
**MIRANDA FOR THE NEXT FIFTY YEARS: WHY THE
FIFTH AMENDMENT SHOULD GO FOURTH**

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INTRODUCTION	893
I. FORMAL CRITIQUES FROM THE PERSPECTIVE OF SEARCH-AND-SEIZURE LAW.....	897
A. <i>The Judicial Legislation Critique</i>	897
B. <i>The Formal Critique and the Fourth Amendment Jurisprudence</i>	902
C. <i>Formal Critiques of Miranda and Institutional Reform Injunctions</i>	909
II. THE OVER- AND UNDER-REGULATION CRITIQUES	915
A. <i>The Over-Regulation Critique</i>	915
B. <i>The Under-Regulation Critique</i>	916
III. MAJOR SYSTEMIC CHANGES WITH IMPLICATIONS FOR INTERROGATION LAW.....	917
A. <i>Strategic Behavior in Response to the Miranda Rules</i>	917
B. <i>Expanding Alternative Sources of Evidence</i>	921
C. <i>The Modern System's Greater Power to Induce Cooperation</i> ...	924
D. <i>Mass Incarceration</i>	925
IV. THE OVER-REGULATION CRITIQUE FIFTY YEARS AFTER <i>MIRANDA</i> ...	927
V. ARGUMENTS THAT THE <i>MIRANDA</i> RULES UNDER-REGULATE THE POLICE.....	929
CONCLUSION: GO FOURTH, FIFTH AMENDMENT!.....	932

INTRODUCTION

This Article addresses two curious anomalies about *Miranda v. Arizona*.¹ The first of these is that while *Miranda* has become a venerated landmark, etched, as Chief Justice Rehnquist said, into our national culture,² the *Miranda* rules have remained a persistent subject of cogent criticism ever since the decision itself. The second thing I find curious was the gulf that emerged between the

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¹ 384 U.S. 436 (1966).

² *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).

constitutional premises of the *Miranda* rules and the constitutional premises of search and seizure law.

What, I wonder, really is the difference between the “prophylactic rules” denigrated in the *Miranda* cases and the “bright-line rules” celebrated in the Fourth Amendment cases? And why has confessions law changed little, and in the general direction of reducing *Miranda* to the voluntariness test that goes back to the 1930s, while Fourth Amendment law has consistently adapted to technological, institutional, and social changes?

I connect these two motivating anomalies by applying Fourth Amendment jurisprudence to three common critiques of the *Miranda* rules. My thesis is that the *Miranda* rules should be reconceived along the formal lines of modern Fourth Amendment doctrine. Fourth Amendment doctrine displays, without apology, a strong, but nonconclusive preference for rules rather than standards. And Fourth Amendment law has responded to changes in the legal ecology in a way that the *Miranda* rules have not.

Critics have made three broad objections to the *Miranda* rules. First, formal critiques object to the Court’s reversal of convictions because these convictions were obtained by violating a general rule intended to prevent constitutional violations in future cases.³ Call this the judicial legislation critique.

Other critics object to the *Miranda* rules not for being rules qua rules, but because they are not the right rules. Some have criticized *Miranda* as overinclusive, that is to say, for treating too many legitimate police tactics as unconstitutional.⁴ Call this second type of critique “*Miranda* went too far” or “handcuffing the cops.”⁵

Still others argue that the *Miranda* rules are underinclusive, because they do not regulate noncustodial questioning, approve too casual a waiver process, and for the majority of suspects who do waive, leave the old voluntariness test pretty much as it was before.⁶ Call this third type of objection the “not far enough” critique or the “legitimation critique.”

I make three related claims about the *Miranda* controversy. First, I echo prior defenders of *Miranda* by arguing that there is nothing illegitimate or even unusual about the Supreme Court declaring and enforcing rules of constitutional law that trump statutory law in some cases where there is no violation of the

³ See, e.g., JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 173-92 (1993) (describing *Miranda* as a “prophylactic decision”).

⁴ See, e.g., Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1450-51 (1985) (“Requiring an officer to tell a murder or rape suspect that he need not answer the officer’s questions and that, if he does, he might suffer the consequences seems altogether too charitable.”).

⁵ Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda’s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685 (2017).

⁶ See, e.g., Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 744 (1992) (“*Miranda*, like *Brown*, is best characterized as a retreat from the promise of liberal individualism brilliantly camouflaged under the cover of bold advance.”).

underlying constitutional right itself. I advance the debate by connecting Fifth Amendment and Fourth Amendment doctrine as a matter of form. In Fourth Amendment jurisprudence “bright line rules” are favored to guide the police and minimize the application of the exclusionary rule.

All rules are overinclusive or underinclusive of the policies they implement. There is no formal difference between Fourth Amendment “bright line rules” and Fifth Amendment “prophylactic rules.” Formal critics of *Miranda* are therefore logically committed, in general, to resolving Fourth Amendment issues ad hoc based on the circumstances of each case.⁷ More specifically, formal critiques impugn the very foundations of Fourth Amendment law—the warrant requirement and the exclusionary rule.

Indeed, challenging the institutional competence, or even the constitutional authority, of the Supreme Court to issue constitutional rules for police casts a dark shadow on institutional reform injunctions issued by federal judges to reform local police departments. These injunctions really are judicial legislation—precise formulations of acceptable police practices tethered to specific accountability and enforcement policies. The formal critics of *Miranda* seem logically committed to challenging the prudence, or even the constitutionality, of comprehensive reform injunctions issued under 42 U.S.C. § 14141, the so-called “Rodney King law.”⁸ Because I doubt that formal critics of *Miranda* stand ready to impugn the Fourth Amendment jurisprudence in general, and § 14141 in particular, I suggest that formal critiques are either unconvincing or far more radical than supposed by their proponents.

In addition to their unabashedly legislative form, the Fourth Amendment cases reflect the sweeping changes in the criminal justice system in the last fifty years. By contrast, the *Miranda* doctrine has changed relatively little, and generally in the direction of reverting to the voluntariness test that dates back to the 1930s.⁹ Police and gangsters have responded strategically to the *Miranda* rules. Technological and institutional changes have dramatically altered the benefits and the costs of obtaining confessions.¹⁰ I suggest that whatever rules were right fifty years ago are unlikely—extremely unlikely—to be ideal rules today or for the future.

⁷ *But see infra* note 80 and accompanying text (discussing the preference for a categorical basis, not an ad hoc basis).

⁸ 42 U.S.C. § 14141 (2012) (authorizing structural reform litigation).

⁹ The Court’s recitation of the *Miranda* rules in *Florida v. Powell*, 559 U.S. 50 (2010), is illustrative of this point, *id.* at 59-60. (“To give force to the Constitution’s protection against compelled self-incrimination, the Court established in *Miranda* ‘certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.’ Intent on ‘giv[ing] concrete constitutional guidelines for law enforcement agencies and courts to follow,’ *Miranda* prescribed the following four now-familiar warnings” (quoting *Duckworth v. Eagan*, 492 U.S. 195, 201 (1989); *Miranda v. Arizona*, 384 U.S. 436, 441-42 (1966))).

¹⁰ *See infra* Section III.B (arguing that the Fourth Amendment doctrine has changed and adapted to new technology).

Here again the jurisprudence of the Fourth Amendment offers a promising template for rethinking the Fifth Amendment. The Fourth Amendment cases not only aspire to guide the police by announcing general rules, but Fourth Amendment law is *dynamic* as well.¹¹ Having undertaken the project of deriving specific rules from the magnificent generality of the constitutional text, the Supreme Court has found it necessary to change the rules to accommodate (sometimes quite dramatic) changes in their costs and benefits.¹²

Systemic changes generally have diminished whatever credibility the handcuffing-the-cops critique may have had. Some of these changes create opportunities for the Supreme Court to engage the under-regulation critique both by modifying the *Miranda* rules and by encouraging other political actors to experiment with other modifications. Enough positive experience with mandatory electronic recording has accrued to justify the Court's imposition of such a requirement to enforce the *Miranda* rules. Beyond a recording requirement, police are free to follow policies that go beyond *Miranda*, state courts can require such policies under their respective constitutions, and federal judges can include different interrogation regimes in institutional reform injunctions. Academics can study the results of different approaches empirically and comparatively. The Supreme Court itself could breathe some life into *Miranda*'s language about alternative regulatory regimes "equally effective" in dispelling the inherent compulsion of custodial interrogation.¹³

Part I of this Article describes the common critiques of the *Miranda* rules. Part II argues that formal critiques are inconsistent with Fourth Amendment jurisprudence and with regulation of local police departments by institutional reform litigation. Part III argues that systemic changes have made the over-regulation critique less credible than ever. Part IV explores how Fifth Amendment doctrine might respond to the under-regulation critique by adopting the formal and temporal perspectives of Fourth Amendment jurisprudence.

¹¹ See, e.g., Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 481 (2011) ("New practices arise, begin to threaten the Fourth Amendment equilibrium, and then are addressed by judicial decisions that make the necessary adjustment."). While I am skeptical about equilibrium adjustment, Orin Kerr is clearly correct in describing the Fourth Amendment jurisprudence as perpetually evolving.

¹² *Id.* at 480 (arguing that the Supreme Court has adopted lower Fourth Amendment protections to "restore the status quo" when there are social and technological changes).

¹³ *Miranda*, 384 U.S. at 467 ("It is impossible for us to foresee the potential alternatives for protecting the privilege. . . . Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process . . .").

I. FORMAL CRITIQUES FROM THE PERSPECTIVE OF
SEARCH-AND-SEIZURE LAW

A. *The Judicial Legislation Critique*

Chief Justice Warren's majority opinion in *Miranda* went far toward inviting the charge of judicial legislation. The opinion describes the required warnings with rule-like breadth and precision. Indeed, to make the *Miranda* rules look like a statute all one needs to do is add section numbers, *viz.*:

§ 1 [I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.¹⁴

§ 2 The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court.¹⁵

§ 3 [A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . .¹⁶

§ 4 [I]t is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.¹⁷

§ 5 If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.¹⁸

§ 6 If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.¹⁹

§ 7 The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant.²⁰

At one point the opinion even refers to “the *system* we delineate today.”²¹

Even before announcing these rules, the opinion invited the charge of judicial legislation by stating “we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the

¹⁴ *Id.* at 467-68.

¹⁵ *Id.* at 469.

¹⁶ *Id.* at 471.

¹⁷ *Id.* at 473.

¹⁸ *Id.* at 473-74.

¹⁹ *Id.* at 475.

²⁰ *Id.* at 476.

²¹ *Id.* at 469 (emphasis added).

interrogation process as it is presently conducted.”²² This passage parried Justice Harlan’s invocation of the process of democratic law reform. It also admitted that the Court had chosen one policy from among many options permitted by the Constitution, precisely the sort of judgment better suited for legislatures and constitutionally out-of-bounds for courts.

Justice Harlan’s dissenting opinion accepted the invitation immediately. Justice Harlan began by characterizing the opinion as the majority’s “new constitutional code.”²³ Justice Harlan closed by challenging the Court’s institutional competence to promulgate such a code:

Despite the Court’s disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past. But the legislative reforms when they come would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.²⁴

Justice Harlan notably did not argue that the *Miranda* majority opinion was beyond the Court’s legitimate authority.²⁵ Justice White’s powerful dissent, meanwhile, explicitly acknowledged that the majority acted within the Court’s traditional ambit of authority.²⁶

The new majority that emerged during the Nixon Administration gave narrow interpretations to both the scope of the *Miranda* rules²⁷ and to the *Miranda* exclusionary rule.²⁸ Along the way the Burger Court recharacterized *Miranda* as

²² *Id.* at 467.

²³ *Id.* at 504 (Harlan, J., dissenting).

²⁴ *Id.* at 524 (footnote omitted). Al Alschuler advances similar arguments in this Symposium. See Albert W. Alschuler, *Miranda’s Fourfold Failure*, 97 B.U. L. REV. 851, 880 (2017) (“For the *Miranda* Court, sound principles of decision-making did not require the even-handed administration of corrective justice. They required selecting a few litigants at random to provide trimmings for the Court’s legislative rulings.”).

²⁵ *Miranda*, 384 U.S. at 515 (Harlan, J., dissenting) (“Legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution . . .”).

²⁶ *Id.* at 531 (White, J., dissenting) (“[W]hat [the Court] has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution.” (footnote omitted)).

²⁷ See, e.g., *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (holding that a suspect who agrees to come to the station at police request and is told that his fingerprints were found at the crime scene is not “in custody”).

