MIRANDA IS DEAD. LONG LIVE *MIRANDA*

Michael Vitiello[*]

I. INTRODUCTION

Miranda v. Arizona is iconic.[1] It played a major role in determining the outcome of the 1968 presidential election.[2] Richard Nixon's election led to significant changes in the makeup of the Supreme Court.[3] Since then, the post-Warren Courts have gutted *Miranda*.[4]

Despite its failings, *Miranda* attempted to solve real problems in the administration of criminal justice.[5] Beginning in 1932, the Supreme Court

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1. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966); *see also* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1418 (1985) (asserting the importance of *Miranda*); Miranda v. Arizona, BRITANNICA, https://www.britannica.com/event/Miranda-v-Arizona (last visited Sept. 8, 2021) (illustrating the Court's continued acceptance of *Miranda*); *The* Miranda *Rights are Established*, HIST., https://www.history.com/this-day-in-history/the-miranda-rights-are-established (last visited Sept. 8, 2021) (explaining how *Miranda* established fundamental rights); *Landmark Cases:* Miranda v. Arizona, THIRTEEN, https://www.thirteen.org/wnet/supremecourt/rights/landmark_miranda.html (last visited Sept. 8, 2021) (describing the reconciliation of police powers and individual rights due to *Miranda*).

2. *See generally* Michael Vitiello, *Introducing the Warren Court's Criminal Procedure Revolution: A 50-Year Retrospective*, 51 U. PAC. L. REV. 621 (2020).

3. *Id.* at 626.

4. Michael Vitiello, *Arnold Loewy, Ernesto Miranda, Earl Warren, and Donald Trump: Confessions and the Fifth Amendment*, 52 TEX. TECH L. REV. 63, 72–75 (2019) (discussing the Supreme Court's continued attempts to cabin *Miranda*); *see, e.g.*, Lego v. Twomey, 404 U.S. 477, 489 (1972) (holding that a stricter standard of proof is unnecessary to prove that the confession was voluntary); New York v. Quarles, 467 U.S. 649, 654, 657–58 (1984) (holding that defendant's initial statement was admissible despite not being read his *Miranda* rights); Oregon v. Elstad, 470 U.S. 298, 300 (1985) (deciding that a violation of *Miranda* rights did not bar admissibility); Berghuis v. Thompkins, 560 U.S. 370, 382, 388–89 (2010) (holding that "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police").

5. Arnold H. Loewy, *The Supreme Court, Confessions, and Judicial Schizophrenia*, 44 SAN DIEGO L. REV. 427, 435 (2007).

began reviewing cases where defendants confessed under questionable circumstances.[6] Over the next thirty years, the Court decided over thirty cases involving the voluntariness of a defendant's confession.[7] Often those cases arose in the south, involving African American defendants.[8] Often the defendants faced the death penalty.[9]

Beginning with *Brown v. Mississippi*, the Court relied on the Fourteenth Amendment's Due Process Clause to determine whether a defendant's confession was voluntary.[10] The Court's many opinions left lower courts with little guidance.[11] What values guided the Court? For example, is due process violated only by certain police practices, or is it also violated when the defendant's confession is unreliable, leading to the potential of the conviction of an innocent defendant?[12] The Court seemed to waver on such issues.[13] Beyond that, what factors demonstrate that a confession is involuntary? *Brown* would be, in retrospect, the only easy case that the Court decided. In that case, a sheriff's deputy admitted beating the suspects.[14] But what about psychological coercion?[15] Or what about a suspect whose mental capacity limited his ability to deal with police pressure?[16]

In *Miranda*, the Court attempted to solve these problems with its voluntariness case law.[17] Warning a suspect of the right to remain silent and to have counsel present seemingly addressed concerns about the uncertainty of voluntariness.[18] If suspects invoked those rights, they would not be subject to having their will overridden—or so the Court seemed to hope.[19] Invoking

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6. *See* 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 also* Powell v. Alabama, 287 U.S. 45, 73 (1932) (reversing after defendants were denied counsel); Brown v. Mississippi, 297 U.S. 278, 287 (1936) (reversing when the defendant's confessions were procured by coercion).

7. *See* Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745, 749, 754 (1987).

8. *Id.* at 747.

9. *Id.* at 746–47.

10. *Brown*, 297 U.S. at 279.

11. Herman, *supra* note 7, at 746.

12. *See* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 600, 603 (6th ed. 2017); *see also, e.g.*, Colorado v. Connelly, 479 U.S. 157, 163 (1986) (stating that "coercive government misconduct" violates the Due Process Clause); Spano v. New York, 360 U.S. 315, 324 (1959) (reversing the use of an involuntary confession when defendant was repeatedly denied access to his attorney).

13. *See* DRESSLER & THOMAS, *supra* note 12; *see also, e.g.*, *Connelly*, 479 U.S. at 163 (stating that "coercive government misconduct" violates the Due Process Clause); *Spano*, 360 U.S. at 324 (reversing the use of an involuntary confession when the defendant was repeatedly denied access to his attorney).

14. *Brown*, 297 U.S. at 284.

15. *See, e.g.*, *Spano*, 360 U.S. at 319–20.

16. *See, e.g.*, *Connelly*, 479 U.S. at 164.

17. *See* Miranda v. Arizona, 384 U.S. 436, 464–66 (1966); 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).

18. *Miranda*, 384 U.S. at 468–69, 491, 524.

19. *Id.*

the right to court-appointed counsel during the interrogation process put poor defendants on a comparable footing with wealthier defendants.[20]

Critics attacked the deeply divided *Miranda* Court immediately.[21] Some questioned whether confessions would dry up, leaving guilty defendants at large.[22] In reliance on statements in the lead opinion, critics argued that *Miranda* lacked constitutional legitimacy.[23]

Such criticisms resonated with the public when many feared rising crime rates and inner-city riots.[24] Richard Nixon successfully rode his law-and-order theme to the presidency.[25] In part because of President Lyndon Johnson's political miscalculations,[26] Nixon made four appointments to the

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20. *See* Caplan, *supra* note 1, at 1457–58; *see also* Michael G. Heitz, *The Rights of a Witness Before the Grand Jury*, 43 MO. L. REV. 714, 721 (1978) (discussing the risks of appearing before a grand jury without counsel).

21. *See* 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, 1062–63 (1998) [hereinafter *A Thirty-Year Perspective*]; *see also* Paul G. Cassell & Richard Fowles, *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) [hereinafter *A Review of Fifty Years*] (concluding restraints placed on law enforcement by *Miranda* have made law enforcement less effective); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2629–30 (1996) (arguing that the Court lacks constitutional authority to supervise the administration of state criminal justice); Loewy, *supra* note 5, at 434–35 (arguing that *Miranda* does not, but should, adequately protect the adversary process).

22. *See* William W. Berry, *Magnifying* Miranda, 50 TEX. TECH. L. REV. 97, 100 (2017); *see also A Thirty-Year Perspective*, *supra* note 21, at 1060 (claiming *Miranda* undercut the abilities of law enforcement). *But see Miranda*, 384 U.S. at 478–79.

23. *See* Donald Dripps, *Is the* Miranda *Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT. 19, 20 (2000).

24. *See* Hazel Erskine, *The Polls: Causes of Crime*, 38 PUB. OP. Q. 288, 292 (1974) (listing 1969 Louis Harris & Assoc. poll showing 51% and 23% of Americans believed "Supreme Court decisions protecting rights of accused" were a "Major Cause" and "Minor Cause" of "an increase in crime," respectively); *id*. at 294 (detailing a Gallup poll showing 63% of Americans in 1968, and 75% of Americans in 1969, believed "the courts" were not dealing "harshly enough" with criminals."); *see also* James Vorenberg, *The War on Crime: The First Five Years*, THE ATL. MONTHLY, May 1972, at 63, http://jfk.hood.edu/Collection/Weisberg%20Subject%20Index%20Files/F%20Disk/FBI/FBI%20Crime/Item%2001.pdf; *see generally* FRED P. GRAHAM, THE SELF-INFLICTED WOUND 299 (1970) (detailing increases in frequency of criminal activity during this period).

25. *See* LIVA BAKER, *MIRANDA*: CRIME, LAW AND POLITICS 224 (1983) (describing how during his speech accepting the Republican presidential nomination, Nixon promised voters "that 'the wave of crime is not going to be the wave of the future in the United States of America,' that the restoration of law and order would be a linchpin of his administration.").

26. *See, e.g.*, John Massaro, *LBJ and the Fortas Nomination for Chief Justice*, 97 POL. SCI. Q. 603, 621 (1982) (evaluating ways in which "it was poor presidential management rather than ideology that was the primary factor leading to the Senate's refusal to confirm Abe Fortas"); KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 17–36 (2011) (arguing Johnson's selection of Fortas, "a case of gross political malpractice," tipped the scales in favor of Richard Nixon securing the Republican Party's 1968 presidential nomination, thereafter the general election and the ability to appoint Justices).

Court between 1969 and 1971.[27] Those Justices, along with some *Miranda* dissenters, began *Miranda's* erosion.[28]

After a near-death experience in 1977, *Miranda* would eventually survive the claim that it lacked constitutional authority.[29] Ironically, Chief Justice Rehnquist, appointed in part to overrule *Miranda*, wrote the opinion "saving" *Miranda*.[30] That fact alone suggests how post-Warren Courts gutted *Miranda*.

Although many defense attorneys and scholars failed to recognize the fact initially, the Court's voluntariness case law remained in play.[31] As the Court eroded *Miranda*, voluntariness case law has become increasingly important.[32] Compliance with *Miranda* as reconstituted by the post-Warren Courts is easy.[33] Police conduct after a *Miranda* waiver now often becomes a defendant's best basis for challenging a confession.[34]

That takes courts and attorneys back to the beginning. Between 1966, when it decided *Miranda*, and the present, the Court has seldom addressed voluntariness.[35] Thus, lower courts have little guidance on how to assess due process claims.[36] This Article explores some of these developments and tries

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27. *Justices 1789 to Present*, SUPREME CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Sept. 8, 2021).

