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Essay

No Time for Silence

Susan R. Klein*

The "right to remain silent" is on life-support, and its death, should the Court so decree it, will not be quick or painless. This moribund right was enshrined in the Court's most famous criminal procedure case, *Miranda v. Arizona*,[1] when the privilege against self-incrimination was extended to the stationhouse. The coercion of confessions from criminal suspects had long been condemned, both because a resulting statement is unreliable and because society disapproves of the abusive police tactics involved in obtaining such a statement.[2] In 1966, Chief Justice Warren commanded that police officers warn suspects of their rights to remain silent and obtain counsel prior to custodial interrogation and mandated the exclusion of any statements taken without a knowing and intelligent waiver of these rights.[3] After all, of what value is the Fifth Amendment privilege against being "compelled in any criminal case to be a witness against oneself"[4] if one can be forced to make the same damaging admissions in a civil proceeding or at the police station and such statements are admissible in a subsequent criminal proceeding?[5]

However, almost immediately on the heels of *Miranda*, the Burger and Rehnquist Courts began the series of nicks and cuts that, while not yet fatal, have led to critical blood loss. Through a series of cases in the 1970s and 80s,[6] the Court "deconstitutionalized" *Miranda*. Contrary to the criticism of

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1. Miranda v. Arizona, 384 U.S. 436 (1966) (5-4 decision).

2. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534, 540–41 (1961) (reversing the conviction based upon an involuntary confession "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system").

3. *Miranda*, 384 U.S. at 492.

4. U.S. CONST. amend. V.

5. *See generally* 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 (1966).

6. *See infra* notes 91–94.

most scholarship on the issue, this change did not occur through the Court's crafting of a series of exceptions to *Miranda* and its exclusionary rule. After all, most constitutional doctrines have some exceptions, and "no constitutional rule is immutable."[7] Rather, the problem lies in the reasoning the Court offered to justify the exceptions. Then-Justice Rehnquist explained that the *Miranda* rules "were not themselves rights protected by the Constitution," but only "measures to insure that the right against compulsory self-incrimination was protected."[8] Perhaps as important, Justice Rehnquist stated, in dicta in the 1990 Fourth Amendment case *United States v. Verdugo-Urquidez*, that a violation of the privilege against self-incrimination "occurs only at trial."[9] Is there actually a "right to silence" if peace officers can use harassing and abusive tactics against suspects so long as the resulting statements are not used in a subsequent criminal trial?

As I predicted with unfortunate accuracy almost a decade ago, the confluence of these decisions has led to two related Fifth Amendment failures.[10] First, if enshrined in a holding, the *Verdugo* reasoning would preclude civil rights liability for a violation of either *Miranda* or the privilege itself, under 42 U.S.C. § 1983 or *Bivens*,[11] so long as the resulting statement was not admitted in a criminal trial. There can be no recovery for innocent and uncharged suspects, as there will be no criminal trial in which the statement could be offered, and there can be no recovery for charged defendants, as the statements will be excluded. Second, the impossibility of monetary sanctions encourages a rational police department to pursue a policy of failing to administer the *Miranda* warnings in a timely manner and refusing to honor any invocation of these rights. There is simply nothing to lose and much to gain by way of impeachment evidence, fruits, or other leads.

The Court was poised two terms ago to resolve the profound constitutional question raised by *Miranda*'s deconstitutionalization—if the warnings are not required by the Constitution, from where does a federal court derive Article III authority to hear such a case (much less reverse a state criminal conviction or impose monetary damages on government

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7. Dickerson v. United States, 530 U.S. 428, 429 (2000).

8. Michigan v. Tucker, 417 U.S. 433, 444 (1974). Justice Douglas dissented in *Tucker* on the grounds that "[t]he Court is not free to prescribe preferred modes of interrogation absent a constitutional basis." Ironically, this argument is the same as that adopted by Chief Justice Rehnquist in *Dickerson*.

