Does Miranda Protect the Innocent or the Guilty?

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Miranda v. Arizona[1] is probably the most widely recognized court decision ever rendered. Thanks to movies and television, people the world over know about "*Miranda* rights." Governments around the globe have embraced *Miranda*-like rights. Suspects in South Korea must receive their "*Miranda* warning" before being interrogated.[2] So must those in Mexico,[3] Canada,[4] and most European countries.[5] *Miranda*'s notoriety surely has something to do with the decision's kaleidoscopic symbolism. To some, *Miranda* embodies the respect due to criminal suspects.[6]

* Professor of Law, Yale Law School. This article is an elaboration of remarks made at the Chapman Law Review Symposium: *Miranda* at 40: Applications in a Post-Enron, Post-9/11 World (Jan. 26, 2007). I am indebted to Theresa Cullen, Sarah Raymond and Geoffrey Starks for their research assistance.

1 384 U.S. 436 (1966).

2 The Korean Constitution protects the right against self-incrimination and Korean courts have held that, in "the Korean version of *Miranda*," police must advise suspects of their right to silence prior to interrogation. If police fail to do so, any resulting statement is inadmissible. Kuk Cho, *The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea*, 30 DENV. J. INT'L L. & POL'Y 377, 383 (2002).

3 The Political Constitution of the Mexican United States, art. 20, provides that the defendant has a right not to be compelled to give a statement and to be informed of his right to remain silent. It further provides that any "confession rendered before whatever authority destined by the Public Minister or the judge, or before these without the assistance of counsel of any value shall be prohibited." INSTITUTO FEDERAL ELECTORAL, POLITICAL CONSTITUTION OF THE MEXICAN UNITED STATES 14 (1994).

4 Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171, 198 (1993).

5 *See generally* Craig M. Bradley, Mapp *Goes Abroad*, 52 CASE W. RES. L. REV. 375 (2001) (surveying the rules in more than ten countries); Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925 (2002).

> Throughout Europe, there is near-universal recognition of a right to silence . . . that applies to both the pretrial and trial stages of a criminal case. Those aspects of the right . . . that require advice of the right and prohibit adverse inferences from silence also are generally accepted. Most civil law countries of continental Europe have adopted rules that require suspects be informed of the right to remain silent prior to questioning as well as rules that prohibit courts from considering [a] defendant's silence as evidence of guilt . . . .

Id. at 926.

6 "*Miranda* . . . allows us to celebrate our values of individualism without paying any real price. As a cultural symbol, *Miranda* stands for the enshrinement of individual rights over the needs of the state for efficiency, equal justice for rich and poor before the law . . . ." Patrick A. Malone, *"You Have the Right to Remain Silent":* Miranda *after*

To others, it represents the professionalism of the police.[7] Still others regard *Miranda* as a glaring example of the Supreme Court's ambivalence toward law enforcement, its lack of respect for victims, and its willingness to "coddle criminals."[8] Constitutional lawyers cite *Miranda* as an example of judicial usurpation of the legislative domain.[9] And so on.

Rather than musing about the symbolic meaning of *Miranda*, I want to examine a more mundane, yet eminently practical, question: whether *Miranda* protects the innocent, the guilty, or neither. That is an empirical question that we cannot answer with entirely convincing proof; we can only debate and opine, which we have already been doing for more than four decades. It is hard to conjure any other subject that has so occupied law reviews, television dramas, talk shows, and op-eds. It may now be impossible to say anything original on the subject and since I have read only some of the debates, I can make no claim here of originality.[10] Nonetheless, some answers seem clear enough that we should focus our concern about confessions in

Twenty Years (1986), *reprinted in* THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING 75, 85 (Richard A. Leo & George C. Thomas III eds., 1998).

7 *See* Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 504 (1996).

8 *See*, *e.g.*, Maxwell Bloomfield, *The Warren Court in American Fiction*, 1991 J. SUP. CT. HIST. 86 (1991), *available at* http://www.supremecourthistory.org/04_library/subs_volumes/04_c09_l.html; Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 244 ("Looking at the ensuing criticism of the decision, one would think that the Court had opened the prisons and handed guns to departing murderers.").

9 *See*, *e.g.*, U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION: 'TRUTH IN CRIMINAL JUSTICE' REPORT NO. 1 (1986), *reprinted in* 22 U. MICH J.L. REFORM 437, 543 (1989) ("*Miranda* violates the constitutional separation of powers and basic principles of federalism. *Miranda*'s promulgation of a code of procedure for interrogations constituted a usurpation of legislative and administrative powers . . . ."); Dickerson v. United States, 530 U.S. 428, 457–61 (2000) (Scalia, J., dissenting).

10 In an effort to be original, some supporters and critics alike stretch pretty far. Daniel Seidmann and Alex Stein, for example, spend eighty pages arguing that when the guilty exercise the right to silence they help the innocent: if the guilty had to talk, they would lie and their lies would make factfinders more skeptical of the innocents' truthful denials. Thus, even though the right to silence directly protects the guilty, it indirectly protects the innocent as well. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege,* 114 HARV. L. REV. 430, 433–34 (2000). Professor Cassell floated a somewhat contradictory theory, that if the police are stymied in their efforts to obtain confessions from the guilty, they will wring false confessions from the innocent. Ergo, they should be freer to obtain confessions from everyone. Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM L. & CRIMINOLOGY 497, 498–99 (1998). For responses to Seidmann & Stein, see Stephanos Bibas, *The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421 (2003) and Van Kessel, *supra* note 5, at 930–31. For a response to Cassell, see Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda*: Another Reply to Paul Cassell*, 88 J. CRIM L. & CRIMINOLOGY 557 (1998).

other directions. We should give *Miranda* a rest.

Part of what fuels the vast literature about *Miranda* are the multitudinous meanings of the subject of the debate. When we speak of *Miranda*, are we referring to the opinion of the Warren Court in June 1966, which was a mini-treatise on the hows and whys and the good and bad of police interrogation, or to the warnings that *Miranda* requires the police to give suspects during custodial interrogation? Do we also include in that reference the Court's directives about how the police should respond when the suspect invokes his rights? And do we include what the Court said about how the trial court should deal with various eventualities?[11] Since most of *Miranda*'s dicta have been disregarded by courts and the police in the four decades since the case was decided, should we disregard that dicta as well when debating the present-day impact of *Miranda*?[12]

In contemplating *Miranda*'s effects on convicting the guilty and the innocent, we might also ask what assumptions we are making about how the legal landscape relating to police interrogation would look today if *Miranda* had never been decided, or if, as some have been seeking for four decades, it had been overruled.

In some of the debates, *Miranda* is regarded as having clearly established (or "invented," some would say) the Fifth Amendment's applicability to police interrogation. But that is untrue. *Bram v. United States* did that in l897, when the Court said, "[W]herever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by [the self-incrimination] portion of the Fifth Amendment . . . ."[13] The Court reaffirmed the *Bram* position in *Malloy v. Hogan,*[14] which preceded *Miranda.* If we assume, as some of *Miranda*'s critics astonishingly do, that before *Miranda* was decided, the police were free to compel a suspect to answer their questions,[15] we

11 For example, the Court said that the prosecution could not use as evidence at trial the fact that the suspect declined to submit to interrogation, Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966), and could not use a confession obtained without a waiver of the *Miranda* rights. *Id.* at 475–76.

12 For some of that dicta, see *infra* note 18.

13 168 U.S. 532, 542 (1897).

14 378 U.S. 1, 7–8 (1964).

15 *See*, *e.g.*, Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 683–84, 686 (1986) (reviewing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962)) (noting that historically, the Fifth Amendment only applied to formal judicial proceedings, not to out-of-court investigations, so whatever the police did in interrogations was not "compelled" self-incrimination within the meaning of the Fifth Amendment). See also the famous refutation of these claims in Yale Kamisar, *Equal Justice in the Gate-*

might attribute to *Miranda* some substantial curbs on police activities and a reduction in confessions. But if the only innovation we attribute to *Miranda* is the duty it imposed on the police to deliver the four-part advisement of rights and to respect the suspect's express desire to cut off questioning, a very different conclusion about *Miranda*'s effects might emerge. In attacks on *Miranda* as criminogenic or at least hindering law enforcement, the critics are rarely clear about what version or interpretation of *Miranda* they find so friendly to felons.