28. *See* EARL M. MALTZ, THE COMING OF THE NIXON COURT: THE 1972 TERM AND THE TRANSFORMATION OF CONSTITUTIONAL LAW 2 (2016); *see also, e.g.*, Lego v. Twomey, 404 U.S. 477, 489–90 (1972) (holding that the State merely had to surpass a preponderance of the evidence standard to prove a suspect waived his *Miranda* rights); Harris v. New York, 401 U.S. 222, 225–26 (1971) (holding that a statement which was inadmissible against defendant in the prosecution's case in chief because defendant had not been advised of his rights to counsel and to remain silent prior to making statement but which otherwise satisfied legal standards of trustworthiness was properly usable for impeachment purposes to attack credibility of defendant's trial testimony).

29. *See infra* Part II (discussing *Brewer v. Williams*, 430 U.S. 387 (1976)).

30. *See* Yale Kamisar, *The* Miranda *Case Fifty Years Later*, B.U.L. REV. 1293, 1294–95 (2017); *see also* Dickerson v. United States, 530 U.S. 428, 431 (2000).

31. Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 876 (1971).

32. *See* Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 312–14 (2003).

33. *See id.* at 309–12; *see also* William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 987 (2001).

34. *See* Slobogin, *supra* note 32, at 310; *see also* Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. 1519, 1549 (2008).

35. *E.g.*, Arizona v. Fulminante, 499 U.S. 279, 280 (1991) (demonstrating one of the few instances where the Court decided a case based on the involuntariness of the defendant's confession); *see also* Weisselberg, *supra* note 34, at 1523; Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. 673, 744–45 (1992) (stating *Miranda* may have "served to insulate the resulting confessions from claims that they were coerced or involuntary"); George C. Thomas III, *The End of the Road for* Miranda v. Arizona*?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 18 (2000) ("Once a suspect waives *Miranda* (and most do), the routinized *Miranda* ritual lulls judges into admitting confessions with little inquiry into voluntariness."). Welsh White could find only nine cases in a recent two-year period in which confessions obtained after a waiver were excluded, and four of these were based on state constitutional grounds. Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1219 (2001). White concluded that "[a] finding that the police have properly informed the suspect of his *Miranda* rights thus often has the effect of minimizing or eliminating the scrutiny applied to post-waiver interrogation practices." *Id.* at 1220.

36. *See infra* Part II (discussing some of the issues affecting lower courts).

to sort out how courts might resolve such claims in ways that provide coherence.[37]

Part II briefly reviews the road to *Miranda* and its core holdings.[38] Part III examines some of the ways in which post-Warren Courts have cabined *Miranda*, leaving it almost unrecognizable.[39] Part IV focuses on the resurgence of voluntariness cases and explores how courts might rethink the assessment of the admissibility of confessions to bring more coherence to the inquiry.[40]

II. ON THE ROAD TO *MIRANDA*

The story of the road from *Brown v. Mississippi*[41] to *Miranda* is familiar.[42] Nonetheless, that narrative is important for this Article.

Brown presented to the Supreme Court a startling example of racial injustice. Local authorities arrested three African-American tenant farmers for the murder of a white planter.[43] The evidence at trial consisted almost exclusively of the defendants' confessions.[44] As the State's witnesses admitted, the deputies whipped the defendants to secure their confessions.[45] For only the second time, the Supreme Court reversed state criminal convictions.[46] In *Brown*, the Court held that the use of a confession procured through police violence was inadmissible because its use violated the Due Process Clause of the Fourteenth Amendment.[47]

No doubt, *Brown* did not end police violence in securing confessions.[48] But seldom were police so willing to testify that they used violence to extract confessions.[49] The cases after *Brown* presented the Court with different kinds of coercive police practices.[50] For example, in *Chambers v. Florida*, the

37. *See infra* Part IV (providing recommendations for these claims).

38. *See infra* Part II (discussing the developments leading to *Miranda* and its holding).

39. *See infra* Part III (discussing how post-Warren Courts have handled *Miranda*).

40. *See infra* Part IV (providing recommendations for using *Miranda* moving forward).

41. *See generally* Brown v. Mississippi, 297 U.S. 278 (1936).

42. *See, e.g.*, Vitiello, *supra* note 4.

43. *Brown*, 297 U.S. at 279.

44. *Id.*

45. *Id.* at 281–82, 285.

46. *See generally* Powell v. Alabama, 287 U.S. 45 (1932); *see also* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50–52 (2000).

47. *Brown*, 297 U.S. at 286.

48. *See, e.g.*, Ward v. Texas, 316 U.S. 547, 555 (1942) (reversing a conviction where a police officer admitted slapping the accused). *But see* Thomas v. Arizona, 356 U.S. 390, 403–04 (1958) (affirming the conviction of accused lassoed by men accompanying the sheriff); Stroble v. California, 343 U.S. 181, 198 (1952) (affirming conviction of accused slapped by a civilian in the presence of the police).

49. As the Court suggested in *Spano*, law enforcement agents became more sophisticated in techniques that they used to secure confessions. *See* Spano v. New York, 360 U.S. 315, 321 (1959).

50. *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143, 147 (1944); *see also Spano*, 360 U.S. at 321 ("But as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made.").

Court dealt with a case where violence was not used.[51] Instead, the police conducted questioning of the suspects over several days, often during the night, and only with occasional breaks for food and rest.[52] But like *Brown*, *Chambers* involved young African-American defendants sentenced to death.[53] After its independent review of the record, a unanimous Court found that the police conduct violated the defendants' due process rights.[54] Similar cases followed.[55]

Often, the Court dealt with cases arising out of the South and involving African-American defendants.[56] Often, the Court reviewed cases where the defendant faced the death penalty.[57] During the thirty years between *Brown* and *Miranda*, the Court decided thirty-five cases in which it had to resolve whether a confession was voluntary.[58] Unlike *Brown*, police did not engage in violence. "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."[59] But given the range of possible police activities, what fact or facts were controlling absent police violence or threat of violence?

Spano v. New York demonstrates the problem. As I summarized that case elsewhere:

> 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. 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. Shortly thereafter, the defendant returned to the area, now with a firearm, and shot the victim to death.
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> 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. 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. The police eventually used Bruno to get him to confess. The police were able to get the defendant to confess to facts that, despite a possible reduction of his crime

51. *See generally* Chambers v. Florida, 309 U.S. 227 (1940).
52. *See id.* at 230–31.
53. *See id.* at 235.
54. *See id.* at 241.
55. *See generally Spano*, 360 U.S. at 315; Escobedo v. Illinois, 378 U.S. 478 (1964); Griffin v. California, 380 U.S. 609 (1965); Lisenba v. California, 314 U.S. 219 (1941); Powell v. Alabama, 287 U.S. 45, 57 (1932); Massiah v. United States, 377 U.S. 201, 204 (1964).
56. *See* Herman, *supra* note 7, at 747.
57. *See id.* at 747–48.
58. *See id.* at 749.
59. Vitiello, *supra* note 4, at 67.

> to voluntary manslaughter, allowed the state to secure a first-degree murder conviction and the imposition of the death penalty.[60]

In concluding Spano's confession was involuntary, the Court recited a dozen facts relevant to its conclusion.[61] One commentator summed up cases like *Spano* by observing that no single fact was controlling, but almost everything was relevant to the conclusion.[62]

The Court's voluntariness caselaw could provide little guidance to lower courts.[63] Apart from a few obvious cases like *Brown*, voluntariness determinations were ad hoc.[64] Combined with that, the Court gave little deference to lower court findings in such cases.[65] Especially because of the racial implications of so many of the cases and because of the Court's increasing discomfort with the death penalty, the Court had to intervene often.[66] That posed difficulties for a court with a limited docket.[67]

Some of the problems with the Court's caselaw derived from uncertainty about "voluntariness" generally.[68] The concept is distinct from the substantive Criminal Law actus reus requirement: there, if the actor wills his conduct, he has acted voluntarily.[69] Brown and his codefendants

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60. *Id.* at 68.

61. *See* Spano v. New York, 360 U.S. 315, 321–23 (1959).

62. *See* Herman, *supra* note 7, at 745. 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 techniques 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, 755 (footnotes omitted).

63. *See id*. at 744.

64. *See Spano*, 360 U.S. at 315; *see also* Lisenba v. California, 314 U.S. 219, 237─39 (1941) (dealing with a fact-laden voluntariness case).

65. While the Court had to defer to findings of historical facts, the Court reviewed de novo whether a confession was voluntary. *See* Vitiello, *supra* note 4, at 69 (citing Brown v. Mississippi, 297 U.S. 278, 286–87 (1936)).

66. *See id*. at 64 (citing Herman, *supra* note 7, at 747).

67. On average, the Supreme Court hears only 100–150 of the more than 7,000 cases petitioned for certiorari each year and cannot hope to resolve many of the difficult confession cases each year*; see About the Supreme Court*, U.S. CTS. , https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about (last visited Sept. 8, 2021). *See also* Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It–And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 168 (2007) ("In the thirty years preceding *Miranda*, *two-thirds* of all the state confession cases the Supreme Court chose to review were death penalty cases. Even then, only one condemned person out of four had his case reviewed by the highest court in the land and only one out of eight obtained a reversal.").

68. *See* Herman, *supra* note 7, at 749.

69. MODEL PENAL CODE § 2.01 (AM. L. INST. 1962).

consciously decided to speak to stop the whipping.[70] But one recoils at the police conduct there, inviting the question: Why is the conduct so intolerable?

Cases like *Brown* demonstrate a concern that an offender might confess falsely.[71] Thus, as the Court observed in *Brown*, little evidence implicated the defendants other than their confessions.[72] Faced with continued beating, the defendants may well have said anything necessary to stop the process. Indeed, John Wigmore, one of the nation's leading evidence scholars, argued that the appropriate test was whether the inducements were calculated to secure a confession without regard to its truthfulness.[73]

In cases decided in the 1940s, such as *Ashcraft v. Tennessee*, justices compared "certain foreign nations" to the United States.[74] Unlike those foreign powers, the United States has in place a constitution that protects against coerced confessions.[75] That suggests civilized societies must follow some basic restraints.

At other times, the Court seemed more concerned about the offender's state of mind than with police practices.[76] In *Lisenba v. California*, for example, the Court noted due process violations during an extended period of interrogation.[77] It acknowledged that in an initial interrogation, even a police officer admitted slapping the defendant.[78] Nonetheless, the Court upheld the defendant's conviction and death penalty, largely because when the defendant confessed, "[h]e exhibited a self-possession, a coolness, and an acumen throughout his questioning."[79] Despite police misconduct, a suspect who retained freedom of action did not act involuntarily.[80]

One can easily imagine—and at times the Court decided cases—where these values are in conflict.[81] What if a defendant confesses because private citizens believe that he has committed a crime and beat him? Do cases like

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70. *See* Brown v. Mississippi, 297 U.S. 278, 281–83 (1936).