9. 494 U.S. 259, 264 (1990) (holding that the Fourth Amendment did not apply to the search and seizure by DEA agents of property owned by a nonresident alien defendant located in Mexico).

10. Susan R. Klein, Miranda *Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 421–54 (1994).

11. 42 U.S.C. § 1983 provides for monetary damages against state actors who violate the civil rights of plaintiffs. The Court created a similar right for persons aggrieved by unconstitutional conduct by federal officials in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

actors) for even the intentional violation of the *Miranda* rules?[12] But *Miranda* was given a brief reprieve in *Dickerson v. United States*,[13] in which Chief Justice Rehnquist, writing for the Court, refused to reverse *Miranda* or permit Congress to legislatively overrule it by returning to the pre-*Miranda* voluntariness test.[14] While *Dickerson* may have appeared, at first blush, to be a liberal victory, a closer examination reveals its failure to address, much less resolve, the pertinent constitutional issue. It simply locked into place, by judicial fiat, all past exceptions, as well as the language and reasoning deconstitutionalizing *Miranda*, without explaining how they could coexist with a *Miranda* rule supported by "constitutional underpinnings."[15] Afraid to overturn a decision that has come to symbolize human dignity for the low-liest antagonist and judicial limits on police authority,[16] the Court chose the surreptitious route of ostensibly upholding the warnings but leaving them without a conceptual justification.[17]

This decision left the *Miranda* warnings and the privilege against self-incrimination vulnerable to a potentially crippling blow in *Chavez v. Martinez*,[18] a case presently before the Court. The officer in *Martinez* conducted a forty-five minute interrogation of a suspect in the emergency room, immediately after the suspect had been maimed and blinded by another officer, though the suspect was never "Mirandized" and repeatedly asserted his right to remain silent. The district judge found that this conduct violated the privilege against self-incrimination, despite the fact that the statement obtained was never offered in a criminal trial.[19] The position adopted by the

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12. This position has been taken most forcefully by Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) (arguing that court-created prophylactic rules are illegitimate grounds to reverse a state court criminal conviction). *But see* Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 454 (1987) (suggesting that every instance of custodial interrogation involves compulsion, and therefore the *Miranda* warnings are not a prophylactic rule but are instead required by the U.S. Constitution).

13. 530 U.S. 428 (2000) (striking down 18 U.S.C. § 3501, Congress's 1968 attempt to repeal *Miranda*, as unconstitutional).

14. *Id.* at 443.

15. *Id.* at 439 n.5.

16. Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1471 (1985); LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 117 (1983).

17. *See* Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1071–77 (2001) (criticizing the *Dickerson* Court for squandering an opportunity to rationalize contradictory case law regarding *Miranda*'s exceptions and to justify the use of prophylactic rules in the Court's pivotal criminal procedure cases).

18. Brief of Amici Curiae The National Police Accountability Project and The National Black Police Association, Inc., Supporting Respondent at 3, *Chavez* (No. 01-1444), *available at* 2002 WL 31427573.

19. Martinez v. City of Oxnard, 270 F.3d 852, 855, 857 (9th Cir. 2001), *cert. granted sub nom.* Chavez v. Martinez, 122 S. Ct. 2326 (2002).

Solicitor General of the U.S. Department of Justice,[20] and by Professor Steven Clymer in a recent *Yale Law Journal* article on the subject,[21] is that taking a compelled statement does not violate the Fifth Amendment privilege, though the admission of such a statement in a criminal proceeding would. The Fifth Amendment offers no right to silence at the stationhouse or anywhere else outside of the criminal courtroom and in fact does not regulate police conduct.[22] However, government compulsion so egregious that it "shocks the conscience" of the Court may constitute an immediate constitutional violation, prior to and independent of any criminal proceedings, pursuant to the substantive due process component of the Fourteenth Amendment.

