

---

## MIRANDA'S SPIDER WEB

GEORGE C. THOMAS III\*

“Will you walk into my parlour?” said the Spider to the Fly.  
—Mary Howitt, *The Spider and The Fly: A Fable* (1829).<sup>1</sup>

We know how that turned out for the fly! I want to argue today that suspects are like the fly and *Miranda v. Arizona*<sup>2</sup> is, if not the spider, at least the spider's web. Along the way I will offer new proof that the forces (the spider web) that suspects face are powerful and tend to produce a desire to cooperate with police. But what is wrong with that? I will argue that *Miranda*'s web gives us the best of both worlds. Police gets lots of confessions, almost all of them from guilty suspects, and courts have clean hands when they admit confessions and affirm convictions based in part on those confessions. The suspect, after all, knew he did not have to talk and that what he said could be used against him in court. My position thus offers a way to understand how *Miranda* could be a success without causing much in a loss of convictions.

To reach *Miranda* as a journey on the road of American law, one can begin with *Ashcraft v. Tennessee*,<sup>3</sup> a 1944 case authored by Justice Black, holding that a thirty-six-hour interrogation rendered a confession inadmissible. The Court concluded that the thirty-six-hour interrogation was “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>4</sup> The idea of “mental freedom” would appear again and again in the *Miranda* opinion.

*Ashcraft* laid the groundwork for *Miranda* in yet another way. As Catherine Hancock has noted, “*Ashcraft* was a milestone because it prefigured *Miranda*'s

---

\* Rutgers University Board of Governors Professor of Law & Judge Alexander P. Waugh, Sr. Distinguished Scholar. I thank Tracey Maclin for his invitation to participate in this wonderful Symposium, Yale Kamisar for an extraordinary half century of work in interrogation law, and Rebecca Kunkel, Rutgers Law reference librarian, for helping me find and decipher the New Jersey data on consent searches.

<sup>1</sup> The rest of the first stanza goes:

‘Tis the prettiest little parlour that ever you did spy. The way into my parlour is up a winding stair, And I have many pretty things to show when you are there.” “O no, no,” said the little fly, “to ask me is in vain, For who goes up your winding stair can ne'er come down again.”

<sup>2</sup> 384 U.S. 436 (1966).

<sup>3</sup> 322 U.S. 143 (1944).

<sup>4</sup> *Id.* at 154.

recognition of the coercion inherent in all custodial interrogation.”<sup>5</sup> Once that premise was engaged, as Justice Jackson noted in his *Ashcraft* dissent, it followed that all confessions obtained by police interrogation are to some extent a product of the inherent coercion of the interrogation. As Justice Jackson put it, “If thirty-six hours is more than is permissible, what about 24? or 12? or 6? or 1? All are ‘inherently coercive.’”<sup>6</sup>

In charting the *Miranda* journey in American law, one must also figure in the contributions of Bernard Weisberg, which included writing an amicus brief in *Escobedo v. Illinois*,<sup>7</sup> decided two years prior to *Miranda*. His brief urged the Court to look at the police interrogation manuals to gain a glimpse into what had up to that point been a black box.<sup>8</sup> These manuals became a central part of Chief Justice Warren’s opinion for the Court in *Miranda*.<sup>9</sup> Weisberg helped persuade the Court that Danny Escobedo’s confession had to be suppressed even though the police methods were not coercive, but the Court based its holding on a violation of the Sixth Amendment right to counsel.<sup>10</sup> This theory suffers several defects, not the least of which is the language of the Sixth Amendment that begins, “In all criminal prosecutions.”<sup>11</sup> As Justice White’s dissent argued passionately, how can an interrogation that occurs before charges are even filed be part of a criminal prosecution?<sup>12</sup>

Of course, the proximate cause of *Miranda* is the man who gave the keynote remarks at this Symposium: Yale Kamisar. A year before *Miranda*, Kamisar published the most influential article yet written on interrogation law: “Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From *Powell* to *Gideon*, from *Escobedo* to . . .”<sup>13</sup> The ellipsis in the title would be filled in by *Miranda*. In this brilliantly argued article, Kamisar gave the Court the analytical structure by which it escaped the *Escobedo* Sixth Amendment trap. Imagine a world in which the Fifth Amendment privilege against compelled self-incrimination applies not only to the courtroom but also to the police interrogation room. The Court would not then need to rely on the Sixth

---

<sup>5</sup> Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2226 (1996).

<sup>6</sup> *Ashcraft*, 332 U.S. at 162 (Jackson, J., dissenting).

<sup>7</sup> 378 U.S. 478 (1964).

<sup>8</sup> Yale Kamisar, *A Look Back at the “Gatehouses and Mansions” of American Criminal Procedure*, 12 OHIO ST. J. CRIM. L. 645, 647 (2015).

<sup>9</sup> *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

<sup>10</sup> See *Escobedo*, 378 U.S. at 490-91.

<sup>11</sup> U.S. CONST. amend. VI.

<sup>12</sup> *Escobedo*, 378 U.S. at 496-97 (White, J., dissenting) (“Under this new approach one might just as well argue that a potential defendant is constitutionally entitled to a lawyer before, not after, he commits a crime, since it is then that crucial incriminating evidence is put within the reach of the Government by the would-be accused.”).

<sup>13</sup> Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in CRIMINAL JUSTICE IN OUR TIME 3, 20 (A.E. Dick Howard ed., 1965).

Amendment to develop protections against the inherent coercion of police interrogation. In a passage that deserves to be often quoted, Kamisar wrote:

The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah, there's the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.<sup>14</sup>

The Court adopted Kamisar's theory, while giving him insufficient credit, and sought to create a protection against the inherent coercion of police interrogation. Pretty much everyone in the Western world knows of the warnings that police must provide before they begin custodial interrogation. The key parts of the warning are that the suspect has a right to remain silent, that anything he says will be used against him in court, and that he has a right to a lawyer to advise him, at state expense if necessary. This was a revolutionary change in American confessions law of the twentieth century, for which we can thank, among others, *Ashcraft*, Weisberg, *Escobedo*, the police interrogation manuals, and Kamisar.