71. *Id.* at 279; *see also* Richard A. Leo, *False Confessions: Causes, Consequences and Implications*, J. AM. ACAD. PSYCHIATRY L. 37, 332–43 (2009); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. HUM. BEHAV. 3 (2010); *The Confessions*, FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/the-confessions/ (last visited Sept. 8, 2021) (acknowledging concerns of false confessions). Many police follow methods advocated in the infamous Inbau-Reid Manual, criticized in *Miranda*. George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEX. TECH. L. REV. 1293, 1300 (2007). Those techniques included isolating defendants, using the good-cop-bad-cop technique, and using various forms of trickery. Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 154–59 (1998). Critics have identified cases in which such techniques lead to innocent suspects confessing to crimes that they did not commit. *See* JOSHUA DRESSLER ET AL., S. MEDWED, CRIMINAL PROCEDURE: INVESTIGATING CRIME 279–30 (7th ed. 2020).

72. *Brown*, 297 U.S. at 279.

73. 2 JOHN HENRY WIGMORE, A TREATISE ON EVIDENCE 159, § 833 (2d ed. 1923).

74. Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

75. *Id.*

76. *See* Lisenba v. California, 314 U.S. 219, 239–41 (1941).

77. *Id.*

78. *Id.* at 230.

79. *Id.* at 241.

80. *Id.*

81. *See generally Lisenba*, 314 U.S. at 219; Brown v. Mississippi, 297 U.S. 278 (1936).

Brown turn on state action? Or do they turn on the fear of unreliability?[82] If state action is required, what if the state actor is not at fault in causing the defendant to confess? For example, what if a doctor acting on behalf of the state provides a jailed offender with pain medication that leads to him confessing?[83]

Three problems surface when one examines this history: first, the concerns underlying the Court's voluntariness caselaw presented an "analytical stew."[84] That is, the Court varied its explanation of their primary concerns for the limitation on police power.[85] Beyond that, the Court's test seemed ill-suited in various ways. The Court's test was hardly a test at all, but an ad hoc assessment of an almost infinite number of variables.[86] Finally, the Court sought to intervene to overcome obvious racial injustice.[87] The defendants in the Court's voluntariness caselaw were most often African-American, indigent, or both.[88] By contrast, more affluent defendants, able to afford counsel, had an advantage when they faced police interrogation: counsel would have advised them to refuse to speak or to insist on consulting with counsel before responding to certain lines of questioning.[89]

Even before *Miranda*, the Court explored other ways to protect suspects in the interrogation setting.[90] Using its advisory powers over the federal system, the Court held that a suspect had to be taken before a magistrate without undue delay, thereby depriving police the chance to engage in extensive interrogation of a suspect.[91] In cases arising out of state courts, the Supreme Court seemed ready to move the Sixth Amendment right to counsel

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82. If the Court's concern in *Brown* was with the reliability of a suspect who had a confession beaten out of him, why should it matter that a private citizen, not a state actor, beat the suspect? *Cf.* Hector (A Slave) v. State, 2 Mo. 166 (1829) (noting that private citizens beat suspect until he confessed to burglary).

83. *See, e.g.*, Leyra v. Denno, 347 U.S. 556, 559–60 (1954); Townsend v. Sain, 372 U.S. 293, 299 (1963).

84. *See* DRESSLER ET AL., *supra* note 71, at 589.

85. *See* Blackburn v. Alabama, 361 U.S. 199, 207 (1966) (noting "a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary.").

86. *Id.*; *see also supra* Part II (discussing *Spano* and the Court's failure to provide a structured test for lower courts).

87. *See supra* Part II (discussing the road to *Miranda* as a response to racial injustice); *see also* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* POLICE INTERROGATION AND CONFESSIONS 27 (1980) (discussing a history of support for the Court's involuntary confession rule).

88. *See id.* (discussing cases arising out of the South and involving indigent African-American defendants).

89. *See* Kamisar, *supra* note 87; *see also* DRESSLER ET AL., *supra* note 71, at 612 (discussing Kamisar's view that respect for the individual and securing equal treatment in law enforcement require the state to make counsel available to all suspects who face police interrogation and to warn them that they need not answer).

90. *See, e.g.*, McNabb v. United States, 318 U.S. 322, 341 (1943) (setting aside convictions as a result of officers' failure to maintain standards of procedure and evidence); Mallory v. United States, 354 U.S. 449, 454–55 (1957) (finding that defendant was not promptly arraigned as required by the Federal Rules of Criminal Procedure).

91. *Mallory*, 354 U.S. at 455.

to the interrogation setting.[92] Thus in *Spano*, four concurring justices urged just that approach.[93] There, the defendant was formally charged and, as such, had a clear right to counsel in any critical stage of the proceedings.[94] Implicit was the idea that custodial interrogation was just such a setting.[95] Then, in *Escobedo v. Illinois*, the Court seemed to hold just that: once the police have focused on a suspect, the suspect has the right to counsel when the police interrogate the suspect.[96]

Enter *Miranda*. Instead of broadening its holding in *Escobedo*, the Court found that the right implicated in custodial settings was the Fifth Amendment right to be free from being compelled as a witness against oneself.[97] Scholars, including Arnold Loewy, have explored why grounding its holding in the Fifth, not the Sixth, Amendment made a difference—one that would allow *Miranda*'s erosion.[98] In defense of the Court, it relied on nineteenth century precedent that held the Fifth Amendment right to be free from compelled testimony extended to the custodial interrogation setting.[99] *Miranda* did much more than find that a suspect in custody might be compelled to be a witness against himself.[100]

Miranda established a set of procedural protections—the set of famous warnings police must provide a suspect before engaging in custodial interrogation.[101] Chief Justice Warren's opinion, for the deeply divided Court, reads like a series of legislative rules.[102] Those rules are, of course, the famous *Miranda* warnings.[103] Seldom has the Court created such a specific set of rules in general, let alone for police to follow.[104] But the Chief Justice's goals were readily visible.

Unlike opinions in the voluntariness cases, the Chief Justice barely mentioned the facts of the *Miranda* case or companion cases before the Court.[105] The answer lies in the discussion above: The hope was to get the Court out of the business of deciding cases on an ad hoc basis.[106] Indeed, the

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92. *See* Spano v. New York, 360 U.S. 315, 324–27 (Douglas & Stewart, JJ., concurring).

93. *Id.*

94. *Id.*

95. *Id.* at 326 (Douglas, J., concurring).

96. *See generally* Escobedo v. Illinois, 378 U.S. 478 (1964). One commentator has called *Escobedo* a schizoid opinion. *See generally* Loewy, *supra* note 5. Much of its discussion focused broadly on the suspect's need for Sixth Amendment counsel in the interrogation setting, but then, in announcing its holding, the Court focused closely on the specifics of the case. *See id.* at 430.

97. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

98. *See* Loewy, *supra* note 5, at 435–37; *see also* Loewy, *supra* note 17, at 147, 152.

99. Bram v. United States, 168 U.S. 532, 550–51 (1897).

100. *See generally Miranda*, 384 U.S. 436 (1966).

101. *Id.* at 344–45.

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

103. *See, e.g.*, *id.*

104. *See* Caplan, *supra* note 1, at 1427–35.

105. *Miranda*, 384 U.S. at 491.

106. *Id.* at 524; *see also supra* Part II (discussing the fact-laden cases decided before *Miranda*, resulting in ad hoc determinations).

Court was clear: even if the state could show that a suspect knew his rights, the state could not argue on an ad hoc basis that the defendant's statement was admissible.[107] Whether police gave the *Miranda* warnings was a "clearcut fact," not subject to case-by-case adjudication.[108]

Not only were warnings needed to avoid ad hoc determinations, but the warnings were also designed to dissipate the inherently coercive environment in the police dominated custodial setting.[109] Implicitly, the suspect would be assured that she could act freely in choosing not to speak.[110] Also implicit in the warnings was the Court's concern about equality: the court would make court-appointed counsel available if the suspect could not afford counsel.[111]

I suspect *Miranda* would have faced a backlash under any circumstances. But the Court left itself open to criticism, as I described in an earlier article:

> 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. 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. 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. But that is part of the post-*Miranda* story.[112]

As one commentator observed, language like this was a "self-inflicted wound."[113] The next section picks up with the depth of that wound.

III. ON THE ROAD TO A NEAR-DEATH EXPERIENCE AND BEYOND

The late 1960s saw increased crime rates and riots in American cities.[114] An early victims' rights organization targeted cases like *Miranda* and other Warren Court decisions that "mollycoddled" criminals as part of the cause of increased violence.[115] Avowed segregationist George Wallace made openly

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107. *Miranda*, 384 U.S. at 467–70.
108. *Id.*
109. *Id.*
110. *Id.*
111. *See* Kamisar, *supra* note 87.
112. Vitiello, *supra* note 4, at 70 (footnotes omitted).
113. *See* GRAHAM, *supra* note 24.
114. *See id.* at 86–101, 299; *see also* MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 12–13 (2016); MCMAHON, *supra* note 26, at 47–51; BAKER, *supra* note 25, at 364–65.
115. Paul G. Ulrich, *What Happened to* Miranda*: A Decision and Its Consequences*, 72 J. MO. BAR. 204, 204 (2016).

racist appeals to American voters.[116] Richard Nixon ran a less overtly racist campaign, instead using the "dog whistle" promise to bring "law and order" back to the streets.[117] Hubert Humphrey did little to defend the Court.[118]

Nixon's attack on the Court helped him win the presidency.[119] In part, because of parting-President Lyndon Johnson's political blunder, Nixon made four appointments to the Court between 1969 and 1971.[120] Along with some of *Miranda's* dissenters, the newly appointed members of the Court would begin eroding *Miranda* almost immediately.[121]

As described in the previous section, the Chief Justice made two statements in *Miranda* that critics focused upon to challenge its legitimacy.[122] First, the underlying constitutional right involved was the right to be free from being compelled to be a witness against oneself.[123] But, as the Court observed, under its prior caselaw the confessions in some cases before the Court would have been admissible.[124] That, along with the statement that Congress or the states could come up with alternatives to *Miranda* procedures gave traction to its critics: *Miranda* was not grounded in the Constitution. [125] If not, then the Court had no power to enforce its protections against the states.[126]

As early as 1971, the Court started the process of *Miranda's* erosion.[127] In *Harris v. New York,* new-Chief Justice Burger argued that much of

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116. *See* MCMAHON, *supra* note 26, at 42–43 (In Wallace's standard stump speech, "he linked the rise in crime to the Court by telling those assembled, 'If you walk out of this hotel tonight and someone knocks you on the head, *he'll* be out of jail before *you're* out of the hospital, and on Monday morning they'll try the *policeman* instead of the criminal.'"); *id.* at 42 ("That's right, we [are] gonna have a *police* state for folks who burn the cities down. They aren't gonna burn any more cities."); *id.*at 46 (Regarding the Court's desegregation of public schools, "Wallace told a group of voters in Toledo, Ohio, that if he became president 'not a single penny of federal tax money is going to be used to send a little child any place you don't want him.'").