In Part I of this Essay, I suggest that the privilege should be considered a ban on certain official conduct outside of a criminal trial, not limited to an evidentiary rule. I respond to the alternative argument that the Court in *Kastigar v. United States*,[23] by blessing official grants of immunity offered by prosecutors pursuant to statute, intended to extend the same authority to peace officers. In Part II, I argue that a deliberate violation of *Miranda* should give rise to a viable civil rights claim. *Miranda* and its exceptions can be justified by developing a conceptual framework for Court-created constitutional prophylactic rules. The contours of such rules, ubiquitous in constitutional criminal procedure, can be legitimately expanded or contracted by the Court in response to competing values, pragmatic considerations, social science data, and action (or inaction) by other branches of government. In Part III, I suggest that the events of September 11, 2001, do not warrant a wholesale abandonment of the privilege. I will conclude with some final thoughts regarding the values underlying the privilege against self-incrimination and outline why we should care whether *Miranda* or the privilege itself is protected by the Court.

I.

The Solicitor General's argument that the privilege against self-incrimination does not protect the right of a person in police custody to be free from interrogation methods that coerce an involuntary statement, unless

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20. Brief for the United States as Amicus Curiae Supporting Petitioner at 6, *Chavez* (No. 01-1444), *available at* 2002 WL 31100916 [hereinafter Brief for the United States].

21. Steven D. Clymer, *Are Police Free to Disregard* Miranda*?*, 112 YALE L.J. 447 (2003). A number of law professors had earlier made the same claim. *See, e.g.*, Akhil Reed Amar & Renee B. Lettow, *Self-Incrimination and the Constitution: A Brief Rejoinder to Professsor Kamisar*, 93 MICH. L. REV. 1011, 1011 (1995); Kate E. Bloch, *Fifth Amendment Compelled Statements: Modeling the Contours of Their Protected Scope*, 72 WASH. U. L.Q. 1603, 1693–1700 (1994); Martin R. Gardner, *Section 1983 Actions Under* Miranda*: A Critical View of the Right to Avoid Interrogation*, 30 AM. CRIM. L. REV. 1277, 1288 (1993).

22. Clymer, *supra* note 21, at 449–50.

23. 406 U.S. 441 (1972).

that questioning occurs at or is admitted in a criminal trial, rests on an overly expansive interpretation of two Supreme Court cases. First, General Olson, Professor Clymer, and others suggest that dicta in *United States v. Verdugo-Urquidez*[24] intended to reverse the long line of "penalty cases" prohibiting the government from penalizing the invocation of the Fifth Amendment's Self-Incrimination Clause in any pretrial setting, even where there is no resulting statement to use in a criminal trial. They further contend that when the Court upheld the federal immunity statute in *Kastigar*, it intended to constitutionally protect those secret coercive police interrogation practices that it had spent the previous fifty years condemning. These propositions are unsound.

Though the *Verdugo* Court correctly characterized the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendment as a fundamental trial right of criminal defendants, this characterization is consistent with earlier and later holdings that this trial right can be protected only by applying the privilege in any pretrial setting where questioning may elicit an incriminating response. "It has long been held that [the] prohibition . . . 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'"[25] For this reason, the Court has, on numerous occasions, found the Constitution violated and ordered injunctive and other relief, even where there was no possibility that a statement would be used in a criminal trial, and even where no statement was generated.

For example, in *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation of the City of New York*,[26] three public workers who were called before a grand jury refused to sign waivers of immunity and testify against themselves were fired.[27] The Court found a Fifth Amendment violation and ordered the City of New York to reinstate these workers.[28] If a constitutional violation occurs only at trial, the Court could not have stepped in unless and until an incriminating statement was offered in a criminal proceeding against these workers. However, since the workers refused to waive their privilege and never made any statement, the admission of their statements in a criminal trial was impossible.[29] Likewise, in *Spevack v. Klein*,[30] the Court insisted

24. 494 U.S. 259 (1990).

25. Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).

26. 392 U.S. 280 (1968).

27. *Id.* at 282.

28. *Id.* at 284–85.

