might argue that counsel really is performing a lawyer's role in that setting.[185]

As an aside, some European countries follow such a rule.[186] Many American commentators, in their rush to criticize the Italian system when Amanda Knox was found guilty there, ignored the fact that the Italian court suppressed her inculpatory statement.[187] Once she became a suspect, the police could not continue to interrogate her without counsel.[188] That means, in effect, there is no custodial interrogation of a suspect.[189]

One should consider whether such a system could work in the United States.[190] After all, the post-*Miranda* backlash was fueled by fears that confessions would dry up.[191] And as Professor Loewy pointed out, at least some justices agree with Justice Scalia's view that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . . . Admissions of guilt resulting from valid *Miranda* waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'"[192]

Many of us would debate Justice Scalia's statement, at least in part.[193] Confessions secured from mentally impaired offenders may not be coerced but should be of concern.[194] Securing confessions from offenders who confess out of confusion about the nature of the charges against them causes some of us to pause.[195] *Spano* provides a good example in which a properly warned offender might have been tricked into condemning himself to death, even though he seemed to have available a partial defense to first-degree murder.[196]

But as I suggested above, many believe our administration of justice works best when the system has relevant evidence from all actors.[197] Hence, while we might object to extracting a confession from a weak, intimidated suspect, we might also want to hear directly from, for example, Donald

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184. *See id.*

185. *See id.*

186. Lenth, *supra* note 170, at 357; *see* Salduz v. Turkey, 49 Eur. Ct. H.R. (2008) (finding that access to a lawyer should be provided from the first interrogation of a suspect by the police).

187. Lenth, *supra* note 170, at 380.

188. *Id.* at 357.

189. *See id.*

190. *Id*.

191. Cassell & Fowles, *supra* note 6, at 1060.

192. Loewy, *supra* note 1, at 428.

193. *See id.*

194. *See* Dassey v. Dittman, 201 F. Supp. 3d 963 (E.D. Wis. 2016), *rev'd* 877 F.3d 297 (7th Cir. 2017) (en banc).

195. *See Percentage of Exonerations by Contributing Factor*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last updated Dec. 1, 2019). As of December 1, 2019, the National Registry of Exonerations cites false confessions as the contributing factor of 309 of 2,522 total exonerations. *Id.*

196. *See id.*; Spano v. New York, 360 U.S. 315, 319 (1959).

197. *See supra* Part I (implying the legal system works better if all relevant evidence is available).

Trump, when the topic at hand is his involvement in the Russian investigation.[198]

We have models in our system for what would happen even if the police could not engage in custodial interrogation.[199] The state and federal government routinely call witnesses, even suspects, before grand juries.[200] The Court has rejected the idea that an offender has a right to counsel in the grand jury room.[201] Of course, a suspect can invoke the Fifth Amendment right to silence.[202]

Similarly, many of us consider our civil discovery rules to be an integral part of the rule of law.[203] Unique from countries around the world, the Federal Rules of Civil Procedure allow parties to demand their opponents to reveal a smoking gun, damning the opponent's own case.[204]

Why do some observers applaud liberal discovery in the civil procedure context but hesitate to allow similar open discovery in the criminal context?[205] Go back to Dean Caplan's observations: Many of us are worried about the inequality of a system that allows the police to secure confessions from offenders unable to afford counsel while their well-heeled counterparts act pursuant to counsel's advice.[206]

One might question whether abandoning stationhouse interrogations could have some unanticipated consequences.[207] In reviewing an earlier draft of this paper, Dean Caplan raised a question: Whether my proposal would impair the ability of the police to develop informants.[208] At times, a suspect wants to curry favor with the police to uncover what the police know or perhaps to make a deal to get back on the street.[209] Such negotiations often

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198. *See supra* Part I (discussing the retrieval of all relevant evidence).

199. *See* Michael G. Heitz, Comment, *The Rights of a Witness Before the Grand Jury*, 43 MO. L. REV. 714 (1978) (focusing on grand juries and witnesses' Sixth Amendment right to counsel).