117. BAKER, *supra* note 25, at 224 (During his speech accepting the Republican Presidential nomination, Nixon promised voters "that 'the wave of crime is not going to be the wave of the future in the United States of America,' that the restoration of law and order would be a linchpin of his administration."); *see also* MCMAHON, *supra* note 26, at 46–47 (examining the differences between Wallace and Nixon's criticisms of the Supreme Court); *id.* at 57 ("As part of his electoral strategy in the 1968 campaign, Nixon often spoke out against the Warren Court.").

118. DRESSLER & THOMAS, *supra* note 12, at 584.

119. Vitiello, *supra* note 2, at 626.

120. SUPREME CT. OF THE U.S., *supra* note 27; *see also, e.g.*, Massaro, *supra* note 26, at 621 (evaluating ways in which "it was poor presidential management rather than ideology that was the primary factor leading to the Senate's refusal to confirm Abe Fortas."); MCMAHON, *supra* note 26, at 17–36 (arguing that Johnson's selection of Fortas, "a case of gross political malpractice," tipped the scales in favor of Richard Nixon securing the Republican Party's 1968 Presidential nomination, thereafter the general election and the ability to appoint Justices).

121. *See supra* note 28 and accompanying text (demonstrating shifts in the application of *Miranda*).

122. *See supra* note 24 and accompanying text (noting significant criticisms of *Miranda* that gained popularity).

123. *See supra* note 24 and accompanying text (discussing the underlying purpose of *Miranda*).

124. Miranda v. Arizona, 384 U.S. 436, 478–80 (1966).

125. *Id.* at 490.

126. Dripps, *supra* note 23, at 19.

127. *See generally* Harris v. New York, 401 U.S. 222 (1971).

Miranda was dicta.[128] Three years later, the Court began referring to those warnings as prophylactic protections, not themselves required by the Constitution.[129] A few years later, the Court would make a sharp distinction between a "mere" *Miranda* violation and a violation of the core right to be free from being compelled to be a witness against oneself.[130]

The argument that *Miranda* was not rooted in the Constitution invited challenges over time.[131] Almost certainly, the Court was ready to overrule *Miranda* when it granted certiorari in *Brewer v. Williams.*[132] There, a young child was abducted, sexually assaulted, and murdered at a YMCA.[133] The events took place on Christmas Eve.[134] The defendant's conviction was affirmed in the state courts.[135] But the federal district court found that the detective's famous "Christian burial speech" was a violation of *Miranda*.[136] The court also found that the speech violated the defendant's Sixth Amendment right to counsel because the detective deliberately elicited the incriminating response after formal proceedings commenced, and the defendant's statement was involuntary.[137] The court of appeals found the police conduct violated *Miranda* and the Sixth Amendment right to counsel.[138] A divided Court did not reach the *Miranda* issues and grounded its affirmance on the Sixth Amendment right to counsel.[139]

What better case to use to overrule *Miranda*? The facts were so brutal that even members of the majority seemed almost apologetic in upholding the lower courts.[140] As I ask my students, why would a Justice in the majority vote to grant review given that the defendant won in the courts below? The answer is obvious: the dissenters, and perhaps Justice Stewart, who wrote an

128. *Id.* at 224, 226.
129. Michigan v. Tucker, 417 U.S. 433, 444 (1974).
130. New Jersey v. Portash, 440 U.S. 450, 457–58 (1979).
131. *See generally* Brewer v. Williams, 430 U.S. 387 (1977).
132. *Id.* at 389–90.
133. *Id.* at 390–93.
134. *Id.* at 393.
135. *Id.* at 400.
136. *Id.* at 402–03.
137. *Id.*
138. *Id.* at 403.
139. *Id.* at 397–98, 407; *id.* at 407 (Marshall, J., concurring).
140. *Id.* at 407 ("The crime of which Williams was convicted was senseless and brutal, calling for swift and energetic action by the police to apprehend the perpetrator and gather evidence with which he could be convicted. No mission of law enforcement officials is more important. Yet '[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues.' Although we do not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned. The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.") (citation omitted).

earlier important Sixth Amendment right to counsel case but was also a *Miranda* dissenter, may have done so to review *Miranda*.[141]

While the Court narrowly avoided overruling *Miranda*, it continued the ongoing process of cabining *Miranda* protections.[142] In the 1980s, the Court found that officers may interrogate a suspect in custody without *Miranda* warnings if warranted by the need to protect the public.[143] The Fifth Amendment right to be free from compelled testimony and the voluntariness requirement do not allow for such an exception.[144] The answer: because *Miranda* is merely prophylactic, the Court should extend it only if, on balance, extension outweighs competing values.[145] Similarly, when the police fail to give a suspect *Miranda* warnings and take a statement, the police may subsequently give the warnings and take a statement; because *Miranda* is merely a prophylactic rule, the fruit of the poisonous tree doctrine does not apply.[146]

In 1968, even before Nixon won the presidency, Congress took *Miranda* at its word, sort of. The 1968 Omnibus Crime Control Act included a provision that seemed to overrule *Miranda*.[147] In effect, the act reinstituted the voluntariness standards that *Miranda* attempted to circumvent.[148] Given the provision's questionable constitutionality, the Department of Justice avoided urging its application.[149] Finally, in the 1990s, in large part at the influence of Professor Paul Cassell, a *Miranda* critic, the government finally implored the Court to apply § 3501 of the 1968 law.[150]

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141. *See* Massiah v. United States, 377 U.S. 207, 211–13 (1964) (holding that defendant's Fifth and Sixth Amendment rights were violated by use in evidence against him of incriminating statements which he made to co-defendant after their indictment and their release on bail and in absence of defendant's retained counsel and which were overheard on radio by government agent without defendant's knowledge that co-defendant had decided to cooperate with government and had permitted agent to install radio transmitter under front seat of co-defendant's automobile); Miranda v. Arizona, 384 U.S. 436, 504–26 (1966) (Harlan & Steward, JJ., dissenting); *id.* at 526–45 (White & Stewart, JJ., dissenting).

142. *See* Vitiello, *supra* note 4, at 72–75.

143. *See* New York v. Quarles, 467 U.S. 649, 657–58 (1984).

144. *Id.* at 653–55.

145. *Id.* at 657.

146. *See generally* Oregon v. Elstad, 470 U.S. 298 (1985).

147. *See* 34 U.S.C. § 10101; 18 U.S.C. § 3501(a)-(b); *see also* S. REP. NO. 1097, 90th Cong., 2d Sess. 37 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2188.

148. *See* 18 U.S.C. § 3501; *see also* Yale Kamisar, *Can (Did) Congress Overrule* Miranda*?*, 85 CORNELL L. REV. 883, 884–85 (2000) ("Section 3501 makes the pre-*Escobedo*, pre-*Miranda* 'due process'—'totality of the circumstances'—'voluntariness' rules the sole test for the admissibility of confessions in federal prosecutions").

149. Section 3501 was never enforced by the Justice Department. Pierre Thomas, *Justice Seeks to Overturn Recent* Miranda *Ruling*, CNN (Mar. 10, 1999), http://www.cnn.com/ALLPOLITICS/stories/1999/03/10/miranda/.

150. Paul Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175, 225 (1999).

Not without irony, Chief Justice Rehnquist wrote the opinion for seven justices: *Miranda* was constitutional.[151] The irony, of course, was that Nixon appointed Rehnquist as one of his "Law and Order" Justices, in part with an eye to overruling *Miranda.*[152] Finding an explanation for why the Chief Justice could write his lukewarm endorsement of *Miranda* is not hard to find: Police learned to deal with its requirements, confessions did not dry up, and after *Miranda's* near-death experience in *Brewer v. Williams*, the Court continued to cabin the decision.[153]

The Court has refused to expand *Miranda* in virtually every post-*Miranda* area save one: when a suspect requests counsel in the custodial setting.[154] Elsewhere, however, *Miranda* has nearly vanished.[155] A review of all those cases is beyond the scope of this Article. One example, however, demonstrates the trend.[156]

Miranda was premised on a suspect's ability to invoke the right to silence or counsel.[157] The *Miranda* Court envisioned a suspect leveling the playing field by invoking silence or the right to counsel to counteract the inherent compulsion in the custodial setting.[158] But, as Justice White argued in dissent, police could get a suspect to waive her rights in that coercive setting.[159] The majority insisted, however, the state would carry a heavy burden of demonstrating waiver.[160] While it rejected the need for any particular form of a waiver, it insisted a waiver would not be lightly inferred, and a statement taken after the warnings, without more, would be insufficient evidence of a voluntary waiver.[161]

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151. *See* Dickerson v. United States, 530 U.S. 428, 462–65 (2000) (holding that *Miranda*'s warning-based approach to determining admissibility of the statement made by the accused during custodial interrogation was constitutionally based and could not be in effect overruled by legislative act).

152. *See* Kamisar, *supra* note 30, at 1294–95.

153. *See* Vitiello, *supra* note 4, at 73; *see also* Kit Kinports, *The Supreme Court's Love-Hate Relationship with* Miranda, 101 J. CRIM. L. & CRIMINOLOGY 375, 376 (2011); *e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 387–91 (2010); Maryland v. Shatzer, 559 U.S. 98, 124-30 (2010); Florida v. Powell, 559 U.S. 50, 64 (2010).