29. The Court noted that such a waiver may have been ineffective after *Garrity v. New Jersey*, 385 U.S. 493 (1967), which would have compelled the state to grant immunity. However, "the possible ineffectiveness of this waiver does not change the fact that the State attempted to force petitioners, upon

that the State of New York reinstate an attorney who had been disbarred for failing to waive his Fifth Amendment privilege at a judicial inquiry into professional misconduct.[31] Again, there was never a resulting statement that could be used in a criminal trial, yet the Court imposed a remedy for the constitutional violation. In *Slochower v. Board of Education*,[32] a public school teacher was dismissed for refusing to waive her Fifth Amendment right not to incriminate herself in front of a Congressional Committee.[33] Again, the Court ordered reinstatement, finding that the Board of Education had violated the Fifth Amendment despite the fact that no statement was given,[34] hence no admission in a later criminal proceeding was possible.

Most recently, in *McKune v. Lile*,[35] the Court accepted that the privilege is available in a psychiatric prison treatment program, again well in advance of any potential criminal case.[36] Though there was sharp disagreement regarding the issue of whether the alleged penalty or loss of benefit imposed on the prisoner (transfer to a more secure facility and loss of privileges) for refusing to admit to prior criminal sexual misconduct constituted "compulsion" within the meaning of the privilege,[37] every member of the Court accepted the plaintiff's use of § 1983 as a vehicle to obtain an injunction to prevent the imposition of a penalty upon invocation of the privilege.[38] The opinion began by noting that if the program amounted to compulsion, it would have to be terminated.[39] This was true despite the fact that the plaintiff refused to make a statement, and hence the introduction of an incriminating statement at a future criminal proceeding was impossible.

In addition to the penalty cases, which apply and enforce the Fifth Amendment in grand jury proceedings, congressional committees, and prison psychiatric interviews, a similar line of cases applies the Self-Incrimination Clause to coercive police interrogations of suspects, regardless of where they occur. In 1897, the Court in *Bram v. United States*[40] first applied the self-

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penalty of loss of employment, to relinquish a right guaranteed them by the Constitution." *Uniformed Sanitation Men*, 392 U.S. at 284 n.5.

30. 385 U.S. 511 (1967).

31. *Id.* at 516–19.

32. 350 U.S. 551 (1956).

33. *Id.* at 552–53.

34. *Id.* at 559. *See also* Lefkowitz v. Turley, 414 U.S. 70, 76 (1973) (declaring invalid a New York statute requiring that public contractors testify before a grand jury and waive immunity from the use of such statements against them in a future criminal trial under threat of loss of contract); Lefkowitz v. Cunningham, 431 U.S. 801, 804 (1977) (holding that a grand jury witness cannot be divested of political office as a penalty for invoking the privilege).

35. 122 S. Ct. 2017 (2002).

36. *Id.* at 2026–27.

37. The four member plurality and Justice O'Connor agreed that the denial of benefits in a prison setting did not rise to the level of compulsion. *Id*. at 2026–32.

38. *See generally McKune*, 122 S. Ct. 2017 (2002).

39. *Id.* at 2025.

40. 168 U.S. 532 (1897).

incrimination clause to bar involuntary confessions offered in federal criminal trials.[41] A long series of cases post-*Bram* but pre-incorporation applied exactly the same standard to the coercion of statements by state officials and condemned as a violation of due process the use of overbearing police tactics to coerce confessions from suspects.[42] As in the penalty cases, the Court required that federal and state officials honor a suspect's desire to remain silent. When officers ignore such a desire and engage in conduct that compels an involuntary statement, the privilege (if in federal court) or due process (if in state court) has been violated. Though the remedy requested in those criminal cases was the exclusion of evidence, the Court made clear that the coercion itself is "revolting to the sense of justice" as embodied in the Constitution.[43] For example, in *Spano v. United States*,[44] the Court clearly stated that the Constitution controls the legality of actions by police officers during interrogations, and not merely the actions of judges during trials:

> The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . . . Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry . . . .[45]

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41. *Id.* at 564–69 (holding that the privilege required suppression in a federal murder trial of a statement made during a custodial interrogation where the police officer promised the suspect leniency).

42. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978); Haynes v. Washington, 373 U.S. 503 (1963); Lynum v. Illinois, 372 U.S. 528 (1963); Watt v. Indiana, 338 U.S. 49 (1949); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Brown v. Mississippi, 297 U.S. 278 (1936). Particularly egregious police practices much worse than those condemned in *Bram*, primarily inflicted by southern police forces against minority suspects, clearly had to be stopped by the Court, and prior to the incorporation of the Fifth Amendment into the Due Process Clause of the Fourteenth Amendment, it was due process or bust. *See generally* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

43. *Brown*, 297 U.S. at 286 (holding that a confession obtained through beatings violated due process). The Court in *Watt v. Indiana*, 338 U.S. 49 (1949), elaborated on this principle with the following language:

> In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life taken.

Id. at 55. *See also* Mincey v. Arizona, 437 U.S. 385 (1978) (holding that questioning a critically ill defendant in a hospital bed despite his request for an attorney violated due process); *Haynes*, 373 U.S. at 536 (stating that a "confession obtained by police through the use of threats is violative of due process"); *Lynum*, 372 U.S. at 534 (holding that informing defendant that her children would be taken from her if she failed to "cooperate" with police violated due process); Malinski v. New York, 324 U.S. 401 (1945) (holding that stripping defendant of his clothes and keeping him naked for several hours violated due process); *Ashcraft*, 322 U.S. at 153–54 (holding a 36-hour interrogation to violate the due process rights of the defendant and opining that such an interrogation is "inherently coercive" and "irreconcilable" with the principle of a voluntary confession).

44. 360 U.S. 315 (1959).

45. *Id.* at 320–21.

In 1964, the Court explicitly incorporated the Fifth Amendment's privilege into the Fourteenth Amendment and applied it to the states.[46] Since incorporation, the Court has used the same test to determine whether a statement was "compelled" within the meaning of the privilege or "involuntary" within the meaning of due process, in fact using these terms interchangeably.[47] However, the Court continues to utilize the "due process" approach, perhaps in part because it allows the Court to plainly differentiate between statements found involuntary by a judge based upon the facts surrounding the interrogation (regardless of whether the *Miranda* warnings were required or given), and statements considered involuntary because of *Miranda*'s legal presumption.[48] Regardless of whether the Court frames the issue as one of due process or privilege, the voluntariness test and the condemnation of coercive police practices should be identical. Just as the Constitution is violated at the moment a state official compels an employee to make a statement (and thus surrender the privilege) by threat of employment loss, the Constitution is violated when police officers compel a suspect to make a statement (and thus surrender her privilege) by threat of continuous harassment.

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46. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

47. For lists and comparisons of cases, see Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497 (1992). I do not mean to suggest here that the Court has explained well, on a philosophical level, what makes a statement compelled or involuntary. Such effort has stumped the Court and philosophers for as long as they have asked the question. *See, e.g.*, McKune v. Lile, 122 S. Ct. 2017, 2035 (2002) (O'Connor, J., concurring) (noting the failure of both the plurality and the dissent to offer a coherent theory of compulsion); Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 977 (1997) (suggesting that the term "coercion" has not been properly defined). It may be for this reason that the Court developed categories of official acts that are always considered compelling—threatening loss of employment (Garrity v. New Jersey, 385 U.S. 493 (1967)), commenting on a defendant's refusal to take the stand (Griffin v. California, 380 U.S. 609 (1965))—and imposed rules of conduct for police officers to follow during custodial interrogation (i.e., the *Miranda* warnings). *But see* Stephen J. Schulhofer, Miranda*,* Dickerson*, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 944 (2001) (suggesting that the Court's erroneous assumption that "compulsion means involuntariness" is one of two chief causes of *Miranda*'s legitimacy crisis).