²⁸ Even before the Court began to characterize the *Miranda* rules as prophylactic, it held in *Harris v. New York*, 401 U.S. 222 (1971), that statements obtained in violation of *Miranda*,

something other than a traditional exercise of judicial review, i.e., not the announcement of a constitutional rule when a constitutional rule was necessary to decide a case, but the announcement of rules based on the Constitution, that prohibited many government actions permitted by the Constitution.²⁹

Scholars were quick to point out the awkwardness of this “prophylactic rules” characterization. After a meticulous review of the cases, Geoffrey Stone concluded that the majority had left *Miranda* without an articulated constitutional basis.³⁰ Henry Monaghan recognized this legitimacy deficit and proposed a radical response—recognition of Supreme Court authority to promulgate and enforce, even against the states, “constitutional common law” that could be modified by statute.³¹

Joseph Grano took the challenge to *Miranda*’s viability to a logical conclusion. If *Miranda* announced prophylactic rules that might be violated without violating the Fifth Amendment itself, then federal courts reversing convictions solely on grounds of a *Miranda* violation were exceeding their constitutional authority.³² Reversing federal convictions solely for *Miranda* violations offends federalism in state cases and the separation of powers in federal cases.³³

In his vigorous dissent in *Dickerson v. United States*,³⁴ Justice Scalia endorsed Grano’s formal critique. In federal cases:

but not coerced according to the voluntariness test founded on due process, are admissible to impeach the defendant’s contrary trial testimony, *id.* at 225-26.

²⁹ See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 307 (1985) (“*Miranda*’s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.”); *Michigan v. Tucker*, 417 U.S. 433, 446 (1974) (“[P]olice conduct at issue here did not abridge respondent’s constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege.”).

³⁰ Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 119 (“Finally, it might be noted that the conclusion that the *Miranda* safeguards are not constitutionally based poses an interesting puzzle. If these safeguards are not derived from the Constitution, whence do they spring?”).

³¹ Henry P. Monaghan, *The Supreme Court, 1974 Term Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975) (arguing that Constitutional “interpretation” can be best understood as “a constitutional common law subject to amendment, modification, or even reversal by Congress”).

³² See GRANO, *supra* note 3, at 185 (“To ‘legislate’ rules that go beyond constitutional requirements, however, the Supreme Court must have authority, presumably derived from the Constitution, either to create a body of federal common law that is binding on the states or—and perhaps this is another way of saying the same thing—to exercise some sort of supervisory power over state courts. That it has such authority seems doubtful.”).

³³ See *id.* at 203 (“No less than Congress in the federal system, state legislatures and state courts have ultimate authority for prescribing the rules of evidence in the various states, provided, of course, that they stay within constitutional bounds.”).

³⁴ 530 U.S. 428 (2000).

[W]hat makes a decision “constitutional” in the only sense relevant here—in the sense that renders it impervious to supersession by congressional legislation such as § 3501—is the determination that the Constitution *requires* the result that the decision announces and the statute ignores. By disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people.³⁵

Moreover, Justice Scalia argued, “Congress’s attempt to set aside *Miranda*, since it represents an assertion that violation of *Miranda* is not a violation of the Constitution, *also* represents an assertion that the Court has no power to impose *Miranda* on the States.”³⁶

Commentators sympathetic to *Miranda* engaged both the institutional competence and legitimate authority arguments. Some challenged the institutional competence of *legislatures* to make policy when the costs of law enforcement, by way of unjustified detention and search or unreliable adjudications, quite predictably fall on the male half of the American underclass.³⁷ Section 3501 was an illustrative product of predictable political incentives.³⁸ Invited to devise better procedures than the *Miranda* rules to dispel the coercive environment of stationhouse interrogation, Congress purported to reinstate the voluntariness test—the test that the *Miranda* Court found constitutionally inadequate, and which Yale Kamisar’s classic article on the *Miranda* dissents thoroughly discredited.³⁹

³⁵ *Id.* at 454 (Scalia, J., dissenting).

³⁶ *Id.* at 456.

³⁷ Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1081 (1993) (“Public choice theory suggests that an overwhelming preponderance of political incentives favor unrestricted enforcement of the criminal law, even if this means abusive police methods or convicting the innocent.”); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 765 (1991) (“Although the post-1940 criminal procedure cases no longer emanated exclusively from the South or involved solely black defendants, they can still be justified under political process theory. Even into the 1960s, legislatures generally evinced no interest in formulating criminal procedure codes; rather they happily delegated the task to the unfettered discretion of politically unaccountable law enforcement officials.”).

³⁸ See Richard Harris, *Annals of Legislation: The Turning Point*, NEW YORKER, Dec. 14, 1968, at 68, 164-76 (discussing legislators’ sense of public demand for tough-on-crime policies).

³⁹ Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test*, 65 MICH. L. REV. 59, 62 (1966) (arguing that the “safeguards provided by the old test were largely ‘illusory’”). Stephen Schulhofer spoke for many when he wrote that Kamisar’s article “expose[d] the central premise of the dissenters’ argument as altogether unconvincing if not mildly ridiculous.” Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869 (1981).

With respect to legitimacy, scholars such as Charles Weisselberg pointed out that the “prophylactic rules” characterization of the *Miranda* rules came not from *Miranda* itself, but from justices hostile to that decision.⁴⁰ Stephen Schulhofer characterized *Miranda* as a straightforward exercise of judicial review in the tradition of *Marbury v. Madison*. Schulhofer did this by pinpointing not one, but three distinct holdings in the majority opinion:

Talk about “overruling” *Miranda* usually obscures the fact that *Miranda* contains not one holding but a complex series of holdings. They can be subdivided in various ways, but three conceptually distinct steps were involved in the Court’s decision. First, the Court held that informal pressure to speak—that is, pressure not backed by legal process or any formal sanction—can constitute “compulsion” within the meaning of the fifth amendment. Second, it held that this element of informal compulsion is present in *any* questioning of a suspect in custody, no matter how short the period of questioning may be. Third, the Court held that precisely specified warnings are required to dispel the compelling pressure of custodial interrogation. The third step, the series of particularized warnings, raises the concerns about judicial legislation that usually preoccupy *Miranda*’s critics. But the core of *Miranda* is located in the first two steps.⁴¹

Along the same lines, Barry Friedman argued that the “prophylactic” characterization traduces *Miranda*, which originally “plainly rested on a determination that unwarned statements are ‘inherently’ compelled.”⁴²

Scholars specializing in constitutional theory also engaged the legitimacy issue. David Strauss challenged *Miranda*’s exceptionalism by pointing to other contexts in which the Court has taken account of institutional capacities by imposing overinclusive restraints on the political branches.⁴³ Strauss’s examples

⁴⁰ Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 111 (1998) (arguing that the drafting history of the *Miranda* opinion shows “that the Justices intended to link *Miranda*’s rules directly to the Constitution”). Even Justice Scalia agreed with this characterization. See *Dickerson*, 530 U.S. at 447 (Scalia, J., dissenting) (“It was once possible to characterize the so-called *Miranda* rule as resting (however implausibly) upon the proposition that what the statute here before us permits—the admission at trial of un-*Mirandized* confessions—violates the Constitution. That is the fairest reading of the *Miranda* case itself.”).

⁴¹ Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436 (1987).

⁴² Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 19 (2010).

⁴³ David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 198-204 (1988) (comparing *Miranda* with the content-based restrictions in First Amendment cases); *id.* at 204-05 (comparing *Miranda* with strict scrutiny of suspect classifications in equal protection cases). The analogy to the strict-scrutiny standard is particularly telling. Justice Thomas joined Justice Scalia’s *Dickerson* dissent, yet also stated in *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016), “a State’s use of race in higher education admissions decisions is *categorically* prohibited by the Equal Protection Clause,” *id.* at 2215 (Thomas, J.,

included the sweeping prohibition of content regulation in the First Amendment cases and the strict scrutiny of racial classifications in the Equal Protection cases.⁴⁴ In his critique of the *Dickerson* opinion, Richard Fallon added some other examples—*stare decisis*, constitutional remedies, standards of review, and *underenforced* constitutional norms.⁴⁵

I agree with Strauss, Schulhofer, and Fallon that the *Miranda* rules are less exceptional than critics have claimed. What I add to the debate is recognition of the remarkable tension between the “prophylactic rules” denigrated in the Fifth Amendment cases and the “bright-line rules” celebrated in the Fourth Amendment cases. With respect to both institutional competence and constitutional authority, there is no real difference between the Fourth Amendment rules and the *Miranda* rules. It follows that the formal critics of *Miranda* are playing not with constitutional matches but with constitutional dynamite.

B. *The Formal Critique and the Fourth Amendment Jurisprudence*

Prophylactic rules have three distinctive features. First, prophylactic rules are rules—as opposed to general standards. Second, they direct excluding evidence against defendants who have not personally suffered a violation of their constitutional rights. Finally, the rationale of such a rule is to encourage future compliance by law enforcement officers.

The *Miranda* rules have these features, but the *Miranda* rules do not stand alone. Rules having these features pervade the Court’s Fourth Amendment jurisprudence. Modern Fourth Amendment law largely adopts what Anthony Amsterdam called a “regulatory” as opposed to an “atomistic” perspective.⁴⁶ The Court crafts many Fourth Amendment rules, and when it makes rules, it

dissenting) (emphasis added) (quoting *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2422 (2013)).

⁴⁴ Strauss, *supra* note 43, at 195 (arguing that “prophylactic rules” are “the norm, not the exception”).

⁴⁵ Richard H. Fallon, Jr., *Judicial Legitimacy and the Unwritten Constitution: A Comment on Miranda and Dickerson*, 45 N.Y. L. SCH. L. REV. 119, 128-33 (2001-2002) (arguing that Justice Scalia’s idea in *Dickerson*, that the Court’s only role is “to identify the Constitution’s meaning and apply that meaning to resolve individual cases,” is not justified by various doctrines such as *stare decisis*, judicial compromise, constitutional remedies, standards of review, and *underenforced* constitutional norms).

⁴⁶ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974) (inquiring whether the Fourth Amendment should “be viewed as a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct”). As I have argued elsewhere, the Supreme Court largely has followed Amsterdam in viewing the Fourth Amendment from a regulatory perspective. See Donald A. Dripps, *Perspectives on the Fourth Amendment Forty Years Later: Toward the Realization of an Inclusive Regulatory Model*, 100 MINN. L. REV. 1885, 1901 (2016) (“[F]rom 1974 until the turn of the millennium the Court adopted Amsterdam’s normative and regulatory perspectives, but applied them so as to limit the scope, and relax the content, of the Fourth Amendment.”).

focuses on the reasonableness of police behavior rather than restorative justice to individuals the police have injured.⁴⁷

Warrants of course are required for only a few types of police practices. Formally, however, the warrant requirement is a rule subject to exceptions. For example, the Supreme Court has never recognized an overwhelming showing of probable cause as a justification for proceeding without a warrant.⁴⁸ Likewise, the exceptions permit the police to proceed without a warrant in some situations where one might suppose they should be required to apply for one, as with immobilized vehicles searched on probable cause.⁴⁹

One might argue that absent one of the categorical exceptions, a warrantless search ipso facto violates Fourth Amendment rights in a way that custodial interrogation does not ipso facto violate Fifth Amendment rights. Language suggesting this characterization of the warrant requirement can be found in these aforementioned cases.⁵⁰ The contrary characterization of the warrant requirement as a procedural safeguard against “unreasonable searches” seems far more plausible.

First, the constitutional text protects the right against unreasonable searches and seizures, not against warrantless searches as such. Second, the warrant clause regulates rather than requires warrants because the founders saw warrants as protecting federal officers from tort liability.⁵¹ Third, there are so many exceptions to the requirement that it is, as Susan Klein puts it, “difficult to argue with a straight face” that warrantless searches are per se unreasonable.⁵² The

⁴⁷ Amsterdam, *supra* note 46, at 369 (“[T]he regulation of police behavior is what the fourth amendment is all about.”).

⁴⁸ *Agnello v. United States*, 269 U.S. 20, 33 (1925) (“Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.”).

⁴⁹ *See, e.g., California v. Carney*, 471 U.S. 386, 390-94 (1985) (holding that the motor vehicle exception applied to a mobile home parked within walking distance of an open courthouse).

⁵⁰ *See Agnello*, 269 U.S. at 32 (“The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws.”).

⁵¹ *See, e.g.,* TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 38-42 (1969) (“There is no evidence that suggests that the framers of the search provisions of the federal and early state constitutions had in mind warrantless searches incident to arrest.”); *id.* at 41 (“[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants.”).

⁵² Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1038 (2001).

