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MIRANDA'S MISTAKE

*William J. Stuntz**

The oddest thing about *Miranda*[1] is its politics — a point reinforced by the decision in, and the reaction to, *Dickerson v. United States*.[2] In *Dickerson*, the Supreme Court faced the question whether *Miranda* ought to be overturned, either directly or by permitting legislative overrides. The lawyers,[3] the literature,[4] and the Court[5] split along right-left — or, in the Court's case, right-center — lines, with the right seeking to do away with *Miranda*'s restrictions on police questioning, and the left (or center) seeking to maintain them.

The split is familiar. Reactions to *Miranda* have always divided along ideological lines, with the right arguing that it handcuffs the police,[6] and the left arguing that it offers needed protection to otherwise helpless suspects.[7] For the past generation, *Miranda*, the exclusionary rule, and the death penalty have formed the criminal justice system's trilogy of ideological markers, issues that separated the true believers of one side from the true believers of the other. To be sure, the left's embrace of *Miranda* has always been half-hearted, tinged with disappointment that Earl Warren's opinion did not go farther and ban un-

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

2. 120 S. Ct. 2326 (2000).

3. *Compare* Brief of Court-Appointed Amicus Curiae Urging Affirmance of the Judgment Below at 40-45, Dickerson v. United States, 120 S. Ct. 2326 (2000) (No. 99-5525) (arguing that *Miranda* should be partially overruled), *with* Brief for Amicus Curiae the American Civil Liberties Union in Support of Petitioner at 3-14, *id.* (arguing that *Miranda* "is an appropriate and necessary means of enforcing the Fifth Amendment").

4. *Compare, e.g.*, Yale Kamisar, *Can (Did) Congress Overrule* Miranda?, 85 CORNELL L. REV. 883 (2000) (arguing that Congress cannot overrule *Miranda*), *with, e.g.*, Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175 (1999) (arguing, in effect, that it can and did).

5. *Compare Dickerson*, 120 S. Ct. at 2333-35 (emphasizing *Miranda*'s constitutional roots), *with id.* at 2346 (Scalia, J., dissenting) (characterizing *Miranda* as "an illegitimate exercise of our authority to review state-court judgments").

6. *E.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998).

7. *E.g.*, Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987).

counseled questioning altogether.[8] But whenever *Miranda* has been seriously challenged, those who believe in protecting criminal suspects' interests have rallied to its defense, on the Court and in the law reviews. The success of that defense in *Dickerson* — written by the Chief Justice, no less — seems to show that, in this area at least, the left has won the day, leaving the right carping from the sidelines.

So what is strange about this picture? One answer is that left and right have it backward. *Miranda* imposes only the slightest of costs on the police, and its existence may well forestall more serious, and more successful, regulation of police questioning. The right should therefore be either indifferent to *Miranda* or supportive of it. Meanwhile, *Miranda* does nothing to protect suspects against abusive police tactics. The left should therefore be its enemy, and should rejoice at the prospect of seeing it fall, since anything that took its place would likely be an improvement.

Another, better answer is that *Miranda* should attract support from neither right nor left. Its effects are probably small, perhaps vanishingly so. But what effects it has are probably perverse — a conclusion that holds, oddly enough, no matter which side of the left-right divide one is on. The general reaction to the Court's decision in *Dickerson*, in the press and in the great majority of conversations among lawyers and law students, was celebration; listening to those conversations, one had the sense that the criminal justice system had dodged a constitutional bullet. The reaction is misplaced. *Dickerson* represents not a bullet dodged but an opportunity missed. As things stand now, from almost any plausible set of premises, police interrogation is badly regulated. Because of *Dickerson*, it will continue to be badly regulated for a long time to come.

The reason has to do with *Miranda*'s regulatory strategy. The essence of that strategy was to shift, from courts to suspects, the burden of separating good police interrogation from bad. Instead of courts deciding based on all the circumstances (or at least all the circumstances disclosed during the suppression hearing) whether the suspect's confession was voluntary, *Miranda* left it for suspects to decide, by either agreeing to talk or by calling a halt to questioning and/or calling for the help of a lawyer, whether the police were behaving too coercively. A growing literature on the empirics of police questioning shows why that strategy has failed. Suspects do not, in fact, separate good ques-

8. *E.g.*, Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826 (1987). *Miranda* disappointed the left for another reason as well: The Court did nothing to ensure an objective record of the interrogation, leaving suppression hearings in the same situation — swearing matches between suspects and police officers — they were in before *Miranda* was decided. For the classic criticism of pre-*Miranda* doctrine along these lines, see Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* CRIMINAL JUSTICE IN OUR TIME 85-88 (A.E. Dick Howard ed., 1965).

tioning from bad; once suspects agree to talk to police, they almost never call a halt to questioning or invoke their right to have the assistance of counsel. Instead, suspects separate *themselves*, not the police, into two categories: talkative and quiet. The sorting says nothing at all about the police, because it happens before police questioning has begun, hence before any police coercion has begun. Rather, the sorting is a signal of the suspect's savvy and experience. Because of *Miranda*, sophisticated suspects have a right to be free from questioning altogether — not simply free from coercive questioning — while unsophisticated suspects have very nearly no protection at all. The first group receives more than it deserves, while the second receives less than it needs.

This problem is hard to solve without introducing distributive unfairness into a system that already has too much of it. *Any* system that separates good police interrogation from bad will tend to benefit some suspects, by making it a little harder for police to get confessions from those suspects, relative to others. The winners in this regulatory game are likely to be the savvy suspects, the ones who have the most sophisticated understanding of their situation, and who can therefore best manipulate the system to their benefit. These savvy suspects are in turn likely to be defined by either wealth or experience — meaning experience dealing with the system, something that recidivists naturally possess. The most vulnerable suspects, which includes those with the *least* experience dealing with the system, are helped, if at all, only indirectly.

In distributive terms, the best system is probably one in which everyone talks — or, at the least, one in which everyone submits to questioning — but where police tactics are effectively regulated. *Miranda* reversed that outcome, leaving only some suspects exposed to questioning but also leaving police tactics *un*regulated. In other words, *Miranda*'s mistake was to sort suspects rather than police tactics. It may be impossible to sort police tactics *without* sorting suspects, but we could at least try. We could, for example, take away the *Miranda* right to be free from questioning (though not the Fifth Amendment right not to answer[9]), and thereby put all suspects on a more level

9. One might respond that the right to be free from questioning is, as a practical matter, the same as the right to be free from *compelled* questioning, because police interrogation is inherently coercive. That line of argument would seem to lead to the conclusion that *Miranda*, or something like it, is required by the Fifth Amendment privilege. *See* Schulhofer, *supra* note 7.

In fact, the conclusion does not follow from the argument. If all police interrogation violates the Fifth Amendment, the Fifth Amendment requires abolishing police interrogation. *Miranda* does not do that. If, on the other hand, only some police interrogation violates the Fifth Amendment, it follows that there is no blanket Fifth Amendment right to be free from questioning, only a right to be free from the kind of questioning that compels an answer. To put the point more simply, suspects' *right* to remain silent does not require that police officers have a *duty* to remain silent.

playing field; the only way to regulate police tactics would then be to look hard at them, case by case, with the aid of video- and audiotape. That approach might not work; it might be that regulating police interrogation fairly and cost-effectively is impossible. For now, we cannot know. That is the real cost of *Miranda* — a bad regulatory scheme removed all possibility of developing a good one, a state of affairs that *Dickerson* ensures will continue.