Professor, now Judge, Paul Cassell is in the vanguard of *Miranda*'s critics, writing a dozen or more law review articles attempting to prove that *Miranda* was not only misguided, but perverse.[16] Unlike some of his allies, Paul Cassell is reasonably clear about the *Miranda* that he is criticizing, at least in his more recent articles on the subject. It is the skeletal *Miranda* that has emerged after decades of judicially-inflicted erosion, a *Miranda* that requires no more than the four-part warning and the right to cut off questioning.[17] That was not the *Miranda* that police thought they were trying to comply with in the immediate wake

houses and Mansions of American Criminal Procedure: From Powell *to* Gideon*, From* Escobedo *to* . . . , *in* CRIMINAL JUSTICE IN OUR TIME 1, 19–36 (A.E. Dick Howard ed., 1965). *See also* Stephen A. Saltzburg, Miranda v. Arizona *Revisited: Constitutional Law or Judicial Fiat?*, 26 WASHBURN L.J. 1, 14 (1986) (arguing that the drafters of the Self-Incrimination Clause could not have intended to prohibit judges from compelling self-incrimination, but to permit other officials to do so in secret sessions without any judicial protection). *Miranda* also declared that the prosecution could not use as evidence at trial the fact that the suspect declined to submit to interrogation. 384 U.S. at 468 n.37. This extended to the police station the Court's earlier ruling in *Griffin v. California*, 380 U.S. 609, 615 (1965), that no adverse inference can be drawn at trial from the suspect's exercise of his Fifth Amendment right.

16 *See*, *e.g.*, Cassell, *supra* note 10, at 503; Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 842–43 (1996).

17 Since Cassell has himself proposed a set of warnings which include the right to silence, his major objection is not to the warnings themselves but to the suspect's right to cut off questioning. *See* Cassell & Hayman, *supra* note 16, at 859 ("[I]t appears that most of *Miranda*'s harms stem from the cutoff rules, not the more famous *Miranda* warnings."). Cassell's own data suggest, however, that suspects rarely cut off questioning after they have made their initial "waiver." In Cassell and Hayman's study of interrogations in Utah, 83.7% of interrogated suspects waived their rights and only 3.9% changed their minds later. *Id.* at 860. See also similar data cited in note 19, *infra.* Cassell's objections to *Miranda* might therefore appear almost trivial were it not that he also wants to permit the police to continue to interrogate and cajole suspects who invoke their rights at any point in the process, whether from the outset or later. Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 497 (1996). In effect, Cassell's proposal would tell the police that they need not respect the suspect's right to silence and can ignore his attempts to invoke it. Such disrespect for the suspect's *Miranda* rights has never enjoyed support in the Supreme Court. Rather, fairly strict enforcement of the cut-off rules has been the norm. *See, e.g.,* Michigan v. Mosley, 423 U.S. 96, 106 (1975); Arizona v. Roberson, 486 U.S. 675, 686–87 (1988); Minnick v. Mississippi, 498 U.S. 146, 156 (1990).

of the decision. Many thought that *Miranda* made lawful interrogation almost impossible.[18]

I. THE LIKELY IMPACT OF NO *MIRANDA* WARNINGS

In the interest of clarity, let us speculate about only one thing: what would be the likely effect on police interrogation, and on convicting the innocent and the guilty, if America repudiated the international movement that it spawned and told the police not only that they were not required to warn suspects of their rights, but that they were forbidden to do so?

About four out of five custodial suspects in the United States who are asked to submit to interrogation do so, while one in five declines. Those who decline usually do so when warned initially, but occasionally do so later in the course of the interrogation.[19] Paul Cassell claims that the *Miranda* warnings cause suspects to clam up (or at least to not confess) and that, as a result, many criminals avoid conviction. Professor Cassell even asserted that "*Miranda* may be the single most damaging blow inflicted on the

18 The *Miranda* opinion clearly contemplates that in the typical police interrogation the suspect will have counsel at his side. If that were the case, there would be very few interrogations. Many statements in *Miranda* created uncertainty about the continuing viability of custodial interrogation: "[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals," Miranda v. Arizona, 384 U.S. 436, 455 (1966); "Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. . . . A mere warning given by the interrogators is not alone sufficient to accomplish that end," *Id.* at 469–70; "[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel," *id.* at 475; "If authorities conclude that they will not provide counsel . . . they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time," *id.* at 474; "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights," *id.* at 476; "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.* As it turned out, none of these statements has current vitality in the courts, but they caused difficulties in police interrogation in the first few years after *Miranda* was decided.

19 *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY, 266, 302 (1996) [hereinafter Leo, *Inside the Interrogation Room*]; Cassell, *supra* note 17, at 495–96. Although the Court in *Miranda* stated that the suspect has the right to terminate questioning at any time, 384 U.S. at 445, 476 n.45, the Court did not require that the suspect be informed of that right and the police rarely add that bit of advice to the warnings. Whether for that reason or others, if suspects do not invoke silence at the outset, they rarely change their minds and terminate the interrogation midstream. *See* Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1554–55 (1967); Cassell & Hayman, *supra* note 16, at 860 & tbl.3; Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653 tbl.1 (1996) [hereinafter Leo, *The Impact of* Miranda *Revisited*] (stating that of 182 Mirandized suspects, 38 invoked their *Miranda* rights but only 2 of those did so after an initial waiver).

nation's ability to fight crime in the last half century."[20]

Professor Stephen Schulhofer and others have taken issue with Cassell's conclusions.[21] Studies conducted after the police learned to minimize *Miranda*'s strictures and courts began to encourage such minimization provide very little support for Cassell's analysis, most of which is based on "confession rates." Cassell says that the confession rates are somewhat lower in the United States than in England and Canada, where police have long given pre-interrogation warnings that are less detailed than those required by *Miranda*.[22] There are, of course, many factors that can influence confession rates that have nothing to do with the content of a pre-interrogation warning or whether one was given. Interrogation rates vary greatly among jurisdictions and police departments within the same state. If, for example, the police interrogate only people whom they have arrested and whom they believe to be guilty, confession rates should be high. If, in contrast, the police frequently interrogate persons whom they have not arrested or against whom they have little evidence, the confession rates will be lower. If police regard interrogation as merely a step in the investigation process, they are less likely to experience a high confession rate than if they regard interrogation as a phase of the prosecution.

Other reasons for variations in interrogation rates include differences in the interrogation expertise of the police, in the time available to the police to conduct interrogations, and the urgency or necessity of the interrogation. Interrogations occur only when the police feel a need to conduct them and are rare where the perpetrator is caught in the act or is in possession of contraband or stolen property shortly after the crime.[23] The need for a confession also varies with the nature of the crimes that are being investigated, and those natures vary over time and jurisdictions. Many crimes simply are not serious enough to warrant custodial interrogation. The difficulties of concluding, based on differences in confession rates, that criminals are being helped by *Miranda* warnings are insuperable.

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20 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, 1132 (1998).

21 Schulhofer, *supra* note 7, at 547 ("For all practical purposes, *Miranda*'s empirically detectable net damage to law enforcement is zero."). *See also* Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1007–09 & nn.41–51 (2001); George C. Thomas III, *Plain Talk about the* Miranda *Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 942–43 (1996).

22 *See* Cassell, *supra* note 19, at 418–22.

23 *See* Cassell & Hayman, s*upra* note 16, at 854–59 (exploring reasons why Utah police did not interrogate); Project, s*upra* note 19, at 1582–93.

Some critics focus alternatively on the numbers or proportion of suspects who decline to converse with the police—those who invoke their right to silence. As noted, those rates hover around twenty percent.[24] Some seem to assume that whoever refuses to submit to interrogation after being warned of his rights does so *because* of the warning. But that is the *post hoc, ergo propter hoc* fallacy: temporal succession does not establish cause and effect. Some suspects refused to talk to the police before *Miranda*.[25]

Even before *Miranda,* physical coercion was rare in American police departments.[26] Thus, a pre-*Miranda* suspect, even if not informed of his right to silence, often knew that he could not be forced to talk and that if he refused, he would suffer at most an adverse inference and a lost opportunity to talk himself out of trouble. When the *Miranda* warning regime began, the warnings did not tell many suspects much, if anything, that they did not already know.[27] Possibly as many as twenty percent of suspects in the pre-*Miranda* era invoked silence.[28] More pertinent to the debate today, however, is how many suspects would invoke si-

24 *See* Leo, *Inside the Interrogation Room*, *supra* note 19, at 302.

25 *Id.* In the New Haven study, of 127 suspects, 20 immediately refused to talk and 18 asked to see a lawyer or friend before receiving any warnings. It is unclear whether the 20 who refused to talk were different than the 18 who asked to see a lawyer or a friend. If they were, then 30% of all suspects invoked their rights without warnings. If they were the same suspects, then about 16% invoked their rights.