Court's opinions generally justify the warrant requirement as a safeguard against promiscuous searches.⁵³ Substantial academic literature supports this view.⁵⁴

Suppose police on the public sidewalk look through the open window of a house and see tools of the drug trade—scales, guns, bags of white powder, and so on. No judge in the country would refuse them a warrant if they sought one. But if they enter without one, the search is illegal and the fruits must be suppressed.

Why? The warrant process *prevents* searches without probable cause.⁵⁵ It requires a judicial determination rather than an executive one.⁵⁶ It forces the applying officers to articulate the basis of their suspicion and thereby internalize the probable cause standard in the instant case and in others.⁵⁷ The time spent in obtaining a warrant adds an extra disincentive to search even with probable cause.⁵⁸

⁵³ Recently, in *Riley v. California*, 134 S. Ct. 2473 (2014), Chief Justice Roberts restated the orthodox view:

As the text makes clear, “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” Our cases have determined that “[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.” Such a warrant ensures that the inferences to support a search are “drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.

Id. at 2482 (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

⁵⁴ See, e.g., Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1613 (2012) (characterizing warrant requirement as an ex ante alternative that can “enhance compliance with constitutional mandates”); Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 920 (1986) (“Enforcement of the probable cause and warrant requirements in cases of actual guilt therefore has the object of protecting the lawful enjoyment of privacy in other cases.”); David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425, 433 (2016) (arguing that “the warrant requirement is best understood as a constitutional remedy akin to the *Miranda* prophylaxis”).

⁵⁵ See Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA. L. REV. 1741, 1782-83 (2008) (“When, in retrospect, it is clear that the police officers who searched without a warrant had probable cause for their search, courts have excluded evidence primarily for instrumental reasons and not to vindicate the rights or interests of the defendants before them.”).

⁵⁶ See, e.g., *Johnson v. United States*, 333 U.S. 10, 13 (1948) (stating that a search warrant was “granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right”).

⁵⁷ See Bar-Gill & Friedman, *supra* note 54, at 1641-45 (arguing that the warrant process improves police decision-making by removing the bias from police decisions and improving deliberative thinking).

⁵⁸ See Dripps, *supra* note 54, at 926 (“The more likely explanation for the success of warrants focuses on the costs of the warrant process to police. If the police view obtaining a warrant as a costly proposition, a proposed search would have to promise very likely returns

Warrants may add value during the execution of the search by apprising the target that the police are acting in due course of law. Suppose we modify our hypothetical case by stipulating that the police know the house to be searched is unoccupied. The variation makes clear that the warrant requirement's main purpose is to discourage searches without probable cause—and in a great many cases, the police clearly have probable cause but nonetheless must first obtain a warrant.⁵⁹

Moreover, with respect to the most common types of warrantless searches, the Court has declared general rules, as opposed to endorsing case-specific application of general standards. The most common types of warrantless searches are searches incident to arrest and the protective frisk permitted during investigative detentions under *Terry v. Ohio*.⁶⁰ The *Terry* frisk is allowed during a justified stop when the frisk is justified under a general standard of reasonable concern for officer safety.⁶¹ The scope of the frisk, however, is categorically limited to the groping of the exterior clothing.⁶² Unless the groping detects a weapon-like object or manifest contraband, further searching of pockets and so on is forbidden.⁶³

Incident to lawful arrest, the police may perform a more thorough search of the person, including containers like purses and backpacks, with no more justification than the arrest itself.⁶⁴ The *Chimel v. California*⁶⁵ “wingspan” rule for searches incident to indoor arrests is an imprecise rule.⁶⁶ But in its negative dimensions it is a quite precise rule. The full search of the home permitted incident to arrest in some prior cases is now clearly illegal.⁶⁷

to justify the expenditure of law-enforcement resources.”).

⁵⁹ Lower court cases applying the inevitable discovery exception to the exclusionary rule when the police could have, but did not obtain a warrant, *e.g.*, *United States v. Tejada*, 524 F.3d 809 (7th Cir. 2008), do not counter the assertion in text. Leaving aside the dubious merits of applying the exception, substantive current Fourth Amendment doctrine still prohibits the search.

⁶⁰ *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (holding that a warrantless search was reasonable, as the police officer had reasonable suspicion, reasonable fear, and had to act promptly).

⁶¹ *See United States v. Askew*, 529 F.3d 1119, 1126-27 (D.C. Cir. 2008) (en banc) (summarizing the *Terry* frisk doctrine).

⁶² *Id.* at 1144 (holding that Fourth Amendment rights were violated when police unzipped the suspect's jacket).

⁶³ *See, e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

⁶⁴ *United States v. Robinson*, 414 U.S. 218, 235-36 (1973).

⁶⁵ 395 U.S. 752 (1969).

⁶⁶ *Id.* at 763 (“There is ample justification, therefore, for a search of the arrestee's person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”).

⁶⁷ *Id.* (“There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the

The *Arizona v. Gant*⁶⁸ rule for search incident to arrest of motorists is narrower than the *New York v. Belton*⁶⁹ rule *Gant* modified.⁷⁰ Nonetheless, the negative dimensions of *Gant* are definite. The police may not search the trunk incident to arrest,⁷¹ and they may not search the passenger compartment for officer safety once the suspect is handcuffed and locked in the police vehicle. Any subsequent search of the passenger compartment must be based on *Terry*-type suspicion that evidence of the crime of arrest might be found there.

The new digital-is-different doctrine announced in *Riley v. California*⁷² does not superimpose any general standards on these categorical rules.⁷³ *Riley* announces a categorical exception to warrantless search authority. Digital devices capable of storing immense quantities of personal data are not “effects” subject to automatic warrantless search incident to arrest.⁷⁴

In at least some applications, the various search-incident-to-arrest rules are prophylactic, in that they forbid searches that on first principles would be thought “reasonable.” The warrant requirement, as we have seen, bars searches even when probable cause is manifest. All of the search incident rules have the same effect, because they limit authority to search without a warrant.

If the police have a warrant to arrest the suspect for drug dealing, but no search warrant, they often will have a right to enter the premises and, typically, probable cause to search for drugs. *Chimel* condemns any such search.⁷⁵ Police may arrest the suspect after an informant arranges a drug deal by cell phone, and yet under

absence of well-recognized exceptions, may be made only under the authority of a search warrant.” (footnote omitted)).

⁶⁸ 556 U.S. 332 (2009).

⁶⁹ 453 U.S. 454 (1981).

⁷⁰ Compare *id.* at 462-63 (holding that, incident to lawful arrest of a vehicle’s occupant, officers may search the passenger compartment, including containers, without a warrant or probable cause), with *Gant*, 556 U.S. at 351 (“Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”).

⁷¹ See *Spencer v. Pistorius*, 605 F. App’x 559, 565 (7th Cir. 2015) (“Even before *Gant* the trunk of a car could not be searched incident to arrest.”); *Johnson v. Phillips*, 664 F.3d 232, 238 (8th Cir. 2011) (“The search of the trunk violated clearly established law. There was no arguable authority to search a trunk of a vehicle incident to arrest.”).

⁷² 134 S. Ct. 2473 (2014).

⁷³ *Id.* at 2485 (“A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*. We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.”).

⁷⁴ *Id.* at 2494 (holding that the “search incident to arrest exception does not apply to cell phones”).

⁷⁵ *Chimel v. California*, 395 U.S. 752, 752 (1969) (holding that a search warrant is required for the search of rooms other than that in which the arrest occurs).

Riley the police may not immediately search the suspect's phone for evidence of similar deals.

Bright-line rules authorize what they do not prohibit.⁷⁶ For example, *Riley* did not disturb the *Robinson* rule permitting search of the person and all (non-digital) effects incident to arrest. If the police arrest a suspect for missing a court date and find a notebook in his pocket titled "Letters to God: My Personal Prayer Journal," they may read every word of it. By contrast, if the police arrest a suspect on child pornography charges, and find a flash drive in the suspect's pocket they need a warrant before opening the flash drive. Rules sometimes direct results contrary to those that would be directed by case-by-case adjudication under the general rubric of reasonableness. Absent a reason to favor tolerating unconstitutional police work over condemning some constitutional police work, judicial authority to declare and enforce both types of rules seems to stand on the same ground.

Some readers have responded that in the Fourth Amendment cases the defendant's "real" constitutional rights were violated. The previous examples (and more that might be offered) show that it is possible (and indeed not infrequent) for the police to violate one of the Court's "bright line" rules without acting unreasonably in the totality of the circumstances. To characterize Fourth Amendment rules as legitimate and desirable "bright lines" while characterizing Fifth Amendment rules as illegitimate, or at least disfavored "prophylactic rules," is to rely on labels to do the work of reasons.

To be sure, some Fourth Amendment law take the form of standards rather than rules. Issues such as probable cause,⁷⁷ reasonable suspicion,⁷⁸ and the voluntariness of consent⁷⁹ are decided case-by-case in light of the totality of the circumstances. What seems clear is that rules play a major role in Fourth Amendment jurisprudence and that the Court, across decades of time and many changes in personnel, prefers rules to standards.⁸⁰ Standards are a last resort, not the template.

The exclusionary rule, like the warrant requirement, while subject to myriad exceptions, takes the form of a categorical rule subject to categorical exceptions. There is no umbrella exception for de minimis violations or any equitable balancing of the police misconduct and the seriousness of the defendant's crimes.⁸¹ Once the defense establishes a Fourth Amendment violation, the

⁷⁶ Klein calls overbroad permissive rules "safe harbors" for the police, and rightly notes that the Fourth Amendment case law recognizes many such safe harbors. See Klein, *supra* note 52, at 1044.

⁷⁷ See *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (holding that probable cause should be tested by the totality of the circumstances rather than the two-pronged *Aguilar-Spinelli* test).

⁷⁸ See *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989).

⁷⁹ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 247-49 (1973).

⁸⁰ See *Riley v. California*, 134 S. Ct. 2473, 2491-92 (2014).

⁸¹ The U.S. exclusionary rule, formulated as a rule of exclusion subject to categorical exceptions, can be contrasted with a general balancing test, such as prevails in Canada. *Cf.*

tainted fruit *must* be suppressed *unless* a categorical exception, like standing or inevitable discovery, applies.

The exclusionary rule in its modern, deterrence-based form is likewise prophylactic. The original formulations in *Boyd v. United States*⁸² and *Weeks v. United States*⁸³ indeed recognized a genuine constitutional right to return of the seized property with the side effect of excluding it from evidence.⁸⁴ As far back as Prohibition, however, the Court extended the rule of exclusion to contraband such as illegal drugs.⁸⁵ Understandably, no right to the return of contraband was included with the exclusion from evidence.

If there is no genuine constitutional right against the *use* in evidence of illegally seized contraband, what is the purpose of exclusion? The Court has repeatedly declared that the exclusionary rule is not a personal constitutional right, but rather “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.”⁸⁶ Grano rightly pointed out that a constitutional violation is a prerequisite for imposition of the deterrent remedy in the Fourth Amendment cases, but not in *Miranda* cases.⁸⁷

Canadian Charter of Rights and Freedoms, s. 24(2), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) (“[Tainted] evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”). The U.S. Supreme Court has never adopted such a case-by-case approach to exclusion. *See* Yale Kamisar, “Comparative Reprehensibility” and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 7 (1987) (noting that critics of the exclusionary rule “protest that rigid application of the exclusionary rule produces disproportionate results”).

⁸² 116 U.S. 616, 638 (1886) (holding that compelled discovery of business records lawfully possessed by the defendant violated the Fourth and Fifth Amendments).

⁸³ 232 U.S. 383, 398 (1914) (holding unconstitutional the taking of letters from the accused’s house without a warrant and holding unconstitutional the denial of the return of such letters when requested).

⁸⁴ On the early development of the exclusionary rule, see TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT’S EXCLUSIONARY RULE* 328 (2013) (describing the history of the exclusionary rule); David N. Atkinson & Lawrence H. Larsen, *A Case Study in Federal Justice: Leading Bill of Rights Proceedings in the Western District of Missouri*, 28 CREIGHTON L. REV. 593, 595 (1995) (providing a specific account of the facts in *Weeks*); Donald A. Dripps, “Dearest Property”: *Digital Evidence and the History of Private “Papers” as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49, 83-99 (2013) (providing a detailed account of the *Boyd* litigation and its background).

⁸⁵ *See, e.g.,* *Byars v. United States*, 273 U.S. 28, 29 (1927) (holding that contraband liquor should be excluded from evidence).

⁸⁶ The quoted language first appeared in *United States v. Calandra*, 414 U.S. 338, 348 (1974). For reiterations of this language, see, for example, *Arizona v. Evans*, 514 U.S. 1, 10-11 (1995); *Illinois v. Krull*, 480 U.S. 340, 347 (1987); *Stone v. Powell*, 428 U.S. 465, 486 (1976).