Part I of this Essay describes the regulatory problem *Miranda* doctrine seems designed to solve. Part II explains why the solution has unraveled. Part III explores the distributive consequences of the unraveling.

I. VOLUNTARINESS' PROBLEM, *MIRANDA*'S SOLUTION

As always, how one defines the problem matters a great deal. And defining the problem with the old voluntariness standard, the regime that *Miranda* replaced, was and is hard. The simplest definition is this: Police interrogation is bad; hence, any body of law that permits much police interrogation is bad, and the voluntariness standard permitted a lot of police interrogation. This view makes sense on either of two assumptions. First, suppose that the government should be able to use self-incriminating statements only if those statements are the product of a rational, informed, unpressured choice. It follows that police interrogation ought to be abolished, or close to it, since its nature is to convince suspects to give the police for free that which they could sell in the course of plea negotiations. Rational, informed, unpressured suspects will rarely make that choice.[10] Second, suppose that police should never use nondefensive violence, threats, or deceit (both active and passive) on criminal suspects, nor should they take advantage of suspects' ignorance or emotional vulnerability. That list of don'ts goes far toward exhausting the list of ways in which police obtain incriminating statements from suspects.[11] If all those tactics are improper (for whatever set of reasons), then police interrogation is itself improper and again should be abolished, or nearly so. Most criminal procedure teachers probably embrace at least one of these assumptions. The *Miranda* majority may have embraced both.

If one starts from either of these assumptions, the problem with voluntariness is obvious: It permits too much interrogation. How much is too much? Any nontrivial amount. What is the solution? Adopt a

10. This is a bit of an oversimplification, for it assumes a limited version of rationality. Suspects trying to minimize the odds or the extent of their punishment would not talk to police; suspects seeking to clear their consciences might. The second type of suspect is certainly rational, but in a different sense from the first.

11. See, for example, the list of successful interrogation tactics noted in Richard A. Leo & Welsh White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 431-50 (1999).

set of rules that will either forbid police interrogation altogether, or that will forbid it save for a small exception for a few unusually thoughtful confessions. Crafting such rules is not hard. The ACLU's *Miranda* brief offered a rule that would ban police interrogation, at least in practice: Abolish all uncounseled questioning.[12] By requiring the presence of defense counsel, that rule would have converted all police interrogation into a species of plea negotiation, and since the police cannot negotiate pleas, that would mean the end of police interrogation. Earl Warren's opinion for the Court in *Miranda* offered a set of rules that would almost-but-not-quite abolish police interrogation: Tell suspects that they have a right not to talk and that talking is unwise (as the TV shows put it, "anything you say can and will be used against you in a court of law"),[13] and place a heavy burden on the government to prove that anyone who talks notwithstanding these warnings did so knowingly and intelligently.[14] No one can know for sure what Warren and his colleagues expected those rules to produce, but their natural outcome seems to be a very few station-house confessions by a very few unusual suspects. (That isn't what happened, of course, but the divergence is probably due to the fact that Warren's "heavy burden" waiver standard was never really applied.[15])

Other rules might accomplish much the same thing. The law could bar post-arrest questioning by any agents of the government. Or, it could require the equivalent of a plea colloquy, in court with the defendant represented, to waive the defendant's right not to speak to the police. With some imagination, one could generate a fairly long list of abolitionist or near-abolitionist options. Which suggests that if the problem is police interrogation itself, if the question is how to do away with it, solving the problem is easy.

There is, however, another way to define the problem with the old voluntariness standard, and by that definition the problem is a good deal less tractable. Suppose now that police interrogation is not inherently, or always, or almost always, bad. Suppose instead that the *wrong sort* of police interrogation is bad, either because it involves behavior that police officers should never engage in, or because it produces confessions that the government should never use (or both). The right sort of police interrogation, though, is fine — and the right

12. Brief for the American Civil Liberties Union as Amicus Curiae at 22-25, Miranda v. Arizona, 384 U.S. 436 (1966) (No. 759).

13. 384 U.S. at 469 ("The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court.").

14. *Id.* at 475 ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.").

15. *See infra* text at notes 27-35.

sort of interrogation works: It produces lots of incriminating statements that the government *can* legitimately use. This might be true if, for example, coercive tactics (broadly defined to include not only physical violence, but browbeating or threats or other sorts of high-pressure questioning) are seen as wrong, but deceptive tactics — meaning anything that tends to *reduce* the cost of talking in the suspect's eyes[16] — are not. On this set of assumptions, what the legal system needs to do with police interrogation is to regulate it, not to abolish it. The need is for some set of rules or standards that will lead police to use good tactics but not bad ones, or, from the suspects' point of view, that will produce good self-incrimination without producing the bad kind.

That kind of sorting, one might think, is exactly what the voluntariness standard seems designed to do — the standard asks courts to look at all the circumstances and judge whether this interrogation, this confession, is acceptable. But the three decades before *Miranda* showed that a case-by-case voluntariness inquiry sorted badly, and at least part of the reason was that courts had a very hard time judging, case by case, the difference between good and bad police interrogation tactics.[17]

The key source of the difficulty was that courts wanted to bar more than just confessions produced by physical brutality; they wanted to keep the police from applying at least extreme forms of emotional (a better word might be "circumstantial") pressure.[18] But once one assumes that *some* pressure is acceptable, it is very hard to define how much pressure is too much. More than that, it may be impossible to determine, based on nothing more than the testimony of a suspect and a couple of interrogating officers, just how much pressure the suspect actually faced when he confessed. When drawing the relevant legal line is hard and determining the relevant facts impossible, the law is likely to fail. By 1966, the voluntariness standard seemed to be failing,

16. I distinguish between false threats, which increase the pressure to confess, and false promises, which decrease it. The prime example of a false promise is a tactic that falls wholly outside *Miranda*'s scope: the use of undercover agents. *See* Illinois v. Perkins, 496 U.S. 292 (1990) (holding that conversations with an undercover agent do not amount to "interrogation" covered by *Miranda*). The promise is that the agent is who he purports to be, that he is not working for the police. The tactic works because that (false) promise reduces the suspect's fear of talking.

17. Yale Kamisar saw this point most clearly. Yale Kamisar, *What is an Involuntary Confession? Some Comments on Inbau & Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 742-59 (1963).

18. *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963) (police denied suspect's request to call his wife, and told suspect he would not call anyone until he made a statement); Rogers v. Richmond, 365 U.S. 534 (1961) (police threatened to arrest suspect's wife if suspect refused to confess); Spano v. New York, 360 U.S. 315 (1959) (officer — a childhood friend of the suspect — claimed he would lose his job if suspect refused to confess). In all three of the cases just cited, the Supreme Court overturned lower-court findings that the confessions were voluntary.

and so could not do the job for which it was designed: It could not separate good police tactics and good confessions from bad ones.

How does one solve *that* problem? There are two plausible possibilities. First, one might find some way to give courts better information, so that they could do a better job of drawing the line the voluntariness standard asks them to draw. Requiring video- and audiotapes of all interrogation sessions is the most obvious way to do that;[19] there may be others. The videotape option leaves the line-drawing difficulty unsolved, but it does address the factfinding problem. Were it embraced, we would learn whether the voluntariness standard's line-drawing problem really was intractable, or whether, instead, courts could apply a consider-all-the-circumstances test effectively if only they could know the circumstances well enough to consider them.