26 Miranda v. Arizona, 384 U.S. 436, 446–48 (1966) (noting that in the time leading up to *Miranda*, physical brutality was the exception, and that most coercion was psychological); Project, *supra* note 19, at 1549.

27 A pre-*Miranda* suspect might have been unaware that his silence could not be used against him at trial, a rule declared in *Miranda*, *id.* at 468 n.37, but this is not part of the required *Miranda* warnings. Moreover, common sense suggests that whatever the rule about adverse inferences at trial, the police will draw an adverse inference against one who refuses to cooperate, and this is the adverse inference that is uppermost in the suspect's mind.

28 *See* Project, *supra* note 19, at 1571 n.135 (between 16% and 30% of New Haven suspects invoked silence without being warned). In a pre-*Miranda* study in Philadelphia in 1965, out of 4801 persons arrested, 1550, or slightly less than 32%, "refused to give a statement." However, they were given some warnings, even before *Miranda*, so they cannot all be counted as persons who would have "refused to give a statement" without any warnings at all. *Controlling Crime through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary,* 90th Cong. 200 (1967) (statement of Arlen Specter, District Att'y of Phila.). In one California city, during a three-month period in 1960, detectives conducted interrogations of 399 persons arrested for felonies. Of those, 58.1% gave confessions or admissions. Edward L. Barrett, Jr., *Police Practices and the Law—from Arrest to Release or Charge*, 50 CAL. L. REV. 11, 43 (1962). Barrett does not report how many of the other 41.9% talked and how many refused but it would be surprising if most of that group submitted to interrogation but did not say anything incriminating. The scholarly literature on interrogation practices and consequences pre-*Miranda* is surprisingly sparse. *See* Ronald H. Beattie, *Criminal Statistics in the United States—1960*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 49 (1960); Caleb Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 17 (1957).

lence if police stopped warning suspects of their rights. That number could approach, or, paradoxically, even exceed the twenty percent who now invoke silence after receiving warnings.

It nonetheless seems almost certain that *Miranda* warnings do cause *some* suspects to reject interrogation.[29] Some, perhaps even most, of those silence-invoking suspects are guilty.[30] Even if we further assume that because they invoke silence, some of those guilty suspects avoid conviction,[31] it still does not follow that the net effect of *Miranda* warnings is to impede convicting the guilty.

We must also consider the possibility that the warnings actually *induce* some suspects to talk rather than to remain silent. The warnings implicitly suggest to the suspect that the police are respectful of the suspect's rights, that the police are not only law-abiding, but that they are also fair and objective. If delivered with the proper tone, the warnings could even suggest to the suspect that the investigators are sympathetic, naïve or gullible.[32] Surely Patrick Malone is right that "[s]killfully presented,

29 *See* Project, *supra* note 19, at 1571 tbl.17. This would seem to be true even if the warnings impart no new or significant information to the suspect. They do at least introduce the issue of silence and make it easier for the suspect to invoke silence than if there had been no mention of the matter by the police, requiring the suspect to raise the issue himself.

30 There is, as far as I am aware, no evidence that virtually everyone who invokes silence is guilty, as is sometimes assumed by scholars. *See*, *e.g.*, Seidmann & Stein, *supra* note 10, at 503. There is evidence that suspects with felony records are much more likely to invoke silence than those whose records are clear, *see* Leo, *Inside the Interrogation Room*, *supra* note 19, at 286, but concluding that they are more likely to be guilty because they have criminal records seems unwarranted. A different conclusion does seem justified: they invoke silence more often because their previous experience with the police taught them the advantages of silence. *See* William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 993 (2001). While it will often end up to his advantage to cooperate with law enforcement, the guilty suspect should rarely cooperate without a quid pro quo. Hence, it is usually unwise for guilty suspects to cooperate during custodial interrogation. Nonetheless, about 60% to 80% of suspects who submit to interrogation end up confessing or making incriminating statements. *See*, *e.g.*, Leo, *Inside the Interrogation Room, supra* note 19, at 281; James W. Witt*, Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320, 326 tbl.3 (1973).

31 There appear to be no studies correlating silence-invoking with conviction, i.e., what proportion of those who invoke silence are not convicted. Nor do there appear to be any studies attempting to show what proportion of those silence invokers are factually guilty.

32 Since courts are permissive in allowing the police to preface the warnings with their own observations and even to intermix their own observations with the warnings, *see*, *e.g.,* Duckworth v. Eagan, 492 U.S. 195, 201–05 (1989), the police can suggest during the warning process that they are sympathetic to the suspect, that the victim "got what she deserved" or "I would probably have done the same thing." This signals to the suspect that he is among sympathetic interrogators. The belief, or hope, that they can talk their way out of trouble is a major motivator for suspects to submit to interrogation. *See* Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of*

the *Miranda* warnings themselves sound chords of fairness and sympathy at the outset of the interrogation. The interrogator who advises, who cautions, who offers the suspect the gift of a free lawyer, becomes all the more persuasive by dint of his apparent candor and reasonableness."[33] If a cop tells the suspect that he need not answer, that he can have an attorney if he wants, is that not reassuring? The Court repeatedly said so in its *Miranda* opinion.[34] The Court's notion that a mere warning would transform the interrogation from one of "inherent coercion" to an occasion for the suspect "to tell his story without fear" was astonishingly naïve, since the warnings lose most of whatever significance they have once the interrogation begins.[35] However, there was some truth to the Court's observation that the warnings serve to reassure and calm the suspect into waiving his rights at the outset of the interrogation. The warnings may also increase the suspect's bravado during the early stages of interrogation, which of course facilitates the interrogators.[36] So, against the guilty who are induced *not* to talk by the warnings, we have to compare the guilty who *are* induced to talk.[37] Which is the larger group? Nobody knows. It seems reasonable to

Innocence, 28 LAW & HUM. BEHAV. 211, 215–16 (2004); George C. Thomas III, Miranda*'s Illusion: Telling Stories in the Police Interrogation Room,* 81 TEX. L. REV. 1091, 1111 (2003) (reviewing WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS (2001)). For other techniques police use to encourage waivers, see Leo, *supra* note 21, at 1019.

33 Malone, *supra* note 6, at 79. A similar point is made in George C. Thomas III, *Is* Miranda *a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821, 831 (1996).

34 The Court suggested that the warnings would "relieve the defendant of the anxieties [the police] created in the interrogation rooms," 384 U.S. 436, 465 (1966), would enable him "under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process," *id.* at 466, and are "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." *Id.* at 468.

35 "[O]nce suspects agree to talk to the police, they almost never call a halt to questioning or invoke their right to have assistance of counsel." Stuntz, *supra* note 30, at 977. "Once the interrogator recites the fourfold warnings and obtains a waiver . . . *Miranda* is irrelevant to both the process and the outcome of the subsequent interrogation. Any protection that *Miranda* might have offered a suspect typically evaporates as soon as an accusatory interrogation begins . . . ." Leo, *supra* note 21, at 1015. *See also supra* note 19. *Miranda*'s naïveté has often been repeated by the Supreme Court. In *Davis v. United States*, for example, the Court said, "[T]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves" and that "comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." 512 U.S. 452, 460 (1994) (quoting Moran v. Burbine, 475 U.S. 412 (1986)).

36 The New Haven study provides some support for this speculation. Law students observed all police interrogations in New Haven during the summer of 1966. Suspects who were warned of their rights made incriminating statements far more often (in 57% of the interrogations) than those who were not warned (30%). *See* Project, *supra* note 19, at 1565. A major motivator for suspects to waive their rights is their hope that they can talk themselves out of trouble. *See supra* note 32.

37 A similar point is alluded to in Thomas III, *supra* note 33, at 831.

speculate, however, that after four decades of living with *Miranda*, the small number of suspects who are induced to remain silent by the administration of the warnings is getting even smaller while the number encouraged to talk is at least remaining stable.

Let us assume arguendo that the number of those induced to remain silent by the warnings exceed those who are induced to talk. If so, then the number of suspects who actually submit to interrogation is somewhat reduced by the *Miranda* warnings—albeit much less than is commonly supposed.[38] There is little reason to assume that this number is more than three or four percent of those who are interrogated. Assuming such a net figure, however, still does not answer the question of whether the guilty are helped or hurt by *Miranda* warnings.

