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## An Essay on *Miranda*'s Fortieth Birthday

By Paul Shechtman\*

*Miranda v. Arizona*<sup>1</sup> has now reached its fortieth birthday, and it has grown in stature with age. After *Dickerson v. United States*,<sup>2</sup> *Miranda* is clearly a “constitutional decision.” Forty years later, however, basic questions about *Miranda*'s effect remain hotly debated: Does *Miranda* frustrate effective law enforcement by shielding the guilty from custodial interrogations? Does it protect the innocent from false confessions and wrongful convictions? Should its warnings be modified to better serve their intended purpose? If not, what other measures should be considered if one believes, as I do, that police interrogation requires additional regulation? This essay, which grows out of my presentation at the Chapman Law Review *Miranda* symposium, addresses those questions.

### I.

As others have observed, there is a paucity of useful empirical analysis of *Miranda*'s effect on police interrogation.<sup>3</sup> In the immediate aftermath of the decision, there was a flurry of research, but most scholars agree that the studies are flawed.<sup>4</sup> Principal among the shortcomings was a failure to appreciate that the police would adapt to *Miranda* with time. As a result, the early studies do not provide a reliable basis for drawing long-term conclusions.

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<sup>1</sup> 384 U.S. 436 (1966).

<sup>2</sup> 530 U.S. 428 (2000).

<sup>3</sup> See, 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, 1058 (1998) (“In what has aptly been described as an ‘empirical desert,’ we have little knowledge about what police interrogation looked like shortly after *Miranda*, much less what it looks like today.” (citing H. RICHARD UVILLER, *TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE* 198 (1988))); George C. Thomas III, *Is Miranda a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996).

<sup>4</sup> See, e.g., Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 631–52 (1996); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 506–41 (1996).

Since those early years, there have been only two studies of note, both published in 1996: one by Professor Leo conducted in the Bay Area<sup>5</sup> and the other by Professor (now Judge) Cassell and his student, Bret Hayman, conducted in Salt Lake County.<sup>6</sup> Those studies are notable because in each, approximately 80% of arrestees who received *Miranda* warnings elected to waive their rights and face questioning.<sup>7</sup> And in each, less than 5% of those who initially waived later reconsidered and invoked.<sup>8</sup> Two studies is a small sample from which to generalize, but it is all we have; hence, those numbers—80% waive, and few subsequently invoke—are treated as revealed truths in the *Miranda* literature.

If those numbers are accurate, the first obvious question is, why do so many arrestees agree to talk? The principal reason, no doubt, is that arrestees want to talk: the innocent want to explain their innocence, and the guilty want to minimize their culpability. (Often, an arrestee does not appreciate the extent to which he has incriminated himself, as when he admits to a robbery but denies pulling the trigger, only to be charged with felony murder.) Many arrestees are loath to remain silent lest the police draw an adverse inference against them. Some waive their rights in order to learn what the police know about the crime. They recognize that the police are unlikely to talk to them unless they talk to the police.<sup>9</sup>

Another reason that so relatively few arrestees invoke is that the *Miranda* warnings are ineffectual. In part that is because the police have learned to give the warnings in a way that masks their import. They have learned to “waltz around *Miranda*,” to use the words of a detective whom Professor Leo interviewed.<sup>10</sup> A revealing example is the recent decision in *Hairston v. United States*,<sup>11</sup> in which the defendant, an 18-year-old, was arrested for a gang-related murder. The arrest occurred at approximately 10:00 p.m., and the lead detective gave the arresting officer express instructions not to administer *Miranda* warnings. Instead, the defendant was placed in an interview room and left there alone for more than an hour. When the lead detective finally en-

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<sup>5</sup> Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

<sup>6</sup> Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996).

<sup>7</sup> Leo, *supra* note 5, at 276; Cassell & Hayman, *supra* note 6, at 859–60.

<sup>8</sup> Leo, *supra* note 5, at 275; Cassell & Hayman, *supra* note 6, at 860.

<sup>9</sup> For insight into the diverse factors that motivate arrestees to talk, see Anemona Hartocollis, *Remain Silent? Some in Custody Spell it All Out*, N.Y. TIMES, Jan. 5, 2007.

<sup>10</sup> Leo, *supra* note 4, at 665; see also Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 431–47 (1999).