200. *Id.* at 716.

201. *Id.* at 719.

202. *Id.* at 721.

203. *See* Geoffrey C. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1017 (1998) (explaining the role of judges in the American pretrial discovery process).

204. *See* Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1063 (Wash. 1933); *see also In re* Text Messaging Antitrust Litig., 782 F.3d 867, 871 (7th Cir. 2015) (using the term, smoking gun, to refer to highly important and material evidence); Pearson v. First NH Mortg. Corp., 200 F.3d 30, 34–35 (1st Cir. 1999) (discussing the smoking gun standard before an evidentiary hearing).

205. *See* Hazard, *supra* note 203, at 1017.

206. *See* Caplan, *supra* note 12, at 1456–58.

207. *See* E-mail from Gerald Caplan, Dean Emeritus, McGeorge School of Law to Mike Vitiello, Distinguished Professor of Law, McGeorge School of Law (Sept. 26, 2018, 14:50 PST) (on file with author).

208. *Id.*

209. *See* Michael L. Rich, *Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship*, 50 SANTA CLARA L. REV. 681, 689–93 (2010).

take place before arraignment or before other formal proceedings have begun.[210]

Even with its ugly underside, the police-informant relationship remains an important law enforcement tool.[211] The importance of informants to crime detection and prevention is axiomatic.[212] I suspect that increasing the role of defense counsel would not end the police-informant relationship. Often, the relationship between an officer and an informant develops on the street, before the officer has busted the offender.[213] That kind of contact would remain subjudicial.[214] Even after arrest, a suspect might talk to an officer with the hopes of gaining a favorable deal.[215] An officer interested in developing an informant might decide to cooperate and forego formal charges that would require having involvement of counsel.[216] Finally, even a represented offender might have leverage: counsel might be able to negotiate with the police in order to secure their client's release in exchange for information.[217]

Back to *Miranda* and Chief Justice Warren. Insofar as equality animated *Miranda*, a pro-*Miranda* Court might see the benefits of curtailing custodial interrogation by holding, similar to European systems, that suspects must consult with counsel.[218]

For the system to work—i.e., protecting offenders from unequal treatment and police overreaching, but not impairing legitimate law enforcement interests in solving crime—the Court would have to rethink one of its holdings.[219] Again, compare our criminal justice and civil justice systems: While a civil litigant can invoke an evidentiary privilege, such as the Fifth Amendment, the law allows the opponent of a party who invokes the Fifth Amendment to argue that the factfinder may draw unfavorable inferences from that invocation.[220]

A year before *Miranda*, the Court held that the state could not instruct a jury that it might draw an unfavorable inference from an offender's invocation of the Fifth Amendment.[221] Professor Alschuler argued that

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210. *See* Laurie Magid, *Questioning the Question-Proof Inmate: Defining* Miranda *Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. 883, 897 (1997).

211. *See* Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1077 (2011).

212. *See* Michael L. Rich, *Lessons of Disloyalty in the World of Criminal Informants*, 49 AM. CRIM. L. REV. 1493, 1495 (2012).

213. *See* Rich, *supra* note 209, at 693.

214. *See id.*

215. *See id.* at 681–83.

216. *See id.* at 697–99.

217. *See id.* at 695.

218. *See* Charles D. Weisselberg, *Exporting and Importing* Miranda, 97 B.U. L. REV. 1235, 1250 (2017).

219. *See* Griffin v. California, 380 U.S. 609, 615 (1965) (holding that prosecutors cannot comment on a defendant's Fifth Amendment right not to testify).

220. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 484–87 (2000).

221. *Griffin*, 380 U.S. at 614–15.

Griffin v. California is not consistent with the language of the Fifth Amendment and the original understanding of the Fifth Amendment.[222] Along with some other legal commentators, Alschuler predicted real benefits were the Court to overrule *Griffin.*[223] I agree.

