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# BOOK REVIEW

A COMPREHENSIVE ANALYSIS OF THE HISTORY OF INTERROGATION LAW,  
WITH SOME SHOTS DIRECTED AT *MIRANDA V. ARIZONA*

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To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.

—*Watts v. Indiana*, 388 U.S. 49, 59 (1949) (Opinion of Jackson, J.)

No other case comes to mind in which an administrative official is permitted the broad discretionary power assumed by the police interrogator, together with the power to prevent objective recordation of the facts. The absence of a record makes disputes inevitable about the conduct of the police and, sometimes, about what the prisoner has actually said. It is secrecy, not privacy, which accounts for the absence of

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a reliable record of interrogation proceedings in a police station. If the need for some pre-judicial questioning is assumed, privacy may be defended on grounds of necessity; secrecy cannot be defended on this or any other ground.

—Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 21, 44-45 (1961)

Police reaction, especially to *Miranda*, was for a time almost paranoid. To many policemen the decision was a slap in the face, a declaration that police are more to be feared than criminals.

—FRED GRAHAM, *THE SELF-INFLICTED WOUND*, 286 (1970)

American detectives are, first and foremost, committed to the goal of convicting the suspects they interrogate. . . . Contrary to the myths of American justice, *the goal of police interrogation is not necessarily to determine the truth*. [Police interrogation] is structured to promote incrimination, if necessary, over truth-finding.

—RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 22-23 (2008)

#### INTRODUCTION

Police interrogation is designed to convict suspects under arrest or those suspected of crime.<sup>1</sup> It does not matter that the suspect may not be guilty; interrogation is instigated to obtain an incriminating statement that will help convict the suspect.<sup>2</sup> Perhaps because of their fear of crime and the

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<sup>1</sup> A person need not be arrested in order to be subjected to police interrogation. Police question many suspects who are not under arrest. And police have fewer restraints when they question suspects outside of custody.

[They] don't have to give warnings or talk about the law. They don't have to mention the right to remain silent and ask a suspect to waive it . . . . They don't need to bring it up at all. And that means that they can construct the conversation in the kind of way that makes it extraordinarily awkward for a person to play lawyer and assert his Fifth Amendment privilege.

Orin Kerr, *Do You Have A Right to Remain Silent? Thoughts on the "Sleeper" Criminal Procedure Case of the Term*, Salinas v. Texas, VOLOKH CONSPIRACY (June 17, 2013, 8:11 PM), <http://www.volokh.com/2013/06/17/do-you-have-a-right-to-remain-silent-thoughts-on-the->, archived at <http://perma.cc/2KJD-JRPR>.

<sup>2</sup> See generally TOM WELLS & RICHARD LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (2008); William K. Rashbaum, *Convicted Killer and Rapist Says He Attacked Central Park Jogger*, N.Y. TIMES, June 12, 2002, at B2; Ian Urbina, *Virginia Governor Sets Free 3 Sailors Convicted in Rape and Murder*, N.Y. TIMES, Aug. 7, 2009, at A9; cf. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 8, 28 (2011) (noting that of 250 innocent people

uncomplicated objective of police interrogation, Americans are sometimes conflicted about police interrogation. While many are quick to defend what are considered the “respectable freedoms” embodied in the Constitution—freedom of speech, freedom of the press, and freedom of religion<sup>3</sup>—few champion the Fifth Amendment’s bar against compelled self-incrimination, popularly known as the “right to remain silent,” as a basis for a suspect’s right to resist police questioning.<sup>4</sup> Although it has been said that “virtually every schoolboy is familiar with the concept, if not the language”<sup>5</sup> of the Fifth Amendment, and that the *Miranda* warnings “have become part of our national culture,”<sup>6</sup> persons steadfastly against police interrogation are difficult to identify.<sup>7</sup> Surely

convicted of crimes, forty exonerees (16%) confessed to crimes they did not commit; many police officers “may have believed they were interrogating a guilty person. Officers may contaminate a confession unintentionally (or intentionally), out of a belief that the suspect is guilty and is a danger to the public.”)

<sup>3</sup> LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 19 (1983).

<sup>4</sup> *Id.* (“Few men have rushed to uphold the constitutional prohibitions against unreasonable search and seizure or against compelled self-incrimination when it was a kilo of heroin that was seized or a confession forced from a father accused of bludgeoning his daughter to death.”). The “privilege has been a subject of controversy from the time it became an effective part of our law.” R. H. HELMHOLZ, *Introduction* to R. H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 1, 2 (1997). Attacking the privilege against self-incrimination is a long-standing practice. Indeed, some legal scholars have condemned the Fifth Amendment. *See, e.g.*, 5 JEREMY BENTHAM *RATIONALE OF JUDICIAL EVIDENCE* bk. IX, ch. III, 230, 238-39 (1827) (describing the argument that it is cruel and unfair to require accused persons to incriminate themselves as the “old woman’s reason,” and describing the argument that requiring accused persons to answer potentially incriminating questions gave an unfair advantage to the prosecution as the “fox-hunter’s reason,” which confused sport with the search for truth); David Dolinko, *Is There a Rationale for the Privilege against Self-Incrimination?*, 33 *UCLA L. REV.* 1063, 1147 (1986) (arguing that neither the goals of the criminal justice system nor a broad view of human rights justifies the privilege, and concluding that “the role of the privilege in American law can be explained by specific historical developments, but cannot be justified either functionally or conceptually”) (footnote omitted); John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 *HARV. L. REV.* 71, 85-86 (1891) (describing the privilege “[a]s a bequest of the seventeenth century, it is but a relic of controversies and dangers which have disappeared”); *id.* at 87 (proposing abolishing the privilege); Mickey Kaus, *The Fifth is Now Obsolete*, *N.Y. TIMES*, Dec. 30, 1986, at A19 (stating the privilege is “obsolete. All of its original purposes can be, and already are, achieved by other, far less destructive, constitutional rules”); *cf.* R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 *WM. & MARY L. REV.* 15, 71 (1981).

<sup>5</sup> *Michigan v. Tucker*, 417 U.S. 433, 439 (1974).

<sup>6</sup> *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

<sup>7</sup> Some scholars have proposed banning police interrogation because it is coercive. *See, e.g.*, OTIS H. STEPHENS, JR., *THE SUPREME COURT AND CONFESSIONS OF GUILT* 205 (1973) (stating that only a ban on police interrogation would eliminate the coercion that prompted *Miranda*); Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 *HARV. L. REV.* 42, 60-61 (1968) (suggesting that barring police interrogation may be required to

many Americans agree with Professor George Thomas when he asks: “Who claims [a right to silence] unless he has something to hide?”<sup>8</sup> Moreover, Justices and legal scholars often argue that interrogation is indispensable to solving crimes.<sup>9</sup> Even scholars who have provided the most compelling critiques of police interrogation would not abolish the practice.<sup>10</sup>

The various facets of police interrogation and its legal history are comprehensively and skillfully studied in George C. Thomas III and Richard A. Leo’s book, *Confessions of Guilt: From Torture to Miranda and Beyond*.<sup>11</sup> The authors explain that their book “will explore a realist explanation of the evolution of the law of interrogation and will not involve itself with high constitutional theory or international law.” (p. 6). The book highlights “the link between the fear of threats and the law of interrogation” (p. 7) and has a straightforward thesis: “A culture’s perception of threats to its existence is an important determinant of the level of interrogation pressure that its legal system will tolerate.” (p. 15). Implicit in this theory “is that law is, at least in part, a captive of cultural forces.” (p. 15). According to the authors, “the law of confessions reflects the institutions that identify, or create, deviance.” (p. 19).

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end coercion of suspects); Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 110-11 (1989) (arguing for a ban on custodial confessions); Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 21, 46 (1961) (arguing that police questioning is “irreconcilable with the privilege”). More recently, in a 1988 article, Professor Donald Dripps wrote that he is *against* police interrogation as employed in America, and against the privilege of self-incrimination. Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 702 (1988).

<sup>8</sup> George C. Thomas III, *Miranda’s Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1095 (2003) (book review) [hereinafter *Miranda’s Illusion*]. Long ago, in 1891, America’s great Evidence scholar, John H. Wigmore, boldly remarked: “[T]he privilege is not needed by the innocent.” Wigmore, *supra* note 4, at 86.

<sup>9</sup> *E.g.*, *Culombe v. Connecticut*, 367 U.S. 568, 571, 579 n.17 (1961); *Stein v. New York*, 346 U.S. 156, 184 (1953) (“Indeed, interrogation of those who know something about the facts is the chief means to solution of crime.”); Fred E. Inbau, *Misconceptions Regarding Lawlessness and Law Enforcement*, 35 TENN. L. REV. 571, 577 (1968) (“[I]n a large percentage of serious crimes, the only way they can be solved, and convictions obtained against the guilty, is by the interrogation of suspected persons, picked up on reasonable suspicion.”); Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 16, 17 (1961).

<sup>10</sup> Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIMES 3, 10 (A. E. Dick Howard ed., 1965) (“I would not abolish all in-custody police interrogation.”); RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 8 (2008) (“I believe that police interrogation is a necessary and valuable police activity in a democratic society, so long as it is conducted fairly and legally.”).

<sup>11</sup> GEORGE C. THOMAS III & RICHARD A. LEO, *CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND* (2012).

Just as a police officer may announce that he is the “law” during a street encounter with a citizen, so too, during interrogation sessions, police detectives are the “law.” The “law,” and how it is employed in the interrogation room, reflects American culture. Consider, for example, police use of the “third degree.” For several decades, starting in the late nineteenth century and extending to the 1930s, police across the nation employed violent and inhumane “third-degree” interrogation methods—“the use of intense coercion on suspects to produce confessions.” (p. 112). Shamefully, “[w]hether the third degree was accomplished by threats, the sweatbox, hanging the suspect, or merely coercive questioning, the American people were ambivalent about its use in the late nineteenth and early twentieth centuries.” (p. 129). Popular and official attitudes toward third-degree methods shifted after the publication of the Wickersham Report in 1931. That report exposed and condemned the violent tactics that some police used during interrogation.<sup>12</sup> Fearing “a political backlash that might limit their ability to conduct interrogations,”<sup>13</sup> prosecutors and police eventually decreased third-degree methods, although isolated instances of interrogators’ violence and brutality still occur today. (p. 139-40).

Similarly, cultural forces (and racism) explain police treatment of black suspects in the stationhouse, particularly in cases where black men were accused of murdering or raping whites in the South. In 1936, the Court decided *Brown v. Mississippi*,<sup>14</sup> a case where three black men were arrested for murdering a white man and subjected to police torture to secure confessions. Beside the confessions, authorities had “no evidence sufficient to warrant the submission of the case to the jury.”<sup>15</sup> A unanimous Court condemned the police behavior and reversed the convictions and death sentences.<sup>16</sup> As Morgan Cloud has elegantly described, although the *Brown* Court did not openly address the role that race played in the case, “the opinion’s repeated references to the race of the murder victim, the race of the defendants, and the race of

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<sup>12</sup> Police reaction to the Report was telling: “As Zechariah Chafee, one of the authors of the Wickersham Commission Report, pointed out, it ‘was greeted by the police with two answers which they regarded as conclusive: first, there wasn’t any third degree; and second, they couldn’t do their work without it.’” LEO, *supra* note 10, at 70 (quoting DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 10 (1986)).

<sup>13</sup> THOMAS & LEO, *supra* note 11, at 138 (footnote omitted).

<sup>14</sup> 297 U.S. 278 (1936).

<sup>15</sup> *Id.* at 279. Unlike subsequent cases where the Court refused to consider disputed evidence on whether the police beat a suspect, the facts of torture and brutality were unquestioned in *Brown*. Indeed, one of the deputies involved in the interrogation, when asked how severely one of the defendants was whipped, testified at trial *for* the State as follows: “‘Not too much for a negro; not as much as I would have done if it were left to me.’” *Id.* at 284 (quoting *Brown v. State*, 161 So. 465, 471 (Miss. 1935)).

<sup>16</sup> *Id.* at 286 (“It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.”).

their attackers do more than merely demonstrate a general awareness of the institutionalized racism existing in that time and place.<sup>17</sup> Put simply, *Brown* demonstrates the Justices' recognition that the defendants "were physically abused before trial and mistreated by the state's legal system because of their race."<sup>18</sup>

In the eight years following *Brown*, the Court heard six more confession cases coming from southern state courts where black defendants alleged their confessions had been coerced.<sup>19</sup> These cases involved facts where police rounded-up and arrested blacks without any individualized suspicion of criminality; subjected the suspects to long incommunicado interrogation sessions without access to legal counsel; had little or no evidence linking the suspects to the crime other than their confessions; and, according to the claims of the defendants, beat suspects to obtain confessions or threatened violence if suspects refused to confess.<sup>20</sup> Tellingly, in these seven cases, including *Brown v. Mississippi*, the Court reversed state court convictions.<sup>21</sup>

Although modern-day critics of the Warren Court and *Miranda v. Arizona*<sup>22</sup> often complain that *Miranda* was unprecedented and the Court imposed its own policy choices rather than impartially interpreting the Constitution,<sup>23</sup> these same critics do not oppose the result in *Brown v. Mississippi*, and rarely

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<sup>17</sup> Morgan Cloud, *Torture and Truth*, 74 TEX. L. REV. 1211, 1214 (1996).