<sup>11</sup> *Hairston v. United States*, 905 A.2d 765 (D.C. Cir. 2006).

tered the room, he launched into a lengthy speech. He announced that he knew the defendant was involved in the crime, named others who supposedly also participated, and informed the defendant that another gang member had already confessed. All the while, the detective admonished the defendant to "listen and not talk."<sup>12</sup>

When the defendant first spoke, it was to express his disbelief that his fellow gang member was cooperating. The detective countered by showing the defendant a videotape of the other gang member talking to the police. The videotape was played for one minute with the volume off so that the defendant could only guess at what his confederate was saying. It was at that point, almost an hour into the session, that the detective asked the defendant if he wanted to tell "his side of the story." When the defendant answered "yes," the detective administered the *Miranda* warnings. Three hours later, he had elicited a confession to the crime.<sup>13</sup> That the detective's stratagem was found to comport with *Miranda*, which it was, speaks volumes about our willingness to tolerate "waltzing."

The answer to the second obvious question—why do so few arrestees who initially waive subsequently invoke?—can be found in a brilliant article by Professor Stuntz, who calls such persons "conditional talkers."<sup>14</sup> As Professor Stuntz observes, conditional talkers are optimistic that they can talk their way out of trouble, seemingly ignorant of the fact that talking to the police is a perilous course, fearful of angering the police by initially invoking, courageous enough to say "stop" in mid-stream, and sophisticated enough to realize that if they say "stop," the police will presumably accede to their request. That so few people share that mix of traits—in Professor Stuntz's words, "ignorant and knowledgeable, fearful and courageous, irrationally optimistic and unusually sophisticated"—should not be surprising.<sup>15</sup>

One other fact helps explain why there are so few conditional talkers. Increased police professionalism, to which *Miranda* has contributed, has meant that interrogation tactics are less abusive, so that the need to say "stop" is less pressing. A little-noted aspect of the Leo and Cassell-Hayman studies is the brevity of the observed interrogations: 92% of the interrogations Leo observed lasted two hours or less and all but one of the interrogations that Cassell and Hayman studied lasted one hour or less.<sup>16</sup>

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<sup>12</sup> *Id.* at 770–71.

<sup>13</sup> *Id.* at 772.

<sup>14</sup> William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975, 983 (2001).

<sup>15</sup> *Id.* at 986–87.

<sup>16</sup> Leo, *supra* note 5, at 279; Cassell & Hayman, *supra* note 6, at 892.

An arrestee is less likely to invoke mid-stream when the stream is so short.

## II.

The goal of confession law should be to regulate the interrogation process so as to maximize the number of arrestees who talk and to minimize abusive interrogations. To borrow Justice Harlan's words, "[P]eaceful interrogation is not one of the dark moments of the law."<sup>17</sup> Indeed, if the available data is correct, more than 50% of all interrogations yield incriminating evidence.<sup>18</sup> For me, what drove the point home was an assignment as a consultant to the District Attorney's Office in pre-Katrina New Orleans, where the police had all but stopped questioning arrestees, even in homicide cases. The result was homicide prosecutions that relied exclusively on the testimony of eyewitnesses and accomplices. Not surprisingly, intimidation of witnesses was rampant, and acquittals were common. One can debate whether confessions are good for the soul, but they are plainly good for the prosecution.

How does *Miranda* fare when judged against the goal of maximizing non-abusive interrogations? I will focus here on *Miranda*'s costs. One cost is that some guilty defendants who might otherwise talk invoke their right to silence. Estimating their number is a parlous task. If 20% of arrestees invoke their *Miranda* rights and 50% of interrogations are successful, incriminating statements would be lost in 10% of cases. That number, however, is high because some of those who invoke would remain silent even if *Miranda* were overruled. (Among those who invoke are a disproportionate number of recidivists who apparently have learned that silence is golden.)<sup>19</sup> Professor Schulhofer may well be close to the mark when he estimates that *Miranda* prevents the police from obtaining incriminating statements in approximately 5% of cases.<sup>20</sup> That is a small percentage, but it is a significant number in the aggregate (there were 603,503 arrests in 2005 for violent crimes<sup>21</sup>), so that *Miranda*'s cost in lost evidence should not be lightly dismissed.