But in the grand scheme of Anglo-American confessions law, *Miranda* was but a return to the eighteenth century. The true journey to *Miranda* begins with the English common law of the early to mid-eighteenth century. For reasons sketched in the book that Richard Leo and I published in 2012, eighteenth-century English judges became skeptical of the voluntariness of confessions.<sup>15</sup> This skepticism manifested itself most notably in the tendency of English trial judges to suppress statements made to magistrates during the pretrial examination required by Parliament.<sup>16</sup> Because there was no formal police force at the time, the magistrate was the principal gatherer of evidence.<sup>17</sup> The statements the accused made were routinely used against him at trial.<sup>18</sup>

William Blackstone and William Hawkins provide good examples of eighteenth century judicial skepticism toward confessions. In the first seven editions of his monumental *Commentaries*, Blackstone expressed no concern about confessions beyond referencing the statutory requirement that confessions to treason had to be made "willingly and without violence."<sup>19</sup> This statute, the

---

<sup>14</sup> *Id.* at 19.

<sup>15</sup> GEORGE C. THOMAS III & RICHARD A. LEO, *CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND* ch. 3 (2012).

<sup>16</sup> *See* 1 & 2 Phil. & M. c. 13 (requiring magistrate's examination prior to bail decision); 2 & 3 Phil. & M. c. 10 (requiring magistrate's examination prior to committal where bail denied).

<sup>17</sup> THOMAS & LEO, *supra* note 15, at 54-55.

<sup>18</sup> *See, e.g.*, Robert Davidson, OPB (Nov. 30, 1796) (t17961130-61).

<sup>19</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*356-57 (7th ed. 1775).

---

---

Treason Act of 1547,<sup>20</sup> was passed months after the death of Henry VIII (do you suppose the timing was coincidental?). But limited to treason cases, as Blackstone's first seven editions were limited, there was no broad protection against involuntary confessions.

In 1778, three years after the seventh edition, Blackstone included a new and robust concern about the voluntariness of confessions in general:

In the construction of [the treason] act it hath been holden, that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence.<sup>21</sup>

I have yet to uncover the source of Blackstone's newfound skepticism about confessions. To be sure, Blackstone's language parallels that of Michael Foster's 1762 *Crown Pleas*.<sup>22</sup> But Foster's skepticism, like that of the Treason Act of 1547, was limited to treason cases. The innovation in Blackstone's eighth edition is the general nature of the skepticism regarding the voluntariness of confessions, at least those confessions made to persons not having the authority to take statements. What happened between the seventh and eighth editions that caused Blackstone to generalize the skepticism about confessions remains an unsolved mystery.

Nine years after Blackstone's eighth edition, in 1787, Thomas Leach added a paragraph to Hawkins's *Pleas of the Crown* that is an improvement both in imagery and in substance.<sup>23</sup> Blackstone's skepticism did not appear to reach

---

<sup>20</sup> 1 Edw. VI, c. 12, § 22.

<sup>21</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*357 (8th ed. 1778).

<sup>22</sup> See MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY AND OF OTHER CROWN CASES. TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 243 (Oxford, The Clarendon Press 1762) (stating that in treason cases, "hasty Confessions made to Persons having no Authority to examine, are the Weakest and most Suspicious of All Evidence. Proof may be too easily procured, Words are often Mis-reported, whether through Ignorance, Inattention, or Malice, it mattereth not the Defendant"). The similarity of the language suggests that Blackstone took Foster as his guide.

<sup>23</sup> 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN; OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS 604 (Thomas Leach ed., Dublin, Eliz. Lynch 6th ed. 1787). Hawkins died in 1746 but his treatise survived him; the last edition was published in 1824. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN; OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS (John Curwood ed., London, C. Roworth 8th ed.

officials who had the authority to take statements,<sup>24</sup> nor did Blackstone suggest suppression as a remedy. To call confessions “weak[]” and “suspicious,” as Blackstone did,<sup>25</sup> is equally consistent with suppressing the confession or letting the jury hear it with a cautionary instruction. We know that some courts followed the latter approach.<sup>26</sup> The Hawkins text, however, was clear that the remedy was not to admit the confession. Their *Pleas of the Crown* was also clear that confessions made to magistrates were also to be regarded skeptically. All questioning threatened the “mental freedom” of those accused of crime:

The human mind, under the pressure of calamity is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.<sup>27</sup>

“Deluded instrument”—now that’s quite a turn of phrase. It perfectly captures the view of English judges of the time that poor, uneducated suspects (often servants) were incapable of making a rational decision about whether to confess when questioned about crime. This led English judges increasingly to suppress statements made by suspects to magistrates. For every action, there is, of course, a reaction. English treatises began to suggest that magistrates warn suspects that they need not answer questions. By 1813, a prominent treatise by William Dickinson found a “duty of the magistrate to apprise the prisoner that his examination may be produced on his trial, and to give him a reasonable caution, that he is not required to criminate himself.”<sup>28</sup> The parallel to the 1966 *Miranda* warnings of the right to remain silent is eerie.

But Leo and I have concluded that this development in English law was not due to any solicitude about the autonomy of suspects.<sup>29</sup> As noted earlier, the

---

1824).

<sup>24</sup> It is possible that the last sentence in the Blackstone quote includes statements made to magistrates, but that seems unlikely. The apparent source of his skeptical comments about confessions makes plain that he draws a bright-line distinction between confessions made to those without authority to take them and statements made to a magistrate. In the latter case, Foster writes “the Party may be presumed to be properly upon his Guard, and apprized of the Danger he standeth in.” FOSTER, *supra* note 22, at 243.

<sup>25</sup> See *supra* note 22.