<sup>18</sup> *Id.*

<sup>19</sup> *Ward v. Texas*, 316 U.S. 547 (1942); *Vernon v. Alabama*, 313 U.S. 547 (1941); *Lomax v. Texas*, 313 U.S. 544 (1941); *White v. Texas*, 309 U.S. 631 (1940); *Canty v. Alabama*, 309 U.S. 629 (1940); *Chambers v. Florida*, 309 U.S. 227 (1940). Another important case, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), involved a white defendant. For an excellent analysis of the evolution of the Court's confession cases between 1936 and 1949, see John F. Blevins, *Lyons v. Oklahoma, The NAACP, and Coerced Confessions Under the Hughes, Stone, and Vinson Courts, 1936-1949*, 90 VA. L. REV. 387 (2004).

<sup>20</sup> MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 227-28 (2004).

<sup>21</sup> See cases cited *supra* note 19.

<sup>22</sup> 384 U.S. 436 (1966).

<sup>23</sup> See, e.g., JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 120 (1993) (stating that "the rights that *Miranda* created were unprecedented in federal constitutional law"); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION: "TRUTH IN CRIMINAL JUSTICE" REPORT NO. 1 118 (1986), reprinted in 22 U. MICH. J.L. REFORM 437, 443 (1989) ("The considerations supporting the recommendation that the Department seek to have *Miranda* overruled include the *Miranda* system's inconsistency with the constitutional separation of powers and basic principles of federalism . . ."); Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1419 (1985) (urging the Court to overrule *Miranda*, and stating that "*Miranda* was not a wise or necessary decision," and that it introduced "novel conceptions of the proper relationship between the suspect and authority"); *id.* at 1471-72 (arguing that *Miranda* imposed "a serious handicap on the government, which arises not merely from a desire to curb historic police abuses but also from an ambivalence about criminality itself and a confusion concerning the purpose behind the rules of criminal procedure").

acknowledge that *Brown* required the Court “to manufacture new constitutional law.”<sup>24</sup> Before *Brown*, the “Court had never considered whether a confession extracted through torture would invalidate a state conviction.”<sup>25</sup> Although the results in *Brown* and the Court’s next major confession case, *Chambers v. Florida*,<sup>26</sup> were “truly unprecedented,”<sup>27</sup> these rulings did not stop southern sheriffs and police officers from beating and coercing black suspects during interrogation sessions.<sup>28</sup> “[S]outhern sheriffs continued to beat black suspects into confessing, especially in emotionally charged black-on-white criminal cases. High court interventions did not end such coercion, though law enforcement officers learned from *Brown* to avoid excessive candor.”<sup>29</sup> Despite unanimous Supreme Court rulings,<sup>30</sup> police beatings of black suspects

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<sup>24</sup> KLARMAN, *supra* note 20, at 128; Cloud, *supra* note 17, at 1211 (stating that *Brown* “broke new ground in constitutional law”).

<sup>25</sup> KLARMAN, *supra* note 20, at 128; *see also* Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 488 (2005) (noting that *Brown* “announced a new ‘voluntariness test’ . . . rooted in the due process clause of the Fourteenth Amendment”); Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2203 (1996) (describing the unprecedented nature of *Brown*).

<sup>26</sup> 309 U.S. 227 (1940).

<sup>27</sup> KLARMAN, *supra* note 20, at 134.

<sup>28</sup> In 1947, J. Edgar Hoover told a Presidential Committee appointed by President Harry Truman to investigate civil rights violations that, in a particular jail, “it was seldom that a Negro man or woman [sic] was incarcerated who was not given a severe beating, which started off with a pistol whipping and ended with a rubber hose.” TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS 26 (1947). The Committee noted that records of the Department of Justice contained evidence of illegal police brutality by southern law enforcement officers. The Committee explained:

In one case, the victim was arrested on a charge of stealing a tire, taken to the courthouse, beaten by three officers with a blackjack until his head was a bloody pulp, and then dragged unconscious through the streets to the jail where he was thrown, dying, onto the floor. In another case, a constable arrested a Negro, against whom he bore a personal grudge, beat him brutally with a bullwhip and then forced his victim, in spite of his protestations of being unable to swim, to jump into a river where he drowned. In a third case, there was evidence that officers arrested a Negro maid on a charge of stealing jewelry from her employer, took her to jail and severely beat and whipped her in an unsuccessful effort to extort a confession.

*Id.*

<sup>29</sup> KLARMAN, *supra* note 20, at 269.

<sup>30</sup> Although the Court was unanimous in *Chambers*, Justices McReynolds and Reed voted in conference to affirm the convictions. THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 505 (Del Dickson ed., 2001). After Justice Black, the author of *Chambers*, circulated a draft opinion to his colleagues, on the back of the draft, Justice McReynolds wrote Black: “I reached a different conclusion but do not care to say more.” Draft of Opinion in *Chambers v. Florida* (Feb. 1940), Hugo Lafayette Black Papers, Library of Congress, Box 258, Folder 8 (on file with author).

were routine, and a key component in maintaining white supremacy and southern culture.<sup>31</sup> “Many southern sheriffs beat blacks not only to secure confessions, but because they enjoyed it and ran little risk of incurring sanctions for doing it.”<sup>32</sup> The investigation of a triple murder of a white family near Hugo, Oklahoma exemplified that, eight years after the ruling in *Brown v. Mississippi*, white officers still severely beat black suspects—without compunction—to obtain confessions. The Oklahoma case also revealed that the Court was no longer unified in how it would respond when police coerced a confession from a suspect.<sup>33</sup>

On January 11, 1940, W.D. Lyons, a poor black man who lived in rural Oklahoma, was arrested for murdering Elmer Rogers, his wife, and their four-year-old son.<sup>34</sup> Rogers and his wife were shot to death and then mutilated with an axe.<sup>35</sup> Their home was set on fire, which badly burned the bodies of Rogers and his wife, along with their son who was asleep in the home.<sup>36</sup> Lyons was arrested eleven days after the murder.<sup>37</sup> He was held incommunicado by

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<sup>31</sup> KLARMAN, *supra* note 20, at 269; *see generally* GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* 73-75 (2012) (describing the interrogation and torture of Charles Greenlee, one of the Groveland Boys, who were alleged to have raped a white woman in central Florida); *id.* at 125-30 (describing the interrogation and torture of Walter Irvin and Samuel Shephard).

<sup>32</sup> KLARMAN, *supra* note 20, at 269 (footnote omitted).

<sup>33</sup> *Lyons v. Oklahoma*, 322 U.S. 596 (1944). Unanimity among the Justices was broken in *Lisenba v. California*, 314 U.S. 219 (1941), and *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). From *Brown* to *Lisenba*, the Justices were unanimous in their rulings when defendants alleged their confessions had been coerced.

<sup>34</sup> *Lyons*, 322 U.S. at 598.

<sup>35</sup> Blevins, *supra* note 19, at 394.

<sup>36</sup> *Id.*

<sup>37</sup> *Lyons*, 322 U.S. at 598. At the time of his arrest, many persons, black and white, believed that Lyons was innocent of the murders. Professor Michael Klarman described the situation at the time:

According to the NAACP’s account of what happened, prior to the arrest of Lyons, a white escapee from the state chain gang had confessed to the murders. But the governor’s office, fearful of the political consequences of election-year allegations that lax supervision of the chain gang had resulted in a triple murder, decided to frame a black man. The governor sent a special investigator to Hugo. According to boastful statements the investigator made to several white witnesses, he assaulted Lyons for several hours with his “nigger beater” (a blackjack). . . . Many local whites, not to mention Lyons’s lawyers, were convinced that Lyons was innocent. At the trial, which the judge called a “gala” event for the community, lawyers from the NAACP and the ACLU sowed enough doubts about Lyons’s guilt that the all-white jury, after several hours of deliberation, sentenced him to life imprisonment rather than death. As Thurgood Marshall, who participated in the trial, stated: “You know that life for such a crime as that—three people killed, shot with a shotgun and cut up with an axe and then burned—shows clearly that they believed him innocent.”

KLARMAN, *supra* note 20, at 171. Lyons served twenty-five years in prison; he “was finally pardoned by the Oklahoma governor in 1965, only to disappear into anonymity.” Blevins,



Oklahoma officials for eleven days and subjected to interrogation without access to counsel.<sup>38</sup> Lyons claimed that he was physically abused after his arrest and during an initial interrogation session, which produced a confession.<sup>39</sup> While state officials denied that Lyons was abused physically, they did concede “that a pan of the victims’ bones was placed in Lyons’[s] lap by his interrogators to bring about his confession.”<sup>40</sup> However, Lyons’s sister, who visited him in jail after his arrest and confession, described “marks of violence on his body and a blackened eye” when she testified at Lyons’s murder trial.<sup>41</sup> More importantly, one witness testified that an investigator from the Oklahoma governor’s office instructed the witness “to ‘go up to my room and get me my nigger beater.’”<sup>42</sup> And the father of one of the murder victims testified, *on behalf of the defense*, that this officer possessed a blackjack, and also told this witness that he beat Lyons for six or seven hours the previous night.<sup>43</sup>

Twelve hours after his first confession, Lyons was taken to a state prison, interrogated again, and a second confession was obtained.<sup>44</sup> Lyons claimed that he was physically assaulted in the prison.<sup>45</sup> Again, state officials denied that violence was employed against Lyons.<sup>46</sup> At trial, the first confession was excluded, but the second one was admitted into evidence.<sup>47</sup> Lyons was convicted and sentenced to life in prison.<sup>48</sup> After an Oklahoma appellate court affirmed his conviction, Lyons appealed to the Supreme Court, arguing that the second confession was the product of the violence employed to obtain the first confession.<sup>49</sup> A divided Court disagreed, and found that the abuse during the first interrogation did not “lead unescapably to the conclusion that the [second] confession was brought about by the earlier mistreatments.”<sup>50</sup>

According to the Court, if the nexus between Lyons’s two confessions is not so apparent that “one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot

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*supra* note 19, at 388-89.

<sup>38</sup> *Lyons*, 322 U.S. at 599.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 599-600.

<sup>41</sup> *Id.* at 599.

<sup>42</sup> Blevins, *supra* note 19, at 406 (footnote omitted).

<sup>43</sup> *Id.*

<sup>44</sup> *Lyons*, 322 U.S. at 599.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 600.

<sup>48</sup> *Id.* at 597.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 604.

be a denial of due process.”<sup>51</sup> In other words, the Court ruled that a break in time between the two confessions was enough that the jury could view the second confession as independent of the coercion that produced the first confession. As one commentator observed years later, the ruling in *Lyons* undermined the holding and message of *Brown* and its immediate progeny: “After *Lyons*, police officers were arguably free to employ very questionable tactics, so long as they waited an acceptable amount of time before obtaining a second confession.”<sup>52</sup> Consequently, *Lyons* “provided an easy way to evade the requirements of *Brown*.”<sup>53</sup>

Chief Justice Earl Warren had these cases and southern police brutality in mind when the Justices were deliberating *Miranda v. Arizona*. In a draft opinion of *Miranda*, Warren referred to “Negro defendants”<sup>54</sup> being “subjected to physical brutality—beatings, hanging, whipping—employed to extort confessions.”<sup>55</sup> The draft also noted that a 1947 Presidential Committee on Civil Rights found that Justice Department files “abounded ‘with evidence of illegal official action in southern states.’”<sup>56</sup> Any student of the Court or American history knew to what Warren was referring: the regular practice of southern sheriffs and police officials physically abusing black suspects to obtain confessions. In the published opinion, however, the Court deleted the phrase “Negro defendants,” and discarded the quote from the 1947 report referring to “southern states” in favor of a quote from a 1961 Commission on Civil Rights report that stated “some policemen still resort to physical force to obtain confessions.”<sup>57</sup>

These changes were made after Justices Black and Brennan wrote to Warren. Justice Black worried that “some of the Court’s critics would immediately say that our holding is but another phase of the racial question, when of course that is not true at all.”<sup>58</sup> Black felt the draft opinion’s reference “to the ‘Southern States’ . . . would likely be over-emphasized by many as an indication that what we are doing is to attack the South.”<sup>59</sup> Black wanted Warren to “point out more emphatically that third-degree methods are not limited to any racial group or to any section of the country.”<sup>60</sup> Similarly,

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<sup>51</sup> *Id.* at 603.