If slightly fewer suspects submit to interrogation because of *Miranda* warnings, there is no reason to doubt that those who do submit continue to confess or make incriminating statements (including provable lies) at the same or at a higher rate than would have been the case without warnings.[39] Once the police obtain a waiver, the trickery and psychological coercion that the Court noted in *Miranda*, together with any new interrogating tricks learned since then, can continue as before.[40] As long as the police do not physically torture the suspect or threaten him with immediate bodily harm, virtually anything goes.[41]

II. THE COUNTERWEIGHT OF COGENCY

Assuming that a fraction of guilty suspects who would otherwise incriminate themselves do not do so because of the *Miranda* warnings, and that because they invoked their right to remain silent they cannot be convicted, there are two strong counterbalancing effects of the warnings that almost certainly

38 Despite *Miranda* warnings, most suspects who are warned (78% to 96%) waive their rights. Richard A. Leo, Miranda *and the Problem of False Confessions*, in THE *MIRANDA* DEBATE, *supra* note 6, at 271, 275.

39 It is often assumed that the guilty are more likely to invoke silence than the innocent. *See*, *e.g.*, Leo, *Inside the Interrogation Room*, *supra* note 19, at 279 n.71. If so, there might be a slight reduction in the harvesting of incriminating statements if the proportion of silence-invokers were slightly increased by the giving of warnings. But that would be true only if (1) the guilty make incriminating statements more often than the innocent (we certainly hope this is true!), and (2) the reduction in the numbers of suspects submitting to interrogation is not more than offset by the ill-advised bravado and garrulity that the warnings engender.

40 *See* Leo, *supra* note 21, at 1003.

41 *See* Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001).

outweigh those losses.[42] The first is the cogency effect of the warnings and the waiver. A jury is more likely to believe that a defendant's incriminating statements were truthful if he received *Miranda* warnings. One who receives warnings but nonetheless "waives" his rights to silence and to have a lawyer present thereby makes his incriminating statements appear more clearly voluntary and reliable than if he made them without any warnings or waivers. According to the *Miranda* court, the warnings serve to dilute or even to eliminate the coercive nature of police interrogation.[43] A Mirandized suspect who talks is arguably doing so without coercion, even if interrogated for half a day,[44] whereas one who is not Mirandized is, according to the Supreme Court, being interrogated in an "inherently coercive" atmosphere.[45] When coercion is seemingly eliminated or reduced, the suspect's incriminating statements acquire more cogency. Although the Supreme Court's view of the power of a simple warning to calm and comfort the suspect throughout a lengthy interrogation was extremely naïve, prosecutors are free to make the same argument to juries who will surely find it persuasive. In sum, although *Miranda* warnings may deter a small fraction of suspects from incriminating themselves, those who are not deterred are more likely to be convicted because their incriminating statements acquire cogency from the warning and the waiver. In its power to produce convictions, this cogency effect could outweigh the evidence lost, if any, by the *Miranda* warnings.

Miranda's contribution to the cogency of a confession may be unnecessary, since juries are likely to believe a confession under almost any circumstances.[46] However, while confessions are obtained in many interrogations, they are by no means the typical result of an interrogation. According to Richard A. Leo's study of l82 interrogations in the early l990s, incriminating statements

42 The first counterbalancing effect is discussed in this Part. The second is discussed in Part III.

43 *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966). As the Court noted in *Miranda*, the pre-*Miranda* interrogation manuals suggested that if a suspect is reluctant to discuss the matter, he should be told that he has a right to remain silent and "[t]his usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator." *Id.* at 453–54 (quoting from FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 111 (1962)).

44 *See* State v. LaPointe, 678 A.2d 942, 949, 964 (Conn. 1996) (holding that confessions obtained from a suspect with a congenital brain defect during a nine-and-a-half hour interrogation was voluntary, even though detectives wrote the confessions he signed).

45 *Miranda*, 384 U.S. at 467.

46 *See infra* note 86.

were obtained in 64%, but only 24% produced full confessions.[47] Thus, nearly two-thirds of the incriminating statements resulting from interrogations are not confessions and need the help of the cogency counterweight.

III. THE COUNTERBALANCING EFFECT OF *MIRANDA* ON JUDGES

A second weighty counterbalance is the effect that *Miranda* warnings have on judges: psychologically, politically and doctrinally. If warnings were delivered by the police and a waiver was given or signed, it is almost impossible to persuade a judge that the resultant confession or admission is "involuntary."[48] The warning/waiver not only helps to persuade the jury of the defendant's guilt, it helps the trial judge deny the defendant's motion to suppress.[49] The focus of the pre-*Miranda* judicial inquiry has been shifted from whether the confession was voluntary to whether the *Miranda* warnings were given and a waiver executed. This shift makes granting a motion to suppress difficult and makes denying it easy.[50] I do not think the waiver adds much, if anything, to the voluntariness of a confession, but I am not a judge who would be the target of the public clamor that inevitably follows a judicial ruling suppressing incriminating evidence despite police compliance with *Miranda*. *Miranda* is a substantial factor in the twenty-first century reality that the suppression of confessions by trial judges on involuntariness grounds is almost as rare today as four-legged chickens.[51]

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47 Leo, *Inside the Interrogation Room, supra* note 19, at 280.

48 White, *supra* note 41, at 1220.

49 As the Court observed in *Dickerson v. United States*, 530 U.S. 428 (2000), when the police have "adhered to the dictates of *Miranda*," the accused can rarely make even "a colorable argument that a self-incriminating statement was 'compelled.'" *Id.* at 444 (quoting Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984)).

50 As Professor Leo notes, "[T]rial judges have learned to use *Miranda* to simplify the decision to admit interrogation-induced statements and to sanitize confessions that might otherwise be deemed involuntary if analyzed solely under the more rigorous Fourteenth Amendment due process voluntariness standard." Leo, *supra* note 21, at 1027.

51 In a study of 7035 cases in three states, Professor Nardulli found only five (.07%) cases that were lost as a result of a court's suppression of a confession. Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 601. In a subsequent study of 2759 cases in Chicago, judges suppressed confessions in only .04% of all cases. Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 227, 232. In a Westlaw search of all federal and state cases decided in 1999 and 2000, Welsh White found only nine cases in which the courts held a post-waiver confession involuntary. Four of those cases were expressly based on state law rather than the Due Process Clause. White, *supra* note 41, at 1219 n.54. It seems likely, moreover, that violations of *Miranda*'s warning and waiver rules were present in some of those cases. I asked a long-time trial judge recently if he had ever suppressed a confession. He said, with apparent pride, "yes." I asked him for the details and he explained that the police had questioned the suspect without administering any *Miranda* warnings. "Did the State lose the case?" I asked. "No," he replied. "After

IV. DIMINISHED CONCERN FOR THE INNOCENT

Before *Miranda*, a major concern of the Supreme Court was the voluntariness of confessions. The Court was developing some rather stringent (if unclear) requirements on the admissibility of confessions.[52] *Miranda,* however, has been a major contributor to the demise of that concern and to an inversion of the law governing involuntary confessions. Many confessions that would have been found involuntary in 1966 are considered voluntary today.

The currently-applied tests for voluntariness are less demanding than the pre-*Miranda* tests.[53] Even more important than its articulation of voluntariness criteria is the message the Supreme Court sends to the lower courts in its case selection and decision patterns. In the three decades prior to *Miranda*, the Supreme Court held that confessions were involuntary in at least twenty-three cases.[54] In the four decades since *Miranda*, however, the Court has decided only three voluntariness cases, and has only held two confessions involuntary: *Mincey v. Arizona*[55] and *Arizona v. Fulminante*.[56] The Court has also moved from a voluntariness test related to the reliability of the confession to a doctrine that explicitly rejects such a concern. Police misconduct, not reliability, is now the sole determinant of involuntariness.[57]

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they got the confession, they Mirandized him and got another confession, which was admissible. He was convicted." *Cf.* Oregon v. Elstad, 470 U.S. 298, 300 (1985). For an especially unusual case, an *appellate* ruling holding a confession involuntary, see Commonwealth v. DiGiambattista, 813 N.E.2d 516, 518 (Mass. 2004), where a conviction for burning a building, in which no one was injured, rested largely on the defendant's confession, which was obtained through lies about nonexistent evidence, expressions of sympathy, and minimization of the offense with implicit offers of leniency. Perhaps four-legged chickens are slightly *more* common than judicial findings of involuntariness. *See* Posting of Bart Dabek to Science & Technology, http://www.aboutmyplanet.com/index.php?s=four-legged+chicken (Mar. 15, 2007).