<sup>26</sup> See Richard Hill, OBP (July 14, 1742) (t17420714-8) (stating that the jury should “consider” when weighing the confession whether the defendant had “any promises of Indulgence before he confessed”).

<sup>27</sup> HAWKINS, *supra* note 23 at 604.

<sup>28</sup> 1 WILLIAM DICKINSON, A PRACTICAL EXPOSITION OF THE LAW RELATIVE TO THE OFFICE AND DUTIES OF A JUSTICE OF THE PEACE 457 (London, Reed and Hunter 1813).

<sup>29</sup> THOMAS & LEO, *supra* note 15, at 65 (crediting Bruce Smith for this conclusion); see

---

principal job of the magistrate was to gather evidence for prosecuting the offense charged in the complaint. If the statements the suspect made to the magistrate were inadmissible, the Crown's case would be difficult, if not impossible, to prove. Whatever the motive behind the practice of magistrates warning suspects that they need not "criminate" themselves, it became a standard part of English law. Indeed, Parliament required these warnings in the 1848 Sir John Jervis Indictable Offences Act, which required magistrates to read to the accused the depositions taken from other witnesses and then to say to the suspect: "Having heard the Evidence, do you wish to say anything in answer to the Charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in Writing, and may be given in Evidence against you upon your Trial."<sup>30</sup>

Across the Atlantic, the New York legislature required warnings in its 1829 Revised Statutes, though New York went Parliament one better and also required that the magistrate tell the accused that he had a right to a lawyer during the examination.<sup>31</sup> By 1842 at least three states—Arkansas, Missouri, and New York—had committal statutes that required the accused be warned of his right not to answer questions and his right to consult with counsel.<sup>32</sup> Unlike the motive behind the English rule requiring that magistrates warn suspects, the American development is probably best explained as a global skepticism about government actors in general.<sup>33</sup> We had, after all, just fought a revolution against a distant Parliament and a king, George III, viewed by many in the colonies as a tyrant.

For reasons that are beyond the scope of this Article, and are set out in detail in my book with Leo, the American concern with the voluntariness of statements made to magistrates was replaced in the late nineteenth century with a concern with crime and crime control.<sup>34</sup> Indeed, the concern with crime control had led the American public to tolerate brutal "third degree" interrogation tactics for roughly half a century in the nineteenth and early twentieth centuries. The earliest news account describing the third degree that Leo and I found appeared in 1868,<sup>35</sup> and these accounts appeared with regularity in the 1880s, seeming to peak in the early years of the twentieth century.<sup>36</sup>

---

also Bruce P. Smith, *Miranda's Prehistory* 60-61 (2005) (unpublished manuscript) (on file with author).

<sup>30</sup> 11 & 12 Vict., c. 42, § 18 (1848).

<sup>31</sup> Revised Statutes of New York, vol. 2, part IV, ch. II, § 15, 17 p. 708 (1829).

<sup>32</sup> See Revised Statutes of Arkansas, ch. 45, § 33 (1837); The Revised Statutes of Missouri, art. II, § 15 (1835); Revised Statutes of New York, vol. 2, part IV, ch. II, § 15, p. 708 (1829).

<sup>33</sup> See THOMAS & LEO, *supra* note 15, at 78-85.

<sup>34</sup> *Id.* at 86-111.

<sup>35</sup> *The Ashburn Murder*, N.Y. TIMES, July 21, 1868, at 2.

<sup>36</sup> See THOMAS & LEO, *supra* note 15, at 130-40 (listing various examples of the "third degree" being used to exact confessions).

The third degree seems to have been particularly virulent in the Chicago police precincts. In one vivid example from 1913, a real estate salesman who happened to be in a Chicago police precinct observed a brutal beating of a suspect named Fred Haas.<sup>37</sup> The salesman, William Kirk, saw Haas “hustled” into a police lieutenant’s office.<sup>38</sup> After a pause, Kirk “heard a few thuds, then a series of agonized screams.”<sup>39</sup> The other officers in the station ignored the sounds. When the beatings continued for seven or eight minutes, Kirk turned to an officer and “demanded to know what was going on.”<sup>40</sup>

The officer shook his head but then opened the door to the lieutenant’s office and said, “Take that man to a cell if you want to do any beating . . . . Get him out of here.”<sup>41</sup> Kirk could see into the office. “Two big brutes . . . [stood] over poor Haas, who was on his hands and knees. These men had even taken off their coats, and they looked like demons from the pit. . . . Haas had no chance. They were kicking him mercilessly and there he was looking up into their faces and pleading for mercy.”<sup>42</sup>

In a story published six days later, Hass’s cellmate verified Kirk’s story.<sup>43</sup> He said that when he first saw Hass, “He looked as if he had been struck by a cyclone or had tried to stop an automobile. . . . [B]lood was running down his face . . . . I never saw a man so scared in my life. . . . His clothing was almost all torn off.” What made matters even worse is that Haas turned out not to be the suspect the police were seeking. According to the news account, he did not even “resemble” the suspect.<sup>44</sup> And yet nothing was done in Chicago or Illinois to regulate this police behavior.<sup>45</sup>

The third degree was unfortunately still prevalent when the Wickersham Commission published its report on American police practices in 1931; the title, “Lawlessness in Law Enforcement,” reveals the commission conclusion about the third degree.<sup>46</sup> The Wickersham Report began to change public attitudes toward police brutality used to obtain confessions. The Second World War revealed the horrors of the Nazi police state and caused further skepticism about police interrogation in this country. In *Ashcraft*, for example, Justice Black drew from what was known in 1944 about totalitarian states:

---

<sup>37</sup> *Accuses Police of ‘Third Degree’; Victim Innocent*, CHI. TRIB., Jan. 30, 1913, at 1.

<sup>38</sup> *Id.*

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

<sup>40</sup> *Id.*

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

<sup>42</sup> *Id.*

<sup>43</sup> *Backs Story of Haas Beating*, CHI. TRIB., Feb. 4, 1913, at 6.