What would a system look like with no custodial interrogation once an offender becomes a suspect? The state could not approach the offender without counsel. But either by calling the offender before a grand jury or by interviewing the offender along with counsel in open court, the state would be able to gain that offender's version of the facts.[224] Of course, a guilty offender could refuse to confess, but would have to balance invoking one's Fifth Amendment right to refuse to cooperate with the inference that the factfinder might draw from the invocation of the Fifth Amendment.[225] Currently, if a suspect invokes the *Miranda* right to counsel, almost certainly counsel tells the suspect to keep his mouth shut.[226] That might not be sound advice if the state will be able to use the right-to-silence invocation as evidence of guilt.[227]

Think back to *Spano*, the young, mentally unstable defendant tricked into confessing to first-degree murder when the facts suggested a voluntary manslaughter partial defense.[228] He is hardly unique. A factor often leading to the conviction of an innocent offender is the offender's false confession.[229] As in *Spano*, or in the case of Brendan Dassey, the presence of counsel during any interrogation would allow a fuller and more accurate presentation of the facts.[230] Also, in such a system, courts would no longer have to make assessments of voluntariness.[231] Counsel could act as a bulwark against coercive pressure and, if such questioning took place in the open, the inherent coercion of the stationhouse would no longer be a factor.[232]

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222. *See id.*; Alschuler, *Peculiar Privilege*, *supra* note 3, at 2668.

223. Alschuler, *Peculiar Privilege*, *supra* note 3, at 2668; *see also* Jane Elinor Notz, Comment, *Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, U. CHI. L. REV. 1009, 1015 (1997) (arguing that *Griffin* is "limited to right to silence at trial").

224. *See* Heitz, *supra* note 199, at 721–22.

225. *Cf.* Seidmann & Stein, *supra* note 220, at 440 (speaking to the ability of the opposing party to argue an adverse inference be taken when a party invokes his or her Fifth Amendment right).

226. *See* Scott C. Stansbury, Berghuis v. Thompkins *and* Miranda *Rights: Speaking Up to Stay Silent*, 38 S.U. L. REV. 317, 344 (2011).

227. *See* Notz, *supra* note 223, at 1010.

228. Spano v. New York, 360 U.S. 315, 323 (1959); *see* Seidmann & Stein, *supra* note 220, at 436–37.

229. Leo, *supra* note 149, at 323–33.

230. *See* Dassey v. Dittmann, 201 F. Supp. 3d 963, 1005 (E.D. Wis. 2016), *rev'd*, 877 F.3d 297 (7th Cir. 2017) (en banc); *Spano*, 360 U.S. at 315. In *Spano*, for example, counsel could have developed facts supportive of Spano's possible partial defense that his crime amounted only to voluntary manslaughter. *Id.*

231. DRESSLER & THOMAS, *supra* note 55, at 600–01.

232. *See* Miranda v. Arizona, 384 U.S. 436, 457 (1966) ("[I]nterrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner.").

In such a system, *Miranda*'s goal of equality would be achieved: rich and poor defendants would be subject to questioning with counsel present in open court.[233] Rich and poor alike would have to reveal relevant information, unless the suspect made an informed decision to invoke the Fifth Amendment.[234]

V. CONCLUSION

As we celebrate Professor Loewy's work, we also mark the fifty years since the end of the Warren Court's criminal procedure revolution. Sadly many of us, including Professor Loewy, no longer have much faith in *Miranda*, one of the Court's signature and revolutionary opinions.[235] But I believe that I share a good bit of common ground with Professor Loewy: *Miranda* was trying to solve a real problem.[236] I believe that Professor Loewy's argument for a Sixth Amendment right to counsel in place of *Miranda*, especially supplemented by my argument for questioning in open court, would achieve *Miranda*'s goal without significant losses to the administration of criminal justice.[237]

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233. *See* Caplan, *supra* note 12, at 1457–58.
234. *See* Heitz, *supra* note 199, at 721.
235. *See* GRAHAM, *supra* note 4, at 158–59.
236. Loewy, *supra* note 1, at 435.
237. *Id.*