<sup>52</sup> Blevins, *supra* note 19, at 417.

<sup>53</sup> *Id.*

<sup>54</sup> Draft of Opinion in *Miranda v. Arizona* 7 (May 9, 1966), William Brennan Papers, Library of Congress, Box I:142, Folder 10 (on file with author).

<sup>55</sup> *Id.* (footnote omitted).

<sup>56</sup> *Id.* (citation omitted).

<sup>57</sup> *Miranda v. Arizona*, 384 U.S. 436, 446 (1966).

<sup>58</sup> Hugo L. Black, Letter to Earl Warren on *Nos. 759, 760, 761 and 584 – Escobedo Cases* (May 18, 1966), at 1, Earl Warren Papers, Library of Congress, Box 616, Folder 3 (on file with author).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

Justice Brennan questioned “if it is appropriate in this context to turn police brutality into a racial problem.”<sup>61</sup> According to Brennan, “[i]f anything characterizes the group [of defendants] this opinion concerns it is poverty more than race.”<sup>62</sup>

Of course, we now know that *Miranda* was about more than poverty, race, or the South. The reasoning and result in *Miranda* reflected a slice of American culture circa 1966.<sup>63</sup> And we also know that *Miranda* and the law of confessions remain a part of American culture, despite the fact that the modern Court has repealed many of the restraints that *Miranda* placed on police interrogation methods. *Confessions of Guilt* captures this history and ventures some counsel on how interrogation law will evolve in the future as the nation pursues its war on terrorism.

Part I of this essay identifies a few of the many historical aspects of the law of interrogation discussed by Thomas and Leo. Part II summarizes what I find to be the most thought-provoking part of *Confessions of Guilt*: its discussion and critique of *Miranda* and its progeny. Briefly put, Thomas and Leo are not admirers of *Miranda* and believe that suspects might be better off without *Miranda* governing the law of interrogation. Finally, Part III offers two rebuttals to positions taken by the authors. Unlike Thomas and Leo, I fully support *Miranda*’s reliance on the Fifth Amendment’s bar against compelled self-incrimination as a constitutional basis for regulating police interrogation. Also, I have a different response to the Court’s pre-*Miranda* Due Process Clause cases, which provided the legal principles for regulating police interrogation by state and local police officers prior to *Miranda*. More specifically, I find that the pre-*Miranda* Court committed serious constitutional error in 1958 when it ruled that suspects did not have a “right to counsel” while undergoing police interrogation.

#### I. HISTORICAL BACKGROUND ON THE LAW OF INTERROGATION

Thomas and Leo’s survey of the history of confessions begins with ancient Roman law, noting that “[t]orture ‘was used from time immemorial against

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<sup>61</sup> William J. Brennan, Letter to Earl Warren on *Nos. 759, 760, 761 and 584* (May 11, 1966), at 13-14, William Brennan Papers, Library of Congress, Box I:142, Folder 10 (on file with author).

<sup>62</sup> *Id.* at 14.

<sup>63</sup> Cf. FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 157 (1970) (“*Miranda* was the high-water mark of the due process revolution, the ultimate expression of the judicial philosophy and technique that had characterized the Warren Court. . . . The guiding ideal had been that bold and idealistic advances by judges can inspire the nation to purify its civilization.”); Yale Kamisar, *Miranda: The Case, The Man, and the Players*, 82 MICH. L. REV. 1074, 1091 (1984) (“The judicial philosophy expressed in *Mapp* [*v. Ohio*, 367 U.S. 643 (1961)], *Miranda*, and other Warren Court cases ‘did not spring from the head of Zeus one morning.’” (quoting A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 254 (1968))).

slaves partly to strengthen testimony, partly to extort confessions.”<sup>64</sup> They observe that “torture was routinely used during the Roman Republic to obtain confessions, but only from slaves.”<sup>65</sup> The law of interrogation served multiple interests and legal principles. Such interests included a concern about false confessions, and a concern about “the autonomy interest of the suspect, consisting of a dignity interest and an interest in being free to make up one’s own mind whether to self-accuse of a crime.” (p. 19). Reliability of legal proceedings is another value promoted by the law of interrogation. (p. 45). Finally, the authors identify a “proportionality principle” that “causes the State to avoid brutal methods to obtain confessions to minor crimes; it also causes judges to draw back from imposing penalties that seem to outweigh the harm a defendant is accused of committing.” (p. 19). As one scholar observes, “The book does a masterful job of charting the ebbs and flows of these different interests” served by interrogation law.<sup>66</sup>

I agree with the positive assessments of two previous reviews of *Confessions of Guilt*.<sup>67</sup> Professor Sherry Colb describes the book as “painstakingly researched” and “insightful.”<sup>68</sup> Professor Andrew Leipold calls the book “terrific” and states: “If you don’t know much about the topic, read this book. If you know a lot about this topic, read it anyway; the time invested will be repaid with new information and new insights.”<sup>69</sup> Indeed, *Confessions of Guilt* revealed many aspects of interrogation law previously unknown to me. For example, the earliest English confession case the authors found was decided in 1295. (p. 24). The initial use of the “voluntary” terminology was found in the 1606 Charter from James I that established the two Virginia colonies in North America. (p. 34). Judicial suppression of involuntary confessions did not start in England until the mid-1700s. Prior to 1740, a criminal jury would hear and consider a confession that was “challenged as unfree and then decided whether, or how much, to ‘discount’ it.” (p. 43).

Thomas and Leo’s book also describes historical artifacts of interrogation law that mirror contemporary legal issues. For example, in 1755, English “justice of the peace manuals began advising magistrates that the prisoner’s statements [in pre-trial preliminary hearings] had to be voluntary before they

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<sup>64</sup> THOMAS & LEO, *supra* note 11, at 19 (footnote omitted).

<sup>65</sup> *Id.* (footnote omitted).

<sup>66</sup> Andrew D. Leipold (Sept. 2012) (reviewing THOMAS & LEO, *supra* note 11), available at [http://cljbooks.rutgers.edu/books/confessions\\_of\\_guilt.html](http://cljbooks.rutgers.edu/books/confessions_of_guilt.html), archived at <http://perma.cc/X8NB-R8V9>.

<sup>67</sup> My one complaint is the endnotes; Professor Thomas is right about endnotes. George C. Thomas III, *An Assault on the Temple of Miranda*, 85 J. CRIM. L. & CRIMINOLOGY 807, 808 n.4 (1995) (“Is it not late in the day for endnotes? Having become accustomed to footnotes in this computer age, the endnotes were quite frustrating, all the more so because readers will want to examine [the author’s] notes carefully.”).

<sup>68</sup> Sherry F. Colb, *Interrogation as a Thermometer of Public Fear*, 11 OHIO ST. J. CRIM. L. 231, 233 (2013) (reviewing THOMAS & LEO, *supra* note 11).

<sup>69</sup> Leipold, *supra* note 66.

were admissible at trial.” (p. 57). Like modern jurists, eighteenth-century English judges’ conclusions about the voluntary nature of a defendant’s statement were complex, indeterminate, and varied “enormously depending on the judge.” (p. 57). After English judges ruled “more and more statements involuntary, magistrates reacted by beginning to warn suspects that they did not have to answer questions” at pre-trial preliminary hearings.<sup>70</sup> Thomas and Leo explain that the motivation for this type of eighteenth-century *Miranda* warning was plain: like police detectives today, English magistrates “viewed their task as helping solve crimes and convict guilty suspects. When statements were rejected, guilty defendants were more likely to walk free, an outcome to be avoided if possible.” (p. 57). English magistrates were not the only British officials to warn suspects about their “right to remain silent.” The authors locate cases in the mid-1800s where English constables warned suspects that they should be careful about making statements that could be used against them in court proceedings. (p. 58).

Interestingly, Thomas and Leo describe that as far back as 1817, an English case, *Rex v. Wilson*,<sup>71</sup> “suggested that the very examination itself could be an improper inducement [to confess]. This, of course, was the U.S. Supreme Court’s theory in *Miranda v. Arizona*—that the process of questioning itself put pressure on the suspect to talk.” (p. 59). The authors agree with Dean Wigmore’s view that *Wilson* was “an outlier” under English law.<sup>72</sup> Nonetheless, on the same page that critiques *Wilson*, the authors describe another case that anticipates modern interrogation law. Today, if a suspect requests a lawyer while being questioned, police must end the interrogation until a lawyer is provided.<sup>73</sup> Any statement obtained after such a request is presumed coerced, and inadmissible at trial.<sup>74</sup> The authors explain that *Rex v. Ellis*,<sup>75</sup> an 1826 English case, involved a suspect requesting the presence of his legal counsel during a preliminary examination. The magistrate denied the request. Later, the trial court suggested that the case should be dismissed because the prisoner had been denied counsel’s assistance; “this was assented to by the counsel for the prosecution, and the prisoner was acquitted.” (p. 59).

On this side of the Atlantic Ocean, during the early nineteenth century, a New York lawyer was advocating a legal theory that would eventually result in the creation of legislation that “anticipated *Miranda* by more than a century

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<sup>70</sup> THOMAS & LEO, *supra* note 11, at 57 (footnote omitted).

<sup>71</sup> 171 Eng. Rep. 353 (1817).

<sup>72</sup> THOMAS & LEO, *supra* note 11, at 59 (footnote omitted).

<sup>73</sup> *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1965) (“If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.”).

<sup>74</sup> *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Edwards v. Arizona*, 451 U.S. 477 (1981).

<sup>75</sup> 171 Eng. Rep. 1073 (1826).

and a quarter.”<sup>76</sup> That lawyer was John A. Graham, and Thomas and Leo describe his encouragement and influence on an 1828 statute that did more to protect suspects’ constitutional rights than any judicial decision up until that point. Space limitations do not permit a complete telling of the story of Graham and his impact on the New York law.<sup>77</sup> It is enough to note that, in 1828, New York was the first state to require that “magistrates [at the start of a preliminary examination] tell the suspect that ‘he is at liberty to refuse to answer any question that may be put to him.’”<sup>78</sup> Moreover, it would be another twenty years before British law required similar warnings, although British legal scholars did advocate that magistrates provide warnings in the second decade of the nineteenth century. (p. 78). “But the New York legislature went further than the English treatises and further than Parliament would go in 1848.” (p. 78). The New York law, according to Thomas and Leo, “required the magistrate to tell the suspect that he had a right to counsel and to allow the suspect ‘a reasonable time to send for and advise with counsel.’”<sup>79</sup> Equally unprecedented, the New York legislation “gave suspects the right to have counsel present during the examinations of all witnesses.”<sup>80</sup> Several years later, the legislatures of Missouri and Arkansas would follow suit by “requiring warnings and permitting defense counsel during [a preliminary] examination.”<sup>81</sup>

What happened to the 1828 law? As the population of New York City rapidly expanded and criminality increased, the City established its first “police” force in 1845. (p. 86). Soon, police began interrogating suspects. (p. 86). Thomas and Leo recognize that because magistrates were required to warn suspects of their right to remain silent, “it would make sense for the police to give warnings when they engaged in the same form of investigation.” (p. 86). Consistency and neutral legal principles, however, are not always practiced or upheld when regulating the authority of the police to secure confessions. Thomas and Leo found “[l]ittle evidence” that the police provided warnings. (p. 86). Moreover, claiming necessity to control crime, the superintendent of the New York City police conceded in 1875 that his department was ignoring a law that required arrestees to be promptly brought before a magistrate. (p. 86). And the superintendent noted “that ‘there is no statute that makes it the duty of

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<sup>76</sup> THOMAS & LEO, *supra* note 11, at 78. The authors rightly and graciously acknowledge that Professor Wesley Oliver was the “first to write comprehensively about the New York innovation.” *Id.*; see Wesley MacNeil Oliver, *Magistrates’ Examinations, Police Interrogations, and Miranda-Like Warnings in the Nineteenth Century*, 81 TUL. L. REV. 777 (2007).

<sup>77</sup> Thomas and Leo devote more than eight pages to describing Graham’s influence on the New York statute. THOMAS & LEO, *supra* note 11, at 80-88.

<sup>78</sup> *Id.* at 78 (footnote omitted).

<sup>79</sup> *Id.* (footnote omitted).

<sup>80</sup> *Id.* (footnote omitted).