<sup>44</sup> *Accuses Police of ‘Third Degree’*, *supra* note 37, at 1 (“He does not resemble [the suspect] remotely.”)

<sup>45</sup> See *Backs Story of Haas Beating*, *supra* note 43, at 6 (stating an Alderman “at the next meeting of the city council . . . will ask that a thorough investigation of the affair be made”).

<sup>46</sup> 4 NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.<sup>47</sup>

By the time we get to *Miranda*, police attempts to undermine “free choices” in the interrogation room are seen as, at best, unfortunate and, at worst, deviant. The *Miranda* revolution was to replace the “bare back rooms and locked doors” of the third degree with orderly interrogation, often with a lawyer at the side of the accused to advise him whether and when to answer police questions.<sup>48</sup> This orderly process would defeat police strategies designed to force suspects to forsake their “free and rational choice.”<sup>49</sup> The problem is that *Miranda* is based on a mid-twentieth century view of the rational actor who makes decisions based on a utilitarian calculus drawn from Jeremy Bentham. But Benthamite actors are few and far between when faced with police demands.

Or, to put the matter differently, when a suspect answers police questions, at that moment in time his choice (whether rational we can never know for certain) is to answer police questions. Wigmore noted more than a century ago that as “between the rack and a false confession, the latter would usually be considered the less disagreeable; but it is nonetheless voluntarily chosen.”<sup>50</sup> It is but a short step from John Henry Wigmore to Michael Seidman and Ron Allen. Seidman argues that preferences about talking to the police are “not individual, autonomous, and preexisting. Instead, they are socially constructed in the course of the very transaction that the court is asked to review.”<sup>51</sup> Thus, “the problem with custodial interrogation is not that it might represent a doomed effort to restructure preferences, but that it risked succeeding in such restructuring.”<sup>52</sup> Under Seidman’s analysis, the restructuring of preferences is what causes most suspects to want to talk to police.

Allen lodges a similar critique. He concludes that *Miranda* has a “hollow core” because it “merely recapitulates the very same problem it was attempting to avoid.”<sup>53</sup> Warren’s opinion in *Miranda* assumes that adequate warnings can protect the suspect’s free will. But “[i]f free will exists, choices to confess

---

<sup>47</sup> *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

<sup>48</sup> Kamisar, *supra* note 13, at 19.

<sup>49</sup> *Miranda v. Arizona*, 384 U.S. 436, 465 (1966).

<sup>50</sup> 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES § 8246 (1904).

<sup>51</sup> Louis Michael Seidman, *Rubashov’s Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J.L. & HUMAN. 149, 174 (1990).

<sup>52</sup> *Id.*

<sup>53</sup> Ronald J. Allen, Essay, *Miranda’s Hollow Core*, 100 Nw. U. L. REV. 71, 75 (2006).



---

always involve it, so there is no line to draw between confessions as an exercise of free will and those that are not.”<sup>54</sup> If free will “does not exist, obviously there is no line to draw, and the whole question is useless, which again leaves us without a line.”<sup>55</sup>

I once thought it was the very situation of interrogation itself—arrest, isolation, no hope of surcease of sorrow unless the suspect talks his way out of the mess in which he finds himself—that causes suspects to babble to police. My new evidence, however, suggests that American citizens seem to want to cooperate with police. It is their “free will.” Or, of course, Allen might be right that determinism governs everything. But on either account, my new evidence supports the notion that *Miranda* warnings have little effect on suspects. No wonder Chief Justice Rehnquist embraced *Miranda* in his opinion for the Court in *Dickerson v. United States*.<sup>56</sup> My new evidence that police can create a will to cooperate comes not from interrogation law but from consent searches. In *Schneekloth v. Bustamonte*,<sup>57</sup> the Court held that consent to search is valid if it is voluntary.<sup>58</sup> Along the way, the Court rejected any requirement that *Miranda*-like warnings had to be given to ensure that consent was voluntary.<sup>59</sup>

The reasons why the Court did not consider warnings necessary to obtain voluntary consent include the informal, unstructured interaction between the police officer asking for consent and the suspect who, presumably, can make an uncoerced decision whether to grant permission for a police search.<sup>60</sup> As Justice Stewart’s majority opinion notes, the consent search issue facing the suspect in *Schneekloth*, unlike police interrogation, involves:

no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, since consent searches will normally occur on a person’s own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite. There is no reason to believe, under circumstances such as are present here, that the response to a policeman’s question is presumptively coerced; and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person’s response. *Miranda*, of course, did not reach investigative questioning of a person not in custody, which is most directly analogous to

---

<sup>54</sup> *Id.* at 84.

<sup>55</sup> *Id.*

<sup>56</sup> 530 U.S. 428, 443-44 (2000) (“[O]ur subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”).

<sup>57</sup> 412 U.S. 218 (1973).

<sup>58</sup> *Id.* at 248.

<sup>59</sup> *Id.* at 248-49.

<sup>60</sup> *Id.* at 245.

the situation of a consent search, and it assuredly did not indicate that such questioning ought to be deemed inherently coercive.<sup>61</sup>

Whether or not the holding in *Schneckloth* is correct, the reasoning has to be right. A suspect who is under arrest and faces detention of unknown length and police interrogators at every step of the way is presumably in a far weaker position than a driver, who is not even told he is a suspect and who is being asked by police for permission to do something. That intuition is what makes the New Jersey journey so instructive.

Two years after *Schneckloth*, the New Jersey Supreme Court rejected the United States Supreme Court's view about the uncoerced nature of the interaction between a police officer asking for consent and the person whose consent was sought. In *Johnson v. State*,<sup>62</sup> the state court essentially adopted Justice Marshall's position in his dissent in *Schneckloth*.