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<sup>17</sup> *Miranda v. Arizona*, 384 U.S. 436, 517 (1966) (Harlan, J., dissenting).

<sup>18</sup> Leo, *supra* note 5, at 280–81 (noting that older studies had success rates of approximately 50%, and suggesting success in as high as two-thirds of interrogations); see generally George C. Thomas III, *Plain Talk about the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933 (1996).

<sup>19</sup> Leo, *supra* note 5, at 286–87.

<sup>20</sup> Schulhofer, *supra* note 4, at 545–46.

<sup>21</sup> U.S. DEP'T OF JUSTICE FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S. 2005 tbl.29 (2006), [http://www.fbi.gov/ucr/05cius/data/table\\_29.html](http://www.fbi.gov/ucr/05cius/data/table_29.html) (classifying murder, forcible rape, robbery, and aggravated assault as violent crimes).

*Miranda* imposes other costs on the criminal justice system as well. We lose some voluntary confessions because of technical non-compliance with *Miranda*, but the number seems small.<sup>22</sup> What bears emphasis is that any exclusion of reliable evidence on a perceived “technicality” breeds disrespect for the law. Take, for example, the recent case of *United States v. Street*, in which the defendant was a police officer with twenty-two years on the job who moonlighted as a bank robber.<sup>23</sup> His voluntary confession was suppressed because he was given only two of the four warnings.<sup>24</sup> Bright line rules must be enforced, but no one should be pleased with the result in *Street*, which flouts common sense.

Another cost of *Miranda* is a proliferation of hearings. Even if the prosecution “wins,” the criminal justice system loses when scarce resources are devoted to pre-trial proceedings. The sad reality is that the adjudicative process has become so costly that we plea bargain virtually all criminal cases.<sup>25</sup> Trials have all but vanished. *Miranda* contributes to that reality, which its admirers too often forget.

*Miranda*'s greatest cost, however, may be that it has stifled further effort to regulate police interrogation. *Miranda* warnings, it seems, share a common feature with the warnings on the boxes of commercial products. Just as those warnings have shielded manufacturers from liability, *Miranda* warnings have shielded police interrogations from closer scrutiny. If the warnings are given, courts are less likely to look “inside the box” to see whether the police have employed dubious tactics. As the Supreme Court itself has observed, “The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry. But as we said in *Berkemer v. McCarty*, ‘[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was “compelled” despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.’”<sup>26</sup>

What we know is that *Miranda* has not eliminated false confessions. Professors Drizin and Leo have documented 125 proven

<sup>22</sup> See George C. Thomas III, *Stories about Miranda*, 102 MICH. L. REV. 1959, 1976 (2004) (describing studies which show that “police have adjusted to the rule that they must warn suspects before beginning custodial interrogation”).

<sup>23</sup> *United States v. Street*, 472 F.3d 1298, 1302 (11th Cir. 2006).

<sup>24</sup> *Id.* at 1304, 1312–14.

<sup>25</sup> Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137 (2005) (“[P]lea bargains resolve ninety-five percent of adjudicated cases.”); see also the classic article by John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

<sup>26</sup> *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984)) (alteration in original) (citation omitted).

cases of false confessions since *Miranda* was announced.<sup>27</sup> DNA exonerations have given prominence to the issue. If we believe 125 false confessions is an unacceptable number, as we must, then reforms that go beyond *Miranda* are required.

### III.

Three reforms commend themselves.

1. Videotaping. A fundamental flaw of *Miranda* is that it does nothing to eliminate the swearing contest between the police and the arrestee that plagued courts in the pre-*Miranda* years. It is still commonplace for a judge (or jury) to be faced with strikingly different accounts of what occurred behind closed doors. In recent years, numerous jurisdictions have mandated videotaping to varying extents,<sup>28</sup> and efforts should be made to study the effect. Does videotaping reduce the number of custodial interrogations? Do the police circumvent the rules by conducting more pre-custody interviews? Does videotaping spawn litigation about what happened before the camera was turned on? One recent study reports promising results.<sup>29</sup> Surely any reform that both Professor Leo and Judge Cassell support (given their otherwise divergent views) deserves our careful consideration.