<sup>81</sup> *Id.* (footnote omitted).

the Police' to give the warnings required of magistrates." (p. 86). By 1876, the New York legislature "was willing to let police question without warnings and was urging magistrates to pressure suspects to answer questions. Whatever interest in the rights of suspects that John Graham had helped create had largely disappeared." (p. 87).

Looking back on the New York law, a critical element of *Miranda*'s holding comes to mind. *Miranda* ruled that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation."<sup>82</sup> Critics of this aspect of *Miranda* have asserted, *inter alia*, that the Court's creation of a "right to counsel" during interrogation was not only unsound constitutional law, but also without precedent.<sup>83</sup> The chambers of Chief Justice Warren was probably unaware of the 1828 New York statute when *Miranda* was being drafted. It is too bad *Miranda* did not reference the statute; citing the 1828 law might have stemmed some of the criticism that a "right to counsel" during interrogation was exceptional under American interrogation law. On the other hand, had Warren cited the law, critics of *Miranda* nonetheless would have found something else to complain about given the controversial nature of the ruling and its predicted impact on police interrogation methods. In fact, despite the reality that *Miranda* has not produced the dire consequences predicted by its opponents in 1966,<sup>84</sup> almost fifty years later, *Miranda* is still harshly criticized by both liberals and conservatives.<sup>85</sup> Interestingly, Thomas and Leo are among the critics.<sup>86</sup>

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<sup>82</sup> *Miranda v. Arizona*, 384 U.S. 436, 471 (1966).

<sup>83</sup> See, e.g., GRANO, *supra* note 23, at 172; OFFICE OF LEGAL POLICY, *supra* note 23; Caplan, *supra* note 23, at 1446-49.

<sup>84</sup> *But cf.* Paul G. Cassel & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) (relying upon a multiple regression time series analysis of crime clearance rates, authors argue that *Miranda* has significantly harmed law enforcement interests).

<sup>85</sup> See, e.g., Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965, 966 (2012) ("There has been a good deal of talk lately to the effect that *Miranda* is dead or dying—or might as well be dead. Even liberals have indicated that the death of *Miranda* might not be a bad thing.") (footnotes omitted).

<sup>86</sup> *But cf.* LEO, *supra* note 10, at 124 (explaining that because *Miranda* warnings require the police to "inform the suspect that he stands in an adversarial relationship to police . . . the *Miranda* warnings threaten to strip detectives of the strategic advantage that modern interrogation is structured to achieve and to expose the adversarial role that they assiduously seek to hide. In this sense, the *Miranda* requirements, though they pass quickly, may be the most honest moment in the entire interrogation process").

II. CRITICIZING *MIRANDA*A. *The Road to Miranda*

This part of my essay briefly summarizes what I consider the most interesting and best part of *Confessions of Guilt*—its discussion and analysis of *Miranda* and its progeny. Space constraints preclude a full description of this part of the book. Thomas and Leo survey and comment on a wealth of topics relating to interrogation law generally, and *Miranda* doctrine specifically. I highlight what I consider to be the authors' major claims about *Miranda*, and the impact of *Miranda* on suspects' rights and the authority of police to interrogate and obtain confessions.

The authors are not fans of *Miranda v. Arizona*. But before discussing that famous ruling, they describe what they call the “March to *Miranda*.” (p. 144). The journey to *Miranda* does not include, according to the authors, *Bram v. United States*,<sup>87</sup> an 1897 decision from the Court, which *Miranda* relies upon as support for its holding. (p. 151). *Bram* relied on the Self-Incrimination Clause of the Fifth Amendment to rule inadmissible pre-trial statements taken from the first-officer of an American sailing vessel during a murder investigation.<sup>88</sup> Instead, the authors describe *Brown v. Mississippi* as the “beginning of a long, largely *unsuccessful* doctrinal grind seeking to regulate police interrogation.”<sup>89</sup> As noted above, *Brown* and its progeny addressed claims of involuntary confessions admitted in state criminal proceedings under the Fourteenth Amendment's Due Process Clause.<sup>90</sup> The Court did not apply the Fifth Amendment's Self-Incrimination Clause to the States until 1964.<sup>91</sup> Under Due Process norms, confessions were constitutional, and thus admissible in criminal proceedings, when they were “voluntary.” The authors recognize the many problems associated with the voluntariness test. (p. 146).

In contrast to *Bram*, the authors find that *Chambers v. Florida* is a pertinent Due Process case leading to *Miranda*. The reasoning of *Chambers* is a significant “shift in focus” from *Brown v. Mississippi*. (p. 148). According to the authors, the “critical inquiry [in *Chambers*] was not whether compulsion *moved the suspect to confess*, as it surely did in *Brown*, but merely whether “compulsion was applied.” (p. 148). This shift is crucial because determining

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<sup>87</sup> 168 U.S. 532 (1897).

<sup>88</sup> *Id.* at 542.

<sup>89</sup> THOMAS & LEO, *supra* note 11, at 146 (emphasis added).

<sup>90</sup> Professor Grano argues that “*Brown* did not, as is sometimes thought, establish a due process voluntariness requirement. In fact, the words *voluntary* and *involuntary* appear in the opinion not in passages containing the Court's due process analysis but only in quotations from the state court dissenting opinion, and no mention whatsoever is made of overborne wills.” GRANO, *supra* note 23, at 92.

<sup>91</sup> *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (“We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States.”).



whether a confession was actually “coerced” or “involuntary” is very difficult; judges, after all, are not psychologists.<sup>92</sup> “It is much easier to decide whether the authorities were attempting to compel a confession.” (p. 148).

*Ashcraft v. Tennessee*,<sup>93</sup> however, is the most important Due Process case leading to *Miranda*, according to the authors. They assert it “is *Ashcraft*, not *Bram*, that is the true ancestor of *Miranda*.”<sup>94</sup> Writing for six Justices, Justice Black found that thirty-six hours of continuous interrogation by relays of police and prosecutors, while Ashcraft was being held “incommunicado, without sleep or rest,” produced an involuntary confession.<sup>95</sup> Focusing on the undisputed evidence in the record, the Court found this degree of questioning was “inherently coercive.”<sup>96</sup> On its face, Thomas and Leo find *Ashcraft*’s holding unremarkable because the “police conduct bordered on the third degree.” (p. 151). The noteworthy aspect of *Ashcraft* is the “analytical structure” of Black’s opinion. (p. 151). “The Court analogized the situation of a suspect to that of a criminal defendant on the witness stand.” (p. 151). Under this analogy, “almost any extended police questioning” could be found to be coercive. (p. 152). Thus, “[g]oing down the *Ashcraft* road will relieve future Courts from having to identify the external force that overbore the suspect’s will. It will be enough to conclude that pressure was applied.” (p. 152).

After *Ashcraft*, the Court decided several more state confession cases under the Due Process Clause,<sup>97</sup> but the Court was unable to reach a consensus on how to regulate interrogation procedures. Along the way, “Justices Jackson

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<sup>92</sup> Under the Court’s Due Process cases, if a confession is considered “involuntary,” it violates Due Process to admit the confession in a criminal trial. To implement the “involuntary” test, judges were tasked with determining a suspect’s subjective state of mind. Professor Mark Godsey has rightly noted the “Herculean task of divining a suspect’s state of mind has been called ‘impossible,’ ‘perplexing,’ and an ‘Alice in Wonderland journey into the metaphysical realm’ of free will. The involuntary confession rule itself has been criticized as ‘legal double talk,’ ‘useless,’ and ‘downright misleading.’” Godsey, *supra* note 25, at 469.

<sup>93</sup> 322 U.S. 143 (1944).

<sup>94</sup> THOMAS & LEO, *supra* note 11, at 151 (footnote omitted).

<sup>95</sup> *Ashcraft*, 322 U.S. at 153. While Ashcraft claimed officers abused him during questioning, police denied that any abuse occurred. *Id.* at 150-51. Justice Black based his holding only on the undisputed evidence in the record. *Id.* at 154.

<sup>96</sup> *Id.* (“We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear.”).

<sup>97</sup> For federal cases, the Court put stricter limits on the opportunities for federal agents to interview suspects before taking them to see a judge. *See* Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). Rather than relying upon the Fifth Amendment to control federal interrogation practices, the Court invoked its supervisory powers to regulate the admission of evidence in federal courts. *See* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

and Frankfurter tried to stem the *Ashcraft* tide.<sup>98</sup> Not mentioned by Thomas and Leo, liberal Justices pushed in the other direction. For example, Justices Black and Douglas believed that the Self-Incrimination Clause should control the admissibility of confessions in state court.<sup>99</sup> They also wanted *per se* restrictions on the authority of police to interrogate suspects who were not promptly arraigned, as required by state law, and often stated that suspects were entitled to counsel's assistance during interrogation sessions.<sup>100</sup> In any event, the authors argue that by 1964, "the Court's confessions doctrine was truly 'in shambles.'"<sup>101</sup> The result and reasoning in *Escobedo v. Illinois*<sup>102</sup> appeared to satisfy few people. *Escobedo* ruled that the police violated the Sixth Amendment right to counsel when they denied Escobedo access to his lawyer after Escobedo requested to see his lawyer and the lawyer sought access to his client during interrogation.<sup>103</sup> Finally, in 1966, the Court endeavored to clarify the meaning of *Escobedo*. That effort produced *Miranda*;

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<sup>98</sup> THOMAS & LEO, *supra* note 11, at 154. Apparently, one or two Justices wanted to end the Court's consideration of state confession cases. When the Justices were deliberating *Stein v. New York*, one of Justice Jackson's law clerks sent Jackson a memo which stated: "Your transcript of remarks made in conference indicate that [Justice] Minton and [Chief Justice Vinson] want to get out of the state confession business entirely." Memo in *Stein v. New York* (undated), Robert Jackson Papers, Library of Congress, Box 182, Folder 4 (on file with author). The published opinion in *Stein*, however, gives no hint of this topic. See *Stein v. New York*, 346 U.S. 156 (1953).

<sup>99</sup> See, e.g., *Stein*, 346 U.S. at 208 (Douglas, J., dissenting) ("The practice now sanctioned is a plain violation of the command of the Fifth Amendment, made applicable to the States by the Fourteenth, that no man can be compelled to testify against himself.") (citation omitted).

<sup>100</sup> See, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 637 (1961) (Douglas, J., concurring) (stating that every suspect—"whether rich or poor—has the right to consult a lawyer before talking with the police; and if he makes the request for a lawyer and it is refused, he is denied 'the Assistance of Counsel for his defence' guaranteed by the Sixth and Fourteenth Amendments."); *Reck v. Pate*, 367 U.S. 433, 448 (1961) (Douglas, J., concurring) ("I would hold that any confession obtained by police while the defendant is under detention is inadmissible, unless there is prompt arraignment and unless the accused is informed of his right to silence and accorded an opportunity to consult with counsel."); *Stein*, 346 U.S. at 208 (Douglas, J., dissenting) (relying on *Brown v. Mississippi* and *Chambers v. Florida* when stating that the Fifth Amendment's privilege against compelled self-incrimination applies to the States).

<sup>101</sup> THOMAS & LEO, *supra* note 11, at 155 (footnote omitted).

<sup>102</sup> 378 U.S. 478 (1964).

<sup>103</sup> *Id.* at 490-91. The result in *Escobedo* satisfied few people because of the "accordion-like quality" of the opinion. YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE 561 (13th ed. 2012). "At some places the opinion launched so broad an attack on the use of confessions in general and rejected the arguments for an 'effective interrogation opportunity' so forcefully that it threatened (or promised) to eliminate virtually all police interrogation. At other places, however, the language of the opinion was so narrow and confining that it arguably limited the case to its special facts." *Id.*

the law of interrogation was upended again, and the fighting has not stopped since.

B. *What's Wrong with Miranda?*

*Confessions of Guilt* sees many flaws in *Miranda*. First, the authors criticize *Miranda's* reliance on *Bram v. United States*, which ruled that the Fifth Amendment's Self-Incrimination Clause controls the admissibility of incriminating statements in federal criminal proceedings obtained through official questioning. (p. 162). The authors explain that *Bram* "was the only case standing for that proposition; all of the Court's other confession cases were based on due process or common law, both of which made voluntariness the touchstone."<sup>104</sup> They also write that *Bram* had impliedly rejected the *Miranda* solution of requiring police to warn suspects before interrogation.<sup>105</sup> "Thus, except for *Bram's* reliance on the Fifth Amendment as an analytical structure, it supported the *Miranda* dissents rather than the majority." (p. 162).