⁸⁷ *See* Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 104 (1985) (“While prophylactic rules also may be intended, at least in part, to prevent future constitutional violations, they result in suppression

Grano “left for another article” the question “[w]hether this distinction makes a difference.”⁸⁸ Does the past violation of the defendant’s constitutional rights make a difference?

In both the Fourth Amendment and the *Miranda* cases, the defendant’s standing to seek suppression comes from the threatened injury of conviction, not a past violation of constitutional rights. In both contexts the evidence is excluded not because it was improperly obtained, but solely to encourage future compliance. Of course in the Fourth Amendment cases, the evidence was obtained improperly, but that is not, under current doctrine, the reason for excluding it. If the Court recognized justifications for the exclusionary rule other than deterrence,⁸⁹ the argument for a constitutional distinction would be stronger. The Court, however, does not recognize any such alternative basis for the Fourth Amendment exclusionary rule.

My point is not to rehearse the old (and important) debates about rules and standards, the warrant requirement, or the proper basis of the exclusionary rule. My point, rather, is that formal critiques of *Miranda* logically entail pervasive and radical revision of Fourth Amendment law. In a great many cases, the Fourth Amendment requires excluding evidence obtained by searches supported by probable cause. And in all such cases, the evidence is suppressed not because exclusion un-does the constitutional violation, but because the violation offers a condign occasion for imposing a regulatory sanction.

The courts have no more institutional competence over searches than they have over interrogations. The case for relatively clear doctrinal rules is as strong in the interrogation cases as it is in the search and seizure cases. Formal critiques of the *Miranda* rules implicitly condemn fundamental features of Fourth Amendment law. Those who have pressed formal critiques have never explained why Fourth Amendment bright-line rules should survive the critique of Fifth Amendment prophylactic rules, or, if they should not, just what sort of Fourth Amendment law should be planted on the scorched earth of the current Fourth Amendment regime.

C. *Formal Critiques of Miranda and Institutional Reform Injunctions*

Consider the following model for a statutory recording requirement as a supplement to *Miranda*:

of evidence or appellate reversal even when the Constitution has not actually been violated. By contrast, deterrent remedies, such as the exclusionary rule, apply only after an actual constitutional violation has occurred.” (footnote omitted)).

⁸⁸ *Id.*

⁸⁹ For arguments in favor of basing the exclusionary rule on more than pure deterrence, see, for example, *Herring v. United States*, 555 U.S. 135, 152 (2009) (Ginsburg, J., dissenting) (“The exclusionary rule is ‘a remedy necessary to ensure that’ the Fourth Amendment’s prohibitions ‘are observed in fact.’” (quoting Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565, 600 (1983))).

163. Officers shall not use physical violence or make threats to carry out harm to the individual or the individual's family during custodial interrogations.

164. All custodial interrogations that take place in a police facility, and all interrogations that involve suspected homicides or sexual assaults, shall be video and audio recorded. All recorded custodial interrogations will be recorded in their entirety. NOPD rejects the concept of a "pre-interview" and prohibits any decision not to record any portion of the interrogation based on such categorization. The recording equipment shall not be turned off unless the suspect states that he/she does not want the interview to be recorded. If the suspect requests that he/she does not want the interview to be recorded, the interviewer will record the subject making this request and shall document this request in the case report.

165. If the interrogation is not able to be video and audio recorded because of equipment failure or malfunction, detectives shall record the interrogation by means of a digital or cassette recorder. Any equipment failure shall be explained and documented in the case report, the case file, and in a memo to the Deputy Chief of the Investigation & Support Bureau.

166. All officers shall maintain in the case file their notes taken during interviews and interrogations.⁹⁰

This model for a statute, however, is not itself a statute. It is a federal court order directed to the New Orleans Police Department. The Department of Justice ("DOJ") threatened to sue the NOPD under 42 U.S.C. § 14141, which provides:

§ 14141. Cause of action

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.⁹¹

⁹⁰ Consent Decree Regarding the New Orleans Police Department at 46, *United States v. City of New Orleans*, No. 2:12-cv-01924-SM-JCW (E.D. La. July 24, 2012) [hereinafter *Consent Decree NOPD*].

⁹¹ 42 U.S.C. § 14141 (2012).

Congress adopted the statute in the wake of the nation's outrage over the video recording of the police beating of Rodney King.⁹²

Section 14141 authorized structural reform litigation to overcome the obstacles to injunctive relief set up by prior judicial decisions. In *United States v. City of Philadelphia*⁹³ the Court of Appeals for the Third Circuit held that federal criminal statutes punishing civil rights violations did not imply the government's right to bring civil suits.⁹⁴ Section 1983 authorizes civil suits by aggrieved individuals, not by the government, so *City of Philadelphia* had the effect of forbidding structural reform litigation brought by the government.⁹⁵

Subsequently in *City of Los Angeles v. Lyons*,⁹⁶ the Supreme Court blocked private suits for injunctive relief under § 1983.⁹⁷ *Lyons* held that a private plaintiff who claimed to have been subjected repeatedly to abusive chokeholds by Los Angeles police officers had standing to sue for damages but no standing to seek prospective injunctive relief.⁹⁸ Adolph Lyons could seek redress for his own injuries, but not preventive ("prophylactic?") injunctive relief to prevent future similar injuries to others. Section 14141 authorizes the DOJ to seek just such preventive relief, provided it establishes a "pattern or practice" of constitutional violations by a state or local law-enforcement agency.⁹⁹

Under the statute, police departments in Pittsburgh, Detroit, Cincinnati, Los Angeles, New Orleans, and many other jurisdictions have entered consent decrees rather than contest the DOJ's allegation of systemic constitutional violations at a civil trial.¹⁰⁰ The interrogation provision quoted above is unusual,

⁹² Congress adopted § 14141 as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified as amended at 42 U.S.C. § 14141). The 1994 law tracked a prior bill, the Police Accountability Act, introduced, but not passed in 1991. H.R. REP. NO. 102-242, pt. 1, at 135-40 (1991).

⁹³ 644 F.2d 187 (3d Cir. 1980).

⁹⁴ *Id.* at 192 ("Even if we were to accept the suggestion that a lack of adequate remedies requires recognition of an implied right of action, however, we could not find a federal right to sue for an injunction in this case.").

⁹⁵ 42 U.S.C. § 1983.

⁹⁶ 461 U.S. 95 (1983).

⁹⁷ *Id.* at 113 ("The individual States may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis. But this is not the role of a federal court . . ."); H.R. REP. NO. 102-242, pt. 1, at 135 (stating that the purpose of the statute is to "grant[] standing to the United States Attorney General").

⁹⁸ *Lyons*, 461 U.S. at 96 ("[W]hile presumably affording him standing to claim damages . . . [T]he equitable remedy is unavailable . . .").

⁹⁹ 42 U.S.C. § 14141 ("It shall be unlawful . . . to engage in a pattern or practice of conduct . . . that deprives persons of rights, privileges, or immunities . . .").

¹⁰⁰ See Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1347-48 (2015) ("[M]any of the nation's largest police departments including Los Angeles, Detroit, Seattle, Albuquerque, Newark, Pittsburgh, Cincinnati, Washington, D.C., and New Orleans have undergone or are currently undergoing this sort of [structural reform litigation]. Today, nearly one in five Americans is served by a law

perhaps unique to New Orleans. Common features of consent decrees include regulations, training and recording requirements for the use of force, reporting requirements for the racial impact of particular police practices, and the appointment of an independent monitor to oversee implementation of the order.¹⁰¹

Consent decrees under § 14141 bear a remarkable structural similarity to the *Miranda* rules. I assume that no informed observer believes that the Fourth Amendment is violated every time the police go on patrol without wearing body cameras, or every time they fail to file a use of force report, or every time they fail to cooperate with compliance audits administered by an independent monitor. Obviously, the police can violate these institutional reform injunctions in dozens of ways—each potentially punishable as contempt—without violating either the Fourth Amendment, the Fifth Amendment, or the *Miranda* rules. If the *Miranda* rules are beyond the authority of the Supreme Court, how can such reform injunctions be within the authority of federal district courts?

There are two possible answers, neither very powerful. First, in § 14141 Congress authorized suits for injunctive relief, while in § 3501 Congress repudiated *Miranda*.¹⁰² Statutes, however, cannot expand federal court authority under Article III of the Constitution. The Rodney King law just grants standing to the DOJ. There was nothing novel about the rights Congress meant to protect,¹⁰³ or about authorizing preventive injunctions via “pattern-or-practice” suits.¹⁰⁴

In the only ruling on a constitutional challenge to § 14141, a federal district court rejected the Commerce Clause as a source of congressional power, but upheld the statute as an exercise of congressional enforcement power under Section Five of the Fourteenth Amendment.¹⁰⁵ Under the Supreme Court’s

enforcement agency that has been subject to a Department of Justice (DOJ) investigation via § 14141.” (footnote omitted)).

¹⁰¹ See *id.* at 1378-87.

¹⁰² 18 U.S.C. § 3501 (2012).

¹⁰³ See H.R. REP. NO. 102-242, pt. 1, at 138 (“The Act does not increase the responsibilities of police departments or impose any new standards of conduct on police officers. The standards of conduct under the Act are the same as those under the Constitution, presently enforced in damage actions under section 1983. The Act merely provides another tool for a court to use, after a police department is held responsible for a pattern or practice of misconduct that violates the Constitution or laws of the United States.”).

¹⁰⁴ *Id.* at 137 (“The Attorney General has pattern or practice authority under eight civil rights statutes, including those governing voting, housing, employment, education, public accommodations and access to public facilities. The Justice Department can sue a city or county over its voter registration practices or its educational policies. It can sue private and public employers, including police departments, over patterns of employment discrimination. The Justice Department can seek injunctive relief under the Civil Rights of Institutionalized Persons Act against a jail or prison that tolerates guards beating inmates. But it cannot sue to change the policy of a police department that tolerates officers beating citizens on the street.”).

¹⁰⁵ *United States v. City of Columbus*, No. CIV.A.2;99CV1097, 2000 WL 1133166, at *4

decision in *City of Boerne v. Flores*,¹⁰⁶ it is well established that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”¹⁰⁷ Congress clearly has some Section Five power to prohibit constitutionally permissible state action as a means to the end of preventing other, unconstitutional state actions. Perhaps the federal courts have no comparable authority.

Lyons itself, however, did not deny the availability of injunctive relief, with no more statutory authorization than the general language of § 1983, to private plaintiffs who could satisfy the standing requirement. Indeed, some lower court decisions have imposed injunctions in private pattern-or-practice suits where the plaintiffs met the *Lyons* criterion for standing.¹⁰⁸ Specific legislative authorization therefore is not a constitutional *sine qua non* for structural reform injunctions.

As for § 3501, Congress has the power to deny federal courts the authority to issue injunctions, so long as due process is observed through other remedies.¹⁰⁹ Statutes cannot amend the Constitution. Section 3501 is therefore irrelevant to the Article III powers of federal courts. Congress, for example, could repeal § 14141 and affirmatively prohibit injunctions against police departments. The repealing statute, however, would not create a constitutional bar to the re-adoption of § 14141.

The second possible distinction between the *Miranda* rules and consent decrees is that the decrees are remedial. In § 14141 cases there not only has been a constitutional violation, there has been a “pattern or practice” of constitutional violations. “[T]he scope of a district court’s equitable powers to remedy past wrongs is broad . . .”¹¹⁰ Just as with Grano’s distinction between the Fourth Amendment exclusionary rule and *Miranda*, however, the “remedial” label suggests a constitutional difference that disappears when analyzed.

(S.D. Ohio Aug. 3, 2000) (“This Court concludes that § 14141 cannot be justified as a valid exercise of congressional authority under the Commerce Clause.”); *id.* at *9 (“As so construed, the Court concludes that § 14141 is a valid and proper exercise of congressional authority under § 5 of the Fourteenth Amendment.”).

¹⁰⁶ 521 U.S. 507 (1997).

¹⁰⁷ *Id.* at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

¹⁰⁸ See *Melendres v. Arpaio*, 784 F.3d 1254, 1267 (9th Cir. 2015) (affirming in most respects the district court’s injunction against the Maricopa County Sheriff’s Office); *Floyd v. City of New York*, 959 F. Supp. 2d 668, 690-91 (S.D.N.Y. 2013) (imposing a sweeping institutional reform injunction on the New York Police Department).

¹⁰⁹ See, e.g., 28 U.S.C. § 1341 (2012) (“[D]istrict courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”).

¹¹⁰ *Floyd*, 959 F. Supp. 2d at 674 (citing *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971)).