154. *See* Edwards v. Arizona, 451 U.S. 477, 485 (1981).

155. *See generally* Weisselberg, *supra* note 34.

156. *See Berghuis*, 560 U.S. at 374–75 (2010).

157. *See* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (holding when at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed).

158. *See id.* at 474 ("Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.").

159. *Id.* at 535–37 (White, J., dissenting).

160. *Id.* at 475.

161. *Id.* at 444–45, 470, 475 ("An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.").

Early in the Burger Court, the Court held that the burden of proving waiver was by a preponderance of the evidence, not by some heightened burden of proof.[162] Even more revealing, in *Berghuis v. Thompkins*, the Court's original insistence that proof of a waiver would be difficult seemed nowhere in evidence.[163]

In *Thompkins*, police gave the suspect a form including the *Miranda* rights.[164] The police also had the suspect read the rights to them to assure he could understand the warnings.[165] He read the warnings but refused to sign a form that would have acknowledged he understood his rights.[166]

Without the suspect making any affirmative statement waiving his rights, the police began questioning him about his involvement in a murder.[167] Over about three hours, the suspect did not invoke his right to remain silent, instead simply remaining mostly silent.[168] Almost three hours after the interrogation began, the suspect admitted his involvement in the murder.[169]

The Court upheld the use of the defendant's confession.[170] The Court resolved two interwoven issues.[171] First, if a suspect wants to invoke his right to silence, he must do so unequivocally.[172] Second, on the facts of the case, the Court found that the defendant waived his rights.[173]

In dissent, Justice Sotomayor questioned the sense of a rule that requires a person wanting to remain silent to speak.[174] Apart from that question, what about the waiver in *Thompkins*? What did the state prove, and did it meet any kind of heavy burden? This looks like little more than a situation where police gave the suspect his warnings, followed by a confession.[175] Beyond a statement (contested in the record) that the suspect said he understood his warnings, the record seems silent on when and how the waiver took place.[176] We have come a long way since *Miranda*.[177]

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162. *See* Colorado v. Connelly, 479 U.S. 157, 168–69 (1986); *see also* Lego v. Twomey, 404 U.S. 477, 489 (1972) (reiterating that the prosecution must prove that a confession was voluntary by a preponderance of the evidence).

163. Berghuis v. Thompkins, 560 U.S. 370, 383 (2010).

164. *Id.* at 374–75.

165. *Id.* at 375.

166. *Id.*

167. *Id.* at 375–76.

168. *Id.* at 375.

169. *Id.* at 376.

170. *Id.* at 391.

171. *Id.* at 382, 385.

172. *Id.* at 382.

173. *Id.* at 385.

174. *Id.* at 391 (Sotomayor, J., dissenting).

175. *See id.* at 399.

176. *See id.* at 374–76.

177. *Miranda* said: "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." Miranda v. United States, 384 U.S. 436, 475 (1966); *see also id.* at 470 ("No effective waiver . . . can be recognized unless specifically made after the [Miranda] warnings . . . have been given."). In addition, the *Miranda*

Early on, *Miranda* had many conservative critics.[178] Over time, largely because it has been so badly eroded, many scholars from across the political spectrum have abandoned belief that *Miranda* works.[179] As now applied, *Miranda* does not do much to address the concerns that led to its adoption.[180] As developed below, however, as *Miranda* shrank, lawyers realized that voluntariness remains an alternative argument against the use of some confessions.[181] But, the courts may be back to the beginning, without much more clarity than existed pre-*Miranda*.[182]

IV. BACK TO THE BEGINNING?

Lawyers trained in the late 1960s did not learn much about the Supreme Court's voluntariness caselaw.[183] Leading Criminal Procedure casebooks typically excluded such material or mentioned it in passing.[184] As the Court began cabining *Miranda*, voluntariness claims reemerged.[185] Indeed, these claims were possible even when *Miranda* had strength.[186]

Recognizing the continued vitality of voluntariness is important. We can only guess at how the Warren Court, had membership on the Court not changed so quickly, would have implemented *Miranda*. But, as the post-Warren Courts have narrowed *Miranda*, *Miranda* protects the wrong suspects. One commentator has argued persuasively that *Miranda* "protect[s] noncooperation and cover-up by the most knowledgeable, cunning, and steely criminals, while providing only minimal safeguards for those who are

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Court stated that "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." *Id.* at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)).

178. *See* Vitiello, *supra* note 4, at 71–72.

179. *See* Dickerson v. United States, 530 U.S. 428, 445 (2000) (Scalia, J., dissenting); *see also A Thirty-Year Perspective*, *supra* note 21, at 1062–63 (arguing that existing data does not answer questions of whether *Miranda* hinders law enforcement); *A Review of Fifty Years*, *supra* note 21, at 848 (concluding restraints placed on law enforcement by *Miranda* have made law enforcement less effective); Alschuler, *supra* note 21, at 2629–30 (questioning the meaning of *Miranda*); Loewy, *supra* note 4, at 434–35 (considering issues of coerced confessions); *see infra* Part IV (discussing post-*Miranda* case law).

180. For example, the *Miranda* Court's concern about equality seems to have gone by the wayside. *See generally* George C. Thomas III, Miranda*'s Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 91 (2003). As some critics point out, few of the suspects most in need of Miranda protection invoke those protections. *See* Alschuler, *supra* note 21.

181. *See infra* Part IV (discussing post-*Miranda* caselaw).

182. *See infra* Part IV (discussing post-*Miranda* caselaw and the issues affecting lower courts).

183. That was my experience as a law student in the early 1970s, when I took Criminal Procedure as a 1L at the University of Pennsylvania Law School.

184. *See* Schulhofer, *supra* note 31, at 878 n.57 (discussing the voluntariness test as part of the historical background of *Miranda*).

185. One can imagine a case in which a suspect waived her *Miranda* rights, only then to be subjected to coercive police practices that violated the Court's voluntariness standard. *See id.* at 878 n.58.

186. *See generally* Arizona v. Fulminante, 499 U.S. 279 (1991). Despite that, many courts ignored that reality. *See* Missouri v. Seibert, 542 U.S. 600, 608–09 (2004). As Justice Souter stated in *Seibert*, "giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility . . . and litigation over voluntariness tends to end with the finding of a valid waiver." *Id.*

uneducated, unintelligent, or easily coerced."[187] Despite its flaws, the Court's voluntariness caselaw did a better job of protecting suspects most in need of court-intervention.[188]

This section discusses the implications of the reemergence of voluntariness. At the core of the discussion is this question: are the courts merely back at the beginning or can courts make the test work more effectively than in the past? This section also explores why the voluntariness test does a better job protecting the "right" suspects. It then considers whether anything has changed since *Miranda* or whether the voluntariness test is still as unworkable as the Court seemed to believe when it decided *Miranda.* Finally, it considers how the Court might evolve its voluntariness standard to create clearer rules governing confessions.

So, who was supposed to benefit from *Miranda*? As developed above, the Court was concerned about equal justice, especially for minority defendants and other defendants unable to deal with inherent coercion present in the custodial setting.[189] Inexperienced suspects or suspects with various emotional or other problems could easily be pressured to give up their rights in such a setting.[190] The *Miranda* Court seemed to envision the warnings as giving such suspects assurance they could, and probably should, invoke their rights.[191] But as evidenced by the evolving caselaw, *Miranda* does a poor job at helping those most in need of protection.

Think about the invocation of one's rights in the custodial setting. Remember that *Miranda* asserted the state would carry a heavy burden in demonstrating a valid waiver.[192] But when the Court has considered how a suspect invokes her *Miranda* rights, it has placed a heavy burden on the suspect to do so unequivocally.[193] Thus, in *Davis v. United States*, the Court found that the suspect's statement, "[m]aybe I should talk to a lawyer," was not sufficient to invoke the right to counsel or even to require any kind of follow-up questioning because the suspect's potential invocation of the right to counsel was ambiguous. [194] The *Davis* Court created a bright line rule, but one that disfavors the suspect.[195]

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187. Scott W. Howe, *Moving Beyond* Miranda*: Concessions for Confessions*, 110 NW. U.. L. REV. 905, 906 (2016).

188. For example, in *Spano*, the Court pointed to the defendant's mental problems, youth, and inexperience with the criminal justice system as relevant to its finding that his confession was involuntary. Spano v. New York, 360 U.S. 315, 321–22 (1959). As Justice Souter suggested in *Seibert*, focusing only on *Miranda* might lead to a different conclusion: if a suspect has received his *Miranda* warnings, his statement will be admissible if his waiver was voluntary. *Seibert*, 542 U.S. at 608–614. In such a case, the suspect's individual traits have less importance than in the voluntariness multifactored test. *Id.*

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

190. *Id.*

191. *Id.*

192. *Id.*

193. Davis v. United States, 512 U.S. 452, 459 (1994).

194. *Id.* at 462.

195. *Id.* at 461─62 (Ruling that under *Edwards v. Arizona*, police are only required to stop a custodial

As discussed above, the Court went further in *Thompkins*.[196] There, it held that a suspect must unequivocally invoke the right to remain silent.[197]

Cases like *Davis* and *Thompkins* invite consideration of who is most likely to make an unequivocal invocation of their rights.[198] Professor Janet Ainsworth identified different speech patterns among men and women.[199] She opined sociological research show "men tend to use direct and assertive language, whereas women more often adopt indirect and deferential speech patterns."[200] Even more important, given men are more likely to enter the criminal justice system as suspects than women, she also observed that the same phenomenon exists with marginalized groups.[201] Powerless individuals are less likely than those with power to speak without ambiguity.[202]

We can only guess whether the Warren Court would have bolstered *Miranda* in areas where the post-Warren Courts have eroded it. Certainly, as administered, *Miranda* does not help the group most likely in need of protection against coercion. As cited above, that has led scholars like Professor Scott Howe to conclude that *Miranda* protects only "the most knowledgeable, cunning, and steely criminals, while providing only minimal safeguards for those who are uneducated, unintelligent, or easily coerced."[203]

The Court's voluntariness caselaw does a much better job at protecting the suspects most in need of protection. Compare cases like *Lisenba* and *Spano*.[204] According to the Court, Lisenba

> Exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer.[205]

Thus, Lisenba's relative sophistication led to the use of his confession.[206]

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interrogation if the suspect has unambiguously requested an attorney).