Next, the authors insist that *Miranda* lacks a "deep justification" for its holding. (p. 9 & 170). They explain this criticism by observing that in the years prior to *Miranda*, "one could comfortably imagine a world in which a suspect faced police interrogators without counsel and without being told of the right to remain silent." (p. 171). Although federal agents did provide warnings to suspects, by 1963, state and local police routinely questioned suspects without provision of warnings and in the absence of counsel; "that was the world in which we lived."<sup>106</sup> A divided Court in *Miranda*, however, ruled that the Fifth Amendment required police to warn suspects of their rights and obtain a waiver of those rights before starting interrogation.<sup>107</sup>

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<sup>104</sup> THOMAS & LEO, *supra* note 11, at 162 (footnote omitted).

<sup>105</sup> *Id.* ("If lack of warnings was sufficient to make the confession inadmissible, there would have been no need to consider, as *Bram* did rather at length, the facts of the questioning before concluding that the answer was involuntary. More significant, one year before *Bram*, the Court in *Wilson v. United States* [162 U.S. 613 (1896)] squarely held that the lack of warnings did not render a confession inadmissible, and *Bram* cited and quoted from *Wilson* with approval.") (footnotes omitted).

<sup>106</sup> *Id.* at 171 (footnote omitted).

<sup>107</sup> Under *Miranda*, many judges, legal scholars, and police officials thought that a waiver of rights was a prerequisite *before* starting interrogation, and that a waiver was a distinct and separate requirement from whether proper warnings were given. See Kamisar, *supra* note 85, at 1008-21. After all, *Miranda* stated: "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Miranda v. Arizona*, 384 U.S. 436, 476 (1966). *Miranda* also explained: "The warnings required and the waiver necessary in accordance with our opinion today are . . . prerequisites to the admissibility of any statement made by a defendant," and went to explain that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]." *Id.* at 476, 479. Leaving no doubt about what constitutes a proper waiver, *Miranda* declared: "a valid waiver will not be

The authors insist there are several difficulties with *Miranda*'s reliance on the Fifth Amendment as a "deep justification" or basis for its holding. Difficulties include the fact that suspects can easily waive their rights, the Court's statement that the warnings and waiver rule are "not even required by the Fifth Amendment," and the fact that "police questioning looks very different from the other contexts in which the privilege applies." (p. 173). "Given the lack of a deep justification," the authors are not surprised that when new Justices hostile to *Miranda* were appointed to the Court, "it was inevitable that the path of future decisions would be to ease the admission of incriminating statements." (p. 174).

Following this line of criticism, the authors argue that contemporary *Miranda* doctrine is not strongly connected to the Fifth Amendment privilege. Adopting a theory previously proposed by Professor Thomas, the authors explain that *Miranda* could be seen as having a "strong force" connection to the Fifth Amendment if it *actually* created a legal principle—"an irrebuttable presumption"—that a confession was inadmissible if obtained without the safeguards required by the *Miranda* opinion. (p. 178). "The obvious problem" with this view is that the post-*Miranda* Court "did not understand *Miranda* that way." (p. 178). Instead, "the Court decided case after case that separated *Miranda* from the strong-force connection to the Fifth Amendment." (p. 178). The authors believe that *Miranda* represents a "weak force" connection to the Constitution: "*Miranda* creates a presumption of compulsion that can be rebutted."<sup>108</sup> Put differently, Thomas and Leo argue *Miranda* is about providing notice to a suspect that he has certain rights that can be exercised

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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." *Id.* at 475.

*Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010), reversed *Miranda*'s requirement that police obtain a waiver before commencing interrogation. The defendant in *Thompkins* was suspected of murder. Thompkins was given warnings, refused to sign a form indicating that he understood his rights, and was mostly silent during nearly three hours of interrogation. *Id.* at 2256. Finally, a detective asked Thompkins whether he believed in God and prayed. Thompkins answered "yes." The detective then asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins replied "yes." *Id.* at 2257 (internal quotation marks omitted). Thompkins said nothing further and the interrogation ended about fifteen minutes later. *Id.* This evidence was admitted at Thompkins's murder trial and he was convicted. *Id.* at 2257-58. The *Thompkins* Court rejected the defense argument that police are not allowed to question a suspect who has received *Miranda* warnings until they obtain a waiver from the suspect. *Id.* at 2264. According to *Thompkins*, the requirements of *Miranda* are satisfied "if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions." *Id.* at 2263. Put simply, police need not obtain a waiver at the outset of interrogation; a suspect's incriminating statement can constitute a waiver.

This is not the place to critique *Thompkins*. It is enough to note that I agree with Thomas and Leo that *Thompkins* "is perhaps the most significant *Miranda* case yet decided." THOMAS & LEO, *supra* note 11, at 192.

<sup>108</sup> THOMAS & LEO, *supra* note 11, at 178-79 (footnote omitted).

during interrogation; *Miranda* creates “a due process notice requirement within the Fifth Amendment privilege.” (p. 179). The authors convincingly maintain that current *Miranda* doctrine is simply about notice, *not* about “ameliorating compulsion, and due process is sufficiently flexible to permit different procedures depending on the cost to the party charged with the responsibility of providing notice.”<sup>109</sup>

Ultimately, Thomas and Leo seem to prefer the Due Process test that was used to evaluate confessions before *Miranda* came on the scene. For most suspects who waive their rights, the authors argue, *Miranda* does not protect them from police questioning. “Instead, *Miranda* has effectively deprived those suspects of the voluntariness flourish that the FDR Court created from the due process clause.” (p. 208). These suspects “are worse off now when they get to court than before *Miranda* was decided.” (p. 208). Whether such suspects are worse off in the police interrogation room is a different issue. Even if it is assumed that *Miranda* has caused a “civilizing” effect on police interrogators, the authors question whether such an effect benefits suspects.<sup>110</sup> “Confessing after having one’s will worn down in a kindly way seems just as detrimental to suspects, if more pleasant, as earlier interrogation methods.” (p. 208).

To be sure, Thomas and Leo are not Pollyannaish about the Due Process test, either as a matter of legal theory or how it worked in practice.<sup>111</sup> But in several places, they convey the message that *Miranda* either comes up short, or has made matters worse, when compared to the Due Process test. For example, they observe that “[o]ne largely lost value is the due process focus on the characteristics of the suspect, which is almost always muted or nonexistent in *Miranda* cases.” (p. 196-97). Similarly, they assert that “[i]t is possible that *Miranda* has made the due process voluntariness test even less protective than it was prior to 1966.” (p. 210). This claim is justified by the Court’s statement that it is a rare case where a suspect raises “a colorable argument that a self-incriminating statement was “compelled” despite the fact that the law enforcement authorities adhered to the dictates of *Miranda*.”<sup>112</sup> In any event,

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<sup>109</sup> *Id.* at 182. The cases supporting their view are discussed on pages 179-84.

<sup>110</sup> *Id.* at 208 (footnote omitted).

<sup>111</sup> *See id.* at 146-47 (“The formalist category that concerns us is the idea that there is such a thing as an involuntary confession.”); *id.* at 226 (arguing that “voluntariness, understood as ‘overbear the will’ is incoherent”). They also acknowledge “the very flexibility that was the virtue of the Court’s voluntariness test *in the hands of the Supreme Court* permitted lower courts to admit confessions pretty much whenever the judge thought it made sense.” *Id.* at 209.

<sup>112</sup> *Id.* at 210 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984)); *see also id.* at 209 (“Voluntariness is flexible enough to permit a court to find the confessions of Fikes [a black suspect with limited education and mental infirmities accused of a series of burglaries and rape] and Haley [a fifteen year-old black suspect accused of murder] a violation of due process even if the interrogation would not have violated the due process rights of white businessmen like Lisenba or Ashcraft.”).

the authors write: “*Miranda* fails in some fundamental ways, that it was largely rhetoric from the beginning, and that the parsimonious application of *Miranda* by later Courts made it emptier still of substantive content.” (p. 168).

III. SUPPORTING THE FIFTH AMENDMENT’S APPLICATION TO THE INTERROGATION ROOM AND A FIFTH AMENDMENT “RIGHT TO COUNSEL”

The remainder of this essay contains two responses to *Confessions of Guilt*. First, I see no problem with *Miranda*’s reliance on the Fifth Amendment to regulate police interrogation. Indeed, *Miranda*’s reliance on the Fifth Amendment made sense as an effort to clarify *Escobedo*. More importantly, reliance on the Fifth Amendment was constitutionally correct in light of the Court’s goal to lessen the coercive atmosphere of police interrogation. As Professor Mark Godsey has argued,

[F]rom both historical and textual standpoints, the self-incrimination clause is undoubtedly the most appropriate provision in the Constitution with which to directly regulate confessions because it unambiguously speaks to the issue by banning the use of compulsion to obtain self-incriminating statements that are later admitted at trial against the suspect.<sup>113</sup>

Second, I have a different reaction to the Due Process cases leading up to *Miranda* and the solution adopted by the Warren Court for the doctrinal confusion that existed after *Escobedo*. Under the Due Process doctrine that reigned prior to *Miranda*, Thomas and Leo claim that “one could comfortably imagine a world in which a suspect faced police interrogators without counsel and without being told of the right to remain silent.” (p. 171). True, a world of police interrogation where suspects are not informed of their rights might be comfortably imagined in 1963. But constitutional analysis of police questioning should not solely focus on what might be comfortably imagined by someone looking in from the outside; rather, constitutional analysis should also consider whether police interrogation exhibits coercive elements for the accused. Objectively viewed, and certainly from a suspect’s perspective, the facts of many of the cases the Court heard from 1936 to 1965 do not look comfortable to me. In most of these cases, police were determined to obtain statements from suspects who were unwilling to provide statements. One way to counteract (but not necessarily eliminate) this police pressure was to inform suspects of their rights, including their right to remain silent and their right to have the advice of counsel. Thus, *Miranda*’s interpreting the Fifth Amendment to require police advise a suspect that he has a “right to counsel” during police questioning was a logical way to reduce the compulsion the Court envisioned in custodial interrogation. Recognition of a right to counsel in this context is not incompatible with history, nor was such an interpretation unexpected from

<sup>113</sup> Godsey, *supra* note 25, at 491 (footnote omitted).

a Court that was determined to ensure protection of Fifth Amendment rights in the stationhouse.

A. *The Fifth Amendment and Police Interrogation*

For many years prior to *Miranda*, the argument that the Fifth Amendment did not apply to police interrogation went as follows: because police are not granted legal authority to compel incriminating statements from suspects, “there is nothing to counteract, there is no legal obligation to which a privilege can apply, and hence the police can elicit statements from suspects who are likely to assume or be led to believe there *are* legal (or extralegal) sanctions for contumacy.”<sup>114</sup> Thomas and Leo seem to accept this argument.<sup>115</sup> At the same time, they do not criticize the holding of *Malloy v. Hogan*,<sup>116</sup> which applied the Self-Incrimination Clause to the States in 1964.<sup>117</sup> Indeed, they accept the upshot of *Bram* and *Miranda* “that suspects have what amounts to a privilege not to answer police questions.” (p. 173). Yet, they continue: “when the Court sought to formalize the exercise of the privilege in the alien landscape of the police interrogation room, it risked major discontinuities.” (p. 173).

The discontinuities risked were generated by at least three factors. First, *Miranda* permitted suspects to waive their rights.<sup>118</sup> “Rights supported by deep justifications, like the right to a jury trial and the right to counsel at trial, cannot be so easily waived.” (p. 172). Second, Thomas and Leo describe the *Miranda* warnings as a “placeholder” for a better legislative solution. (p. 173). Here, the authors refer to the following statement in *Miranda*:

[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a

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<sup>114</sup> Yale Kamisar, *A Dissent From the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test*, 65 MICH. L. REV. 59, 65 (1966) (footnote omitted) [hereinafter *A Dissent*]. Professor Kamisar explains that this argument was made by counsel for the State of New York during the oral argument in *Vignera v. New York*, a companion case to *Miranda*. *Id.* at 65 n. 35.

<sup>115</sup> THOMAS & LEO, *supra* note 11, at 173 (“Police have no formal authority to compel answers; they cannot ask a court to find a suspect in contempt. And police cannot overcome an assertion of the privilege with an offer of use immunity.”).

<sup>116</sup> 378 U.S. 1 (1964).

<sup>117</sup> Professors Dripps and Grano, however, strongly criticize *Malloy*. Dripps, *supra* note 7, at 729; GRANO, *supra* note 23, at 122 (stating that the *Malloy* Court “simply erred in describing the protection against compulsory self-incrimination as a basic principle of free government. . . . [A] society can very well be free and yet require those under suspicion to answer questions posed in an orderly proceeding.”).

<sup>118</sup> *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (“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.”).

constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect.<sup>119</sup>

Lastly, Thomas and Leo charge that a “major difficulty with *Miranda*’s attempt to use the Fifth Amendment privilege as a deep justification for requiring warnings and waiver is that police questioning looks very different from the other contexts in which the privilege applies.” (p. 173).