Second, one might shift the decision from courts, who found it hard to make well, to some other decisionmaker who could make it better. That option offers the hope of solving both problems at once — if one can identify a decisionmaker who both knows the relevant facts and can accurately gauge how much pressure the police are placing on a suspect when they are questioning him.

There *is* such a decisionmaker: the suspect. He knows both the text and the context of police questioning, and so he knows just how tightly the police turned the screws. He also knows his own vulnerabilities, so he knows how much pressure he actually felt. To be sure, suspects might behave strategically: If a suspect states that questioning must stop, that the pressure is too great, one might reasonably fear that the suspect is concerned more with keeping the police from gathering evidence against him than with preventing undue police coercion. Suspects may do a better job of protecting their hides than protecting their autonomy. But that self-interested nature seems to ensure accuracy in the other direction. If, knowing he can stop the questioning if the heat is turned up too high, the suspect nevertheless agrees to talk, that fact strongly indicates that any questioning, and any incriminating statements, must have been voluntary. Letting suspects draw the line between good and bad police questioning might produce too much protection, but at least in the abstract, it seems certain not to produce too little.

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19. The need for video- and audiotaping is the one proposition that wins universal agreement in the *Miranda* literature. *E.g.*, Paul Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 486-92 (1996); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 748-51 (1997); Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions and Compelled Testimony*, 93 MICH. L. REV. 929, 934 n.19 (1995); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 495 (1998); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 153-55 (1997).

Miranda doctrine has embraced this second option. That may not be the choice the *Miranda* Court intended — Warren and his colleagues probably thought they were choosing not-quite-abolition rather than new-and-improved regulation.[20] But it is what *Miranda* doctrine in fact does. Judges have a hard time knowing how much pressure a suspect is under, but the suspect knows. *Miranda*, through the requirement of the famous warnings and through its not-as-famous but more important invocation rules, lets the suspect decide whether the pressure is too great.

The mechanics are familiar. The suspect is told he has the right to remain silent, and that if he gives up that right, anything he says can be used against him in court. He is further told (misleadingly[21]) that he has the right to have counsel present during police questioning, and that poverty is no bar to this right — if he cannot pay for a lawyer, the court can appoint one for him free of charge.[22] These warnings are supposed to let suspects know of the power they have over police questioning. *Miranda*'s invocation rules define that power. If a suspect says that he does not want to talk to police, questioning must stop.[23] If he says that he wants to see a lawyer, questioning must stop and may not begin again except at the suspect's instigation.[24] Any statements obtained in violation of these rules are inadmissible against the suspect.[25]

Taken together, warnings and invocation rules should divide suspects into three groups. The first group consists of suspects who invoke their rights — those who utter the magic words, "I don't want to talk; I want to see a lawyer" — as soon as the warnings are given, before questioning begins. Call these suspects Silent Types. For them, *Miranda* amounts to the abolition of police questioning, for as soon as

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20. The best evidence for this proposition is the Court's waiver standard, which seems designed to make waivers exceptional. *See supra* note 14.

21. Actually, *Miranda* does not give suspects a right to counsel, but only a right not to be questioned in counsel's absence. The usual, and proper, response to a suspect's demand to see a lawyer is not to give him a lawyer, but to stop questioning him.

22. *Miranda*, 384 U.S. at 444.

23. Michigan v. Mosley, 423 U.S. 96 (1975). *Mosley* permits police to renew questioning after some respite. *Id.* at 103-07 (holding that suspect's invocation was "scrupulously honored" where police waited two hours before resuming questioning, and where the questioning was about a different crime).

24. Minnick v. Mississippi, 498 U.S. 146 (1990); Edwards v. Arizona, 451 U.S. 477 (1981).

25. At least in the government's case-in-chief. Defendant's statements *can* be used to impeach his testimony if he takes the stand at trial. Harris v. New York, 401 U.S. 222 (1971). There is a fair amount of argument that this rule seriously undermines *Miranda*. For the best discussions, see Leo & White, *supra* note 11, at 453-64; Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 140-70 (1998). I take no position on the merits of that argument, for I believe *Miranda*'s regulatory mechanism cannot operate successfully regardless of what rule one adopts for impeachment.

the magic words are uttered, questioning is barred; in other words, questioning is over before it has begun. The second group consists of suspects who are willing to be questioned, but only if the questioning is not too uncomfortable. Call them Conditional Talkers. *Miranda* gives them the right to stop questioning when it becomes too intense or abusive; for them, *Miranda*'s magic words are a means of regulating police questioning rather than abolishing it. The third group includes suspects who are willing to talk and lack the ability (or fortitude, or knowledge, or something) to call a halt to coercive questioning. Call them Unconditional Talkers. They will respond to police pressure by talking, not by invoking their *Miranda* rights.

There is little the police can do about Silent Types (save convincing them, if possible, to be something else). And there is nothing the police *need* to do about Unconditional Talkers (save questioning them until they talk). But the police may not know who the Unconditional Talkers are; they do not, after all, announce themselves. If that is so, and if there are enough Conditional Talkers in the mix, the police are forced to treat all suspects other than Silent Types as if they were Conditional Talkers, as if they might call a halt to questioning if it became too uncomfortable. Since the police want admissible confessions, they have a strong incentive to figure out the boundaries Conditional Talkers will draw, and to stay within those boundaries. That should lead police to adopt tactics that keep pressure and abuse low, that reassure suspects rather than frighten them, lest these Conditional Talkers decide that they no longer wish to talk and slam the door on police questioning by invoking their *Miranda* rights.

In this way, Conditional Talkers' preferences, their view of which police tactics cause too much discomfort, should function exactly like a legal standard.[26] The only difference is that the standard comes from suspects rather than from a court or legislature. If police comply with

26. There is one sense in which Conditional Talkers' preferences are quite different from a legal standard. A standard, though uncertain, is more or less constant across cases. Here, the standard is individual-specific: If a given suspect decides that the heat has been turned up too high, he invokes; another suspect, under exactly the same circumstances, might be entirely comfortable with the police tactics and so might not invoke. This feature of the invocation "standard" might, in theory, give rise to the following police tactic: ratchet up the pressure, bit by bit, until the suspect either talks or invokes. If he invokes, well, the police obviously couldn't have gotten him to talk anyway, since all pressure shy of the invocation line failed. So much for the invocation standard.

But this police tactic cannot work, at least not as an ordinary practice. First, pressure cannot be fine-tuned; police officers do not have it in their power to calibrate precisely the level of stress they are imposing on a suspect. Second, it is not always true that more pressure yields higher odds of obtaining a confession. Some police interrogation tactics involve *reassuring* suspects, not pressuring them. Add to those two facts another: Police do not know in advance when any particular suspect will invoke his *Miranda* rights; they can only know what most suspects (or perhaps most suspects of a particular type) do. It follows from those three facts that the police have a substantial incentive to avoid crossing the *normal* suspect invocation line, because if they do so, they may forfeit whatever chance they had (and the chance might have been substantial) at getting the suspect to incriminate himself.

the standard, they have some chance of getting incriminating statements. If police transgress the standard, that chance disappears — the door closes, and only the suspect can open it again. Since noncoercive questioning is likely to maximize the chances of getting confessions, police should, over time, find more and better ways to engage in such questioning. Since coercive questioning leads to invocations, police should, over time, abandon its use. By using their power to invoke their *Miranda* rights, Conditional Talkers should be able not only to separate good police questioning from bad, but to encourage police to shift their energies from bad questioning to good. And this is true even if there are a fair number of Unconditional Talkers, as long as (i) police do not know who the Unconditional Talkers are, and (ii) there are enough Conditional Talkers for police to care about obtaining their incriminating statements.