52 *See generally* Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 741 (1963); Welsh S. White, *What is an Involuntary Confession Now?,* 50 RUTGERS L. REV. 2001, 2008–20 (1998).

53 Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 745–46 (1992) (stating that because the Supreme Court is not interested in reviewing voluntariness cases, "lower courts have adopted an attitude toward voluntariness claims that can only be called cavalier"); White, *supra* note 51, at 2009 ("[P]olice interrogators have in some respects been afforded greater freedom than they were during the era immediately preceding *Miranda*.").

54 White, *supra* note 41, at 1220.

55 437 U.S. 385, 401 (1978).

56 499 U.S. 279, 282 (1991). The third case was *Colorado v. Connelly*, 479 U.S. 157, 159 (1986), discussed *infra.*

57 Professor Godsey observes that prior to *Miranda*, the Court in its voluntariness decisions emphasized the subjectivities of the suspect, such as his age, background, strength of character, and mental condition at the time of the interrogation, but *Miranda* made these concerns virtually irrelevant to its "waiver" questions. Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Com-*

Although the Court in *Miranda* took full note of the coercive pressures of custodial interrogation and the effectiveness of psychological coercion, including the power to obtain confessions from the innocent,[58] the remedy the Court fashioned to counteract those pressures is almost totally ineffective. In what has become essentially a faux remedy, the *Miranda* warning regime has virtually replaced a vibrant and developing voluntariness inquiry that took into account the vulnerabilities of the particular suspect as well as the inducements and conditions of the interrogation. As far as the Supreme Court is concerned, that protection of the innocent has vanished from the law of confessions.

In its immediate aftermath, the *Miranda* decision was commonly believed to do much more than prescribe a set of warnings and related rights. Some thought that defense lawyers would have to be assigned to police stations and to participate in all interrogations.[59] Many thought that this would virtually eliminate confessions as tools for convicting the guilty.[60] There is language in the opinion that supported many of these fears and predictions.[61] But none of them came to pass. As others have noted in countless law review articles, the courts have pretty much cut the flesh out of the *Miranda* opinion and left it with only its skeleton—the four-part warnings and the right to cut off questioning.[62]

The *Miranda* court explained at length how police use psychological coercion to obtain confessions without using force or

pelled Self-Incrimination, 93 CAL. L. REV. 465, 489–90 (2005). As a result, the tests of confession admissibility after *Miranda* had virtually nothing to do with reliability. *See also* White, *supra* note 52, at 2021–23 (1998). The rejection of reliability concerns was made complete and total in *Colorado v. Connelly*, 479 U.S. 157, 159 (1986), where the Court held that a confession that was ordered by the "voice of God" and made by a psychotic was nonetheless "voluntary."

58 Miranda v. Arizona, 384 U.S. 436, 455 n.24 (1966).

59 Leo, *The Impact of* Miranda *Revisited*, *supra* note 19, at 672.

60 As Donald Dripps observes, *Miranda* was preceded by *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964), in which the Court held that there is a Sixth Amendment right to counsel whenever the police begin to "focus" on the suspect. This "implied the end of police interrogation." DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 75 (2003). *Miranda* implicitly rejected both the Sixth Amendment's application and the "focus" test, and thereby "saved police interrogation from the jaws of *Escobedo*." *Id.* at 76. By substituting the Fifth Amendment for the Sixth, the *Miranda* court allowed interrogation with its dubious holding that one who is in an "inherently coercive" environment can nonetheless waive the right to silence.

61 See *supra* note 18.

62 What survives the four-decade erosion of *Miranda* are the following requirements: (1) to give the four-part warnings prior to obtaining an admissible confession in a custodial setting, (2) to respect the suspect's invocation of silence, and (3) to respect his request for the assistance of counsel. In (2) or (3), all "interrogation must cease." *Miranda*, 384 U.S. at 473–74.

threats of force—how they lie to the suspects, create phony accusatory witnesses, falsely accuse suspects of other crimes, promise leniency and employ phony expressions of sympathy—and the Court seemingly disapproved of these methods.[63] Yet lower courts have, with virtual unanimity, condoned them all.[64] Once the *Miranda* warnings are given, the old techniques continue. Some new ones have been added, like asking the suspect, who denies guilt, to imagine or dream about how he might have done it if he had done it—as in O.J. Simpson's recent unpublished book, *If I Did It*.[65] Once the suspect articulates a fanciful scenario of guilt, he then is pressured to admit that the fantasy is truth. That sometimes succeeds with innocent suspects.[66]

As has been repeatedly demonstrated, there are serious threats to the innocent in contemporary interrogation techniques and their judicial condonation. People confess to crimes that they did not commit.[67] Some do this for publicity and attention,[68] others because "God" told them to,[69] others to escape the pressures of interrogation,[70] others because the police persuaded

63 *Id.* at 449–55.

64 *See* White, *supra* note 41, at 1217–18.

65 *See* Edward Wyatt, *Publisher Calls Book a Confession by O.J. Simpson*, N.Y. TIMES, Nov. 17, 2006, at C1.

66 *See*, *e.g.*, JOAN BARTHEL, A DEATH IN CANAAN 49–140 (Dell Publishing Co., Inc. 1977) (1976) (detailing the interrogation of Peter Reilly about the death of his mother); JOHN GRISHAM, THE INNOCENT MAN 87–93 (2006). A related technique, not noted by the Court in *Miranda*, is to suggest to the suspect that he must have "blacked out" or had a "memory problem" that does not allow him to consciously recall what he did. GISLI GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 228 (1992).

67 GUDJONSSON, *supra* note 66, at ch. 10; 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 (1998); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004). The basic strategy of modern interrogation is to persuade the suspect that it is in his interest to confess. The first stage in that process is to convince him that his conviction is certain regardless of what he says or does. The second is to offer him inducements to persuade him that it will be beneficial to him to confess. *Id.* at 914–15.

68 Among the confessions that are internally generated and not in any sense the product of interrogation pressures are those motivated by a desire for notoriety. *See* GUDJONSSON, *supra* note 67, at 226. About 200 people confessed to the Lindbergh kidnapping. *See* Alan W. Scheflin, Book Review, 38 SANTA CLARA L. REV. 1293, 1296 (1998) (reviewing CRIMINAL DETECTION AND THE PSYCHOLOGY OF CRIME (David V. Canter & Laurence J. Alison eds., 1997)). A recent example is John Mark Karr, who confessed to the murder of JonBenet Ramsey but was released when it was determined that there was no corroboration and he could not even be placed in Colorado when the crime occurred. *See* Judith Graham, *Confession Raises More Questions than Answers: Prosecutor Cautious as Doubts Are Raised on Suspect's Story*, CHI. TRIB., Aug. 18, 2006, at A1, A8.

69 Colorado v. Connelly, 479 U.S. 157, 161 (1986).

70 *See* Innocence Project, Understand the Causes, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Apr. 2, 2007).

them that it was in their interest to falsely confess,[71] and still others because they have been at least temporarily persuaded of their guilt by skilled practitioners of coercive persuasion, i.e., police interrogators.[72] We have no way to quantify reliably what percentage of all confessions given are false, since there is rarely any DNA or other forensic evidence to refute the confession. However, in several studies of innocents wrongly convicted, stretching over nearly a century, false confessions have been obtained in 14–25% of the cases.[73] Among those persons who have been convicted and later exonerated by DNA results, about one-fourth had confessed.[74]

Stripped of its muscle by narrowing interpretations, *Miranda* not only provides no significant protection for suspects, guilty or innocent, it actually assists the police in their efforts to convict whomever they believe to be guilty.[75] If the Court had not imposed the warnings on the police, they would eventually have discovered their value and given them anyway. It is no aberration that *Miranda* is being copied all over the world and that the police and prosecutors like it.[76] *Miranda* no longer has anything significant to say about the legality of interrogation methods or the reliability of confessions. Yet since *Miranda* has been a major focus of debates about confessions, it serves mainly to distract lawyers, scholars and judges from considering the real problem of interrogation, which is how to convict the guilty while

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71 *Id.*

72 *See id.*

73 Drizin & Leo, *supra* note 67, at 902.

74 Innocence Project, *supra* note 70.

75 The problem of false confessions is exacerbated by the apparent fact that police, who typically presume guilt of the suspect until persuaded otherwise, surprisingly, have no special skill in evaluating credibility. Chet Pager reports the following on that subject:

> One widely cited 1991 study assessed the lie detection ability of 509 subjects, including officers from the CIA, FBI, National Security Agency, Drug Enforcement Agency, California police, judges, psychiatrists, and college students. Accuracy rates ranged from 53% to 58%, with no expert group performing significantly better than untrained college students. Previous studies involving federal law enforcement officers, police, detectives, and investigators found similar accuracy results, which fell in the mid-fifties. Despite their increased confidence, experts are no better than inexperienced civilians at distinguishing truth from falsehood, and some studies have found that experts, despite (or because of) their years of experience, perform even *worse* than laypersons.