Traditionally, injunctive relief has been restricted to preventing irreparable injury when ex post remedies are inadequate.¹¹¹ Without some limits, courts might enjoin any violation of any law, with the effect of substituting the contempt sanction for the regular processes of civil and criminal litigation. The “pattern or practice” formula is a proxy for the traditional limits on injunctions. A recurring pattern or an established practice shows that other remedies are inadequate. If they were adequate, there would be general compliance rather than systemic noncompliance. The threat of irreparable injury likewise accompanies a pattern or practice of violations. The inadequacy of other remedies makes the threatened injuries irreparable.

Institutional reform injunctions, then, are not ex post remedies for past violations. Officers who committed specific violations are liable individually, and neither tort plaintiffs nor criminal prosecutors need to show a pattern or practice to prevail against individual officers. Even if the officers responsible for the pattern or practice all have been held accountable in tort, the district court would still have power to issue prospective injunctive relief.

Formal critiques of the *Miranda* rules logically condemn institutional reform injunctions, unless the federal courts somehow have broader remedial powers to issue injunctions than to reverse convictions. Compared to reversing state convictions, enforcing institutional reform injunctions against local police departments involves a much more intrusive role for the federal courts. The *Lyons* line of cases reflected hostility to this sort of federal court intervention in local law enforcement. By contrast, when the courts announce a preventive rule in the course of deciding a concrete case, they neither impose affirmative obligations nor intrusive monitoring duties on the police.

The police themselves participate in the process for formulating a decree, and the district judges typically delegate primary enforcement responsibility to professional monitors. Nonetheless, in the § 14141 cases, the federal courts are enforcing rules promulgated by the courts themselves. These rules impose costly affirmative obligations on the police, obligations not themselves required by the Constitution, for the sake of preventing subsequent constitutional violations. For example, the New Orleans decree’s recording requirement imposes on state officers an affirmative duty to observe procedures not otherwise required by the Constitution.¹¹² If there were a constitutional case against prophylactic rules issued by the Supreme Court in the course of deciding individual cases, that case would seem to apply even more strongly against district courts converting injunctions into detailed codes of criminal procedure.

Let me illustrate the problem with a hypothetical case. Suppose that after the Supreme Court adopted Justice Scalia’s *Dickerson* dissent as a majority opinion, Congress responded by adopting a statute purporting to impose the *Miranda* rules on the states pursuant to Section Five of the Fourteenth Amendment. Suppose further that the statute requires no pattern-or-practice finding, but,

¹¹¹ See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

¹¹² Consent Decree NOPD, *supra* note 90, at 46.

insofar as it requires states to exclude noncoerced confessions for the sake of preventing actual, unconstitutional coercion in other cases, the courts uphold this statute as within the Section Five enforcement power.

If the formal critique were given constitutional force by way of Article III, as Grano and Justice Scalia argued, the federal courts could not reverse state convictions challenged under the federal habeas corpus statute. To do that would be to do precisely what Grano and Scalia said was forbidden to the federal courts when state courts admitted evidence obtained in violation of the *Miranda* rules. I see no plausible way to deny judicial power to issue preventive rules in the course of deciding concrete appellate cases, yet also approve of judicial power to issue sweeping institutional reform injunctions.

The formal critique of the *Miranda* rules has disturbing implications for Fourth Amendment jurisprudence and for § 14141 proceedings. Logically applied, the formal critique would require assessing whether searches and arrests are “unreasonable” on a case-by-case basis through a totality-of-the-circumstances test, converting the Fourth Amendment into Amsterdam’s “immense Rorschach blot.”¹¹³ It would require abandoning the exclusionary rule to the extent that the rule is thought to be based solely on deterrence of future violations. It also would deny federal district courts authority to invoke injunctive relief for anything more than the cessation of official acts which violate constitutional rights, even when blessed by statute. Prudent jurists might regard a theory carrying such pervasive destabilizing implications with skepticism.

II. THE OVER- AND UNDER-REGULATION CRITIQUES

Many other critics of the *Miranda* rules object not to their formal character but to their substantive content. The *Miranda* rules, being rules, can be criticized for being overinclusive or underinclusive of unconstitutional police practices. The first line of critique argues that the *Miranda* rules bar humane questioning that could solve serious crimes. The second line generally points to other policies that might decrease coercion and increase reliability. *Miranda* certainly does not go as far as some of these proposals, and at least arguably has gotten in the way of more serious reforms. Parts III and IV reconsider these objections in light of the ways in which the criminal justice system has changed in the last fifty years.

A. *The Over-Regulation Critique*

Criticism of *Miranda* for over-regulating the police began with the dissenting opinions of Justice Harlan and Justice White. Justice Harlan acknowledged the empirical uncertainties, but argued “that the Court is taking a real risk with society’s welfare in imposing its new regime on the country.”¹¹⁴ Justice White wrote that “[i]n some unknown number of cases the Court’s rule will return a

¹¹³ Amsterdam, *supra* note 46, at 393.

¹¹⁴ *Miranda v. Arizona*, 384 U.S. 436, 517 (1966) (Harlan, J., dissenting).

killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him.”¹¹⁵

More than twenty years later, a Department of Justice Report made the same charge: “In a substantial proportion of criminal cases, confessions and other statements from the defendants are indispensable to a successful prosecution. When statements are not obtained in such cases through the operation of *Miranda*’s system, criminals go free.”¹¹⁶ Prominent commentators, including Grano, Gerard Caplan, and Paul Cassell, have made the same basic point.

B. *The Under-Regulation Critique*

Criticism of *Miranda* for under-regulating the police likewise arose immediately and has never ceased. In their brief for the ACLU in *Miranda*, Amsterdam and Paul Mishkin had argued that actual consultation with counsel was essential to dispelling coercion.¹¹⁷ The Court refused to go so far, prompting Amsterdam to write that “*Miranda* does not go far enough. Although its standards governing waiver of the right to counsel are strict, it does permit findings of waiver to be made. Those findings will be made by the same old trial judges, following the same old swearing contest.”¹¹⁸

Those who argue that *Miranda* has left the police under-regulated have advanced a variety of plausible alternative rules. For example, Richard Leo and his coauthors have proposed relying on Federal Rule of Evidence 403 to review confessions for reliability.¹¹⁹ Eve Primus has suggested resurrecting the voluntariness standard.¹²⁰ Many writers have argued for a recording requirement.

Now, it is logically possible to advance *both* lines of substantive critique. For example, Caplan, after assessing *Miranda*’s damage to crime control, put forward a menu of promising alternatives:

¹¹⁵ *Id.* at 542 (White, J., dissenting).

¹¹⁶ U.S. DEP’T OF JUSTICE, REP. NO. 1, REPORT TO THE ATTORNEY GENERAL: THE LAW OF PRE-TRIAL INTERROGATION 97 (1986) (footnote omitted).

¹¹⁷ Brief for American Civil Liberties Union as Amicus Curiae Supporting Petitioner at 22-31, *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹¹⁸ Anthony G. Amsterdam, *The Rights of Suspects*, in THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 402, 424 (Norman Dorsen ed., 1970) (indicating that while *Miranda* provides certain protections, it is insufficient in the author’s view and is unlikely to be extended).

¹¹⁹ Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 793 (2013) (arguing for a reliability test based on Federal Rule of Evidence 403, which would prevent false confessions from being presented at trial).

¹²⁰ Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 3 (2015) (observing that the doctrines set forth in *Miranda* and *Massiah* to protect those being interrogated by the police have been undermined so much so that the only option to protect these suspects is the voluntariness doctrine).

Requiring the government to prove voluntariness beyond a reasonable doubt, rather than by a preponderance of the evidence, would have accomplished much. A higher burden of proof would have encouraged further compliance with the law and stimulated the government to find improved evidentiary methods for proving its adherence. In addition, the Court could have added teeth to the voluntariness test by establishing *per se* rules forbidding certain practices. Certainly, the totality of the circumstances test could have been modified to ban behavior that was inherently coercive. A time limit for questioning suspects would have been a strong prophylactic against police abuse and probably would have attracted broad based support. Perhaps the presence of neutral observers from the community to witness the interrogation could have been encouraged. . . . Finally, current technology makes videotaped interrogations practical. A rule mandating recording would confine extensive questioning to those cases in which it mattered most and would provide an accurate record by which the judiciary could evaluate the police pressure on the suspect.¹²¹

Obviously enough, every plausible regulation of police interrogation has costs and benefits. The gist of all substantive critiques is that *Miranda* instantiated the wrong set of rules. In what follows I argue that changes in the criminal justice system since the Court decided *Miranda* have very much altered these costs and benefits, generally weakening the over-regulation critique and generally reinforcing the under-regulation critique.

III. MAJOR SYSTEMIC CHANGES WITH IMPLICATIONS FOR INTERROGATION LAW

It would take an entire article, or more likely a book, simply to describe all the changes in American criminal justice since 1966. Focusing on changes that have implications for the *Miranda* rules, I note four major types of change. First are changes induced by *Miranda* itself, i.e., strategic behavior by police and by criminals. Second, technological and doctrinal changes have substantially increased sources of evidence other than custodial interrogation. Third, institutional changes have given the prosecution more power—dramatically more power. Sentences are longer, even for easily proved possessory offenses. The prosecution has gained corresponding leverage in plea-bargaining. Fourth, terrorism has become a far more palpable threat in the last fifty years. I turn now to the relationship between police interrogation and each of these changes.

A. *Strategic Behavior in Response to the Miranda Rules*

The *Miranda* decision itself changed the way both police and criminals operated. Police developed three strategies for coping with the new doctrine.

¹²¹ Caplan, *supra* note 4, at 1473-75.

First, the *Miranda* rules are limited to custodial interrogation.¹²² Ergo, when police question a suspect who is not under arrest, there is no constitutional requirement for the warning-and-waiver procedure.¹²³ The Supreme Court facilitated this strategy by adopting a narrow definition of custody.¹²⁴ A suspect who is “invited” to come to the police station for a “voluntary” interview is not “in custody” for *Miranda* purposes.¹²⁵

There is no definite data on the extent to which the police have turned to noncustodial questioning as a supplement, or alternative, to custodial interrogation which is subject to *Miranda*. The literature suggests that noncustodial questioning is commonplace.¹²⁶ In Cassell and Bret Hayman’s study, thirty percent of all police questioning of suspects was not custodial.¹²⁷

Second, police adopted various approaches to encouraging waivers from suspects in custody.¹²⁸ Whether due to these strategies or to a coercive stationhouse environment, most suspects given *Miranda* warnings waive their rights. In the more recent studies, the waiver rate is in the vicinity of eighty percent.¹²⁹ Once the suspect waives their rights, all the old interrogation tactics taught in the manuals and reviewed in *Miranda* are back in play.

¹²² See *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (finding when respondent voluntarily came to the police station for questioning, he was not considered in custody for purposes of *Miranda*).

¹²³ *Id.*

¹²⁴ *Id.* (“*Miranda* warnings are required only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’ It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.”).

¹²⁵ *Id.*

¹²⁶ See, e.g., Aurora Maoz, Note, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1320 (2012) (“Officers often manipulate delivery of the warnings and conduct nominally noncustodial interviews in order to avoid constitutional restraints.”).

¹²⁷ Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 927 (1996).

¹²⁸ George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: “Embedded” in Our National Culture?*, 29 CRIME & JUST. 203, 244 (2002) (“[T]here appears to be relatively little dispute . . . [that] police appear to have successfully ‘adapted’ to the *Miranda* requirements. In practice, this means that police have developed strategies that are intended to induce *Miranda* waivers. . . . [P]olice appear to elicit waivers from suspects in 78-96 percent of their interrogations.”).

¹²⁹ See Cassell, *supra* note 127, at 859 (“The evidence, although generally quite dated, suggests that about 20% of all suspects invoke their *Miranda* rights.”). In Cassell and Hayman’s study of interrogations in Salt Lake City, the authors found “that of suspects given their *Miranda* rights, 83.7% waived them. Reflecting the practices of the local law enforcement agencies, virtually all of these waivers were verbal rather than written. At the same time, 16.3% invoked their rights.” *Id.* (footnote omitted); see also Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 394 (2007) (“In our survey [of 631 investigators from 16 departments], participants’ self-reported experiences were highly consistent with this finding,

Third, even when suspects invoke their rights, the police may continue questioning. The *Miranda* exclusionary rule ordinarily does not reach physical fruits¹³⁰ or admissions offered to impeach trial testimony.¹³¹ The police are not liable under § 1983 of the Civil Rights Act when they disregard the suspect's invocation.¹³² True, the Court has excluded fruits when custodial interrogation without the warnings was part of a calculated strategy to obtain a second, *Miranda*-compliant confession.¹³³ Yet the Court has also admitted evidence when an inadequate warning was followed by a question specifically asking about illegal possession of the firearm that ultimately was used to convict the suspect.¹³⁴

The frequency of police persistence following invocation is unknowable, but there are hundreds of citations to *Patane* in the reported decisions.¹³⁵ In a system where prosecutors may not go forward, the defense may plead out, and the ruling

as they estimated an overall waiver rate of 81%”).