We conclude that under Art. I, par. 7 of our State Constitution the validity of a consent to a search, even in a non-custodial situation, must be measured in terms of waiver; *i.e.*, where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent.<sup>63</sup>

Though the state court was careful not to require a specific warning, it still placed the burden on the State to demonstrate "knowledge on the part of the person involved that he had a choice in the matter."<sup>64</sup> Obviously, the easiest way to meet that burden would be to give a warning of the right to refuse consent. The New Jersey State Police responded to *Johnson* by creating a "Consent to Search" form. The state police were told to present the form to any driver from whom they were requesting consent and to obtain a signature before searching. The form was quite detailed. It authorized a "complete search" of the motor vehicle or other premises and then provided:

I further authorize the above member of the New Jersey State Police to remove and search any letters, documents, papers, materials, or other property which is considered pertinent to the investigation, provided that I am subsequently given a receipt for anything which is removed.

I have knowingly and voluntarily given my consent to the search described above.

I have been advised by [the investigating officer] and fully understand that I have the right to refuse giving my consent to search.

---

<sup>61</sup> *Id.* at 247.

<sup>62</sup> 346 A.2d 66 (1975).

<sup>63</sup> *Id.* at 68. Justice Marshall in his *Schneckloth* dissent wrote, "I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all." *Schneckloth*, 412 U.S. at 284 (Marshall, J., dissenting).

<sup>64</sup> *Johnson*, 346 A.2d at 68.

I have been further advised that I may withdraw my consent at any time during the search.<sup>65</sup>

Those, like the members of the *Miranda* Court, who believe that rational actors will make self-interested decisions when given knowledge of the consequences of their actions must have been very happy with *Johnson*. Not only was the warning given in writing, which is not required by *Miranda*, but it is also very detailed in the description of the scope of the waiver. What person, knowing that there was contraband or evidence of a crime in his car or home, would give consent after being informed so clearly of his right to refuse?

One might think (I had clients once who claimed this was their motivation to consent) that if one says, “sure, go ahead, search my car,” the police might take that as evidence that the search would be fruitless and thus choose not to waste their time. I think that is a pretty dangerous assumption but let’s indulge it for a moment. Unlike the *Miranda* warnings, the *Johnson* warnings make clear that the one giving consent has the right to revoke consent.<sup>66</sup>

So, the question becomes: What drivers, knowing that there is evidence of crime in their cars, would give consent to a search, or if they did give consent, would not revoke that consent once police begin to search? The answer, according to *State v. Carty*, is lots of people. Over a several month period in 2000 and -2001, nearly 95% of those from whom consent was requested gave consent to a search of their vehicle.<sup>67</sup> Of course, if one has nothing to hide, giving consent might seem the most efficient way to be allowed to go one’s way. But using the same state police data from a slightly earlier period, we see that 305 drivers gave written consent to a search that turned up material leading to their arrest.<sup>68</sup>

From the state police data, we can actually make a pretty good estimate of the percentage of drivers who consented to searches that would turn up evidence of their guilt. A total of 993 consent searches were made in the years 1998 and 1999.<sup>69</sup> We know that 305 of those 993 cases resulted in arrest. We also know that only 5% of drivers refused consent. Thus, of the drivers in the consent pool who had evidence of guilt in their vehicle, 85% nonetheless gave “voluntary” consent!<sup>70</sup>

---

<sup>65</sup> *State v. Carty*, 790 A.2d 903, 907 (N.J. 2002) (alteration in original).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 910-11 (“Indeed, data from the New Jersey State Police Independent Monitors’ most recent reports indicate that thirty-four out of thirty-six people agreed to consent searches at the request of officers over an approximately nine month period.”).

<sup>68</sup> PETER VENIERO & PAUL H. ZOUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 28 n.4 (1999), [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf) [<https://perma.cc/TF38-3L4Y>].

<sup>69</sup> *See id.*

<sup>70</sup> If 5% refused consent and there were 993 searches based on consent, this means that police requested consent in 1045 cases (993 divided by 95%). So we have a group of likely guilty suspects from whom consent was requested of 357: the 305 with evidence of guilt found

Now before the skeptics attack me like sharks, I realize that the state police were probably applying strategies to encourage *Johnson* consent. First, they might be ignoring *Johnson* entirely and proceeding as in the good old days without any reference to the form. Second, they might not be reading the form to the motorist. You can imagine, “Do you mind if I search your car?” “No.” “You have to sign this form first.” Third, the police might meet a refusal with a “suggestion” as to why it would be better to consent—e.g., the drug dog’s on his way; we can always impound your car and get a warrant; if you cooperate, it will go easier on you. Fourth, of course, they might be lying about the extent of their cooperation with *Johnson*.

To check on the hypothesis that state police were undermining the *Johnson* regime, I drew a random sample of New Jersey cases that cited *Johnson*. I looked at 100 cases and wound up with a data set of thirty-two cases that reached the merits of the issue of whether the motorist consented to the police search.<sup>71</sup> The state police testified, and the courts agreed, that in all but two cases, the officer advised the motorist of his right to refuse consent. That is a 94% rate of providing warnings. But are police telling the truth? One check on whether police are lying is to look at the claims that defendants make in their motions to suppress. In only two other cases did defendants even claim that they were not warned; thus, even if we accept the defendant’s version of events—and the suppression judges did not accept their word—police warned of the right to refuse consent in 88% of the cases (28 of 32). So it appears that ignoring *Johnson*

---

in their car plus the 52 (1045 times 5%) who refused consent (I assume most of them had evidence of guilt in their car) equals 357. Dividing 305 by 357 is 85%. Even if we take a more conservative estimate of the number of people who consented knowing that there was evidence of crime in their car, the point remains the same.