The one problem with this system is the Silent Types. They offer no bonus to police for good questioning, because they invoke their *Miranda* rights before questioning has begun. And they offer no punishment for bad questioning, for the same reason. Silent Types do not defeat the regulatory regime — as long as there are some Conditional Talkers, the police have an incentive to question *those* suspects in ways that will prevent invocations. But Silent Types also do nothing to advance the regulatory regime. If the goal of *Miranda* is to regulate police questioning rather than to abolish it, Silent Types are undeserving beneficiaries, the recipients of a windfall. Thus, a good way to tell whether *Miranda* is seeking to eliminate police questioning or to reform it is to see whether the doctrine maximizes the number of Silent Types or keeps that number as low as possible.

Earl Warren's "heavy burden" waiver standard might have produced a great many Silent Types. The *Miranda* waiver standard as it was refined in the 1970s and 1980s, on the other hand, keeps that number fairly small. Under *North Carolina v. Butler*,[27] suspects can waive their *Miranda* rights and agree to submit to police questioning without any formalities. If having heard the warnings, the suspect goes ahead and talks to the police, the talking itself constitutes a waiver.[28] Under *Connecticut v. Barrett*,[29] suspects' ignorance of the practical consequences of talking to the police is no bar to waiver. (Barrett told police he would not make any written statement but would be happy

27. 441 U.S. 369 (1979).

28. In *Butler*, the defendant refused to sign a waiver form but proceeded to talk to the police. *Id.* at 370-71. The Court found a valid *Miranda* waiver, in an opinion that emphasized that such waivers need not be explicit but can be inferred from the suspect's conduct. *Id.* at 373-76.

29. 479 U.S. 523 (1987).

to talk to them, which he proceeded to do, on tape.[30] The likely explanation is that Barrett assumed only written statements could hurt him — a clear error, but one that did not invalidate Barrett's waiver.[31]) Under *Colorado v. Spring*,[32] police can ask a suspect about different crimes than the one for which the suspect was arrested; the surprise does not defeat the suspect's *Miranda* waiver.[33] And under *Moran v. Burbine*,[34] police can keep a suspect's lawyer from seeing him; as long as the suspect does not ask for the lawyer, his *Miranda* waiver remains valid.[35] Suspects can hear the warnings and talk to police out of ignorance, confusion, or misplaced confidence. No matter: As long as they actually hear the warnings and actually talk to the police, *Miranda* is satisfied. This standard does not eliminate Silent Types, but it substantially reduces their number.

It bears emphasizing that these lax waiver decisions are a natural corollary to using *Miranda* to encourage good police questioning (and to discourage the bad kind). If that is *Miranda*'s object, courts should give police a good deal of leeway to persuade suspects to talk — as long as those same courts strictly enforce the ban on post-invocation questioning. To put it another way, if *Miranda* is meant to *eliminate* police questioning, the key event is the warnings. Once the warnings are given, questioning should be rare; most suspects should be Silent Types. But if *Miranda* is meant to *regulate* police questioning, the key to the regime is invocation. Warnings are merely a device to ensure that invocations sometimes happen. As long as Conditional Talkers can invoke their rights, and thereby put a stop to questioning, police will stay away from tactics that cause invocations, and the system will regulate effectively. The fewer Silent Types, and the more Conditional Talkers, the better.

Interestingly, the same Supreme Court that decided the waiver cases mentioned above has remained fairly strict about invocations. *Edwards v. Arizona*[36] held that not only do *Miranda*'s magic words close the door on questioning, the door must stay closed until the suspect opens it.[37] *Minnick v. Mississippi*[38] held that the *Edwards* ban lasts

30. Unfortunately for the police, the tape recorder didn't work, so one of the interrogating officers had to reduce the confession to writing from memory. *Id.* at 525-26.

31. The Court declined to adopt this explanation, see *id.* at 530 n.4, but it remains the most — maybe the only — plausible explanation for Barrett's behavior.

32. 479 U.S. 564 (1987).

33. *Id.* at 575-76.

34. 475 U.S. 412 (1986).

35. *Id.* at 416-18, 421-28.

36. 451 U.S. 477 (1981).

37. *Id.* at 484-85.

38. 498 U.S. 146 (1990).

as long as custody lasts.[39] These decisions are as natural as *Butler*, *Barrett*, *Spring*, and *Burbine*. They make sense on the premise that *Miranda* chiefly protects not Silent Types but Conditional Talkers, and that by protecting Conditional Talkers, *Miranda* ensures that police engage in only the right kinds of interrogation tactics. In this way, *Miranda*'s not-quite-abolitionist rule has been converted to a regulatory standard, a standard that gives suspects the power to sort police tactics, and thereby gives police the incentive to change their behavior for the better.

II. *MIRANDA*'S MISTAKE

As the preceding account suggests, *Miranda*'s heroes are the Conditional Talkers — they are the ones who keep the police on the right side of the coercion line, even while giving the system the confessions it needs. And for *Miranda* to work as it should, Conditional Talkers must be good at their job: They must invoke their rights when the heat is turned up too high in order to keep police honest. It is worth considering, then, just what characteristics Conditional Talkers must have.

First, they must be willing to talk. Since *Miranda* uses suspects to regulate police questioning, suspects must be willing to be questioned, or there can be no regulation. The fact of police questioning alone cannot deter Conditional Talkers, or *Miranda*'s mechanism can never get off the ground. This requires that Conditional Talkers have one of a mix of motives or sensibilities: guilt, of the sort that might lead one to confess when it is against one's interest to do so; ignorance of the fact that talking to police is against one's interest; fear of angering the police by refusing to talk; or optimism, the belief that one can talk one's way out of trouble. Second, they must be willing and able to invoke their rights if questioning becomes too coercive. This requires a combination of knowledge and courage — the knowledge that suspects have real power over the police, along with the courage to use that power when the police behave badly.

Consider how those characteristics fit together. Ignorance of the consequences of talking is technically consistent with knowledge of the power to stop police questioning. But they are surely in some tension. The first characteristic requires that suspects misunderstand one of the four *Miranda* warnings — "anything you say can and will be used against you in a court of law." (This was Barrett's mistake.) The second requires that suspects understand the other three warnings — the right not to answer questions, the right to have outside assistance, and

39. *Id.* at 150-56. The one major exception to the pattern is *Davis v. United States*, which holds that only an unequivocal assertion of the right of silence or the right to counsel counts as a *Miranda* invocation. 512 U.S. 452, 461-62 (1994).

the right to insist that the state pay for the assistance.[40] That combination of ignorance and knowledge may be common among criminal suspects, but it would hardly be surprising if it were not. Similarly, fear of police anger does not logically exclude a willingness to stand up to the police by calling a halt to questioning. But a suspect who is fearful before questioning has even begun is unlikely to be more courageous later, when the pressure is greater and circumstances are more bleak. Optimism seems more promising: A suspect with a great deal of confidence in his verbal abilities might also have the knowledge and courage needed to force the police to behave properly. But optimism, in this context, is irrational. Suspects are not likely to be better at tricking the police than the police are at tricking them; the police, after all, do it for a living. And if a suspect has information that is valuable to the government, he can get something for it — charging or sentencing concessions, perhaps even a dismissal. To do that, though, he must negotiate not with the police but with the district attorney's office, and to do *that*, he must work through defense counsel.[41] Trying to talk one's way out of trouble in the police station is a little like trying to sell something to a thief — the sale won't happen, but the thief will get the goods anyway. Such irrationality sits uncomfortably with the kind of knowledge of one's rights, and of how to use them, that *Miranda* requires.