¹³⁰ See *United States v. Patane*, 542 U.S. 630, 643 (2004) (plurality opinion) (“[A] failure to give a suspect *Miranda* warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements.”). In *Patane*, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, wrote “police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.” *Id.* at 641. Justice Kennedy, joined by Justice O'Connor, wrote a concurring opinion based on balancing the loss of the evidence against deterring future police misconduct, concluding:

In light of the important probative value of reliable physical evidence, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation. Unlike the plurality, however, I find it unnecessary to decide whether the detective's failure to give *Patane* the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself, or whether there is “[any]thing to deter” so long as the unwarned statements are not later introduced at trial.

Id. at 645 (Kennedy, J., concurring).

¹³¹ *Harris v. New York*, 401 U.S. 222, 226 (1970) (holding that while a statement may be inadmissible because it does not meet the requirements set forth in *Miranda*, it may still be used for impeachment of the defendant's credibility).

¹³² *Chavez v. Martinez*, 538 U.S. 760, 779 (2003) (plurality opinion).

¹³³ See *Missouri v. Seibert*, 542 U.S. 600, 621 (2004) (Kennedy, J., concurring) (“When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps.”).

¹³⁴ See *Patane*, 542 U.S. at 634-35 (plurality opinion). In *Patane*, officers arrested the defendant for violation of a restraining order. *Id.* at 634. They also had information that the defendant, who had a felony record, kept a gun in violation of federal law. *Id.* The defendant interrupted the reading of the warning, stating that he knew his rights. *Id.* at 635. The officers then questioned defendant about the gun. *Id.* Eventually he admitted to having the weapon and told the police where the gun was kept. *Id.*

¹³⁵ A Westlaw search of the federal cases alone for “542 U.S. 630” produced 411 hits as of April 9, 2017.

on the motion may not be appealed, the frequency of the phenomenon is certainly understated. Moreover, because waiver, rather than invocation, is the norm, the reported cases suggest that the opportunity is exploited in a higher percentage of invocation cases than one might suppose.

Even if the police cross the less than bright line between good and bad faith violations, the physical fruits may still be received under some other exception to the exclusionary rule. Inevitable discovery, in particular, is sometimes a plausible exception once the contraband has been found by tainted admissions.¹³⁶ When the suspected fruits are drugs or guns, the incentive to continue the interrogation despite invocation is the perfectly understandable desire to “get the stuff off the streets.”

Criminals also responded to the *Miranda* doctrine. A minority of suspects invoke their rights, and these suspects tend to be more sophisticated or more hardened offenders.¹³⁷ Since the Court’s decision in *Edwards v. Arizona*,¹³⁸ prohibiting police-initiated waivers following an initial invocation of the right to counsel,¹³⁹ professional criminals have learned to “lawyer up” in response to the warnings.

The implications of substantive critiques for the *Miranda* rules are interesting. The critique that the *Miranda* rules are unduly restrictive of police questioning confronts some difficult challenges from the fact that *Miranda* has been part of the system for fifty years. If we were to abandon *Miranda*, experienced criminals would still know to refuse to make a statement in the absence of counsel. But, could the police obtain voluntary admissions from many of these suspects? If the voluntariness test were clarified to recognize any formula for stopping the interrogation, the formula would be learned and exploited by sophisticated criminals. The post-*Miranda* policy calculus, then, is different than the pre-*Miranda* calculus.

¹³⁶ See, e.g., *United States v. Almeida*, 434 F.3d 25, 29 (1st Cir. 2006) (holding that drugs discovered after a *Miranda* violation occurred were admissible under the inevitable discovery exception).

¹³⁷ See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996) (“[W]hile 89% of the suspects with a misdemeanor record and 92% of the suspects without any record waived their *Miranda* rights, only 70% of the suspects with a felony record waived their *Miranda* rights. Put another way, a suspect with a felony record in my sample was almost four times as likely to invoke his *Miranda* rights as a suspect with no prior record and almost three times as likely to invoke as a suspect with a misdemeanor record. This result confirms the findings of earlier studies, as well as the conventional wisdom among the detectives I studied, who complained that ex-felons frequently refuse to talk to them as a matter of course.” (footnote omitted)); see also Cassell & Hayman, *supra* note 127, at 895 (finding no statistically significant difference in the invocation rates for suspects with and without criminal history, but defining criminal history as any adult arrest, misdemeanors included which “might not have involved delivery of the *Miranda* warnings”).

¹³⁸ 451 U.S. 477 (1981).

¹³⁹ *Id.* at 486-87 (holding that after a suspect invokes the *Miranda* right to counsel, the police may not obtain a valid waiver by initiating subsequent interrogation).

As for criticism of *Miranda* for under-regulating police questioning, if noncustodial interviews are to be regulated we would need to provide workable rules for the police. Currently, a suspect “invited” to the station and questioned there by police who intend to arrest him, no matter what he says, is not entitled to the *Miranda* procedure. On the other hand, when police talk to the suspect in the suspect’s house, or over the telephone, the environment is significantly different. Police might still lie about the evidence or minimize the suspect’s guilt, but these tactics would not be reinforced by the tension attending confinement in a total institution. While alternative regulations of custodial interrogations have been proposed, workable regulation of noncustodial questioning is at best a work in progress.

B. *Expanding Alternative Sources of Evidence*

One striking difference between law enforcement in the 1960s and law enforcement today is the dramatic increase in the ways a criminal case can be proved. In 1966 forensic science was still in infancy. Fingerprints and ballistic comparisons were well established, but there was no DNA technique. The homicide and rape cases, characterized respectively by no victim to testify or by a victim who might be discredited by a jury, were the leading exhibits supporting giving the police wide latitude in questioning suspects. Not all those cases can be solved with DNA evidence, but many of them can be, and the need for confessions to resolve these very serious cases is correspondingly reduced.

It is estimated that “fewer than 20% of violent crimes involve biological evidence.”¹⁴⁰ Even the twenty percent figure is impressive. In 1966, of course, the percentage was zero. DNA evidence is more likely in rape¹⁴¹ and murder cases.¹⁴²

The DNA technique has created another seismic shift. DNA testing has not only strengthened police investigations, it has also shown how often those investigations come to erroneous conclusions. While statistics were gathered,

¹⁴⁰ Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 835 (2010) (observing the connection between wrongful convictions and biological testing).

¹⁴¹ The infamous “rape kit backlog” suggests that there is available DNA evidence in many more rape cases than are actually solved by DNA testing. See Nora Caplan-Bricker, *The Backlog of 400,000 Unprocessed Rape Kits Is a Disgrace*, NEW REPUBLIC (Mar. 9, 2014), <https://newrepublic.com/article/116945/rape-kits-backlog-joe-biden-announces-35-million-reopen-cases> [<https://perma.cc/3U7J-EYT7>].

¹⁴² David Schroeder studied the role of DNA evidence in homicide cases investigated in Manhattan from 1996 to 2003. David Schroeder, *DNA and Homicide Clearance: What’s Really Going On?*, 7 J. INST. JUST. & INT’L STUD. 276, 276 (2007). Schroeder found “that 270 cases (DNA-CMD-2, -3, and -4 combined) out of a total 593 (or 45.5%) have the potential for the creation and use of a DNA analysis as part of the investigation. Out of the 270 cases that have the potential to use a DNA analysis, only 40 did. This means that analyses of DNA evidence taken from homicide crime scenes are only being conducted in 14.8% of the cases in which a DNA analysis could possibly be conducted.” *Id.* at 286.

the evidence showed about a fourth of conclusive DNA tests excluded rather than included the suspect.¹⁴³ If you view detectives sweating suspects through the lens of Learned Hand's "unreal dream," you will have a different view of confessions than if you assume that a fourth of those hearing the warnings are innocent.¹⁴⁴ While false confessions are indeed rare, they are not exotic in exoneration cases.¹⁴⁵

Another change that might have surprised the court-watchers of the 1960s is the extent to which the Court has allowed the use of informants, including those whose conversations are electronically recorded. After *Katz v. United States*,¹⁴⁶ it was by no means clear whether there was a reasonable expectation of privacy in conversations free from secret recording.¹⁴⁷ Five years after *Miranda*, however, the Court held that electronic monitoring was not a Fourth Amendment search and therefore could be lawful even when "unreasonable."¹⁴⁸ Undercover agents and confidential informants are not subject to even the *Terry* suspicion standard, let alone the warrant requirement.

Just like electronic consumer products, transmitting devices have become cheaper and smaller. Today they can be concealed "in buttons, in pens, at the point of a pen, in a cuff link or the edge of a tie clip."¹⁴⁹ Cases clinched by undercover recordings are staples of the law reports. The reported cases do not include those that end in guilty pleas or those where the recording is used only to support a warrant application.

In 1966, wiretapping was prohibited by the Communications Act, although its illegal use by police was not uncommon.¹⁵⁰ Title III of the 1968 Crime

¹⁴³ See Peter Neufeld & Barry C. Scheck, *Commentary*, in EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, at xxviii, xxviii-xxix (1996).

¹⁴⁴ *United States v. Garsson*, 291 F. 646, 649 (1923) ("Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.").

¹⁴⁵ According to the University of Michigan's National Registry of Exonerations, there were 149 exonerations in 2015, twenty-seven (approximately eighteen percent) of which were based on false confessions. See NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, at 1 (2016) (analyzing the statistics and the circumstances surrounding exonerations in 2015).

¹⁴⁶ 389 U.S. 347 (1967).

¹⁴⁷ *Id.* at 359 (reversing the conviction of the defendant because it was based partially on conversations heard through the wiretap, which should have been protected under the Fourth Amendment).

¹⁴⁸ See *United States v. White*, 401 U.S. 745, 754 (1971).

¹⁴⁹ Wendy Ruderman, *Is Our Little Talk Being Recorded? It's Harder to Tell*, N.Y. TIMES, Apr. 8, 2013, at A17 (describing the technological advances used by government agencies in criminal investigations).

¹⁵⁰ See *Nardone v. United States*, 302 U.S. 379, 382-85 (1937) (holding that the Communications Act's prohibition on interception and divulgence implied excluding evidence obtained by violating the act through testifying about information heard from wiretapping); see also *Schwartz v. Texas*, 344 U.S. 199, 201-04 (1952) (holding that the *Nardone* exclusionary rule applies only in federal proceedings).

Control Act authorized wiretapping subject to a stringent and costly warrant procedure.¹⁵¹ Burdensome as it may be, today's law enforcement officers have the option of lawfully intercepting communications, an option that was unavailable to their *Miranda*-era counterparts.

Technology and doctrine have given today's police at least one more extremely powerful investigative resource—big data. In the 1970s the Supreme Court held that when the government seeks financial records from the suspect's bank, the suspect has no Fourth Amendment right to the warrant requirement or even to the *Terry* reasonable-suspicion standard.¹⁵² Subsequently the Court held that collecting the envelope information on outgoing landline calls was not a "search."¹⁵³

In the internet age this third-party-records doctrine opens a window on almost everyone's day-to-day life.¹⁵⁴ As of this writing, over some forceful judicial opinions taking the other view, the Courts of Appeals have held that the government does not need a search warrant to compel the production of historical location data from cell phone service providers.¹⁵⁵ With more support from intuition than from logic, the courts have protected *the content* of e-mails and text messages against warrantless collection.¹⁵⁶ That limitation, however, leaves a great deal of detailed information as fair game (and, of course, the government can access the communications if it obtains a search warrant). Given the "digital dossiers" compiled by our internet traffic and electronic purchases—dossiers that, in this country, are never expunged—police can build a thorough

¹⁵¹ 18 U.S.C. § 2516 (2012).

¹⁵² *United States v. Miller*, 425 U.S. 435, 443 (1976) (holding that there is no reasonable expectation of privacy in cashed checks or deposit statements).

¹⁵³ *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979) (rejecting a Fourth Amendment challenge to warrantless use of a pen register device).

¹⁵⁴ *See, e.g., Daniel J. Solove, Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1089-90 (2002) (discussing how the development of technology has led to third parties holding records and how those records are "becoming increasingly useful to law enforcement officials").