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

197. *See id.* at 380–82 (holding that where a defendant does not invoke his right to remain silent after fully understanding his *Miranda* rights, he implicitly waives his *Miranda* rights by making a voluntary statement to police).

198. *See generally id.*; *Davis*, 512 U.S. at 452.

199. *See, e.g.*, Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 259 (1993).

200. *Id.* at 262.

201. *Id.* at 263.

202. *Id.* at 261–62.

203. Howe, *supra* note 187, at 907.

204. *See generally* Lisenba v. California, 314 U.S. 219 (1941); Spano v. New York, 360 U.S. 315, 241 (1959).

205. *Lisenba*, 314 U.S. at 241.

206. *See id.*

Compare the Court's view of Spano.[207] There, the Court focused on the suspect's youth, lack of familiarity with the criminal justice system, and emotional instability as relevant to its finding that the suspect's confession was involuntary.[208]

Would Lisenba or Spano be more likely to invoke *Miranda* rights unequivocally? The sociological research suggests that Lisenba would be more likely to do so.[209] Of course, he would seem far less in need of help in negotiating the coercive police-dominated environment. That certainly suggests the voluntariness test was better suited to the task than was *Miranda*.

This recognition goes only so far in redeeming the Court's voluntariness caselaw. As discussed above, the test was hardly a test but an almost infinite variety of factors relevant to a court's conclusion.[210] Compounding the imprecision of the Court's tests was its "analytical stew."[211] Thus, the Court seemed to be advancing different, and at times competing, values in its caselaw.

Because voluntariness is now important again, one needs to ask whether anything has changed since the Court tried to address these problems. The answer is yes and no.

Initially, what about the "analytical stew" or, as the Court described it, "a complex of values" that explain its voluntariness test?[212] Early cases like *Brown* seemed premised on the concern about reliability.[213] A suspect who is beaten may be willing to testify to whatever his torturer wants him to say to stop the pain.[214] Since the early cases, however, the Court has made clear that its voluntariness test is triggered only if a defendant is complaining about state action.[215] Thus, as in *Colorado v. Connelly*, a delusional person who confesses because God told him to do so cannot claim that his statement was involuntary.[216] His recourse, if any, is to argue under the jurisdiction's evidence rules that the statement is inadmissible.[217]

Connelly clarified the "analytical stew" only slightly. Unanswered by *Connelly* is whether state action is enough or whether the state actor must act

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207. *See Spano*, 350 U.S. at 321–23.

208. *See id.*

209. *See, e.g.*, Ainsworth, *supra* note 199, at 286.

210. *See supra* Part II (discussing the Court's voluntariness test and asserting it was no test at all, but an ad hoc determination rendering inconsistent results).

211. DRESSLER & THOMAS, *supra* note 12, at 603.

212. *See* Blackburn v. Alabama, 361 U.S. 199, 207 (1966).

213. *See generally* Brown v. Mississippi, 297 U.S. 278 (1936).

214. *Id.* at 282.

215. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 163–64 (1986).

216. *Id.* at 159.

217. *Id.* at 167 ("We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum.").

with some level of culpability.[218] Imagine, for example, that a doctor acting on behalf of the police inadvertently gives a suspect medication that acts as a truth serum.[219] Does that render a confession involuntary? The state actor may have been without blame.[220] The suspect's statement may be reliable, depending on the drug administered.[221] However, the suspect would not be acting with mental freedom.[222]

The Court still seems intent on advancing competing values with its test.[223] One can imagine other examples like the previous one where the various values protected by the Court's voluntariness test are at odds with one another. For example, what about cases in which police act improperly, perhaps even intentionally, but the conduct does not seem to deprive the suspect of his mental freedom?[224] *Connelly* seemed to make state action a necessary condition but did not address whether improper police conduct might be a sufficient condition.[225]

Beyond the reality that the Court's case law seems to advance competing values, what about the even more significant problem *Miranda* sought to address: can the Court create clarity so its test does not turn on endless factors?

To get at the previous question, consider taping of confessions.[226] About half of the states require taping of confessions, at least in some cases.[227] Indeed, many commentators have argued that taping is a better remedy than *Miranda*.[228] This includes commentators across the political spectrum.[229] The late-Dean Gerald Caplan urged taping, along with other remedies, as a better alternative to warnings in his widely cited Article critical of *Miranda*.[230] More recently, Professor Chris Slobogin, among others, has urged taping as

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218. *Id.* at 165.

219. *See* Townsend v. Sain, 372 U.S. 293, 298 (1963) (describing how medication was administered by a physician acting on behalf of the police and that neither the physician nor the police realized that the medication would act as a "truth serum").

220. *Id.* at 308; *see also Connelly*, 479 U.S. at 165.

221. *Cf.*, Brown v. Mississippi, 297 U.S. 278, 237 (1936) (deciding that a confession procured by coercion is unconstitutional).

222. *Contra* Lisenba v. California, 314 U.S. 219, 241 (1941) (deciding that the suspect made the statement with his own freedom).

223. *See generally Brown*, 297 U.S. at 278; *Connelly*, 479 U.S. at 157; Moore v. Dempsey, 261 U.S. 86 (1923); Mooney v. Holohan, 294 U.S. 103 (1935).

224. Imagine a case in which police falsely tell the suspect that he will be given favorable treatment if he confesses, but the suspect is fully aware the police are lying.

225. *See generally Connelly*, 479 U.S. at 157.

226. *False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT, https://www.innocenceproject.org/false-confessions-recording-interrogations/ (last visited Sept. 8, 2021).

227. *Id.*

228. *See, e.g.*, Slobogin, *supra* note 32, at 316–18; *see also* Caplan, *supra* note 1, at 1475.

229. *See, e.g.*, Paul G. Cassell, Miranda's *Social Casts: An Empirical Reassessment*, 90 NW. U.. L. REV. 286, 489–92 (1996); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R. C.L. L. REV. 105, 153–55 (1997).

230. *See, e.g.*, Caplan, *supra* note 1, at 1475.

an effective method for reviewing voluntariness claims.[231] Indeed, Professor Slobogin has argued that a litigant might make a constitutional argument requiring taping.[232]

One would be hard-pressed to argue against the efficacy of taping. But as developed below, taping does not solve all the problems with voluntariness.[233] First, though, one can see the advantages in taping confessions in some well-documented cases.[234]

Notably, Worcester, Massachusetts police interrogated Vietnamese-American teenager Nga Truong about the murder of her infant son.[235] Anyone unfamiliar with the video of her confession ought to watch the full confession.[236] Several aspects of the confession are notable.

Consider how the case would have been resolved without the videotape. The officers gave the suspect *Miranda* warnings and got a waiver of her rights.[237] The interrogation lasted only about two hours.[238] The police complied with *Miranda*.[239] Beyond that, without the tape, officers might have testified they questioned her without threatening her or otherwise coercing her confession.[240] She might have testified to aggressive questioning and to promises that the police never intended to honor.[241] As happens in most cases involving officers and suspects testifying to different versions of the facts, the court most likely would have found the confession complied with the law.[242]

Nga Truong won her suppression hearing, most importantly, because the trial judge watched the videotaped confession.[243] The officers used various techniques, often associated with the infamous Inbau-Reid manual, for securing a confession.[244] Before her confession, the officers told her,

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231. Slobogin, *supra* note 32, at 316–18.

232. *Id.*

233. *See infra* Part IV (discussing post-*Miranda* caselaw and the issues affecting lower courts).

234. *See infra* notes 235–56 and accompanying text (discussing cases where confessions were taped).

235. David Boeri, *How a Teen's Coerced Confession Set Her Free*, NPR (Dec. 30, 2013, 3:22 PM ET), https://www.npr.org/2012/01/02/144489360/how-a-teens-coerced-confession-set-her-free.

236. *See generally* David Boeri, *Woman in Tossed-Out Confession Gets $2.1M Settlement from Worcester*, WBUR (June 30, 2016), https://www.wbur.org/all-things-considered/2016/06/30/nga-truong-worcester-settlement.

237. Commonwealth v. Truong, No. CV20090385, 2011 WL 1886500, at *3 (Mass. Super. Ct. Feb. 25, 2011).

238. Boeri, *supra* note 235; Boeri, *supra* note 236.

239. *Truong*, 2011 WL 1886500, at *3.

240. *See, e.g.*, Joel Atlas, *Tailored Police Testimony at Suppression Hearings*, CORNELL FAC. PUBL'NS (2002), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=1871&context=facpub (last visited Sept. 8, 2020); *see also* Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html.

241. *See* Goldstein, *supra* note 240.

242. *Id.*

243. Boeri, *supra* note 235; Boeri, *supra* note 236.

244. Boeri, *supra* note 236; *see also Coerced to Confess: How US Police Get Confessions*, AL JAZEERA (Mar. 20, 2019), https://www.aljazeera.com/indepth/features/coerced-confess-police-

falsely, that the officers wanted to help her.[245] The officers told her that as soon as she confessed, she would remain in the juvenile justice system where she would get help.[246]

Although not without some debate,[247] the taped confession presents an easy case for the court. It involved police misconduct—flagrant lies.[248] The suspect was young, inexperienced with the criminal justice system, and badgered by the officers.[249] She hardly looked as if she acted with anything resembling full mental freedom.[250]

Nga Truong's case was easy, though, as probably are many other taped confession cases.[251] But other widely watched confessions suggest taping does not solve all the problems with the Court's voluntariness caselaw. Consider Brendan Dassey's confession.[252] According to the state, Dassey, at the time a sixteen-year-old special-education student, confessed to assisting his uncle, Steven Avery, sexually assault, mutilate, and murder Teresa Halbach.[253] The state court denied Dassey's motion to suppress his confession.[254] After his conviction and appeal through the state court system, Dassey challenged his detention in the federal district court.[255] A federal magistrate found for Dassey, a finding affirmed by a divided panel of the Seventh Circuit and then by the Seventh Circuit en banc.[256] The en banc court divided, four judges to three.[257]

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) required a higher showing than would otherwise be required if Dassey's case

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confessions-190313080319051.html (describing how police use the Inabu-Reid technique to coerce confessions in the United States).