Guilt may be an exception. Suspects who feel guilty can be both knowledgeable and courageous; there is no inconsistency unless one assumes feelings of guilt are stupid or cowardly, and such an assumption would plainly be unfair. But suspects who confess out of guilt are not likely to attract abusive police questioning anyway; police should find it easy to obtain *their* confessions without coercion. In other words, suspects who confess out of guilt or conscience are likely not to be Conditional Talkers in the first place; they are better classified as Unconditional Talkers.

We are left with the following picture. For *Miranda* to function as it should, Conditional Talkers must be at once ignorant and knowledgeable, fearful and courageous, irrationally optimistic and unusually sophisticated. Perhaps a fair number of suspects have this odd set of characteristics. We should not discount that possibility. Police interrogation is a stressful situation that may call forth strange reactions; it is also a dynamic situation, one in which suspects may be confident one

40. Actually, it requires even more than understanding those three warnings. A suspect might understand that he has the right not to talk but not realize he has the right to force the police to stop asking him questions. The latter right, which *Edwards* and *Minnick* establish, *see supra* notes 36-39 and accompanying text, is not described by any of the *Miranda* warnings.

41. A recent reminder of this fact is the First Circuit's decision that an FBI agent's promises of immunity to an informant were not binding. United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000).

moment and terrified the next. In the abstract, no one can say for certain how large numbers of suspects will respond to it. But we can say this much: It would be no great surprise to find that only a very few suspects respond by *both* talking to police *and*, if the heat is turned up too high, invoking their rights. If it is possible that Conditional Talkers are common, it is also possible that they are quite rare.

For a long time, no one but the police knew how many Conditional Talkers there are. Thanks to some recent work on the empirics of police interrogation, we know now. Conditional Talkers are indeed rare. The universe of suspects consists of a few Silent Types, a very small number of Conditional Talkers, and a great many Unconditional Talkers, who constitute the large majority of suspects. If the police know this — and how could they not? — *Miranda* does not, and cannot, regulate police interrogation.

What is the evidence for the near nonexistence of Conditional Talkers? A single fact: Almost no one invokes his *Miranda* rights once questioning has begun. Out of the 182 Mirandized suspects Richard Leo observed in three California police departments, thirty-eight invoked their *Miranda* rights — but thirty-six of those invocations came immediately after the *Miranda* warnings were read.[42] Only two — one percent — came during the course of police questioning. Paul Cassell and Bret Hayman reached similar conclusions in their study of police interrogation in Salt Lake City.[43] These studies show that while invocation is fairly common, invocation during questioning is rare.

And if invocation during questioning is rare, *Miranda* is not working. Consider the three possible explanations for Leo's data. First, coercive interrogation could be fairly common, but suspects do not put a stop to it by invoking their rights. Courts may be tolerating coercive tactics because *Miranda* doctrine has shifted Warren's "heavy burden" from the state to the suspect, who now must convince a judge that, even though he heard the famous warnings, he didn't understand them well enough to prevent the police from twisting his arm. And few suspects invoke in response to these coercive tactics because few suspects have the set of characteristics Conditional Talkers must have. Police would tend not to worry about the risk of invocation if that risk were small; coercive interrogation tactics would then be worthwhile because those tactics would pose only a slight risk of the suspect slamming the door on further questioning. If this first explanation holds true, *Miranda* has no effect on police behavior, save that it prevents police questioning of Silent Types. Once the Silent Types have sorted them-

42. Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653 (1996).

43. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 859-60 (1996) (finding only five invocations after interrogation had begun, out of a total of 126 interrogations).

selves out and received their reward, police use whatever tactics maximize their chances of getting incriminating evidence from other suspects. Not all of those tactics are coercive, but some are.

The second explanation is more optimistic, but not about *Miranda.* Police interrogation might be benign — mild deception is common; coercion is rare — but for reasons that have little to do with *Miranda.* Police culture, political forces, a fear that coercive tactics will produce false confessions — any or all of these may push police to avoid the kinds of interrogation that *Miranda* doctrine seeks to prevent. If they do, Conditional Talkers and Unconditional Talkers alike are treated reasonably well; there is no need for invocations. But then, those suspects would be treated reasonably well even if *Miranda* were overturned. In this scenario, *Miranda* is irrelevant to police questioning, which is effectively regulated by nonlegal forces. Only Silent Types would be worse off if we did away with *Miranda*: They would have to experience the same sorts of questioning other suspects experience now.[44]

According to the first explanation of Leo's data, *Miranda* is a failure. According to the second explanation, it is pointless. But either way it is costly, for it prevents police from talking to Silent Types. And though that cost is not great — there are not that many Silent Types — it is also incurred to no purpose. Silent Types' gain is their own; it is not shared with anyone else.

The third explanation is very different from the other two. Perhaps *Miranda* is working wonderfully. Suspects may invoke their rights so rarely because police so rarely employ the kinds of tactics that should lead to invocations. On this view, the tiny number of invocations during police questioning shows not *Miranda*'s failure but its success. *Miranda*'s deterrent, the invocation that shuts off questioning, is rarely used precisely because it deters so well. If this is the case, the benefit to Silent Types seems much more sensible. Silent Types may get too much benefit from *Miranda*, but they do so in order to ensure that other suspects get the protection they need and deserve.

All three of these explanations are consistent with the world Leo and Cassell and Hayman describe, a world where invocations during police interrogation are very rare. But which explanation is true?

The first, the most depressing one, may be the most plausible. A decade ago in a brilliant article about *Miranda*'s unintended consequences, Mike Seidman argued that courts were ignoring police misbehavior as long as *Miranda* warnings were given — that police were, in effect, free to coerce confessions as long as they Mirandized sus-

44. I am assuming that at least some — and probably most — Silent Types would no longer *be* Silent Types if they were forced to submit to police questioning. It is one thing to stay silent when the police are not allowed to ask you questions. It is quite another to remain silent *in the face of* questioning.

pects first.[45] Seidman concluded that *Miranda* might actually make vulnerable suspects worse off, by wrongly convincing courts that the suspects could protect themselves.[46] Even if that conclusion holds true, claims of police coercion will be hidden; they will tend to surface only rarely in reported opinions. Consequently, no one can know whether Seidman's fears are justified. But they might be: Police coercion could be common, at least in some jurisdictions. If it is, *Miranda* is doing nothing to stop it.

The second conclusion — police are behaving well, but *Miranda* is not responsible for the good behavior — is likewise plausible, and it has some evidence to support it. Leo's study, the most thorough to date, found surprisingly few instances of coercive interrogation: only 4 cases out of 182.[47] It may be that the departments Leo studied were unusual, or that police were careful to behave themselves when he was watching. But it may also be that police interrogation is, for the most part, healthy, that some forms of deception and advantage-taking are common, but that coercion and abuse are not. The three "p's" — police culture, professionalization, and politics — may be regulating stationhouse questioning effectively.