¹⁵⁵ *See, e.g., United States v. Graham*, 824 F.3d 421, 424 (4th Cir. 2016) (en banc) (holding that no warrant is required for government access to service provider location data).

¹⁵⁶ *See United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010). In *Warshak*, the defense moved to suppress stored e-mails, including content obtained by an order under the Stored Communications Act ("SCA") for disclosure by the Internet service provider ("ISP") of e-mails more than six months old. *Id.* at 292-93. The e-mails were turned over based on a showing of articulable suspicion rather than probable cause. *Id.* at 291. The Court held the SCA unconstitutional insofar as it authorized compelled disclosure of e-mail content without a traditional warrant. *Id.* at 288. *Warshak* has become the leading case. *See Orin S. Kerr, The Next Generation Communications Privacy Act*, 162 U. PA. L. REV. 373, 400 (2014) ("*Warshak* has been adopted by every court that has squarely decided the question. The case law is not entirely settled, as only one federal court of appeals has squarely addressed the issue. But the trend in the case law is to recognize fairly broad Fourth Amendment protection, backed by a warrant requirement, for stored contents such as emails.").

account of a suspect's location over time, as well of the suspect's associates and transactions.¹⁵⁷

C. *The Modern System's Greater Power to Induce Cooperation*

Interrogation is one way to extract an admission of guilt. It is not, however, the only way. The prosecution can confront the accused with a difference between the sentence expected if convicted at trial and the sentence expected after a plea of guilty. This sort of pressure was a familiar part of the system in the 1960s. In the fifty years since, it has become not just part of the system but very close to the system itself.¹⁵⁸ "In 1980, one defendant went to trial for every four who pled guilty. By 1999, that ratio fell to one in twenty."¹⁵⁹ Three related legal developments contributed to the change.

First, the adoption of sentencing guidelines reduced judicial sentencing discretion.¹⁶⁰ Second, where guidelines curtailed judicial discretion, mandatory minimum sentences eliminated it.¹⁶¹ Mandatory sentences, however, apply only

¹⁵⁷ See Solove, *supra* note 154, at 1090-103 ("For instance, from pen registers and trap and trace devices, the government can obtain a list of all the phone numbers dialed to or from a particular location, potentially revealing the people with whom a person associates. From bank records, which contain one's account activity and check writing, the government can discover the various companies and professionals that a person does business with (ISP, telephone company, credit card company, magazine companies, doctors, attorneys, and so on). Credit card company records can reveal where one eats and shops and which cultural events one attends. The government can obtain one's travel destinations and activities from travel agent records. . . . A person's ISP can also keep records about websurfing and e-mail activity. At the government's request, an ISP can keep logs of the e-mail addresses with which a person corresponds. Further, the government can use ISP information to find out who uses a particular e-mail address." (footnote omitted)).

¹⁵⁸ See *Missouri v. Frye* 132 S. Ct. 1399, 1407 (2012) ("To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." (alterations in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992))).

¹⁵⁹ Irwin H. Schwartz, *Consequences of the Disappearing Criminal Jury Trial*, CHAMPION, Nov. 2001, at 7, 7.

¹⁶⁰ See, e.g., Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1011 (2005) ("Because the regulatory burden of sentencing guidelines now falls on judges rather than prosecutors, long-term trends in the law of sentencing have made prosecutors more powerful relative to judges." (footnote omitted)).

¹⁶¹ See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 69 (2009) ("Between the mid-1970s and the mid-1980s, every American state but one enacted at least one new mandatory penalty law. Most adopted many such laws for violent, sexual, and drug offenses and for 'career criminals.' The U.S. Congress repeatedly, between 1984 and 1996, enacted new mandatory sentencing laws and increased penalties under existing ones. The first 'three strikes and you're out' law was enacted by referendum in Washington State in 1993 and was followed most famously in California in 1994 but also by more than 23 other states and the federal

when sought by the prosecution; they can be avoided by a plea to a different charge, or to an agreement not to allege and prove the triggering facts, or by entering a substantial assistance motion.¹⁶²

Of course, the prosecution has to credibly threaten conviction at trial to make these incentives effective. Given a sufficiently catastrophic trial penalty, however, it may be irrational for even innocent defendants to elect to stand trial. Moreover, the third of these legal developments—the increasing role of possessory offenses or so-called “proxy crimes”—has significantly increased the credibility of the prosecution’s trial threat.¹⁶³

Today, very serious penalties apply to such proxy crimes as possession with intent to deliver illegal drugs, conspiracy or attempt to distribute, possession of firearms by felons, carrying a firearm during a drug offense, and so on.¹⁶⁴ In these cases the testimony of the arresting officers typically will establish guilt beyond reasonable doubt. Those who plead guilty can expect some reduction in sentence for accepting responsibility, and may be able to bargain for reduced charges or a substantial assistance reduction.¹⁶⁵

D. *Mass Incarceration*

Between 1970 and 2010 the U.S. per capita prison population quadrupled.¹⁶⁶ Crime rates rose from the early 1970s to the early 1990s and then declined

government.” (citations omitted)).

¹⁶² See, e.g., Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AM. J. CRIM. L. 1, 27 (2008) (“Much of the traditional discretion judges had in sentencing defendants has not disappeared from the criminal justice system but has shifted into the hands of prosecutors. With the cooperation of the prosecutor, the number of ways to avoid a mandatory minimum sentence is practically unlimited.”).

¹⁶³ See, e.g., Timothy P. O’Neil, *Confronting the Overcriminalization of America*, 48 J. MARSHALL L. REV. 757, 763 (2015) (“A proxy crime is a substitute crime; prosecution of a proxy crime is a stand-in for prosecuting a different crime that cannot be proven. If an eyewitness will not come forward for a crime of violence, then the solution is to find a proxy crime that does not require a citizen-eyewitness. And this is why drug and weapon possession cases take up so much of today’s criminal docket. These offenses require only one witness: the arresting police officer.”); see also U.S. SENTENCING COMM’N, STATISTICAL INFORMATION PACKET 1 fig.A (2015) (indicating that of those sentenced in federal courts in 2015, drugs, firearms, and child pornography crimes were the primary offense in, respectively, 31.9%, 10%, and 2.7% of the cases).

¹⁶⁴ See, e.g., 21 U.S.C. § 841(b)(1)(B)(iii) (2012) (prescribing five to forty year sentences for possessing twenty-eight grams or more of a substance containing cocaine base, i.e., crack).

¹⁶⁵ See U.S. SENTENCING COMM’N, *supra* note 163, at 11 tbl.8 (noting how, nationwide, federal prosecutors obtained substantial assistance reductions in 12.4% of cases and early disposition departures in 9.2% of cases).

¹⁶⁶ See STEVEN RAPHAEL & MICHAEL A. STOLL, *WHY ARE SO MANY AMERICANS IN PRISON?* 12 fig.1.1 (2013) (depicting the prison population growing from about 100 inmates per 100,000 United States residents to about 500 inmates per 100,000 residents in that

dramatically, but the prison population kept growing.¹⁶⁷ Mass incarceration has offended equality almost as much as it has offended liberty. Our national population is roughly twelve percent black, but African-American prison population, per capita, is roughly three times that.¹⁶⁸ Much of this is due to higher rates of offending, but much of it is also due to the enforcement of drug laws, even though there is no good reason to suppose higher rates of offending occurs among blacks as compared to whites.¹⁶⁹

American sentences are the highest in the western world.¹⁷⁰ They consume immense resources that might be put to better things. The marking out of a stigmatized, arguably ostracized, underclass has become a major social problem in its own right.¹⁷¹ Perhaps the most important challenge facing the criminal justice system today falls under the general rubric of “re-entry.”¹⁷²

In the immediate aftermath of *Miranda*, rising crime rates, riots, and assassinations understandably made law and order a grave concern. Today, there is no support—in the political system, in the academic literature, or indeed in public opinion generally—for any major expansion of social control via the

timespan).

¹⁶⁷ See, e.g., Yair Listokin, *Does More Crime Mean More Prisoners? An Instrumental Variables Approach*, 46 J.L. & ECON. 181, 183 fig.1, 185 (2003) (“According to the results presented here, the increase in crime experienced from 1970 to 1997 should have led to an 80 percent increase in incarceration. This does not suggest, however, that the mechanical theory offers a complete explanation for the secular rise in imprisonment in the United States over the past 30 years. Incarceration rates increased almost fivefold, rather than by 80 percent.”).

¹⁶⁸ E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 8 tbl.7 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf> [<http://perma.cc/QFL3-YUFV>] (indicating that 3% of black males are imprisoned, as opposed to 1% of Hispanic males and 0.5% of white males).

¹⁶⁹ See Donald A. Dripps, *Race and Crime Sixty Years After Brown v. Board of Education*, 52 SAN DIEGO L. REV. 899, 904-05 (2015) (detailing statistics that demonstrate that “blacks and whites use marijuana and cocaine at virtually identical rates,” even though “blacks are five times more likely to be convicted”).

¹⁷⁰ See Michael Tonry, *Equality and Human Dignity: The Missing Ingredients in American Sentencing*, 45 CRIME & JUST. 459, 483 (2016) (“[T]he United States has the longest prison sentences in the developed world.”).

¹⁷¹ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (opining that mass incarceration and the criminal justice system create the same social inequities that Jim Crow laws did when they were enacted).

¹⁷² See, e.g., THE FEDERAL INTERAGENCY REENTRY COUNCIL: A RECORD OF PROGRESS AND A ROADMAP FOR THE FUTURE, at iii (2016), <https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf> [<https://perma.cc/NFG2-UL7V>] (“All too often, returning citizens face enormous barriers that endure long after they have paid their debts to society – and with over 600,000 individuals released from federal and state prisons every year, societal choices about how we treat reentering individuals will have far-reaching implications for all of us. Without effective reentry policies, we risk perpetuating cycles of violence, victimization, incarceration and poverty in our neighborhoods.”).

criminal justice system.¹⁷³ Put another way, in the 1960s, the problem was seen, understandably, as *too few* people in prison. Today the problem, again understandably, is generally seen as *too many*.

IV. THE OVER-REGULATION CRITIQUE FIFTY YEARS AFTER *MIRANDA*

Apprehension about *Miranda*'s impact on law enforcement was perfectly understandable in 1966. Often the suspect was arrested on the basis of eyewitness testimony that by itself might fail to produce a conviction. A confession was one way, and often the only way, to clinch these cases. Forensic science, surveillance technology, record keeping, and communications were then in their infancy. Things are very different today.

In homicide and rape cases, trace evidence may make the case without any need for a statement from the suspect. In drug cases, the suspect's vehicles and premises may be searched, the latter subject to a warrantless inspection by the canine nose. Moreover, those suspects who do invoke, typically suspects with criminal records, may be vulnerable to all kinds of pressures to cooperate. They may be subject to the revocation of conditional release. They may be found in possession of a firearm when they have a felony record. They may be subject to a recidivism enhancement if they hazard trial and lose. They may fear that accomplices will rat them out unless they turn first.

Modern forensic science is of course not a panacea. A major limitation on both DNA and other trace evidence, and on data collections under the third-party doctrine, is that these techniques typically depend on identifying a suspect *ex ante*. There are cold-case DNA matches, but generally trace evidence is discovered by taking a sample from the suspect to match with a perpetrator sample, or searching for victim traces connecting the suspect. The *Miranda* rules, however, only regulate the police in the same circumstances. The suspect must be in custody, arrested on probable cause, before the *Miranda* rights come into play.

The chain of events that now leads to the loss of valuable evidence in *Miranda* cases is long and improbable:

- (1) The police have probable cause that a particular suspect is guilty. Otherwise, the arrest is illegal and any statements would be excluded by the Fourth Amendment exclusionary rule.
- (2) It is futile or impractical to question the suspect in a noncustodial setting.
- (3) It is futile or impractical to obtain admissions through informants.

¹⁷³ In 1999, John J. DiIulio, Jr., a prominent defender of tough-on-crime polices, published *Two Million Prisoners Are Enough*, in which he criticizes the laws at the time because, despite the fact that crime continued to decrease in the late 1990s, the prison population continued to grow. John J. DiIulio Jr., Opinion, *Two Million Prisoners Are Enough*, WALL STREET J., Mar. 12, 1999, at A14.

- (4) A digital portrait of the suspect does not produce enough evidence to convict or to support additional warrant searches.
- (5) The police do not have grounds for an electronic surveillance order, or do not believe the case is worth obtaining one.
- (6) The search incident to arrest did not unearth contraband that would lead to a long sentence.
- (7) After arrest, the suspect must invoke his *Miranda* rights.
- (8) The suspect would have made significant admissions absent *Miranda*.
- (9) These admissions would have survived a motion to suppress under the voluntariness test.
- (10) Conclusive trace evidence is not available.
- (11) The proof available does not enable prosecutors to induce a guilty plea.
- (12) The proof available does not enable prosecutors to turn an accomplice.
- (13) The suspect does not make significant admissions in pretrial detention.
- (14) Last, but not least, the suspect must, in fact, be guilty for the confession *Miranda* kept him from giving to count as a social cost.