These factors do not strike me as a basis for charging that *Miranda* lacks a deep justification or criticizing *Miranda*’s reliance on the Fifth Amendment. Regarding the waiver point, it is true that nearly eighty percent of suspects today waive their rights and agree to talk to police.<sup>120</sup> But is that *Miranda*’s fault? I do not think so. Relying on *Malloy*’s holding, *Miranda* was intended to make the Fifth Amendment operative during police interrogation—to guarantee “the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.”<sup>121</sup> Prior to *Miranda*, the police were not required to inform a suspect about his constitutional rights, and if the Court’s Due Process cases reflect anything, most suspects did not know they had a right to remain silent. Those cases also reveal that police acted as if they had authority to demand answers from suspects. The *Miranda* warnings were designed to counteract the pressures of police interrogation by informing suspects they have a right to remain silent and a right to request counsel’s advice.

To be sure, the Court probably assumed that most suspects would invoke their rights and not talk with the police after receiving warnings.<sup>122</sup> However, the protections required by *Miranda* were not designed to guarantee that suspects would rationally exercise their rights. Certainly, there is no reason to

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<sup>119</sup> *Id.* at 467.

<sup>120</sup> THOMAS & LEO, *supra* note 11, at 9; Richard A. Leo, *Inside The Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996) (discussing observational study of police interrogations that found that 78% suspects waived their rights after being read the *Miranda* warnings).

<sup>121</sup> *Malloy*, 378 U.S. at 8. After reading a draft of *Miranda* circulated by Chief Justice Warren, Justice Brennan urged the Chief Justice to alter the opinion so that the thrust of our analysis should be that our concern is to assure an “unfettered choice” at any given moment during the interrogation. That requires some continuous safeguard or reminder of right. Perhaps it need not be counsel—but there must be some effective reminder, and we do know that counsel will work. The question as I see it is not one of a “right to counsel”, words which often appear in the next few pages and evoke the Sixth Amendment, but rather, what is sufficient to assure that a choice made is a free one, under the Fifth Amendment.

William J. Brennan, Letter to Earl Warren, *supra* note 61, at 18.

<sup>122</sup> See Caplan, *supra* note 23, at 1448 (“The Court probably imagined that the typical suspect advised of his rights would elect to exercise them.”); Thomas, *Miranda’s Illusion*, *supra* note 8, at 1103 (stating that the Court “maintained the foundational assumption that a suspect’s will about whether to confess is the product of a rational balancing of benefit versus potential harm”).



think that suspects would not waive their rights if police-required warnings were based on Due Process principles or the Sixth Amendment's right to counsel.

Furthermore, consider the reaction of police and politicians if *Miranda* required the presence or advice of counsel before a suspect could constitutionally waive his rights. To be sure, "a rule that a suspect needs counsel to waive counsel [or his right to silence] is by no means unthinkable. The 'waiver' standards are designed for judicial proceedings; no judge presides in the stationhouse."<sup>123</sup> Indeed, the American Civil Liberties Union amicus brief in *Miranda* argued that counsel's presence was necessary to protect the privilege.<sup>124</sup> While that alternative might have resulted in "smarter" decisions by suspects, many undoubtedly would have criticized the Court for "legislating from the bench" and implementing "judicial policy choices" rather than interpreting the Constitution. I agree that the waiver rule announced in *Miranda* "is plainly at odds with the rest of the opinion."<sup>125</sup> But eliminating the possibility that suspects could waive their rights required a constitutional ruling that a majority of the Justices were unwilling to adopt.<sup>126</sup>

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<sup>123</sup> Kamisar, *A Dissent*, *supra* note 114, at 67 n.47.

<sup>124</sup> Brief for American Civil Liberties Union as Amicus Curiae, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 759), 1966 WL 100516, at \*3 ("A police warning of the subject's right to remain silent is not adequate. Neither is the granting of prior access to counsel, as distinguished from the presence of counsel. . . . [E]ffectuation of the privilege against self-incrimination, in these circumstances, requires the providing of counsel to all."); *see also* Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal To Mirandize Miranda*, 100 HARV. L. REV. 1826, 1830 (1987) (proposing "a per se rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney").

<sup>125</sup> THOMAS & LEO, *supra* note 11, at 172 (quoting Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 20 (2001)).

<sup>126</sup> As Professor Kamisar explains, "[t]he failure of the [*Miranda*] Court to deal explicitly with (if only to reject) the ACLU contention is surprising, for in all other respects the ACLU amicus brief presents 'a conceptual, legal and structural formulation that is practically identical to the majority opinion—even as to use of language in various passages of the opinion.'" Kamisar, *supra* note 114, at 67, n.47 (citation omitted). In a recent article, Professor Kamisar observes: "There is reason to believe that the division among the *Miranda* Justices was extraordinarily close." Yale Kamisar, *A Look Back at the "Gatehouses and Mansions" of American Criminal Procedure*, OHIO ST. J. CRIM. L. (forthcoming) (manuscript at 11) (on file with author). There probably would have been no *Miranda* warnings but for the fact that federal law enforcement officers provided similar warnings to arrestees. *See* BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* 589 (1983) ("The F.B.I.'s record of effective law enforcement showed that requiring similar warnings in all police interrogations would not impose too great a burden. Another Justice who was present says, 'the statement that the F.B.I. did it . . . was a swing factor. I believe that was a tremendously important factor, perhaps the critical factor in the *Miranda* vote.'").

Second, Thomas and Leo complain that *Miranda* admitted its “procedural minefield is not even required by the Fifth Amendment.” (p. 173). Of course, the *Miranda* Court never said that the prescribed warnings were “not . . . required” by the Fifth Amendment or the Constitution. That description of the warnings initially came from then-Justice Rehnquist’s opinion in *Michigan v. Tucker*,<sup>127</sup> when he wrote that *Miranda* “recognized that these procedural safeguards *were not themselves rights protected by the Constitution* but were instead measures to insure that the right against compulsory self-incrimination was protected.”<sup>128</sup> In contrast to Rehnquist’s formulation, *Miranda* said “the Constitution” does not “necessarily require[] adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.”<sup>129</sup> Thus, *Miranda* indicated that its ruling did not create “a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect.”<sup>130</sup> Of course, these statements should not have prompted questions about the constitutional foundation of *Miranda*’s holding or the Court’s reliance on the Fifth Amendment. Chief Justice Warren made plain, in several passages of *Miranda*, that the requirements of warnings and waiver were constitutionally mandated. For example, *Miranda* emphasized that “unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.”<sup>131</sup>

As Professor Weisselberg has documented, these statements about not imposing a “constitutional straitjacket” were the product of an exchange between Chief Justice Warren and Justice Brennan after Warren sent Brennan a draft opinion.<sup>132</sup> Brennan was troubled by the suggestion in the draft that “there is only a single constitutionally required solution to the problems of testimonial compulsion inherent in custodial interrogation.”<sup>133</sup> Brennan suggested changes to the draft that would “allow the states a modicum of flexibility, in part because he believed that this allowance might appease some critics of the Court and make the opinion more acceptable to the general public.”<sup>134</sup> As Brennan’s private summary of the 1965 Term put it: Brennan “felt strongly that a rigid system should not be imposed—both because he recognized the greater resourcefulness of the legislative process and because he thought that the appearance of some flexibility would enhance the

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<sup>127</sup> 417 U.S. 433 (1974).

<sup>128</sup> *Id.* at 444 (emphasis added).

<sup>129</sup> *Miranda*, 384 U.S. at 467.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 123-25 (1998) (footnotes omitted).

<sup>133</sup> *Id.* at 124 (footnote omitted) (internal quotation marks omitted).

<sup>134</sup> *Id.* (footnote omitted).

acceptability of the opinion.”<sup>135</sup> Warren accommodated Brennan’s changes; thus, the *Miranda* opinion left room for the States or Congress to offer equivalent safeguards for protecting suspects’ rights, which, of course, were never enacted.

While Brennan’s motivations were benign, the changes he prompted caused much mischief. Conservative Justices of the Burger Court exploited the “no constitutional straitjacket” passage as a legal basis for declaring the warnings were not constitutionally required.<sup>136</sup> Those decisions are hard to take seriously. Any law student who has had constitutional law knows the Supreme Court has no authority to require state officials to perform certain tasks, or to direct state courts to exclude challenged evidence, or to reverse state court convictions based on confessions that did not comply with *Miranda*, unless the Constitution itself compels those actions. In other words, if the *Miranda* warnings were not required by the Constitution, the Court had no authority to impose them on state officials, and certainly no power to reverse state convictions resting upon confessions obtained without the prescribed warnings. Eventually, even Chief Justice Rehnquist had to acknowledge the obvious, although he and other members of the Burger Court were responsible for this constitutional nonsense in the first place. In *Dickerson v. United States*,<sup>137</sup> Rehnquist explained that the “first and foremost of the factors” supporting the constitutional foundation of *Miranda* was that its holding was applied to proceedings in state courts.<sup>138</sup> In sum, “[o]ne cannot read the majority opinion in *Miranda* to describe anything other than a normative vision about the constitutional limits on a custodial interrogation.”<sup>139</sup> And the “no constitutional straitjacket” passage does not undermine this conclusion in any way.

Finally, Thomas and Leo question the applicability of the privilege in the police station. In contrast to a witness summoned before a grand jury or legislative investigative hearing, persons under arrest “typically have no notice that they will face police interrogation and thus no time to prepare for the questioning.” (p. 173). Thomas and Leo are right about the predicament facing arrestees, but their reasoning supports warning the suspect about his right to remain silent, rather than not applying the Fifth Amendment during police

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<sup>135</sup> William J. Brennan, Case Histories (October Term, 1965), at XLI, Library of Congress, Box II:6, Folder 8 (on file with author). Interestingly, the summary of the 1965 Term began with the following statement: “Although [Justice Brennan] was in large measure responsible for the decision to turn *Miranda* on the Fifth rather than the Sixth Amendment, he was troubled by The Chief Justice’s initial circulation. It seemed to undercut this decision by stressing *Escobedo v. Illinois*, 378 U.S. 478, almost to the exclusion of *Malloy v. Hogan*, 378 U.S. 1, a case more directly related to the Fifth Amendment problems the Justice had in mind.” *Id.* (citations omitted).

<sup>136</sup> See, e.g., *Oregon v. Elstad*, 470 U.S. 298 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Michigan v. Tucker*, 417 U.S. 433 (1974).

<sup>137</sup> 530 U.S. 428 (2000).

<sup>138</sup> *Id.* at 438.

<sup>139</sup> Weisselberg, *supra* note 132, at 123.

interrogation. Further, after acknowledging that police have no authority to compel answers from uncooperative suspects, the authors assert that suspects “can say nothing and pay no formal price” for their silence. (p. 173). But the problem with this logic is that the typical suspect, untrained in the law, does not know this. He needs a lawyer, or at least a warning, to communicate that information. The police are not going to tell him. Ultimately, Thomas and Leo conclude that *Miranda* warnings and the Fifth Amendment are inapt in the police station because “police questioning looks very different from the other contexts in which the privilege applies.” (p. 173).

I agree that “police questioning looks very different” from a grand jury or legislative hearing; it looks worse. It is more coercive for the reasons stated by Thomas and Leo: a suspect typically has no notice; has no time to prepare; and cannot bring counsel along for legal advice, as can someone summoned before a grand jury or a legislative hearing. Moreover, unlike a legislative hearing or civil proceeding which is open to the public, police interrogation is secret. Because of the invisibility of the setting and the absence of disinterested witnesses during interrogation, police can engage in coercive tactics without fear of contradiction. Of course, “[t]here is the word of the accused against the police. But his voice has little persuasion.”<sup>140</sup>

Because police interrogation is more coercive than these other contexts, it requires the same or greater Fifth Amendment protection for the accused. Indeed, Professor Kamisar said it best, as he has on so many issues concerning police interrogation and the Constitution:<sup>141</sup> given that the Fifth Amendment applies in legislative investigations and civil proceedings, “*Miranda* appears to be an *a fortiori* case; that is, unless one is prepared to rekindle” the correctness of applying the Fifth Amendment to the States.<sup>142</sup> Thomas and Leo do not question *Malloy*’s holding. Nor do they question *Miranda*’s (and *Chambers v. Florida*’s) conclusion that police questioning of persons in custody without warnings or the presence of counsel is inherently coercive. On this point, Frankfurter put it well: “Of course, the police meant to exercise pressures upon [the suspect] to make him talk. That was the very purpose of their

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<sup>140</sup> *Reck v. Pate*, 367 U.S. 433, 446 (1961) (Douglas, J., concurring); *see also Crooker v. California*, 357 U.S. 433, 443-44 (1958) (Douglas, J., dissenting) (“The trial of the issue of coercion is seldom helpful. Law officers usually testify one way, the accused another. The citizen who has been the victim of these secret inquisitions has little chance to prove coercion.”).