<sup>71</sup> A full list of the cases is available from the author. *See, e.g.*, *State v. Lamb*, 95 A.3d 123 (N.J. 2014) (finding that even if the defendant’s testimony were credible that police threatened to get a search warrant if she did not consent, it was just a prediction of what would happen and was not coercion); *State v. Berkenmeir*, 888 A.2d 1283, 1286 (N.J. 2006) (“Although defendant ultimately was unwilling to sign a written consent to search form, it is undisputed that defendant at least twice granted oral consent for the search of his home.”); *State v. Shaw*, 2016 WL 4474312, at \*13 (N.J. Super. Ct. Aug. 25, 2016) (finding consent was invalid based on factors such as that “she was under arrest; she had initially refused to give consent; considering where the [evidence] was ultimately discovered in the vehicle, she must have known it would be discovered; and she was handcuffed”); *State v. Craft*, 2016 WL 456628 (N.J. Super. Ct. Feb. 8, 2016) (holding there was a valid consent where defendant twice orally consented to the search but refused to sign form); *State v. Ruiz*, 2014 WL 4175595, at \*3 (N.J. Super. Ct. Aug. 25, 2015) (noting that the trial court dismissed as “unbelievable” testimony of the defendant’s fiancée denying that she consented); *State v. Love*, 2012 WL 952277, at \*9 (N.J. Super. Ct. Mar. 22, 2012) (finding that a threat to get a warrant is just a prediction of the future and not coercion); *State v. Montenegro*, 2011 WL 205508, at \*12 (N.J. Super. Ct. Jan. 24, 2011) (rejecting as not credible defendant’s testimony that the police did not read the consent form to her); *State v. Chapman*, 753 A.2d 1179 (N.J. Super. Ct. 2000) (affirming trial judge’s rejection, as not credible, defendant’s testimony that police threatened to arrest him if he did not consent to search).

---

---

entirely, or finding a way to avoid reading the form, is not a strategy that New Jersey police employed with much frequency.

The preferred method of providing the warning was reading the form developed by the state police. Again relying on the suppression judge's findings of fact, police read the form in 84% of the cases and orally warned in 9%.<sup>72</sup> Suspects signed the form in 53% of the cases and refused to sign, or were not asked to sign, in 31% of the cases. Of course, as long as the defendant is not willing to deny that the warnings were given, and only 12% were willing to do so (4 out of 32), whether the suspect signs or not is of little moment. These data suggest that warnings were in fact given in almost all cases.

One strategy of minimizing *Johnson* that I found in the cases is the encouragement of giving consent. In over half of the cases, 62%, defendants claimed that their waiver was involuntary. Before the skeptics get too excited, however, two cautionary comments are in order. First, I am reading a universe of cases where the defendant appeals from a trial conviction; in the vast universe of cases where the defendant pleads guilty or chooses not to appeal, presumably the percentage of claims of involuntary waiver is much, probably radically, lower. Second, many of the challenges to waiver in the cases I read were perfunctory.

There were, however, a few meaty challenges to waiver: evidence that police are willing to be quite persuasive when they want consent to search a vehicle. As I hypothesized earlier, one police strategy is to suggest that a search is going to take place anyway and the suspect might as well give consent. Why a suspect would fall for the strategy is a mystery to me. Why make things easy for police rather than require them to get a warrant or find a drug dog? But suspects do fall for this strategy; perhaps, as I said earlier, the hope is that if they consent, police will decide that they are not in possession of evidence of crime and will save themselves the trouble of searching. As the old saying goes, hope is not a plan, and suspects won only 16% of their challenges to the voluntariness of the waiver (3 out of 19).

Our old friend, the drug dog, was utilized in three cases in my study.<sup>73</sup> For suspects cognizant of New Jersey search and seizure law, a number that probably approaches zero, the drug dog is a particularly empty threat. For several decades, the New Jersey Supreme Court rejected the United States Supreme Court's facile assumption that all cars lawfully stopped can be searched without a warrant if police have probable cause to conduct the search. Instead, in a series of cases, the state court held that a search of a car was permissible without a warrant under the state constitution only if the circumstances giving rise to probable cause to search the car developed unforeseeably and spontaneously.<sup>74</sup> Thus, if the officers

---

<sup>72</sup> These percentages do not add up to 94% because of rounding.

<sup>73</sup> See, e.g., *State v. Shaw*, 2016 WL 4474312, at \*12 (N.J. Super. Ct. Aug. 25, 2016) (finding consent invalid for reasons that had nothing to do with use of drug dog).

<sup>74</sup> This doctrine first clearly appears in *State v. Alston*, 440 A.2d 1311, 1322 (N.J. 1981), but traces of the notion can be found as early as *State v. LaPorte*, 301 A.2d 146, 149 (N.J.

have time to concoct a plan to get a drug dog to give them probable cause, it cannot be said that the probable cause arose unforeseeably and spontaneously, and the consent would be poisoned by the failure to observe the state court's rules about searches of cars without warrants.

Police, of course, use what works. When one suspect refused to sign the consent form, the officer "responded, 'That's fine. You don't have to sign. We'll just call for a dog.'"<sup>75</sup> The suspect was then told "that he would be detained until the dog arrived. . . . [A]fter being told again that his consent had to be voluntary, [he] signed the consent form."<sup>76</sup>

Another strategy, one that is at least grounded in New Jersey law, is to say something like "we already have probable cause for a warrant, which we will get if you do not consent." This claim permits police to argue that the probable cause to search had already developed unforeseeably and spontaneously. In *State v. Lamb*,<sup>77</sup> the defendant testified that the officer told her "that if she did not consent, the police would obtain a warrant, the search would likely be more disruptive, and possibly everyone would be arrested."<sup>78</sup> Coercive? Not according to the New Jersey courts. The Appellate Division affirmed the trial court's conclusion that this statement did not render the resulting "consent" involuntary:

We agree with Judge Farrell's assessment that there was probable cause to conduct a search of the home for the handgun. . . . The officer's statement that a warrant would be obtained was permissible, because it "was a fair prediction of events that would follow, not a deceptive threat made to deprive [defendant] of the ability to make an informed consent."<sup>79</sup>

My reading of the 19 cases in which the defendant challenged the voluntariness of the waiver is that 14 of the challenges were perfunctory and only 5 were plausible. To be sure, that is a subjective judgment, but if correct, it means that in only 16% of the consent waiver cases (5 of 32) did the state police fail to warn or employ strategies that might have unfairly undermined the free will of the suspect. When we add in the 4 cases where the court held, or the defendant claimed, that the warnings were not given, we have 9 of 32, or 28% of cases where there is even a claim of *Johnson* noncompliance. But that means that the police complied with *Johnson* in at least 71% of the cases, and thus that "voluntary" consent was obtained in at least 71% of the cases.