Chet K.W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance,* 41 WILLAMETTE L. REV. 373, 380–81 (2005).

76 *See* All Experts, *Miranda* Warning: Encyclopedia, http://en.allexperts.com/e/m/mi/miranda_warning.htm (last visited Apr. 2, 2007); Richard A. Leo, *The Impact of* Miranda *Revisited, supra* note 19, at 666 (1996). In 1988, an American Bar Association survey found that an overwhelming majority of police, prosecutors and judges surveyed reported that compliance with *Miranda* did not hinder law enforcement efforts. Leo, *supra* note 21, at 1022.

protecting the innocent.[77]

Many scholars have proposed changes in the law to increase the reliability of confessions and to reduce the pressures of interrogation. They include putting time limits on interrogation,[78] putting lawyers in the interrogation room,[79] and prohibiting some or all police fraud and trickery.[80] These proposals have varying merit in that some would reduce risks to the innocent while interfering minimally with efforts to convict the guilty, while others, such as putting lawyers in the interrogation room, would gravely curtail the utility of police interrogation. An overarching problem with all of these proposals is the presumed remedy for their violation: suppressing the defendant's statements. Such a drastic remedy chills much of what might otherwise be warm support for some of these proposals.

IV. MORE NUANCED REMEDIES ARE NEEDED

We need to face the fact that judges simply are not going to throw out confessions just because psychological coercion was used or some rule relating to interrogation was not fully obeyed.[81]

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77 Some might quibble that the "real problem" is not convicting the guilty while protecting the innocent but rather protecting the right of the suspect to be free from coercion that renders his statement "involuntary." I acknowledge that this is a problem, too, but I do not think it is of the same magnitude as my version. In any event, the two problems overlap considerably. Another bothersome concern, outside the scope of this article, is the "distributive justice" problem described by William Stuntz. Noting that *Miranda* substitutes a right of silence for a system that regulates interrogations, he argues that this substitution rewards sophisticates who understand the interrogation system and does virtually nothing for those who, by reason of limited education, inexperience, and other disadvantages, do not know what they are getting into when they agree to be interviewed. Stuntz, *supra* note 30, at 978.

78 Apart from mentally ill people who confess for irrational reasons, the innocent who confess usually do so only after lengthy interrogation. Professor White recommended an upper limit on interrogation of six hours, after earlier suggesting a five-hour limit. *Compare* White, *supra* note 52, at 2049, *with* Welsh S. White, *False Confessions and the Constitution: Safeguards against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 145 (1997). See also *infra* notes 111–14 and accompanying text, stating that over 90% of interrogations last no more than two hours whereas the interrogations that produce false confessions typically last three times that long, or more.

79 Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1842 (1987); *see also* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 858 (1995) (allowing a judge to compel answers from the defendant).

80 Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 602 (1979). *But see* Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far*? 99 MICH. L. REV. 1168, 1209 (2001) (arguing that "additional limits on deception are unwarranted").

81 The same fate can be predicted for proposed "reliability hearings," where, as a condition to admissibility, the trial judge holds a hearing and finds the defendant's statement to be reliable. For details of one such innovative proposal, see Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 241–43 (2006). I support pretrial reliability hearings not be-

The conventional remedy for "involuntary" confessions, *Miranda* violations, and other illegal interrogation methods is to exclude the confession from evidence[82] and, in at least some cases, to exclude derivative evidence as well.[83] An exclusionary ruling keeps probative evidence from the jury and sometimes threatens to destroy the prosecution's case and free a guilty and dangerous defendant. That probably does not happen three times a year, despite more than a million felony prosecutions.[84] Focusing on *Miranda* compliance and an undemanding "voluntariness" requirement assures that virtually all confessions will be admissible in evidence, but does nothing to help the jury determine how much weight to give to incriminating statements made by the accused. We need to think about more nuanced remedies that will help the jury accurately evaluate the reliability of such statements. Three candidates—videorecording, expert testimony and cautionary instructions—are briefly discussed below.

Although it is possible to convict many defendants without their confessions, there is no doubt that confessions are often necessary for convictions.[85] They are powerfully incriminating: juries almost always convict a defendant who has confessed, even when there is little or no corroborating evidence and even where there is evidence of innocence.[86] Jurors are not aware of how unreliable evidence of confessions or incriminating statements can be.[87] First, there is uncertainty about what the defendant actually said to the police and in what context. This is true even if a written confession is obtained. If the only way to reconstruct the interrogations and their context is through the memory of those present—the police and the defendant—there is great risk of er-

cause I think they will result in exclusion of unreliable confessions—they will not—but because they will provide pretrial discovery that will help the defendant attack the reliability of the statement before the jury. If the interrogation is recorded, however, the need for other evidence related to the interrogation will be minimized.

82 Minnick v. Mississippi, 498 U.S. 146, 156 (1990).

83 *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391–92 (1920) (holding that information obtained illegally cannot be used for any purpose). But see Oregon v. Elstad, 470 U.S. 298, 307 (1985), where the Court distinguishes between "prophylactic" violations of *Miranda*, to which the "fruit of the poisonous tree" prohibition does not apply, and "coercion of a confession," to which the prohibition does apply.

84 *See supra* note 51.

85 Virtually all who write about confessions concede this. Confessions are less important where there is strong corroboration and much more important where there is little, and it is in the latter case that the primary risk of false confession exists.

86 Drizin & Leo, *supra* note 73, at 962; Leo & Ofshe, *supra* note 67, at 481; Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Empirical Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 470 (1997); Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 42 (1997).

87 Leo & Ofshe, supra note 87, at 962.

ror.[88] Memories of the details of conversations are shockingly unreliable—worse by far than eyewitness identification memories.[89] Apart from inaccuracies, testimony about interrogations is necessarily incomplete. The subtle pressures, assurances and deceits that accompany police interrogation will inevitably be left out of the story or at least minimized.[90] This is exacerbated by the fact that the defendant is often neither very bright nor very articulate, and he rarely has anyone to corroborate his story.

A. Videorecording

Perhaps the least controversial remedy for abuses in the interrogation room is compulsory videorecording of the interrogation.[91] This has been done in England since 1984.[92] Alaska requires it as a matter of due process and has been videorecording for more than two decades.[93] Many police departments throughout the country have long been videorecording selectively.[94] An Illinois Commission headed by Thomas P. Sullivan recently spoke to 238 law enforcement agencies in thirty-eight states that currently record custodial interviews in at least some felony investigations. The Commission found that "[t]heir experiences have been uniformly positive."[95] Among the advantages to law enforcement are that the detectives can focus on the suspect rather than taking copious notes while interrogating;[96] when the police review the recordings later, they often observe incriminat-

88 "Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms." Miranda v. Arizona, 384 U.S. 436, 448 (1966).

89 Steven B. Duke, Ann Seung-Eun Lee & Chet K.W. Pager, *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1 (2007).

90 The temptation of the police to "testily" (that is, to lie on the witness stand) to support the admissibility or reliability of evidence is also a factor that cannot be ignored. *See generally* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 234 (1998).

91 *See* Yale Kamisar, *Foreword:* Brewer v. Williams*—A Hard look at a Discomfiting Record*, 66 GEO. L.J. 209, 236–43 (1977); Gail Johnson*, False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 735–37 (1997). See also cases and other authorities collected in *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 529–31 (Mass. 2004). "Videotaping" is no longer the appropriate description since videorecording is increasingly done digitally.

92 Johnson, *supra* note 91, at 745.

93 Stephan v. State, 711 P.2d 1156, 1159 (Alaska 1985).

94 William A. Geller, *Videotaping Interrogations and Confessions* (1992), *reprinted in* THE *MIRANDA* DEBATE, *supra* note 6, at 303, 304–05.

95 THOMAS P. SULLIVAN, NORTHWESTERN UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS (2004), *available at* http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf [hereinafter SULLIVAN REPORT].