<sup>141</sup> In a classy and gracious move, Thomas and Leo dedicate their book to Professor Kamisar. THOMAS & LEO, *supra* note 11, at v. I applaud their honoring of Professor Kamisar.

<sup>142</sup> Kamisar, *A Dissent*, *supra* note 114, at 64-65; *see also* Susan R. Klein, *No Time for Silence*, 81 TEX. L. REV. 1337, 1341-49 (2003) (explaining that the Court has found that the Fifth Amendment was “violated and ordered injunctive and other relief, even where there was no possibility that a [pre-trial] statement would be used in a criminal trial, and even where no statement was generated”).

procedure.”<sup>143</sup> I do not question these propositions either. Thus, in my view, because the Fifth Amendment guarantees “the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence,”<sup>144</sup> that same provision applies in a setting designed to make suspects incriminate themselves—whether willingly or unwillingly. Put simply, if the Fifth Amendment protects a right to remain silent, it ought to apply during police interrogation, a context purposefully constructed to undermine that right.

B. *The “Right to Counsel” in the Stationhouse*

The authors appear to prefer the flexibility and case-by-case approach of the Due Process voluntariness test over *Miranda*’s bright-line requirements for assessing the constitutionality of confessions.<sup>145</sup> As Thomas and Leo acknowledge, however, there were several problems with the Court’s Due Process cases. I will not repeat the flaws and line-drawing difficulties associated with the Due Process cases and the voluntariness test those cases embraced. I do find it ironic, however, that Justice Frankfurter, a devoted champion of Due Process analysis and fierce opponent of applying the Bill of Rights to the States, privately told his colleagues in *Watts v. Indiana* that he “would just as soon not have [the] due process clause in the Fourteenth Amendment—it’s too vague.”<sup>146</sup> I will focus on one aspect of the Due Process cases that strikes me as anomalous in light of the pre-*Miranda* Court’s often-stated stance that only voluntary confessions are admissible as evidence. That is, the Court’s willingness to uphold a confession despite the fact that a suspect requested and was denied access to counsel before making a confession. *Miranda*’s reversal of this position was correct.<sup>147</sup> Moreover, interpreting the Fifth Amendment to include a “right to counsel” during police interrogation is not incompatible with the history of the privilege, nor was such an interpretation unexpected from a Court that wanted to “ameliorat[e] compulsion” (p. 182) in the stationhouse.

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<sup>143</sup> *Haley v. Ohio*, 332 U.S. 596, 606-7 (1948) (Frankfurter, J., concurring). During the conference discussion of *Harris v. South Carolina*, another Due Process confession case, Frankfurter told his colleagues that “all police deny they use coercion—they all do—this case shows it.” William Douglas, Conference Notes for *Harris v. South Carolina* (Nov. 20, 1948), William Douglas Papers, Library of Congress, Box 183, Folder 17 (on file with author).

<sup>144</sup> *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

<sup>145</sup> While *Miranda*’s holding and *per se* rules were a shock for some, Professor Catherine Hancock has shown that vague outlines of *Miranda*’s holding can be seen scattered about the Due Process cases. See Hancock, *supra* note 25, at 2232-36.

<sup>146</sup> William Douglas, Conference Notes for *Watts v. Indiana* (Apr. 26, 1949), William Douglas Papers, Library of Congress, Box 183, Folder 17 (on file with author).

<sup>147</sup> *Miranda v. Arizona*, 384 U.S. 436, 436 n.48 (1966).

Long before *Miranda* was decided, the Court, in several cases, noted the relevance for Due Process doctrine that a suspect did not have access to a lawyer during police questioning.<sup>148</sup> At times, the Court or individual Justices assumed that suspects had a right to counsel during interrogation. For example, in 1949, in *Watts v. Indiana*,<sup>149</sup> Justice Jackson, a strong advocate of police questioning and ardent opponent of Court-imposed restrictions on state interrogation practices, recognized the “serious situation” created by the fact that the suspect “neither had nor was advised of his right to get counsel.”<sup>150</sup> Certainly, prior to 1958, a majority of the Court never explicitly ruled that a suspect lacked a right to counsel during police interrogation, just as the Court never expressly stated that a suspect had no right to remain silent during interrogation.<sup>151</sup> Relatedly, the Justices repeatedly noted their disapproval that police, during extended incommunicado interrogation sessions, violated state prompt arraignment laws, which required police to bring suspects to judges as quickly as possible after arrest. “The Justices understood that most of these arrestees would be entitled to the appointment of counsel at these hearings, and that the practice of *incommunicado* interrogation appeared to be designed to deprive defendants of the advice of counsel that would be given at those hearings.”<sup>152</sup>

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<sup>148</sup> See, e.g., *Ward v. Texas*, 316 U.S. 547, 555 (1942) (explaining that the Court will invalidate convictions where, *inter alia*, a defendant has “been unlawfully held incommunicado without advice of friends or counsel”); see also *Haynes v. Washington*, 373 U.S. 503, 516-17 (1963) (noting that the suspect was “not advised that he is entitled to counsel” during interrogation as a factor to consider in determining the voluntariness of his confession); *Gallegos v. Nebraska*, 342 U.S. 55, 65 (1962) (Opinion of Reed, J.) (explaining that “the lack of counsel before, during, or after arraignment, and confession to the police in private” are elements to be considered under Due Process analysis); *Culombe v. Connecticut*, 367 U.S. 568, 630 (1961) (noting that the suspect “expressly told the police that he wanted counsel, . . . and his request was in effect frustrated”); *Spano v. New York*, 360 U.S. 315, 322-23 (1959) (noting police continued interrogation despite suspect’s refusal to answer questions without the advice of counsel, and police ignored the suspect’s reasonable requests to contact a local attorney); *Fikes v. Alabama*, 352 U.S. 191 (1957) (noting that suspect’s “father and lawyer were barred in attempts to see him”); *Haley*, 332 U.S. at 604 (observing that fifteen year old suspect subject to interrogation was not advised “that he was entitled to have the benefit of counsel or the help of his family”).

<sup>149</sup> 338 U.S. 49 (1949).

<sup>150</sup> *Id.* at 59 (Opinion of Jackson, J.); see also *Haley*, 332 U.S. at 604 (Opinion of Frankfurter, J.) (stating that teenage suspect “was not advised that he was not obliged to talk, that it was his right if he chose to say not a word, nor that he was entitled to have the benefit of counsel”).

<sup>151</sup> I disagree with Professor Grano’s assertion that “whether it premised its analysis on the common law, the Fifth Amendment, or the Fourteenth Amendment, the Court always rejected the argument that a defendant had a right to counsel during police interrogation.” GRANO, *supra* note 23, at 149.

<sup>152</sup> Hancock, *supra* note 25, at 2233 (footnote omitted). Professor Hancock further notes: “It was not odd, then, for [the Justices in the Due Process cases] to think of the right of

Acknowledging a suspect's "right to get counsel" was easy; however, implementing that right was another matter. Allowing access to counsel posed a quandary. As Justice Jackson described, exposing a suspect "without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom" and "largely negates the benefits of the constitutional guaranty of the right to assistance of counsel."<sup>153</sup> Yet, allowing a suspect access to counsel "means a real peril to solution of the crime."<sup>154</sup> Similarly, Justice Frankfurter saw a contradiction between access to a lawyer and police interrogation; Frankfurter thought interrogation was permissible and required "reasonable means"<sup>155</sup> to make questioning effective. "Legal counsel for the suspect will generally prove a thorough obstruction to the investigation. Indeed, even to inform the suspect of his legal right to keep silent will prove an obstruction."<sup>156</sup> And in 1951, Justice Reed spoke for four Justices when he stated, in dicta, that "[l]ack of counsel prior to trial" does not deny a suspect "the essentials of justice."<sup>157</sup>

Things came to a head in 1958. In two cases, the Court addressed whether denial of a suspect's request for counsel prior to a confession meant that his subsequent confession was coerced. In *Crooker v. California*,<sup>158</sup> a thirty-one year old man, who had attended one year of law school, was arrested for murdering a former girlfriend.<sup>159</sup> After questioning began, Crooker requested to see a specific lawyer, "but was told that 'after [the] investigation was concluded he could call an attorney.'"<sup>160</sup> Fourteen hours after his arrest, Crooker confessed.<sup>161</sup>

The *Crooker* Court concluded that the defendant's confession was voluntary. While conceding that "coercion seems more likely to result from state denial of a specific request for opportunity to engage counsel than it does from state failure to appoint counsel immediately upon arrest," the Court stated that the greater possibility of coercion was "not decisive."<sup>162</sup> Instead, the Court determined that the likelihood of coercion was negated by Crooker's age, intelligence, and one year of legal education.<sup>163</sup> Replying to the defendant's

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access to counsel at interrogation as a Due Process safeguard, when that right was a surrogate for counsel whose assistance was barred by deliberate police violation of state procedural safeguards." *Id.* at 2233-34.

<sup>153</sup> *Watts*, 338 U.S. at 59 (Opinion of Jackson, J.).

<sup>154</sup> *Id.*

<sup>155</sup> *Culombe v. Connecticut*, 367 U.S. 568, 579 (1961) (Opinion of Frankfurter, J.).

<sup>156</sup> *Id.* at 580 (footnote omitted).

<sup>157</sup> *Gallegos v. Nebraska*, 342 U.S. 55, 64-65 (1962) (footnote omitted).

<sup>158</sup> *Crooker v. California*, 357 U.S. 433 (1958).

<sup>159</sup> *Id.* at 435.

<sup>160</sup> *Id.* at 436.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 438.

<sup>163</sup> *Id.*

additional argument that police denial of a request for counsel violated Due Process “without regard to the circumstances of the case,”<sup>164</sup> the Court asserted that such a rule would have a “devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney.”<sup>165</sup>

In the second case, *Cicenia v. Lagay*,<sup>166</sup> police denied the defendant’s request to see his lawyer. Moreover, Cicenia’s lawyer, who had come to the police station, requested to see his client, but the police denied that request as well.<sup>167</sup> Cicenia and his lawyer were permitted to confer seven hours later, after his confession was obtained. Unlike Crooker, Cicenia had not spent a year in law school.<sup>168</sup> After finding that Cicenia’s confession was voluntary, the Court noted his additional claim that he had a constitutional right to confer with counsel.<sup>169</sup> That claim, the Court ruled, was controlled and rejected by *Crooker*.<sup>170</sup> Although expressing a “strong distaste . . . over the episode disclosed by [the] record,”<sup>171</sup> the Court explained that adoption of Cicenia’s position “would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases” and “would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel.”<sup>172</sup>

*Crooker* and *Cicenia* strike me as odd rulings. I certainly understand the Court’s view that honoring a suspect’s request for counsel “would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney.”<sup>173</sup> This statement reflects the Court’s view that counsel’s presence will prevent police interrogation.<sup>174</sup> This logic, however, also applies to a suspect’s request that police honor his right to remain silent. But the answer to the latter scenario is that “there is *no* right to interrogate—by the police any more than by the courts—when the privilege

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<sup>164</sup> *Id.* at 440.

<sup>165</sup> *Id.* at 441.

<sup>166</sup> 357 U.S. 504 (1958).

<sup>167</sup> *Id.* at 505.

<sup>168</sup> See Weisberg, *supra* note 7, at 43 (“Justice Harlan’s opinion in *Cicenia* is curiously lacking in information about Cicenia such as we are given about Crooker[’s law school education]. In substance, all that the Court says about Cicenia is that he consulted a lawyer before surrendering to police and during his questioning his requests to see his lawyer were refused as were his lawyer’s requests to see him.”).

<sup>169</sup> *Cicenia*, 357 U.S. at 508.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 509.

<sup>173</sup> *Crooker v. California*, 357 U.S. 433, 441 (1958).