---

1973), see also *State v. Witt*, 126 A.3d 850, 874 (N.J. 2015) (overruling some elaborations of *Alston* but affirming the core holding).

<sup>75</sup> *State v. Elders*, 927 A.2d 1250, 1256 (N.J. 2007). The court did not reach the question of whether this "consent" was voluntary. I offer the facts to show how officers can deploy the drug dog strategy to get a waiver form signed.

<sup>76</sup> *Id.*

<sup>77</sup> 2012 WL 2427947 (N.J. Super. Ct. App. Div. June 28, 2012).

<sup>78</sup> *Id.* at \*5.

<sup>79</sup> *Id.* (quoting *State v. Cancel*, 607 A.2d 199, 201 (Super. Ct. App. Div. 1992)).

---

We have already concluded that guilty suspects give what counts as consent 85% of the times they were asked. Accepting all of these findings means that at least 60% of *guilty* suspects freely and voluntarily consented to a search of their vehicle. Now there are a lot of assumptions built into this conclusion, the data set is rather small, and I do not pretend I have found the definitive answer to the percentage of New Jersey suspects who, knowing that there is evidence of guilt in their vehicle, nonetheless voluntarily consent to its search. But I do believe I have defeated the robust skeptic (like one of my students) who claims that the state police simply do not comply with *Johnson* in any meaningful way. The robust skeptic is wrong, I think, for three reasons.

First, all things even, police would rather not lie. Their experience with *Miranda* strongly suggests to them that they can read the consent warning and still get consent in many cases. That's a win-win for police: they get consent in many cases, even where there is evidence in the car, and they don't have to lie in a suppression hearing.

Second, there are costs to lying. One cost is that the State has the burden of proof, and the defendant will almost certainly testify that the officer did not give the warnings. The judge just might find for the defendant. I won a motion to suppress in a consent case by arguing that no defendant in his right mind would consent to a search knowing that the search would incriminate him (he had a trunk filled with marijuana). Indeed, this factor is one that New Jersey courts consider in determining whether the State has carried its burden of proving voluntary consent.<sup>80</sup> Then there's the problem of repeat players. In counties with a limited number of suppression judges, I can imagine a judge saying, "Officer Thomas, that's the fourth motorist who has testified that you did not read the warnings. This time I'm going to believe the defendant and not you."

Finally, the skeptical acid that police almost always lie about compliance with notice requirements that we place on them washes away every conceivable regulatory regime in the absence of videotaped encounters. Why not assume police always lie about giving *Miranda* warnings? So, unless we videotape every encounter between a police officer and a motorist, we either have to assume they are (mostly) complying or throw up our hands and try something else.

The latter is what the New Jersey Supreme Court did. They were careful not to accuse the state police of cheating. Instead, the Court concluded, some twenty-five years after the *Johnson* experiment, that *Johnson* had failed to empower suspects to refuse consent. The court concluded in *Carty* that "the *Johnson* standard has not been effective in protecting our citizens' interest against unreasonable intrusions when it comes to suspicion-less consent searches following valid motor vehicle stops."<sup>81</sup> And if a driver does not feel free to say "no" to a request for a consent search, after receiving the *Johnson* warnings, how likely is it that a person under arrest will feel empowered by the *Miranda* warnings to remain silent or request counsel?

---

<sup>80</sup> See, e.g., *State v. King*, 209 A.2d 110, 113 (N.J. 1965).

<sup>81</sup> *State v. Carty*, 790 A.2d 903, 911 (N.J. 2002).

---

---

This leaves us with the mystery with which we began—why would a suspect do X when he has every reason to know that doing X is likely to convict him of a crime? And that question returns to the theoretical construct with which I began the paper: when a suspect waives *Miranda* and incriminates himself; when a suspect who knows there is evidence of crime in his car nonetheless consents to a search, his cooperation is his will in the moment. Now the common law was certainly correct in holding that some influences impermissibly create a will to confess or to consent. But it makes nonsense of law and philosophy to claim that, in the moment of the confession or the consent, the suspect is doing anything other than what he wants to do.

All of this means, of course, that if the goal of *Miranda* was to create a will independent of the one that police create in their interaction with the suspect, it was largely, if not completely, a failure. David Simon's chapter on interrogation in his book, *Homicide*, rings true as an explanation of why so many suspects talk to police:

Homicide detectives in Baltimore like to imagine a small, open window at the top of the long wall in the large interrogation room. More to the point, they like to imagine their suspects imagining a small, open window at the top of the long wall. The open window is the escape hatch, the Out. It is the perfect representation of what every suspect believes when he opens his mouth during an interrogation. Every last one envisions himself parrying questions with the right combination of alibi and excuse; every last one sees himself coming up with the right words, then crawling out the window to go home and sleep in his own bed. More often than not, a guilty man is looking for the Out from his first moments in the interrogation room; in that sense, the window is as much the suspect's fantasy as the detective's mirage.<sup>82</sup>

So, what could we do if we wanted to “reform” *Miranda* and prevent the police creation of a will to answer police questions? The New Jersey Supreme Court recognized that its *Johnson* solution was not doing much to encourage suspects to refuse consent. It “solved” the consent search problem by creating a prophylactic rule to protect suspects from their own will to consent. *Carty* held that if state police wish to search a vehicle, they must first show they have reasonable suspicion that the vehicle contains evidence of a crime. Otherwise, consent will not justify a search under the state constitution. This is a remarkable holding, essentially rejecting centuries of Anglo-American law premised on the view that a properly informed rational actor can make decisions that benefit him. Take that, Jeremy Bentham.