But the third explanation — *Miranda* works just as it should — cannot possibly be true. Police may be behaving tolerably well, but if they are, fear of invocations cannot be responsible for their good behavior. Were it otherwise, *Miranda* would work not just well but nearly perfectly, better than any regulatory regime actually works. For *Miranda* to regulate effectively consistent with the data, the threat of invocations must deter police misconduct so well that the threat need never (well, almost never) be carried out. That kind of near-perfect deterrence exists only in theory.

It might be barely possible to accept the *Miranda*-is-working-perfectly story if the line police had to avoid crossing were utterly clear, so that police could always be certain whether they were about to cross it. But the line is both vague and wholly subjective. It is vaguer than the famously vague voluntariness standard. That standard didn't, and doesn't, have much content, but it has some. The invocation line, though, has no definition at all: It amounts to the sum of the lines Conditional Talkers would draw if pushed. To put it differently, the invocation line consists of hypothetical data points without any doctrinal formula, and the data points can only be known if the line is crossed. Plus, the invocation line is different for different suspects. All

45. Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 744-46 (1992).

46. *Id.* at 745-46 & n.241.

47. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 282-83 (1996). This number probably understates the true level of police coercion, if only because the interrogating officers in Leo's study knew they were being observed. For Leo's response to this concern, see *id.* at 270-72.

of which means that police *must* guess where the invocation line might be. They cannot possibly know where the line is in advance. If that line is deterring coercive interrogation, if it exists but police are never crossing it, they must be guessing right nearly one hundred percent of the time. No regulated actor does that. It seems safe to assume police aren't doing it either.

Which leaves the other two possibilities. Police interrogation may include a lot of abusive questioning, in which case *Miranda* has failed. Or, police interrogation may include very little abusive questioning, in which case *Miranda* makes no difference. Either way, *Miranda* gives Silent Types the valuable right to avoid questioning altogether, and gives other suspects nothing. Total protection for the few, no protection for the many — that is *Miranda*'s achievement in a nutshell.

Perhaps this failure could be remedied with the right doctrinal tinkering. Maybe invocations are too hard; perhaps the Supreme Court erred when it decided that only "unequivocal" assertions of the *Miranda* rights would count.[48] If suspects only had to say "maybe I want to see a lawyer" instead of "I want to see a lawyer" we might see more invocations, and *Miranda*'s regulatory mechanism might work. But the more likely possibility, the one that better fits ordinary intuitions about human nature and human knowledge, is that suspects cannot do the kind of sorting that *Miranda* doctrine calls for. If suspects really understand the power *Miranda* gives them, and really understand the benefits of exercising that power, they will likely become Silent Types — they will avoid questioning altogether. If that happened often enough, *Miranda* would abolish police interrogation, not regulate it. On the other hand, if suspects have the kind of limited understanding of their situation that leads them to talk to the police in the first place, they are likely not to be able to stop the kinds of police questioning the law seeks to forbid. In that event *Miranda* leaves police interrogation unregulated. If suspects know enough, they will prevent *all* questioning. If they don't know enough, they will prevent nothing. That is why, in practice, the invocation line is drawn before, not during, police questioning.

One of two things is true: Either there is a significant amount of abusive police questioning, or there isn't. If there is, *Miranda* is a failure; it does not protect the suspects who need protecting. If there isn't, *Miranda* is pointless — it gives a few Silent Types a very valuable entitlement, but to no good end. Either way, *Miranda* accomplishes nothing save distributive perversity. After thirty-five years, we can be reasonably confident of this much: Suspects cannot regulate police

48. Davis v. United States, 512 U.S. 452, 461-62 (1994). For an interesting critique of the requirement that suspects must take affirmative steps to invoke their *Miranda* rights, see Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993).

interrogation. The law of police interrogation is broken, and needs fixing.

III. *MIRANDA* AND DISTRIBUTIVE JUSTICE

Return to the right-left divide we saw in *Dickerson*, the same divide that has dominated discussion about *Miranda* since it was decided. We are now in a position to see why that divide is misguided, why the right opposes *Miranda* for the wrong reasons and the left wrongly supports it. The right objects to *Miranda* because it overregulates police interrogation (and thereby reduces the number of admissible confessions).[49] In fact, *Miranda* doesn't regulate police interrogation at all. Rather, it leaves interrogation unregulated for most suspects, and forbidden for a few. The right should have no objection to the first outcome, but should dislike the second. As to Silent Types, *Miranda* doctrine amounts to precisely the rule the ACLU urged in *Miranda* itself: no questioning without counsel. Just as the right objected to that rule for all suspects, it should object to it for some.[50]

The left's relationship to *Miranda* doctrine is more interesting. As a general matter, the left has argued that *Miranda* regulates police questioning, but not enough. Hence the usual line: *Miranda* should be strengthened, but it is worth defending even as is.[51] This view misunderstands what *Miranda* does. *Miranda* enacts the right's preferred rule — no regulation — for most suspects, and the left's preferred rule — no uncounseled questioning — for those fortunate suspects who know enough to invoke their rights once the warnings are read. From the left's point of view, that ought to be worse than no regulation at all.

Consider the characteristics of Silent Types, *Miranda*'s key beneficiaries. They are likely not to feel guilty: Strong feelings of guilt should produce a desire to confess, not a determination to clam up.[52] But they

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49. *E.g.*, JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 218-22 (1993); Cassell & Fowles, *supra* note 6, at 1059; Fred E. Inbau & James P. Manak, Miranda v. Arizona — *Is it Worth the Cost?*, 24 CAL. W. L. REV. 185, 197-99 (1988).

50. *See* note 44 *supra*. Though I suspect that most Silent Types would cease to be silent if the police could question them, that suspicion is not critical to my argument. If only a few Silent Types would talk under questioning, the point in the text still holds: For them, *Miranda* stands between a chance at acquittal and certain conviction, and it does so by giving them immunity from questioning. Even if that is only true of a small number of suspects, it should be objectionable to those who believe that (1) there is nothing wrong with police questioning, and (2) truthful confessions are good.

51. In addition to the work of a number of other participants in this Symposium, see Ainsworth, *supra* note 48, at 320-21; Ogletree, *supra* note 8, at 1830; Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 109-15 (1989).

52. *See* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 68 (1992) (noting that "a feeling of guilt motivates people towards reparative action," such as confessing). The picture is complicated by the fact that guilty suspects

are likely to *be* guilty, at least guilty of something:[53] Innocent suspects' natural reaction is to explain themselves, to tell the police they didn't do anything wrong. Most important of all, Silent Types are likely to know that talking to the police is a tactical error, that any relevant information they have can be sold through the plea bargaining process; it need not be given away for free in the police station.

It bears emphasizing that such knowledge does not come from hearing the *Miranda* warnings — which is why most suspects don't have it. The warnings tell suspects that they have a right not to talk, and that if they do talk, their words can be used against them. The warnings say nothing about alternatives to talking, like plea negotiations or seeking a dismissal for insufficient evidence. And the warnings do not tell suspects that their *silence* will *not* be used against them, that if they are guilty, refusing to talk cannot harm them.

Suspects who understand these things without being told will tend disproportionately to fall into two groups. The first and by far the largest is those with relevant experience, suspects who have been arrested for serious crimes in the past. Leo's study found that a suspect with a felony record was four times more likely to invoke his *Miranda* rights than a suspect with no criminal record, and three times more likely to invoke than a suspect with only a misdemeanor record.[54] The smaller of the two groups is those who are wealthy enough to have regular contact with a lawyer, such that asking for one when dealing with agents of the government is a natural thing to do.[55]

Notice that these two groups are defined not by their disadvantage but by their advantage — they are more knowledgeable than most suspects. That advantage produces another: They are more likely to deal with the government through counsel, not directly, and that gives them the benefit of a lawyer's knowledge about how the system works and how it can be made to work for them. So *Miranda* takes the most advantaged suspects, the suspects who are in the best position to deal with the police effectively, and makes them more advantaged still. It is hard to imagine a more distributively perverse result.