Recall that those with criminal records are the most likely to invoke *Miranda*. Absent *Miranda*, these suspects will still say “I demand a lawyer. I have nothing to say to you.” The police would be free to continue, subject to the voluntariness test—perhaps one enhanced by a recording requirement. In some cases, they may succeed in getting useful admissions that can withstand scrutiny under the voluntariness test. It is fair to ask just how often this would be the case.

There is an important counterargument that all alternatives to confessions demand scarce law enforcement resources, so that making a case when the suspect invokes may cost other cases the police cannot get to. Two related rejoinders put this important point in perspective. First, the resources point undoes the rhetoric of repeat offenders getting away with murder. If some get away because they did not confess, *Miranda* was one but for cause of their escape. But society’s insistence on quick-and-dirty justice, or none at all, is, in many cases, another but for cause of their escape.

James Stephen reports a disturbing analogy. When asked why colonial Indian officers resorted to torture, a shrewd civil servant replied: “There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil’s eyes than to go about in the sun hunting up evidence.”¹⁷⁴ I do not mean to say that any particular officer is lazy or that questioning in violation of *Miranda* is tantamount to torture. I do say that a system that relies on confessions, not because other evidence is unavailable, but because gathering other evidence is too expensive, should not be taken to mean that the guilty escape “because” of limits on interrogation.

¹⁷⁴ 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 441-42 n.1 (London, MacMillan & Co. 1883).

Second, as we recover from the punishment binge of the last forty years, it seems odd to think of discounting the highest sentences in the world for the sake of a plea, or to turn a witness, as an offense to either crime control or retributive justice. Sure, in some cases (not many, but some) *Miranda* means the prosecution has to reassign resources or to come down on the length of the prison term. When so many of law enforcement's resources are directed at problematic goals, and when mass incarceration, including the billions it costs to maintain it, rivals crime as a social problem, it is not clear which way the resources point cuts.

V. ARGUMENTS THAT THE *MIRANDA* RULES UNDER-REGULATE THE POLICE

The scope of the changes in criminal justice in the last fifty years suggest some healthy skepticism about the utility of *any* doctrine that has changed very little over those same years. In general, changes in the criminal justice system have reduced the need for confessions, generally supporting some version of the under-regulation position. If we think of *Miranda* on its own terms—as one of many possible compromises between security and autonomy—we can see that the terms of trade have changed. Terrorism investigations aside, today's respect for autonomy costs less in security than in it did in 1966.

The development of new sources of evidence has another implication. Insofar as *Miranda* is thought to increase the reliability of confessions, DNA testing and data trails have made it easier to prove innocence as well as guilt. Thousands of DNA tests have *excluded* the suspect.¹⁷⁵ Location data has a similar power to exclude a suspect who would otherwise “fit,” by placing the suspect away from the crime scene. We do not have the statistic, but in at least some of these cases the evidence against the suspect probably included incriminating admissions made during interrogation. The risk of false confessions has not been eliminated, but it has been reduced by these collateral developments.

Technology suggests at least one way forward for confessions law. As frequent video clips of police behaving badly show, modern technology makes recording universally available at very little cost. Many jurisdictions have

¹⁷⁵ See Neufeld & Scheck, *supra* note 143, at xxviii-xxix (indicating that of 10,000 sexual assault cases, 2000 have excluded the suspect).

adopted recording policies,¹⁷⁶ generally with good results.¹⁷⁷ A constitutional recording requirement would cost little and have very low risks of unintended consequences.¹⁷⁸

Miranda itself provides a natural doctrinal basis for requiring recordings. The government bears the burden of proving waiver.¹⁷⁹ The suspect, moreover, may revoke a waiver at any time by clearly asserting his *Miranda* rights. The best proof that the suspect voluntarily waived and continued to talk voluntarily is a continuous recording of the entire interrogation, including the waiver. A Supreme Court majority willing to think about requiring recordings could justify such a decision as the logical application of *Miranda* more easily than it could under the voluntariness test.

Two special features of recording provide powerful support for a constitutional requirement, whether based on *Miranda* or the voluntariness test. First, there is experience in many jurisdictions suggesting that recording improves the judicial review of the interrogation process without significantly reducing police effectiveness. Second, a constitutional requirement would inform further development of the law. We would have an accurate description of police practices all over the country. If we are to rely on judge-made law in

¹⁷⁶ See, e.g., THOMAS P. SULLIVAN, COMPENDIUM: ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS 7-8 (2016), <https://www.nacdl.org/electronicrecordingproject> [<https://perma.cc/D262-Y7P9>] (indicating that twenty-four states have adopted some variation of a court recording policy); Andrew E. Tazlitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J.L. & SOC. POL'Y 400, 408 (2012) ("For example, Illinois, the District of Columbia, Maine, Maryland, Nebraska, New Mexico, North Carolina, and Wisconsin have adopted mandatory recording laws for a variety of felony investigations. Alaska, Massachusetts, and Minnesota have recording requirements imposed by judicial decision. The New Jersey and Indiana Supreme Courts have, likewise, required recording via court rule." (footnotes omitted)).

¹⁷⁷ See, e.g., William A. Geller, *Videotaping Interrogations and Confessions*, NAT'L INST. JUST. 5 (Mar. 1993), <https://www.ncjrs.gov/pdffiles1/Digitization/139962NCJRS.pdf> [<https://perma.cc/BLS5-DWQL>] ("The vast majority of surveyed agencies that videotape interviews believed that videotaping has led to improvements in police interrogations . . ."). See generally Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005) (summarizing benefits of recording policies).

¹⁷⁸ See Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 316 (2003) ("What is needed is a constitutional rationale for rules like this, one that would at least be persuasive in state, if not in federal, court. Such a rationale could come from at least three different constitutional provisions—the Due Process Clause, the Fifth Amendment Privilege Against Self-Incrimination, and the Sixth Amendment Right of Confrontation.").

¹⁷⁹ See *id.* at 319 ("The Supreme Court has held that the state must prove by a preponderance of the evidence that police gave warnings, that the suspect understood the warnings, and that any waiver of the rights incorporated in those warnings is voluntary and intelligent. If one assumes that voluntariness cannot be assessed without taping, the tapeless prosecutor cannot meet that burden . . ." (footnote omitted)).

this area, that law should be made by judges who have seen interrogations with their own eyes.

The familiar point that the *Miranda* rules do not exclude other rules, like a recording requirement or a time limit, bears repetition. Whether *Miranda* caused the stagnation of confessions law is dubious. The multiplicity of recording policies adopted since *Miranda* cast considerable doubt on the *Miranda*-froze-the-law argument. Fourth Amendment cases, moreover, point in the other direction. The Court itself has modified Fourth Amendment doctrine in response to both technological change and to the evolving interaction of the various rules it has announced.¹⁸⁰

On those rare occasions when interest group politics have supported legislative regulation of the police, the symbolic force of the Court's jurisprudence has not held them back. Congress enacted Title III's stringent warrant procedure because of *Katz*, not in spite of it.¹⁸¹ After the Court rejected the claim that warrants alone were insufficient safeguards when the police searched the offices of journalists,¹⁸² Congress responded with a statutory fix.¹⁸³ *Lyons* did not forestall § 14141.

Ideology, on the Court and off, gives a better explanation than *Miranda* symbolism to explain the comparative stagnation of confessions law. The Court itself has not treated *Miranda* as gospel. Court majorities since *Miranda* have generally, but not invariably, narrowed both the *Miranda* rules and the exclusionary rule that enforces them.¹⁸⁴

Ideology has played a role, but at least one other important factor is the uncertainty of just what alternatives deserve legal recognition, whether by constitution, statute, or regulation. In the Fourth Amendment cases the question generally is whether or not to require a warrant. We know much about the costs and benefits of search warrants.¹⁸⁵ We know much about recording policies, but

¹⁸⁰ See *supra* note 11 and accompanying text.

¹⁸¹ The legislation's illuminating title was The Omnibus Crime Control and Safe Streets Act. See generally Harris, *supra* note 38 (describing the political impulse for "The Omnibus Crime Control and Safe Streets Act").

¹⁸² *Zurcher v. Stanford Daily*, 436 U.S. 547, 559-63 (1978) (holding that the standard for issuing warrants to search a newspaper office is not higher than the usual requirement of probable cause).

¹⁸³ See 42 U.S.C. § 2000aa(a) (2012) (indicating that work product may not be searched and seized unless "there is probable cause to believe that the person possessing such materials has committed . . . the criminal offense to which the materials relate").

¹⁸⁴ See Stone, *supra* note 30, at 100 ("In terms of its decisions on the merits, the Court, in the years since Warren Burger assumed the role of Chief Justice, has handed down eleven decisions concerning the scope and application of *Miranda*. In ten of these cases, the Court interpreted *Miranda* so as not to exclude the challenged evidence.").

¹⁸⁵ See generally RICHARD VAN DUIZEND, L. PAUL SUTTON & CHARLOTTE A. CARTER, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* (1985); Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221

we know much less about time limits, reliability reviews, rifle-shot bans on specific interrogation tactics, or extending admonitions or recording requirements to noncustodial questioning.

The Court could encourage experiments with policies like these within the *Miranda* framework. If the suspect invokes the *Miranda* right to counsel, the *Edwards* line of cases bars police-initiated interrogation.¹⁸⁶ Under *Michigan v. Mosley*,¹⁸⁷ however, if the suspect invokes the right to silence, the police may reapproach the suspect after a break in the action.¹⁸⁸ If some of the justices floated in dicta the suggestion that jurisdictions that adopted *Miranda*-plus policies might have a strong case for treating invocations of counsel under the *Mosley* standard rather than the *Edwards* rule, we might see some movement toward such *Miranda*-plus policies. A similar incentive might be offered by applying the Fourth Amendment exclusionary rule, which excludes derivative evidence, to *Miranda* violations in jurisdictions that did not follow *Miranda*-plus policies, such as a recording requirement.¹⁸⁹

CONCLUSION: GO FOURTH, FIFTH AMENDMENT!

In the Fourth Amendment cases, the Court, for decades spanning changes in both the times and the justices, has applied what Amsterdam called the regulatory, as opposed to the atomistic, perspective. *Miranda* started down that same path, by adopting prospective and general rules designed to prevent, rather than to repair, constitutional violations. But in the *Miranda* cases, succeeding generations of justices have reverted to an atomistic focus on the defendant's personal rights.

That did not happen in the Fourth Amendment cases. There are, to put it mildly, genuine disagreements about the Fourth Amendment. But with search

(2000).

¹⁸⁶ See *Arizona v. Roberson*, 486 U.S. 675, 682-85 (1988) (holding that following invocation of the right to counsel, the ban on police-initiated interrogation includes questioning about factually unrelated crimes); *Edwards v. Arizona*, 451 U.S. 477, 486-87 (1981) (holding that a petitioner's confession could not be used against him because he did not have counsel at the interrogation and did not waive his right to counsel).

¹⁸⁷ 423 U.S. 96 (1975).

¹⁸⁸ *Id.* at 104-07 (holding that questioning surrounding another crime which produced incriminating information for the defendant did not violate *Miranda* even after defendant said he wanted to remain silent); see also Steven P. Grossman, *Separate but Equal: Miranda's Rights to Silence and Counsel*, 96 MARQ. L. REV. 151, 154 (2012) ("The result of this differential treatment has been that suspects who invoke their right to silence receive far less protection from their Fifth Amendment rights than do suspects who invoke their right to counsel."). If the Court eventually agrees with Steven Grossman and subjects invocations of counsel to the *Edwards* rule, it would still be possible to apply the *Mosley* standard to invocations of both silence and counsel when the police follow *Miranda*-plus policies.

¹⁸⁹ This would not be a radical step. A strong case can be made for applying the "fruit of the poisonous tree doctrine" in *Miranda* cases to deter violations. See *United States v. Patane*, 542 U.S. 630, 645 (2004) (Souter, J., dissenting); *id.* at 647 (Breyer, J., dissenting).

and seizure, the issues are seen as what rule to adopt, not whether to adopt a rule, and how to adapt, not whether to adapt a body of judge-made constitutional law to social, institutional, technological, and legal changes. If those are the right issues to focus on when we argue about the Fourth Amendment, as I think they are, they are also the right issues to focus on when we argue about the Fifth.