2. Expert testimony. Juries, we now know, are not skilled at recognizing false confessions. In the 35 false confession cases in the Drizin-Leo study that went to trial before a jury, the jury acquitted in 7 and convicted in 28.<sup>30</sup> That percentage reflects the fact that most jurors believe that an innocent person would not confess to a crime. Expert testimony can help dispel that canard. The leading case is *United States v. Hall*,<sup>31</sup> in which the court

<sup>27</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

<sup>28</sup> See Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 528–29 (identifying jurisdictions that have required electronic recording); Cathy Young, *Miranda Morass*, REASON, Apr. 2000, at 54, 56 (“[A]t least 2,400 police and sheriffs’ departments nationwide (about 15 percent of the total) audiotape or videotape . . . interrogations . . .”).

<sup>29</sup> See THOMAS P. SULLIVAN, NORTHWESTERN SCH. OF LAW, CTR. FOR WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 6, 24–26 (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf>.

<sup>30</sup> Drizin & Leo, *supra* note 27, at 953. Fourteen of 125 false confessors pleaded guilty and two were convicted by a judge; the other seventy-four were never charged or the charges were dropped pre-trial.

<sup>31</sup> *United States v. Hall* (*Hall I*), 93 F.3d 1337 (7th Cir. 1996) (remanding for a *Daubert* hearing); *United States v. Hall* (*Hall II*), 974 F. Supp. 1198 (C.D. Ill. 1997) (admitting expert testimony on remand); *United States v. Hall* (*Hall III*), 165 F.3d 1095 (7th Cir. 1999) (affirming convictions); see generally Nadia Soree, Comment, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testi-*

found that such testimony would be helpful to the jury and that it passed muster under *Daubert*. (The expert was allowed to testify that there are false confessions and to the factors that seem to produce them, but *not* that the defendant's confession was false.)<sup>32</sup> It bears note that Hall was convicted despite the expert's testimony—an outcome which should allay the fears of some prosecutors that expert testimony about false confession is a recipe for false acquittals.

3. Length Restrictions. One of the lessons from *Miranda* literature is that protracted interrogations can yield false confessions. In 84% of the cases in the Drizin-Leo study for which the length of interrogation could be determined, questioning lasted more than six hours. Several interrogations lasted more than a day.<sup>33</sup> A rule limiting questioning to four hours with the ability to seek additional time from a judge in exceptional circumstances would seem desirable.<sup>34</sup> I would not require the police to advise arrestees of the four-hour rule: what matters is not that arrestees know the limit but that there be one.<sup>35</sup>

#### IV.

There have been proposals to strengthen the *Miranda* warnings to address the false confession problem. One proposal calls for adding the admonition that a suspect's silence cannot be used against him.<sup>36</sup> For me, the proposal misses the mark. An added warning might have the unwanted effect of increasing the number of arrestees who invoke. And it is unlikely to prevent false confessions from occurring. As noted above, false confessions are often the product of lengthy interrogations, and those who confess falsely are often young or mentally defective.<sup>37</sup> A refined warning would do precious little to prevent them from talking.

*Miranda* is now forty years old, and, after *Dickerson*, its fifti-

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mony, 32 AM. J. CRIM. L. 191 (2005).

<sup>32</sup> *Hall II*, 974 F. Supp. at 1205.

<sup>33</sup> Drizin & Leo, *supra* note 27, at 948–49.

<sup>34</sup> Notably, a leading manual on police interrogation indicates that four hours is generally sufficient to obtain a confession. Welsh S. White, *False Confessions and the Constitutional Safeguards against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 145 (1997) (citing FRED E. INBAU, ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 310 (3d ed. 1986)).

<sup>35</sup> Compare *id.* at 144 (arguing that “interrogators should be required at the outset to inform a suspect as to the maximum permissible length of the questioning”).

<sup>36</sup> Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 813 (2006).

<sup>37</sup> Drizin & Leo, *supra* note 27, at 948–49; Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 308 (2006) (“By contrast, prolonged interrogation—especially in conjunction with youthfulness, mental retardation, or other psychological vulnerabilities—is strongly associated with eliciting false confessions.”).



eth birthday (and well beyond) seems assured. It is now a fixture on the criminal justice landscape. That said, we should not look to *Miranda* as a solution to the false confession problem. Video-taping, expert testimony, and length restrictions should be promoted in upcoming years. Their effect should be examined at the next Chapman *Miranda* symposium, say in 2017.