245. Commonwealth v. Truong, No. CV20090385, 2011 WL 1886500 at *4, *10 (Mass. Super. Ct. Feb. 25, 2011).

246. *Id* at *10.

247. Although many consider the interrogation as a clear example of improper police conduct resulting in a false confession, not everyone agrees. *See* Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1601–03 (2009). For example, after showing my Criminal Procedure class her confession, I polled the class. While 72% agreed that the confession was involuntary, over one-fourth found that it was voluntary.

248. *See Truong*, 2011 WL 1886500, at *9–10; Boeri, *supra* note 235; Boeri, *supra* note 236.

249. *Truong*, 2011 WL 1886500, at *10.

250. *Compare id.* (describing Truong as young and inexperienced), *with* Lisenba v. California, 314 U.S. 219, 230, 241 (1941) (describing petitioner as self-possessed and collected).

251. *See* FRONTLINE, *supra* note 71; *see also The Confession Tapes*, NETFLIX (2017), https://www.netflix.com/title/80161702.

252. *Brendan Dassey: A True Story of a False Confession*, YOUTUBE (May 9, 2016), https://www.youtube.com/watch?v=Z7jDf5wWdDQ; *WATCH: Brendan Dassey 'Confession' Videos & Trial Testimony*, HEAVY (Aug. 12, 2016, 9:36 PM), https://heavy.com/news/2016/08/brendan-dassey-confession-videos-watch-interrogation-police-trial-testimony-conviction-overturned-steven-avery-making-a-murderer-netflix-okelly/.

253. Dassey v. Dittmann, 877 F.3d 297, 300–01, 310 (7th Cir. 2017).

254. *Id.* at 311.

255. Dassey v. Dittmann, 201 F. Supp. 3d 963, 985 (E.D. Wis. 2016).

256. *Id.*; *see also Dassey*, 877 F.3d at 318 (affirming the magistrate judge's decision).

257. *Dassey*, 877 F.3d at 300.

had not come into the federal court system via the writ of habeas corpus.[258] Nonetheless, much of what the court en banc said demonstrates the ad hoc assessment of a voluntariness claim.[259]

After reviewing relevant caselaw dealing with voluntariness, the court en banc recognized Dassey's case involved factors pointing in opposite directions.[260] Most importantly, offender characteristics favored a finding of involuntariness; but the police conduct was not so bad, even if a little bit bad.[261] Here are a few details, favoring a finding of voluntariness:

> Over the next three hours, Dassey was repeatedly offered food, drinks, restroom breaks, and opportunities to rest. At no point in the interview did the investigators threaten Dassey or his family. Nor did they attempt to intimidate him physically. They did not even raise their voices. Neither investigator tried to prevent Dassey from leaving the room, nor did they use any sort of force to compel him to answer questions. Dassey never refused to answer questions, never asked to have counsel or his mother present, and never tried to stop the interview.[262]

But the police misled the sixteen-year-old. Here are some of those details:

> Sensing that Dassey 'may have held back for whatever reasons,' the officer assured Dassey 'that Mark and I both are in your corner, we're on your side.' Acknowledging Dassey's potential concern that talking to the police meant he 'might get arrested and stuff like that,' the investigator urged Dassey to 'tell the whole truth, don't leave anything out.' Talking could be in Dassey's best interest even though it 'might make you look a little bad or make you look like you were more involved than you wanna be,' because admitting to unfortunate facts would leave 'no doubt you're telling the truth.' The first investigator closed by saying that 'from what I'm seeing, even if I filled' in some holes in Dassey's story, 'I'm thinkin' you're all right. OK, you don't have to worry about things . . . [W]e know what Steven [Avery] did . . . we just need to hear the whole story from you.'[263]

There was more. The second officer stated as follows:

> Honesty here Brendan is the thing that's gonna help you. OK, no matter what you did, we can work through that. OK. We can't make any promises but we'll stand behind you no matter what you did. OK. Because you're being the good guy here . . . . And by you talking with us, it's, it's helping

258. *Id.* at 301–03; *see also* The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–32, 110 Stat. 1214 (requiring federal courts to give deference to findings by state courts).

259. *Dassey*, 877 F.3d at 305.

260. *Id.* at 305–311.

261. *Id.*

262. *Id.* at 306.

263. *Id.* at 307.

> you. OK? Because the honest person is the one who's gonna get a better deal out of everything.[264]

Yes, the officers stated that they could not make promises.[265] Ask what an intellectually challenged sixteen-year-old would believe when officers told him that they were standing behind him? Would he think he would end up with a life-sentence? Is that a "better deal" than he would have received had he not confessed? After confessing, Brendan believed that he would be free to go home to resume playing video games.[266] That seems to undercut any claim that he understood what he confessed freely.

Chief Judge Wood's three-judge dissent focused not only on Dassey's low IQ and other offender characteristics but also on ways in which the police suggested details that Dassey later "admitted to."[267] As Judge Wood stated, "the confession is so riddled with input from the police that its use violates due process."[268]

Watch the videos both of Nga Truong and Brendan Dassey's interrogations. Both are young, but Truong is not intellectually challenged.[269] Dassey is.[270] Her interrogators are more aggressive than his.[271] But both sets of interrogators deceive their "prey;" that is, the police obviously believe that their suspect is guilty.[272] Voluntariness is in the eyes of the beholder. Truong is free;[273] Dassey may eventually be released, perhaps in 2048.[274] Taping helps, perhaps, a great deal, but it does not solve a core problem that *Miranda* hoped to remedy: the hope for clear rules that would protect vulnerable suspects.[275]

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264. *Id.*

265. *Id.* at 316.

266. *See id*. at 312 ("The officers' questioning included general assurances of leniency if he told the truth, and Dassey may have believed they promised more than they did.").

267. *Id.* at 319–31 (Wood, C.J., Rovner & Williams, J.J., dissenting).

268. *Id.* at 319.

269. Commonwealth v. Truong, No. CV20090385, 2011 WL 1886500, at *9 (Mass. Super. Ct. Feb. 25, 2011) (discussing Nga's characteristics and other circumstances that made her vulnerable to policy pressure).

270. *Dassey*, 877 F.3d at 312.

271. *Compare* Boeri, *supra* note 235 (showing police repeatedly swearing at Nga, stating that she was being untruthful, and suggesting that Nga killed her brother who had died years earlier) *with*, HEAVY, *supra* note 252 (showing police repeatedly encouraging Brendan to be honest and tell everything he knew, even if it was against Brendan's best interest).

272. *Compare* Boeri, *supra* note 235 (showing police repeatedly swearing at Nga, stating that she was being untruthful, and suggesting that Nga killed her brother who had died years earlier) *with*, HEAVY, *supra* note 252 (showing police repeatedly encouraging Brendan to be honest and tell everything he knew, even if it was against Brendan's best interest).

273. And won a judgment against the police. *See* Boeri, *supra* note 235; Boeri, *supra* note 236.

274. *See* Mariel Padilla, *Brendan Dassey of 'Making a Murderer' Is Denied Clemency*, N.Y. TIMES (Dec. 21, 2019), https://www.nytimes.com/2019/12/21/us/brendan-dassey-pardon-making-a-murderer.html (noting Dassey is not eligible for parole until 2048).

275. Miranda v. Arizona, 384 U.S. 436, 441–42, 445 (1966).

The Court's voluntariness caselaw was not only attempting to prevent innocent suspects from confessing. One hopes that the result in *Brown* would be the same even if the police developed independent corroboration that the suspects were guilty.[276] That is at least one area where clarity exists.[277] Beyond that, imagine that you were advising police officers on how to comply with the Court's voluntariness standards. Could you come up with any clear rules other than, "don't beat the suspect?"

Many police departments continue to adhere to the much-discredited Inbau-Reid methods.[278] They do so despite serious concerns those methods can lead to false confessions.[279] The Court might reject outright some of the methods recommended in Inbau-Reid. For example, as *Miranda* observed, one recommendation in the Inbau-Reid manual was to isolate the suspect.[280] Although the Court might not be willing to micromanage interrogations to such a degree under constitutional protections, certainly a legislature could mandate interrogations be held in open court or otherwise in a place not dominated by the police.[281]

The most challenging aspect of voluntariness is the use of trickery. In an early voluntariness case, the Court held that a confession was inadmissible "if any degree of influence has been exerted."[282] No one can seriously contend that is still the law. In fact, the Court has acknowledged some

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276. As a result of the attack on 9/11, some commentators, including Harvard Emeritus Professor Alan Derschowitz, have argued in favor of torture warrants. David Kohn, *Legal Torture?*, CBS NEWS (Jan. 17, 2002), https://www.cbsnews.com/news/legal-torture/. That is, under certain compelling circumstances, police might be authorized to use torture to secure vital information. *See* DRESSLER ET AL., *supra* note 71, at 576. *See also* David Kohn, *supra* note 76. To date, the Court has not authorized such warrants. *Facts on Torture*, HUM. RTS. FIRST, https://www.humanrightsfirst.org/campaigns/never-torture/facts-torture (last visited Oct. 14, 2021). Also, some commentators have cast doubt that torture produces accurate information and is less likely than other methods to do so. ALI H. SOUFAN, THE BLACK BANNERS 387, 389, 423 (2011).

277. *Lisenba*, where even the police admitted to slapping the suspect, might appear to contradict this general statement. Lisenba v. California, 314 U.S. 219, 230 (1941). But at least in the Court's view there, the police use of violence did not result in the confession. *Id.* at 240–41. Instead, the confession came much later, after the suspect had been released initially and now had regained mental composure. *Id.*

278. DRESSLER ET AL., *supra* note 71, at 729–30.

279. *Id.; see generally* TOM WELLS & RICHARD A. LEO, THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR (2008) (detailing the false accusations of rape and murder against seven men in Norfolk, Virginia).

280. *See* Miranda v. Arizona, 384 U.S. 436, 449 (1966) ("The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation.'").

281. This Article does not address a variety of legislative solutions that would protect innocent suspects. Some commentators have suggested a few such reforms that would help a great deal. *See e.g.*, Caplan, *supra* note 1, at 1432, 1475 n. 271; Slobogin, *supra* note 32, at 310; Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 73 (1966) ("[T]he concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice."). For a summary of state legislative responses to *Miranda*, see MODEL CODE OF PRE-ARRAIGNMENT PROC. § 140.8 note (AM. L. INST. 1975).