Reasonable suspicion is a close cousin to probable cause. Probable cause, if developed unforeseeably and spontaneously, automatically justifies a search of a vehicle in New Jersey. Thus, the net effect of *Carty* is essentially to reduce consent searches of vehicles to a very narrow category of New Jersey cases.

---

<sup>82</sup> DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 206 (2006).



Whether that is a good idea or a bad idea, it won't work to solve any problem critics see with suspects who foolishly waive *Miranda*. By definition, police have probable cause to arrest the suspect; otherwise the confession is inadmissible as a violation of the Fourth Amendment.<sup>83</sup> We could adopt different bright lines that would eliminate or reduce the problem with police-created preferences in the interrogation room. We could, for example, simply refuse to admit even volunteered statements made while in custody.<sup>84</sup> Or we could refuse to admit statements made in response to custodial interrogation unless the suspect had a lawyer at his side.<sup>85</sup> But I don't see a court or a legislature going that far.

And, in any event, it is not clear to me that *Miranda* needs repair. It is not true, as Allen claims, that *Miranda* "makes no sense at all."<sup>86</sup> *Miranda* makes perfect sense. In a purely deterministic world, it matters not whether suspects (deluded instruments of their own destruction) are given warnings. In a world that recognizes at least a modicum of free will, *Miranda* is the perfect embodiment of liberal philosophy. Give suspects the information that will make them not deluded instruments but, rather, accomplices in their own destruction. Now the suspect knows when he opens his mouth what he is doing; it is difficult to imagine even the densest suspect not understanding what it means to have a right to remain silent and that anything he says can be used against him in a court of law.

In our free will world, *Miranda* is the ultimate compromise. In the pre-*Miranda* days, even Supreme Court opinions that affirmed convictions based on confessions had a defensive tone. In *Crooker v. California*, for example, the Court, by a 5-4 margin, rejected the death row inmate's claim that he had a right to counsel when he requested a lawyer's assistance. The due process issue was whether the denial of his request for counsel "infect[ed] his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.'"<sup>87</sup> This required the Court to examine "all the circumstances of the case."<sup>88</sup> Justice Clark concluded for five members of the Court that the confession that condemned Crooker to death was "a voluntary confession by a college-educated man with law school training who knew of his right to keep silent. Such facts, while perhaps a violation of California law, do not . . . violate

---

<sup>83</sup> See, e.g., *Brown v. Illinois*, 422 U.S. 590 (1975); *Wong Sun v. United States*, 371 U.S. 471 (1963).

<sup>84</sup> See Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 69 (1989).

<sup>85</sup> See Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1830 (1987).

<sup>86</sup> Allen, *supra* note 53, at 73.

<sup>87</sup> *Crooker v. California*, 357 U.S. 433, 439 (1958) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)).

<sup>88</sup> *Id.* at 440.

due process of law.”<sup>89</sup> The Court thus permitted California to execute a man who confessed after he had asked for a lawyer that California law apparently promised him. Tough work.

In *Cicenia v. Lagay*,<sup>90</sup> decided the same day as *Crooker*, the police refused for over seven hours to permit the suspect’s father, brother, and lawyer to talk to the suspect. They were permitted to see him only after he had confessed. The Court appeared almost regretful that the Due Process Clause did not create a right to counsel that would provide relief to the petitioner: “We share the strong distaste expressed by the two lower courts over the episode disclosed by this record. Were this a federal prosecution we would have little difficulty in dealing with what occurred under our general supervisory power over the administration of justice in the federal courts.”<sup>91</sup> The best the Court could do, at that time, to “achieve a proper accommodation by considering a defendant’s lack of counsel one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness.”<sup>92</sup>

Courts no longer have to seek “accommodation” or be defensive about affirming convictions based on confessions cleverly wrung from suspects. Suspects accomplish their own destruction. The suspect in *Berghuis v. Thompkins*,<sup>93</sup> for example, was largely silent for almost three hours during an interrogation in a murder case. Then the detective found his weak spot when he asked, “Do you believe in God?” The suspect answered “Yes,” as his eyes filled with tears. “Do you pray to God?” “Yes.” “Do you pray to God for shooting that boy down?” “Yes.”<sup>94</sup>

There can be no doubt that the police interrogator, like Raskolnikov’s nemesis Porfiry Petrovich,<sup>95</sup> took advantage of Van Chester Thompkins. There can be no doubt that an almost three-hour interrogation is an ordeal. Yet the Court had no regret affirming the conviction and was not in the least defensive:

[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. Thompkins did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police.<sup>96</sup>

---

<sup>89</sup> *Id.*

<sup>90</sup> 357 U.S. 504 (1958).

<sup>91</sup> *Id.* at 508-09.

<sup>92</sup> *Id.* at 509.

<sup>93</sup> 560 U.S. 370 (2010).

<sup>94</sup> *Id.* at 376.

<sup>95</sup> FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* (Constance Garnett trans., Grosset & Dunlap 1927) (1866).

<sup>96</sup> *Berghuis*, 560 U.S. at 388-89.

What's not to like here? A murderer who shot "that boy down" is serving life in prison.<sup>97</sup> He knew he had a right to cut off interrogation. He did not. Like Mary Howitt's fly, Thompkins went up that "winding stair" and "ne'er [came] down again."<sup>98</sup> Justice is served, and the courts have clean hands. The more I think about it, the more I believe that we have achieved interrogation nirvana with the current Court's interpretation of *Miranda*. I doubt that this is the nirvana Chief Justice Warren sought, but the world has changed a lot in the last half century.

---

<sup>97</sup> *Id.* at 376.

<sup>98</sup> Howitt, *supra* note 1.