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may also experience shame, which "makes the person want to hide from others and not reveal what happened." *Id.* Gudjonsson suggests that guilt feelings are likely to predominate initially — for example, when the suspect is being interrogated by the police — while feelings of shame are more likely to predominate later. *Id.*

53. One piece of evidence in support of this intuition is the dramatically higher rates of invocation by suspects who have prior convictions for serious crimes. *See infra* note 54 and accompanying text.

54. Leo, *supra* note 47, at 286-87. This is not to say that all suspects with felony records invoked their rights. On the contrary, more than two-thirds waived their *Miranda* rights. *Id.* at 287 tbl. 9. But the waiver rates of other groups of suspects were much higher. *Id.*

55. Leo found no evidence that this group exists. *Id.* at 291-92 (noting absence of any class effect on the success rate of police interrogation). But it may be that the group does not exist because police know the outcome of any attempt at interrogating wealthier suspects in advance. There is no way to know without overturning *Miranda.*

But there is more. By giving Silent Types a pass on questioning, *Miranda* makes it more expensive to prosecute and convict them, all else being equal, than it is to prosecute and convict other suspects. That added cost must have some effect, at least at the margin. Some Silent Types who would otherwise be charged are let go; some who would otherwise be convicted have charges against them dismissed; some who would otherwise get unfavorable plea bargains get favorable ones.

It is obvious why this result should bother the right, but it should also bother the left. Prosecutors operate at or close to capacity; they lack the time and manpower to dramatically expand their dockets.[56] And they cannot aggressively pursue charges in all the felony cases the police bring them. About a quarter of felony arrestees are never prosecuted, and another quarter are charged and convicted but never incarcerated.[57] In a world with these features, if some arrestees are harder to convict than others, prosecutors will tend to shift their attention to the easier cases. Thus, *Miranda* not only helps Silent Types by making them harder to prosecute. It also hurts the rest of the suspect pool by making them relatively *easier* to prosecute. To see the point, imagine that a prosecutor has a pool of ten cases, but only enough time to go after five. Now make one of the ten a marginally tougher case. Not only do the odds of pursuing that one go down, the odds of pursuing each of the other nine go up.[58]

The point is not that the government loses more cases, that deterrence somehow suffers. It may not: Convicting a talkative defendant may deter just as well as convicting a quiet one. Rather, the problem is distributive. *Miranda* not only protects the least vulnerable suspects and fails to protect the most vulnerable. By protecting the former, it actually makes the latter worse off. More punishment for the most vulnerable suspects is hardly a program the left should find attractive.

The best defense against this charge is a depressing one: Perhaps *any* regulation of police interrogation would be distributively perverse — at least if the regulation leaves some suspects better able to fend off police questioning than others. Any regime that distinguishes among suspects in police interrogation — any regime that makes it easier for some class of suspects to avoid talking — is likely to advantage more

56. For a discussion of the evidence for this proposition, see William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 24-26 (1997).

57. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1997, at 437 tbl. 5.70, 439 tbl. 5.72 (Kathleen Maguire & Anne L. Pastore eds., 1998) [hereinafter 1997 SOURCEBOOK].

58. This is where *Miranda*'s critics on the right fall down. The tacit assumption those critics make is that dockets are fixed — that no case dropped because of *Miranda* is replaced by another case. The opposite assumption is more reasonable.

knowledgeable suspects. That means *Miranda*'s beneficiaries would be the beneficiaries of any regime that put limits on police questioning.

That sad conclusion may not hold true; on the current state of the evidence we cannot know. Regulating police interrogation in ways that avoid distributive injustice may be possible if the law can do two things at once: maximize the number of suspects who talk to the police, while minimizing the frequency with which police use abusive interrogation tactics. The usual assumption is that if police are disabled from using some interrogation tactics, some nontrivial number of suspects will keep quiet. We will see fewer confessions if torture is barred than if it is allowed, fewer confessions if threats and browbeating are rare than if they are common. That assumption makes some sense, and it may be right. But it may be wrong. Remember that guilty suspects need not confess for interrogation to be useful; in general, if the suspect says much of anything the police benefit, and benefit substantially.[59] It may be that, as to any given suspect, a wide range of police tactics would provoke some kind of response, some statement that police could either build on or poke holes in.[60] Some of those successful tactics are easier for the police than others, and the easiest tactics may be among the most offensive. If all that is true, banning offensive police interrogation tactics need not cause any appreciable decline in the rate at which suspects incriminate themselves. It may simply make police interrogation both a little more expensive for the police and a lot more decent for suspects. It may be possible to make police interrogation *both* successful (from the police perspective) *and* fair, at least if fairness permits a range of noncoercive tactics.

Miranda certainly doesn't achieve that result. Inviting suspects not to talk, as *Miranda* requires, is a poor way to maximize the number of suspects who do talk. And leaving questioning essentially unregulated, as *Miranda* also does, is a poor way to ensure that questioning is fair.

But while *Miranda* falls off the regulatory tightrope (in both directions — a rare achievement), a new-and-improved voluntariness standard might not. Let the police question everyone — give suspects the right to keep quiet, but not the right to avoid questioning. Require an accurate recording of the questioning, with video and audio, so that we are not faced with the swearing matches that plague suppression

59. Anyone who has ever spoken to a police officer about interrogation practices knows this proposition is true, but the legal literature barely acknowledges it. For an exception to that pattern, see George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 949-50 (1996). For a discussion of how statements other than confessions are useful in developing a case against a suspect, see FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 70-76 (1986).

60. This seems to fit with Leo's findings concerning the number of different tactics police use. Leo found four separate interrogation tactics with at least a 90% success rate, and another ten tactics with a success rate in excess of 75%. Leo, *supra* note 47, at 294 tbl. 14. He also found evidence that police use overlapping lists of tactics on different classes of suspects. *Id.* at 295-96 tbl. 15.

hearings now. Then let judges sort out the cases. This amounts to voluntariness with better evidence. If judges can sort reasonably well, if they can separate good police interrogation from the bad kind once they know the facts, it might work. Of course, voluntariness with better evidence is still voluntariness, and neither judges nor anyone else has figured out how to define the difference between voluntary and involuntary statements. Yet judges need not necessarily *define* the voluntariness line in order to *apply* it. Definition may be beyond the law's capability. Application may nevertheless be possible. Sometimes, "I know it when I see it" works.[61] We should find out whether that is the case here.

In short, in distributive terms, we should be striving to make it easy for police to get suspects to talk, as long as they avoid producing false confessions and abusive police tactics. *Miranda* reaches neither half of that goal. Better to force Silent Types to listen to questions, as is functionally the case with the rest of the suspect pool. Meanwhile, case-by-case voluntariness would leave other suspects no worse off than they are now, and probably a little better off. That is a distributive goal worth seeking.

One might imagine the following counter-argument: There is a way to improve the welfare of the many Unconditional Talkers *without* harming the few Silent Types. Instead of subjecting all suspects to questioning, we could instead question none of them. Ratchet the standard up rather than down; bring all suspects to the position Silent Types enjoy instead of pulling Silent Types down to the level of Unconditional Talkers. Return to Earl Warren's vision of *Miranda*, "heavy burden" waiver standard and all.