282. Bram v. United States, 168 U.S. 532, 543 (1987).

trickery is permissible, or at least, is alone insufficient to make a confession involuntary.[283]

Lower courts have tried to resolve cases involving fabricated evidence.[284] While recognizing the absence of a bright-line rule with regard to false statements to a suspect, one court held that a confession was inadmissible if the police fabricated test results.[285] Some countries discourage any form of trickery and train police to engage suspects with open minds about the suspects' guilt or innocence.[286] I doubt that the Court would adopt any similar bright-line rules.[287]

Most courts, including the Supreme Court, dealing with trickery, do not present a coherent theory about line-drawing.[288] Some discussions of interrogation techniques offer plausible ways to draw the line between legal and illegal misstatements to suspects.[289] Notably, prominent evidence scholar John Henry Wigmore urged that the test be focused on reliability.[290] He argued the question should be, "Was the inducement of a nature calculated under the circumstances to induce a confession irrespective of its truth or falsity?"[291]

One can imagine legislative solutions that can improve upon the Court's voluntariness test. For now, however, the question worth asking is whether the voluntariness test might be improved to avoid such ad hoc cases like those discussed above.

At the outset, we now know state action is a necessary condition, and police cannot use physical force to extract confessions.[292] We know some amount of trickery is permissible.[293] Here, adhering to Wigmore's test might

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283. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969).

284. *See, e.g.*, State v. Cayward, 552 So. 2d 971, 972 (Fla. Dist. Ct. App. 1989); State v. Jackson, 304 S.E.2d 134, 145 (N.C. 1983); Sheriff, Washoe Cnty. v. Bessey 914 P.2d 618, 618 (Nev. 1996); Whittington v. State, 809 A.2d 721, 723 (Md. Ct. Spec. App. 2002).

285. *See Cayward*, 552 So. 2d at 972.

286. *See* DRESSLER ET AL., *supra* note 71, at 577.

287. Of course, a legislature could adopt such a rule. Again, while a legislature could do so, there seems little momentum in that direction.

288. For a good example of how the Supreme Court's voluntariness caselaw works currently, see Dassey v. Dittmann, 877 F.3d 297, 303–305 (7th Cir. 2017).

289. *See* WIGMORE, supra note 73, at 154–55.

290. *Id.*

291. *See id.* at 1534.

292. *See* Colorado v. Connelly, 479 U.S. 157, 170 (1986) (noting to be voluntary confessions must be free of physical and psychological force).

293. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969) (concluding that the fact that police in interrogation of the defendant falsely told the defendant that the defendant's companion had confessed, though relevant, was insufficient to make otherwise voluntary confession by defendant inadmissible); *see also Dassey*, 877 F.3d at 303 (holding that, in deciding whether a confession is voluntary, "courts assess 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation'"; "[t]he purpose of this test is to determine whether 'the defendant's will was in fact overborne'"); Gretchen Gavett, *A Rare Look at the Police Tactics That Can Lead to False Confessions*, FRONTLINE (Dec. 9, 2011), https://www.pbs.org/wgbh/frontline/article/a-rare-look-at-the-police-tactics-

help courts draw clearer lines about the kinds of trickery that violate a suspect's constitutional rights. Think back to a case like Nga Truong's confession.[294] Apart from the officers' abusive conduct, the police told her that she would leave the interrogation room and enter the juvenile system where she would get help.[295] Would that induce an innocent person to confess falsely? Observers might disagree about the answer to that question; but posing the question in that way allows a more coherent discussion than does the more open-ended voluntariness question.

Examining Dassey's confession in the same manner might have resulted in a different outcome from the en banc court's decision.[296] As quoted above, the officers made statements like this:

> We can't make any promises but we'll stand behind you no matter what you did. OK. Because you're being the good guy here . . . . And by you talking with us, it's, it's helping you. OK? Because the honest person is the one who's gonna get a better deal out of everything.[297]

Would a suspect confess falsely with such inducements? Wouldn't a suspect told he will help himself by cooperating with his interrogators have induced him to say whatever they wanted to hear? Again, the answer to that question might be debatable, but the question is better than the ones the Seventh Circuit en banc considered.[298] The majority in *Dassey v. Dittmann* never addressed that question.[299]

The same question might provide clearer answers than the more general voluntariness focus in other cases of trickery as well. Imagine false statements about DNA evidence found at a crime scene. An innocent suspect almost certainly would not confess because of such trickery. She should realize that the police are bluffing—at least in most cases.[300]

I do not pretend focusing on whether police tactics are likely to lead to false confessions solves all problems of uncertainty. Take the previous example: we know from examination of false-confession cases that some suspects are so confused about the surrounding circumstances they end up

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that-can-lead-to-false-confessions/; Cynthia J. Najdowski & Catherine L. Bonventre, *Deception in the Interrogation Room*, APA (May 2014), https://www.apa.org/monitor/2014/05/jn.

294. Commonwealth v. Truong, No. CV20090385, 2011 WL 1886500, at *1 (Mass. Super. Ct. Feb. 25, 2011).

295. *Id.* at *3–4, *10.

296. *See Dassey*, 877 F.3d at 318.

297. *Id.* at 307.

298. *Id.* at 300–01.

299. *Id.* at 312–13.

300. *See* Gavett, *supra* note 293; *see also* Najdowski & Bonventre, *supra* note 293 ("[Police] are able to use a variety of powerful psychological ploys to extract confessions from criminal suspects, including the use of deception during interrogation.").

confessing.[301] Imagine someone who was intoxicated or mentally impaired who was told that an eyewitness identified him at the scene; the suspect might confess out of confusion.[302] One can find cases of false confessions.[303] That is, suspect characteristics would have to remain relevant.

My point here is that focusing on likelihood of false confessions narrows the inquiry somewhat. It also adds protection to those most deserving of protection in the custodial setting.[304] Again, in Professor Alschuler's words, "the most knowledgeable, cunning, and steely criminals"[305] are less likely to confess falsely than innocent offenders who lack sophistication in dealing with the police.[306]

The *Miranda* Court was openly critical of the Inbau-Reid methods.[307] But it did not outlaw such techniques.[308] The Court, perhaps naively, thought the warnings would give suspects confidence to protect themselves against such practices.[309] While I doubt the Court would hold those techniques are per se unlawful, focusing closely on whether police practices are likely to induce an innocent person to confess would call into question many of the specific techniques commonly used by police following Inbau-Reid methods.[310]

V. CONCLUSION

Many scholars now recognize *Miranda* as a failure.[311] In recent years, I have become a *Miranda* skeptic.[312] But while we may abandon *Miranda* and while the Court has largely done so,[313] we need to be mindful the Court was attempting to resolve significant legal issues.[314] Concerns about providing

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301. *See, e.g.*, Douglas Starr, *This Psychologist Explains Why People Confess to Crimes They Didn't Commit*, SCIENCEMAG (June 13, 2019, 8:00 AM), https://www.sciencemag.org/news/2019/06/psychologist-explains-why-people-confess-crimes-they-didn-t-commit.

302. *See, e.g.*, Leo, *supra* note 71, at 335–36.

303. *See, e.g.*, Starr, *supra* note 301; Leo, *supra* note 71.

304. *See supra* Part IV (discussing how certain defendants are unable to deal with the inherent coercion present in the custodial setting).

305. Howe, *supra* note 187, at 906.

306. Alschuler, *supra* note 21, at 906.

307. Miranda v. Arizona, 384 U.S. 436, 445–58 (1966).

308. Buffie B. Merryman, *Arguments Against Use of the Reid Techniques for Juvenile Interrogations*, 10 COMM. L. REV. 16, 22 (2010).

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

310. *See supra* Part IV (discussing various police interrogation tactics, including Inabu-Reid in cases such as Nga Truong).

311. *See supra* Part II (discussing common criticisms of Miranda); *see also* Alschuler, *supra* note 21, at 2626–27, 2629–30; Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849, 850–54, 891 (2017); *A Thirty-Year Perspective*, *supra* note 21, at 1062–63; *A Review of Fifty Years*, *supra* note 21, at 848; Loewy, *supra* note 5, at 434–35.

312. Vitiello, *supra* note 4, at 63.

313. *See supra* Part II (discussing the abandonment of *Miranda*).

314. *See supra* Part II (discussing the reasons and justifications for *Miranda*).

guidelines to prevent police abuse and reducing inequality among suspects remain important goals of our criminal justice system.[315]

As *Miranda* began its disappearing act, lawyers and courts rediscovered voluntariness.[316] Voluntariness is now more important in many confession cases than is compliance with *Miranda*.[317] Indeed, as I have argued, the voluntariness test does a better job of protecting the right set of suspects than does *Miranda*.[318] But still an open question is the extent to which the voluntariness test can provide meaningful guidance without serving merely as a Rorschach test.[319]

Since *Miranda*, the Court has resolved some problems with uncertainty about its voluntariness test.[320] State action is a necessary condition for a voluntariness claim.[321] I have argued voluntariness questions become more carefully focused when one asks the question Professor Wigmore insisted was the important one: Are the police inducements "calculated to induce a confession without regard to its truthfulness?"[322] That does not create bright lines in all cases, but it does give courts a clearer focus about what is at stake.[323] It also does tend to help suspects most in need of help in the custodial setting.[324]

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315. See *supra* Part IV (discussing reassessments made to ensure the protection of suspects).

316. *See supra* Part III (discussing the abandonment of *Miranda*).

317. *See supra* notes 188, 194 and accompanying text (discussing the voluntariness issue in *Spano* and the ambiguous invocation of the right to counsel).

318. *See supra* Part IV (discussing the benefits of the voluntariness test).

319. *See supra* Part IV (discussing the benefits and limitations of the voluntariness test).

320. *See supra* Parts III & IV (discussing the abandonment of *Miranda* and the implications of the reemergence of the voluntariness test).

321. *See supra* Part IV (discussing the *Colorado v. Connelly* decision and the requirement of state action).

322. *See supra* Part II (discussing *Brown v. Mississippi* and the coercive nature of police interrogations, which often lead to false confessions).

323. *See supra* Part IV (discussing the absence of a bright-line rule in the Supreme Court's voluntariness case law).

324. *See supra* Part IV (discussing those most vulnerable to coercive police techniques used to induce confessions, which often reduce reliability).