96 *Id.* at 10.

ing statements that they would have forgotten or not perceived in the first place,[97] recordings "dramatically reduce the number of defense motions to suppress statements and confessions,"[98] and increase the number of guilty pleas.[99] Judges prefer the recordings to having to hear and resolve conflicts in testimony about the interrogation and its results.[100] It appears that the only opposition from law enforcement is from those who have not tried videorecording.[101]

A common objection to a recording requirement for custodial interrogations is that when suspects are informed or realize the session is to be recorded, they will refuse to be interviewed or will at least "clam up" and become untalkative. But according to the Sullivan Report, these concerns are "unfounded."[102] First, most states do not require that the suspect be informed that he is being recorded.[103] Even when the suspects are informed, they usually do not object to being recorded and there is little evidence that their responses to interrogation are adversely affected by knowledge of the recording. Once the interviews get underway, initial hesitation fades and the suspects focus on the subject of the interview.[104] In those rare instances when suspects object to the recording, the interview can proceed without recording, provided the objection is documented.[105]

Another concern frequently heard is that the police will try to circumvent the requirement by conducting their interrogations off camera and will only use the recording to preserve the results of the earlier interrogations, a "recap." If the entire custodial interrogation is required to be videorecorded, however, the recap approach would be unlawful and it is unlikely that the recap could be passed off as an entire interrogation. Thus, the only effective way to circumvent the recording requirement would be to interrogate in a non-custodial setting. This might be considered analogous to interrogating "outside of *Miranda*," getting the confession, then Mirandizing the suspect and having him repeat

97 *Id.* at 11. This would seem especially important where the credibility of the confession rests on the claim that the suspect provided details of the crime that he could not have learned anywhere but at the crime scene.

98 *Id.* at 8.

99 *Id.* at 12.

100 *Id.* at 13.

101 An earlier study found the same thing: law enforcement opposition to taping came mostly from those who were unfamiliar with the practice. Geller, *supra* note 94, at 305.

102 SULLIVAN REPORT, *supra* note 95, at 20. Cassell & Hayman, *supra* note 16, at 897 (finding no inhibiting effects when suspects in their sample were recorded).

103 SULLIVAN REPORT, *supra* note 95, at 20.

104 *Id.*

105 *Id.* at 22.

it.[106] Some courts have disapproved of that stratagem[107] and similar rulings could be made when recording is involved. On the other hand, as the Court in *Miranda* correctly implied, the dangers of involuntary confessions are relatively remote in non-custodial interrogations. I see no profound objection to allowing the police to interrogate briefly on the street or in a suspect's home and to using the fruits thereof either as evidence at trial or to facilitate on-camera interrogations in a custodial setting.

The temptations to evade recording requirements seem not to be a major problem in those jurisdictions that require the recording of interrogations. The advantages of recording the actual interrogation rather than merely its fruits are substantial. For one thing, it avoids claims of off-camera threats, promises and other improprieties.[108] If a suspect begins the interrogation with evasions and lies, then admits the crime without extensive prodding and cajolery, a stronger piece of evidence has been created than if merely the results are recorded.[109] More than ninety percent of normal interrogations last less than two hours[110] and it seems unlikely that in most of those interrogations it was necessary for the police to employ techniques that were extreme or despicable.[111] In a typical interrogation, incriminating state-

106 Another way police go "outside *Miranda*" is to continue to question the suspect after he invokes his right to silence or to consult counsel. If an incriminating statement follows, it can be used to impeach the suspect at trial. *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 189–92 (1998).

107 *See*, *e.g.*, Missouri v. Seibert, 542 U.S. 600 (2004).

108 SULLIVAN REPORT, *supra* note 95, at 17. Even where recording was not mandatory, the consensus of law enforcement officers queried by the Sullivan Commission was that recording the entire interrogation rather than the final statements was preferable. In addition to avoiding claims of off-camera skullduggery, full recording also defeats a defense claim that "negative inferences should be drawn because the entire session could have been recorded by the flick of a switch, whereas the detectives chose instead to record only a rehearsed final statement." *Id.* at 17–18.

109 A dramatic example of the importance of recording the entire interrogation is the Central Park Jogger Case, where the police conducted unrecorded interrogations followed by taped final confessions. The defendants in that case were later shown to have been convicted falsely. *See Crime, False Confessions and Videotape*, N.Y. TIMES, Jan. 10, 2001, at A22; Saul Kassin, *False Confessions and the Jogger Case*, N.Y. TIMES, Nov. 1, 2002, at A31.

110 Leo, *Inside the Interrogation Room*, *supra* note 19, at 279 (noting that of 182 police interrogations observed in the early 1990s, more than 70% lasted less than an hour; 92% less than two hours); Barrett, Jr., *supra* note 28, at 42 (noting that nearly half of all pre-*Miranda* interrogations were completed in 30 minutes or less, nearly three-quarters in an hour or less, 95% in less than two hours).

111 In a study of 182 actual interrogations in a major urban police department, conducted by forty-five different detectives, Richard A. Leo observed and catalogued the tactics employed. Most involved some negative incentives (suggestions that there is no other plausible course of action) and positive incentives (suggestions that the suspect will feel better or otherwise benefit if he confesses). In 90% of the interrogations, the detectives confronted the suspect with incriminating evidence, usually true (85%) but sometimes false (30%). The longest interrogation lasted four-and-a-half hours. Leo, *Inside the Inter-*

ments are obtained without extreme conduct that would seriously embarrass the police or that would create grave doubt about the voluntariness or reliability of the statements.[112] Therefore, to interrogate and then recap and record is, in most cases, a duplication of effort. The kind of interrogation that is likely to produce a false confession—a lengthy interrogation[113] suffused with trickery, cajolery, good guys and bad guys, fake evidence and so forth—is surely uncommon in most police departments and the police will rarely, if ever, expect to engage in such an interrogation at the outset. Accordingly, when they would wish to interrogate off camera, it is usually too late: the interrogation has already occurred on camera.

Videorecording will not always help the defendant. Experience strongly suggests that more often it will help the prosecution convict him. But in those exceptional cases where intense psychological pressure has been employed or there is little corroborating evidence, there is no substitute for a videorecording of the entire interrogation. Courts should not wait for legislatures to require such recording. They should encourage it either by holding that it is required by due process, as the Alaska Court did,[114] or in the exercise of their supervisory power, as the Minnesota Supreme Court did,[115] or as in Massachusetts, by instructing juries that "because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care."[116]

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rogation Room, *supra* note 19, at 278–79. Some police fear that these common tactics, especially minimizing the moral seriousness of the offense, will have to be curtailed if they record. This concern does not loom large in the Sullivan Report. SULLIVAN REPORT, *supra* note 95, at 22.

112 Of the 182 interrogations observed by Richard A. Leo in the early 1990s, only four of them involved what Leo regarded as "coercive" methods. Leo, *Inside the Interrogation Room, supra* note 19, at 282–83.

113 In a study of 125 "proven false confessions," Steven Drizin and Richard Leo found that in the 44 confessions in which the length of interrogation was determinable, 84% lasted more than six hours, "34% between six and twelve hours; 39% between twelve and twenty-four hours; 7% between twenty-four and forty-eight hours; 2% between forty-eight and seventy-two hours; and 2% between seventy-two and ninety-six hours. The average length of interrogation was 16.3 hours and the median length of interrogation was twelve hours." Drizin & Leo, *supra* note 67, at 948–49.

114 Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985). It would not be a major stretch to find a due process violation in the failure to record an interrogation. The Supreme Court has intimated that it would be a due process violation to destroy or fail to preserve evidence if the police did so in order to gain an advantage over the defendant. *See* Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

115 State v. Scales, 518 N.W. 2d 587, 589 (Minn. 1994).

116 Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533–34 (Mass. 2004). A Canadian court recently held that a failure to record an interrogation warrants a jury instruction that the failure constitutes "an important factor to consider in deciding whether

B. Expert Witnesses

Given the ignorance of juries about the innocents' propensity to confess falsely and the evidence that such confessions are much more common than was supposed prior to the DNA revolution, one might expect courts routinely to admit the testimony of psychologists in cases where there is a plausible claim that the confession was coerced, or in any event unreliable because of the methods and circumstances under which it was obtained. Such an expectation would be premature.