<sup>174</sup> *Cf.* Weisberg, *supra* note 7, at 43 (“The argument for excluding counsel from the police station is simply that if the suspect talks to a lawyer he will be advised not to answer any questions.”).



against self-incrimination is invoked.”<sup>175</sup> The same can be said about a suspect’s request for counsel. When a suspect requests counsel, he is either following the advice of his attorney or indicating that “he is not competent to deal with the authorities without legal advice.”<sup>176</sup> Either way, he is clearly signaling a desire to end questioning because he does not wish to make any statements to police. Thus, any statement obtained by police after denying a suspect’s request for counsel should not be considered “voluntary.” At a minimum, “a later decision at the authorities’ insistence to make a statement without counsel’s presence may properly be viewed with skepticism.”<sup>177</sup>

While some may agree that a suspect’s request for counsel signals an inability or unease in dealing with the circumstances, a critic might note that, prior to *Miranda*, no precedent under the common law or constitutional doctrine recognized a right to counsel during police questioning. For example, Professor Grano thinks that *Crooker* and *Cicenia* were correctly decided; a contrary conclusion lacked precedent and threatened federalism concerns.<sup>178</sup> I disagree. When a suspect subject to police interrogation requests or invokes his right to counsel, the police deny the request or ignore the invocation, and the police eventually obtain an incriminating statement, the suspect’s Fifth Amendment rights have been violated. My view is not grounded on an original understanding of the Fifth Amendment or the common law of interrogations. I agree with Professor Al Alschuler’s conclusion that “[t]he history of the privilege against self-incrimination provides only limited guidance in resolving the Fifth Amendment issues that confront modern courts.”<sup>179</sup> While history may not command that a suspect be allowed access to counsel, my position is

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<sup>175</sup> *Culombe v. Connecticut*, 367 U.S. 568, 639 (1961) (Douglas, J., concurring) (emphasis in original).

<sup>176</sup> *Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring in result).

<sup>177</sup> *Id.*; see also *Minnick v. Mississippi*, 498 U.S. 146, 156 (1990) (holding in *Edwards* applies even after the suspect has consulted with counsel); *Arizona v. Roberson*, 486 U.S. 675, 677-78 (1988) (explaining that *Edwards* applies when police want to interrogate suspect about an offense unrelated to the subject of the initial interrogation where the suspect requested counsel); *Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (holding that once suspect invokes his right to see counsel, police may not conduct interrogation, unless suspect evidences a desire to discuss case with police and subsequently waives his rights).

<sup>178</sup> GRANO, *supra* note 23, at 148-50. Grano writes that “[p]rior to *Cicenia*, the Court had never indicated that a denial of counsel to a suspect was enough by itself to render a confession inadmissible.” *Id.* at 148-49. He also contends that federalism concerns work against recognizing a right to counsel in this context. *Id.* at 149. State courts are the primary adjudicators of criminal law issues. The rulings in *Crooker* and *Cicenia*, “[f]ar from being deviational,” instead “reflected the view that state and federal courts had historically taken.” *Id.* For Grano, “it would have been quite remarkable, and even presumptuous, for the Supreme Court to have decided *Cicenia* other than the way it did.” *Id.* at 150.

<sup>179</sup> Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION*, *supra* note 4, at 181, 203.

not inconsistent with the history and evolution of the privilege,<sup>180</sup> because “lawyers were crucial in the development of the privilege.”<sup>181</sup>

Prior to the late 1700s, “the fundamental safeguard for the defendant in [British] common law criminal procedure was not the right to remain silent but rather the opportunity to speak.”<sup>182</sup> Defendants were forbidden to be represented by lawyers during criminal trials.<sup>183</sup> “The essential purpose of the criminal trial was to afford the accused an opportunity to reply in person to the charges against him.”<sup>184</sup> Although a privilege against compulsory self-incrimination existed during this time, defendants did not rely upon it. “The right to remain silent when no one else can speak for you is simply the right to slit your throat, and it is hardly a mystery that defendants did not hasten to avail themselves of such a privilege.”<sup>185</sup> Furthermore, like modern police interrogation, pre-trial proceedings were extremely important to the outcome of criminal cases. British pre-trial procedures in the sixteenth, seventeenth, and eighteenth centuries were “designed to induce the accused to bear witness against himself promptly.”<sup>186</sup> Once a pre-trial incriminating statement was secured, “the criminal defendant would find that any supposed privilege against self-incrimination available at trial was worth little. If he declined to testify at trial, or attempted to recant on his pretrial statement, the statement would be invoked against him at trial.”<sup>187</sup> A similar state of affairs existed in the colonies. “American criminal procedure in the colonial period—like the English model it closely followed—assumed the testimonial availability of the defendant at the crucial pretrial stage of the prosecution and at trial freely made use of the defendant’s admissions.”<sup>188</sup>

In the late eighteenth century and the nineteenth century, however, criminal trials took on a very different mode with the arrival of lawyers to represent the defendants. “The criminal trial came to be seen as an opportunity for the

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<sup>180</sup> Cf. John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION*, *supra* note 4, at 82, 108. (“Across the centuries the privilege against self-incrimination has changed character profoundly, from the original privilege not to accuse oneself to the modern privilege not to respond or to testify.”).

<sup>181</sup> Helmholz, *Introduction to THE PRIVILEGE AGAINST SELF-INCRIMINATION*, *supra* note 4, at 13.

<sup>182</sup> Langbein, *supra* note 180, at 82.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 87.

<sup>186</sup> *Id.* at 92.

<sup>187</sup> *Id.* at 92.

<sup>188</sup> Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION*, *supra* note 4, at 109, 143; *see also id.* at 117 (in the colonies, “the prosecutorial system depended upon routine self-incrimination in preliminary hearings”).

defendant's lawyer to test the prosecution case."<sup>189</sup> Once lawyers arrived on the scene, "that made it possible for the criminal defendant to decline to be a witness against himself."<sup>190</sup> Put differently, with the presence of lawyers to represent those charged with crime, defendants could choose to rely on the privilege against self-incrimination. "To leave lawyers out of the story, and to suppose that once the privilege had been accepted as a matter of principle it would somehow enforce itself, has proved to be a mistake."<sup>191</sup>

Again, I do not contend that the above history mandates recognition of a universal right to counsel during police interrogation. My claim is simply that counsel's presence and advice to a suspect undergoing police interrogation is consistent with protecting the central meaning of the privilege, namely, "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."<sup>192</sup> If a suspect undergoing interrogation tells the police that he wishes to remain silent, but the police ignore that request and press ahead with questioning and secure a confession, is that confession "voluntary"? If that confession is considered coerced, why should the result be different if the suspect requests access to counsel, but that request is also denied? In both situations, the suspect is communicating his discomfort and inability to cope with police interrogation. When police deny a suspect's request for counsel, any subsequent confession obtained without counsel's presence is not voluntary. That is why, in my view, *Crooker* and *Cicenia* were wrongly decided under the Due Process doctrine embraced by the Court before *Miranda* was announced.

#### CONCLUSION

I end where I started: Police detectives question suspects to obtain incriminating statements. Interrogators are not concerned with truth-finding. Illustrative of this phenomenon are the actions of New York City detectives who questioned several teenage suspects about the vicious 1989 rape of a woman in Central Park. What mattered for these detectives (and the Manhattan District Attorney's Office prosecutors involved in the case) was securing confessions from the suspects;<sup>193</sup> whether the confessions were reliable was irrelevant. We now know that the police obtained false confessions. None of the suspects were involved with the rape.<sup>194</sup> But these suspects were convicted

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<sup>189</sup> Langbein, *supra* note 180, at 83.

<sup>190</sup> *Id.*

<sup>191</sup> Helmholtz, *Introduction to THE PRIVILEGE AGAINST SELF-INCRIMINATION*, *supra* note 4, at 14.

<sup>192</sup> *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

<sup>193</sup> Two suspects were fourteen years old, two were fifteen, and one was sixteen. Rick Hornung, *The Central Park Rape: Have the Cops Blown the Case? The Case Against the Prosecution*, VILLAGE VOICE, Feb. 20, 1990.

<sup>194</sup> See Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at B5.

of the crime based on their confessions and each spent between seven and thirteen years in prison.<sup>195</sup> Years later, a serial rapist admitted that he alone was responsible for the crime.<sup>196</sup>

Professor Thomas has written that “*Miranda* failed these defendants—as it has many others.”<sup>197</sup> I disagree. *Miranda* didn’t fail these defendants; what failed these innocent suspects was an interrogation process and police mindset in which detectives are hell-bent on securing confessions.<sup>198</sup> The innocent suspects (and later defendants) in the Central Park jogger case, like other innocent suspects who provided false confessions during police interrogations and were later convicted of crimes they did not commit,<sup>199</sup> would have been better served and would not have been convicted and imprisoned if they had refused to talk with the police and invoked their right to remain silent and their right to counsel while being questioned by the police.

As the Central Park jogger case sadly demonstrates, the law of interrogation is important for all persons, the innocent as well as the guilty. Although its intrinsic merits have sometimes been misunderstood by lay persons and debated among legal scholars, there is no doubting that “[a]cross the centuries the privilege against self-incrimination has changed character profoundly, from the original privilege not to accuse oneself to the modern privilege not to respond or to testify.”<sup>200</sup> *Confessions of Guilt* teaches that the law of interrogation has also evolved over the centuries. And the law continues to develop in ways that will affect innocent and guilty suspects. *Salinas v. Texas*<sup>201</sup> is a good example. In *Salinas*, a majority of the Court held that a non-custodial suspect’s silence during police interrogation can be used as evidence

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* (reporting that a New York state judge threw out the convictions of “five young men who had confessed to attacking [a] woman on a night of violence that stunned the city and the nation. . . . The judge ruled based on new evidence pointing to another man, Matias Reyes, a convicted murder-rapist who stepped forward in January, as the probable sole attacker of the jogger.”).

<sup>197</sup> Thomas, *Miranda’s Illusion*, *supra* note 8, at 1100.

<sup>198</sup> Long before the Central Park jogger defendants were exonerated, it was reported that: at least one high-ranking police officer has had second thoughts about his role in the investigation. Though convinced the judge will rule the teenagers’ statements can be used against them, the officer now realizes that his department jeopardized the case. “In the rush to collar these kids,” admits the officer, “we played fast and loose with the law. We created the rush. But we also had these kids’ names, their addresses, and their parents. We could have slowed it down. We could have stopped, focused on one, done it real thoroughly, and gone on to the next. It might have been cleaner that way but we didn’t think of it at the time. We just went around the clock.”

Hornung, *supra* note 193. This article was written before the defendants were prosecuted.

<sup>199</sup> See GARRETT, *supra* note 2, at 8 (noting that “[f]orty of these 250 DNA exonerees (16%) confessed to crimes they did not commit”).

<sup>200</sup> Langbein, *supra* note 180, at 108.

<sup>201</sup> 133 S. Ct. 2174 (2013).

of guilt at trial. A plurality of the Court explained that Salinas' silence in response to police questioning was not enough to invoke the protection of the Fifth Amendment. According to the plurality, Salinas "was required to assert the privilege in order to benefit from it."<sup>202</sup> The plurality declared that "[a]lthough 'no ritualistic formula is necessary in order to invoke the privilege,' . . . a witness does not do so by simply standing mute."<sup>203</sup> This is not the proper forum to critique *Salinas*.<sup>204</sup> It is enough to note that the result in *Salinas*, and how judges interpret *Salinas* in future cases, will impact the rights and liberty of everyone, guilty and innocent, subject to police questioning. If you want to understand how the law of interrogation has come to be, and where it is likely to go, read *Confessions of Guilt*. You will learn a lot.

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<sup>202</sup> *Id.* at 2178.

<sup>203</sup> *Id.*

<sup>204</sup> Recently, there has been a lot of discussion, in the press and among legal academics, about whether persons actually possess a "right to remain silent." See, e.g., ALAN M. DERSHOWITZ, IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11 (2008); Brandon L. Garrett, *Remaining Silent after Salinas*, 80 U. CHI. L. REV. DIALOGUE 116 (2013); Emily Green, "You Have The Right To Remain Silent." Or Do You?, NPR (Oct. 5, 2014, 5:05 PM), <http://www.npr.org/2014/10/05/353893046/you-have-the-right-to-remain-silent-or-do-you>. There is language in *Salinas* that suggests that persons not in custody do not have a right to remain silent when confronted by police interrogation. See *Salinas*, 133 S. Ct. at 2182-83 (after quoting the text of the Fifth Amendment, the plurality states the amendment "does not establish an unqualified 'right to remain silent.>"). Although the plurality's language is subject to differing interpretations, I would not read this passage to mean that persons not in custody lack a right to remain and thus are unprotected by the Fifth Amendment. Implicit in the reasoning and result of the *Salinas* plurality opinion is that persons not in custody for *Miranda* purposes, or persons who voluntarily speak to the police, are entitled to Fifth Amendment protection, provided they expressly invoke the privilege. If police custody was required before the privilege became applicable, there would have been no need for the plurality to discuss the requirement that suspects expressly invoke the privilege. The plurality could have simply said that because *Salinas* came to the police station voluntarily, he enjoyed no Fifth Amendment protection. That would have been enough to decide the case.