That position, the left's ideal, might be the worst of all in terms of distributive justice. Consider the position of suspects who are both poor and innocent. Their poverty makes it hard for them to fight the state successfully; indeed, it is likely to be hard for them to convince even their own lawyers, who are used to clients who falsely claim they didn't commit the crime.[62] Once the police and prosecution are convinced these poor-and-innocent suspects are guilty, victory for the suspects is very unlikely. Their real chance at success, their best hope of escaping wrongful punishment, lies in convincing the government

61. This phrase appeared most famously in Justice Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184 (1964); Stewart used it to capture the essence of the legal standard then applied to obscenity. *Id.* at 197. Stewart's point, I think, was that the obscenity standard was impossible to define but quite possible, maybe even easy, to apply. For a slightly different understanding of Stewart's phrase, and a defense of the kind of judging it suggested, see Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023 (1996).

62. The difficulty defendants have in "selling" their lawyers is a function of two things: the frequency with which defendants falsely claim innocence, and the resource constraints under which defense lawyers operate. The former makes defendants incredible, and the latter makes investigating their stories impossible.

that a mistake has been made. Thus, 28% of felony arrestees are not charged with any crime; another 23% are convicted but never incarcerated, presumably because of a favorable plea bargain.[63] But only a little more than 1% are acquitted at trial.[64] In a system that generates numbers like those, the poor-and-innocent need to maximize their chances of favorable discretionary decisions by police and prosecutors.

That means maximizing their chances of distinguishing themselves from other, guiltier suspects. Police interrogation offers one of the best opportunities to do just that. If police can ask suspects questions before the suspects have had a chance to craft effective stories, there is some chance that the police can separate the false denials from the true ones. If all questioning is done through lawyers — which is what abolition of police questioning means — that chance is much smaller.

This point holds true even if, as is clearly the case, innocent suspects sometimes confess to crimes they didn't commit.[65] Police interrogation probably raises the odds of convicting *all* suspects — if all cases went to trial. The innocent and the guilty alike may make incriminating statements in the police station. But as long as the guilty make incriminating statements more often, the innocent probably benefit from a system that allows police to ask questions. In a system like ours, a system with the kinds of resource constraints that force prosecutors to dismiss charges in a large fraction of cases, what matters to the poor-and-innocent is not the odds that the state could convict them at trial, but rather the gap between those odds and the odds that the state could convict their guilty counterparts. That is why the poor-and-innocent benefit from broader evidence gathering. Rich suspects, guilty and innocent, can use their wealth to make it harder for the state to punish them. Poor suspects lack that option; the best thing for them is to make it easier for the state to punish other poor suspects, in a world in which the state will not punish everyone. Anything that helps to distinguish the innocent poor from the guilty poor is a boon to the former.

To see the point, imagine two systems, one with Fourth and Fifth Amendment rules that are very favorable to the government, the other with rules that are very favorable to the defense. In both systems, the odds of convicting defendants who go to trial depend in part

63. 1997 SOURCEBOOK, *supra* note 57, at 437 tbl. 5.70, 439 tbl. 5.72.

64. *E.g.*, BARBARA BOLAND ET AL., THE PROSECUTION OF FELONY ARRESTS — 1987, at 1 (1990).

65. On the reality of false confessions, see GUDJONSSON, *supra* note 52, at 226-28; Johnson, *supra* note 19, at 729-30; Richard A. Leo, *The Problem of False Confessions*, *in* THE MIRANDA DEBATE 271, 272-73 (Richard A. Leo & George C. Thomas III, eds., 1998); Leo & Ofshe, *supra* note 19, at 430-31; White, *supra* note 19, at 108-09. For an argument that false confessions rarely, if ever, lead to convictions, see Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Convictions from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999).

on the defendants' guilt — trials do not sort randomly — but the odds that innocent defendants would be convicted at trial are positive — trials also do not sort perfectly. Assume that in the first, pro-government system, the odds that guilty defendants would be convicted at trial are 90%; for innocent defendants, the odds are 50%. In the second, pro-defendant system, the odds are 45% for guilty suspects and 30% for innocents. If all cases go to trial, innocents would obviously prefer the second system. But if police and prosecutors pursue only some fraction of cases, innocents would likely prefer the first. A prosecutor pays a large price for mistaking a 50% case for a 90% case; the price of confusing 30% cases with 45% cases is much smaller. It follows that prosecutors will make more such mistakes. And in the more pro-defendant world, acquittals will be much more common, meaning that any one of them is less salient, hence less costly for prosecutors. Plus, 50% and 90% cases will look more *different* to police and to prosecutors than 30% and 45% cases. All distinctions help those with stronger claims.[66]

None of this proves that abolishing police interrogation would harm the innocent poor. But it might. And that would be the most serious distributive injustice the system could tolerate. Abolition (or near abolition, the original *Miranda* position) might make for an even less just system than we have now. Deregulation, letting the police question whomever they want however they want, allows a different kind of injustice, the kind that flows from abusive police questioning. *Miranda* doctrine manages to capture the worst features of both. It abolishes police interrogation for the favored few, and leaves it unregulated for the less favored many. Whatever the right answer to the question how best to deal with police interrogation, surely it cannot be *that*.

IV. CONCLUSION

Miranda is not a disaster, as some on the right have suggested. It would be hard for it to be a disaster, given that its effects seem so small. But it is also not the guardian of our liberties that its defenders think it is. It is, rather, a modest failure, a missed chance to do something about abusive police interrogation — and a small contributor to distributive injustice in an already distributively unjust system.

The best case for *Miranda* is that something *was* done — police needed to professionalize, and police culture needed to develop a greater sense of respect for suspects' rights, and those things have happened. (Whether *Miranda* caused them is another matter.) Few observers of American police forces would deny that there has been

66. The argument in this paragraph is made in more detail in William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1930-33 (1993).

substantial improvement in police treatment of suspects since 1966.[67] But the work seems incomplete — there is surely some abusive questioning going on in some departments, and there is no reason to believe *Miranda* is discouraging it. Meanwhile, the suspects who need *Miranda*'s protection least are the ones who use it most. One way or another, we ought to change that picture.

The only way to change it for the better is to have courts return to the role they played before *Miranda*, as drawers of the line between good and bad police interrogation. *Miranda* represents an experiment in having someone else draw that line. The experiment failed. Hard as it is to define, the line must be drawn (at least it must be drawn if abusive police interrogation still exists). And courts are the right entities to draw it. Perhaps with better evidence of the kind that videotape offers, the line can be drawn with reasonable accuracy at reasonable cost. Or perhaps not — in which case the system should choose between abolishing police interrogation and deregulating it. Given that choice, deregulation is probably better, as it better protects the suspects whose claim on our sympathies is greatest: those who are both poor (in money and education) and innocent. Even if that conclusion is wrong, better that we face the choice squarely rather than abolishing interrogation for some suspects and deregulating it for others, as *Miranda* does.

Sadly, none of these changes is likely to happen. *Miranda* succeeded in one key respect: It established an equilibrium that both police officers and courts, the regulated and the regulators, were willing to live with. Productive change requires that the equilibrium be upset. The Court could have done that in *Dickerson*, but didn't. It may be a long time before the next opportunity arises.

67. *But cf.* Cassell, *supra* note 19, at 473-78 (arguing that police in 1966 were already fairly professionalized).