The strongest case for admissibility of expert confession testimony would appear to be the psychiatrist or psychologist who treated the confessor before he was interrogated or at least conducted extensive psychological testing and examinations thereafter. Such an expert could testify to the psychological traits of the defendant that would incline him toward giving a false confession. Is he pathologically gullible or deferential? Does he have a perverse need to please his interrogators, such that he might confess to a crime just to please them? How intelligent is he? Such testimony would certainly provide the jurors with evidence that would not otherwise be known to them and that any rational person would consider relevant in assessing the reliability of the confession. The Supreme Court declared such evidence immaterial, however, on the issue of voluntariness. In *Colorado v. Connelly*, the Court held that coercive police activity alone determines involuntariness.[117] Unless the police were aware of some special vulnerability of the suspect and exploited it, the Court stated, his vulnerabilities have nothing to do with whether his confession is voluntary or involuntary. In *Connelly*, the defendant approached a police officer and confessed to a murder. Later, at the police station, he confessed to a child's murder. The following day, he told the police he had confessed because voices had told him to do so. A psychiatrist who examined him testified that he was psychotic and was following instructions from the "voice of God." Accordingly, the psychiatrist testified, these

to rely on the officer's version of the statement." R. v. Wilson, No. C42952, [2006] O. J. No. 2478: 2006 ON.C. LEXIS 2388, at *18 (Ont. Ct. App. June 21, 2006). In *Arizona v. Youngblood*, the police failed to refrigerate semen samples in a sexual assault case. One factor that led Justice Stevens to concur in the Court's judgment that due process was not violated was the fact that the trial judge instructed the jury, "If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest." *Youngblood*, 488 U.S. at 59–60 (Stevens, J., concurring). Given the ease with which interrogations can be videorecorded, a similar instruction, adapted to the evidence lost by failure to record, would seem appropriate in most cases where interrogations were not recorded.

117 479 U.S. 157, 167 (1986).

"command hallucinations" deprived the defendant of his own volitional abilities.[118] The Colorado courts held that the confessions were involuntary but the Supreme Court reversed, holding that it does not matter how psychotic the defendant is or if he acted on God's orders. His confessions were still voluntary, as were his *Miranda* waivers, as long as there was no police overreaching, threats or intimidation.[119] Thus, psychological evidence will rarely be admissible on the issue of the voluntariness of a confession.

Fortunately, the Court also held, in *Crane v. Kentucky*, that there is a due process right to introduce evidence that a confession is not credible.[120] Whether a confession is voluntary is one issue; whether it is true is quite another. Even though the trial judge may determine voluntariness on her own and not put that issue to the jury, she may not arrogate to herself the reliability issue. According to the Court, the right to present a defense "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence."[121] It seems clear, therefore, that any competent expert evidence bearing on the particular defendant's vulnerabilities or propensities as they relate to the reliability of his confession should be admissible. In *United States v. Shay*, for example, the defense sought to elicit testimony from a psychiatrist that Shay suffered from "pseudologia fantastica," a symptom of which was to "spin out webs of lies which are ordinarily self-aggrandizing and serve to place him in the center of attention."[122] The First Circuit held that such evidence is admissible to attack the credibility of a confession. The Seventh Circuit reached a similar conclusion in *United States v. Hall.*[123] In both cases, however, the testimony held admissible was "medical" testimony, describing symptoms of a "mental disorder." A defendant whose gullibility or suggestibility falls short of an identifiable, recognized pathology still might find himself without admissible expert assistance about his psychological propensities.[124]

118 *Id.* at 161.

119 *Id.* at 162, 167.

120 476 U.S. 683, 690–91 (1986).

121 *Id.* at 690.

122 57 F.3d 126, 129–30, 132 (1st Cir. 1995).

123 93 F.3d 1337, 1345–46 (7th Cir. 1996) (holding that the defendant was entitled to present evidence that he had a personality disorder that made him pathologically susceptible to suggestion).

124 United States v. DiDomenico, 985 F.2d 1159, 1164 (2d Cir. 1993). Evidence of an abnormally low intelligence, however, is often admitted. *See* People v. Gilliam, 670 N.E.2d 606, 614 (Ill. 1996). There are some instances where the courts are correct in ex-

Also problematic is testimony offered by a psychologist primarily to educate the jury about the psychological factors that sometimes lead to false confessions. Some courts think such testimony "invades the province of the jury" because it does not tell the jurors anything that they do not already know.[125] This is, of course, nonsense and many courts are beginning to admit this evidence, subject to some limitations. In *United States v. Hall*,[126] for example, the district court on remand found that the testimony of social psychologist Richard Ofshe met the requirements of Federal Rules of Evidence 702 and *Daubert*[127] because it was "based upon systematic observation of data to which the jury is not privy,"[128] and permitted him to testify "that false confessions do exist, that they are associated with the use of certain police interrogation techniques, and that certain of those techniques" were used in the defendant's case.[129]

The reasoning of the decisions admitting expert testimony in confession cases is impressive and the trend seems clearly in the direction of admissibility.[130] However, although most people who falsely confess are neither mentally ill nor cognitively impaired, "the vast majority of reported false confessions are from cognitively and intellectually normal individuals."[131] The interrogation techniques that produce most false confessions were developed for, and are employed against, rational suspects. Thus, the defense will often have to rely on the testimony of a social psychologist rather than a psychiatrist and on generalizations rather than specific, case-related factors with medical terminology.

One reason that such testimony does not often arise is that most of the relevant facts concerning the interrogation, to which the psychological principles can be applied, are not available.

cluding the evidence, e.g., testimony from an expert that the threat of death by electrocution can lead to a false confession. Upholding exclusion of the testimony, the Florida court said, "[T]he jury was capable of assessing without the aid of an expert witness that the threat of death in the electric chair may have a coercive effect . . . ." Bullard v. State, 650 So. 2d 631, 632 (Fla. Dist. Ct. App. 1995). Some courts create something akin to a Catch-22 when they refuse to allow an expert to opine on the reliability or falsity of the particular confession before the court, *see* People v. Page, 2 Cal. Rptr. 2d 898, 899 (Cal. Ct. App. 1991), and when they exclude the proffered testimony because it does not opine on the unreliability or falsity of the confession, *see* State v. Tellier, 526 A.2d 941, 944 (Me. 1987); State v. Wilson, 456 N.E.2d 1287, 1293 (Ohio 1982).

125 *E.g.*, State v. Cobb, 43 P.3d 855, 869 (Kan. Ct. App. 2002); *see also* State v. Davis, 32 S.W.3d 603, 608–09 (Mo. Ct. App. 2000).

126 974 F. Supp. 1198, 1205 (C. D. Ill. 1997).

127 Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993).

128 *Hall*, 974 F. Supp. at 1206.

129 *Id.* at 1205.

130 Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony,* 32 AM. J. CRIM. L. 191, 262–63 (2005).

131 Drizin & Leo, *supra* note 67, at 920.

The police deny that there was much in the way of psychological coercion and the defendant either does not testify at all or, because he is inarticulate, unintelligent and unattractive—and because of his obvious self-interest—is of little value to the defense in reconstructing the interrogation. As the police begin to record their interrogations, the importance of social psychologist testimony will grow considerably. Many recorded interrogations will provide fodder for expert testimony.

Another consideration, often unstated but omnipresent, is the expense factor. About eighty-five percent of criminal defendants are indigent.[132] If they are to have expert assistance in attacking their confessions, the experts will have to be provided at state expense. The viewing and analysis of the video and the related expert testimony will sometimes also consume considerable court time. That may explain why the judiciary appears less than enthusiastic about psychological experts in confession cases.

C. Cautionary Instructions

One remedy for unreliable confessions that neither takes up much time nor costs any money is cautionary jury instructions. Much of the experience of miscarriages of justice and the findings of social psychological experiments can be distilled in a jury instruction, once judges have taken judicial notice of such experience and findings. Counsel can then argue the applicability of the principles to the particular facts of the case. As videorecording of interrogations becomes more common and expert analysis thereof admissible, the value of alternative cautionary instructions in confession cases will become obvious. Scholars and judges should get together and work out some appropriate instructions to guide the jury in its evaluation of the credibility of confessions and incriminating statements.

CONCLUSION

Miranda, on balance, helps neither the guilty nor the innocent avoid conviction. When we consider not only the effect *Miranda* has on interrogations but its impact on juries and judges, it is clear that *Miranda* created a large lacuna where protections against unreliable statements attributed to the accused are badly needed. Rather than tweaking *Miranda*, reformulating the warnings or tightening waiver requirements, we should focus on ways to help the jury determine whether incriminating statements were made and what weight should be given to them. Re-

132 S. REP. NO. 104-179, at 30 (1995).

quiring videorecording, liberalizing admissibility of experts, and delivering specific cautionary instructions are far more promising remedies.