48. *See* Withrow v. Williams, 507 U.S. 680, 693 (1993) (holding that eliminating habeas review of *Miranda* claims would not advance federalism or efficiency, because even if the dictates of *Miranda* were followed, petitioners could still claim that statements were involuntary under "the due process approach"). This legal distinction is necessary for two reasons. First, a statement found to be involuntary given the circumstances cannot be used to impeach, unlike statements that are presumptively involuntary because of a *Miranda* failure. *Compare* New Jersey v. Portash, 440 U.S. 450, 459 (1979) (holding that a person's grand jury testimony, obtained pursuant to a grant of immunity, cannot constitutionally be used in a later effort to impeach him or her in a criminal trial), *with* cases cited *infra* notes 90–92. Second, there are numerous situations, such as when a suspect is questioned while not in custody, or obtaining spontaneous statements from suspects in custody, where *Miranda*'s presumption of involuntariness is not triggered. *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291 (1980) (holding that a suspect's spontaneous response in a patrol car to the officers' conversation was not the product of interrogation); Beckwith v. United States, 425 U.S. 341 (1976) (holding that a suspect interviewed at home was not in custody and therefore need not receive the *Miranda* warnings).

Two years after incorporation, the *Miranda* Court reaffirmed *Bram* and *Malloy*, again holding that the privilege is applicable at the stationhouse.[49] There is nothing unusual or illegitimate about protecting trial rights before trial. In addition to the Fifth Amendment cases above, the Court applies the quintessential trial right—the Sixth Amendment right to counsel—in many early but critical stages of a proceeding, months or even years before a criminal trial.[50]

The most famous legacy of *Miranda* is the requirement that police officers advise suspects that they have a right to remain silent.[51] For thirty-six years, countless officers have advised countless Americans, at the specific direction of the Supreme Court, that they possess this right. The premise that the Fifth and Fourteenth Amendment's privilege, except in extreme cases that "shock the conscience," applies only at trial cannot be accepted without concluding that the suspect in the stationhouse in fact has no "right" to remain silent. If the government's position in *Martinez* is correct, the warnings must be revised, so as not to continue to mislead the American public about the nature of its rights. Perhaps "we are going to continuously harass you, short of behavior a court might later find shocking, until you talk to us, but your attorney may be able to get some of your statements excluded, at least until cross-examination of your testimony and the government's rebuttal case" would do.

The federal government, the state of California, and Professor Clymer further believe that their position in *Martinez* is bolstered by the Court's holding in *Kastigar v. United States*.[52] According to their theory, police and other government officials can use any nonshocking method to compel an individual to make a statement that could potentially be incriminating in a future criminal proceeding without violating the Fifth Amendment, because such coercion constitutes a grant of use-immunity.[53] I believe that *Kastigar* in fact stands for the following much narrower proposition: A government official may use a certain form of compulsion, utilizing judicial process in a

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49. Miranda v. Arizona, 384 U.S. 436, 467 (1966) ("Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.").

50. *See, e.g.*, United States v. Henry, 447 U.S. 264, 273–75 (1980) (prohibiting undercover government informants from eliciting information from an indicted defendant in the absence of his attorney); United States v. Wade, 388 U.S. 218, 236–37 (1967) (holding that defendants have the right to counsel at line-ups).

51. *See* LaChance v. Erickson, 522 U.S. 262, 267 (1998) ("If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment *right to remain silent*.") (emphasis added); Estelle v. Smith, 451 U.S. 454, 468 (1981) (declaring that a criminal defendant "may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding").

52. 406 U.S. 441 (1972).

53. *See supra* notes 20–21.

public forum, in exchange for an explicit promise, pursuant to statute, not to use that statement or any evidence derived from that statement in a future state or federal criminal prosecution. Thus the two requirements before *Kastigar* immunity becomes coextensive with the privilege are, first, that the "compelled" testimony must be taken in a public proceeding enforced by judicial process, and second, that the suspect must be properly informed that the government is invoking an immunity statute, whereby neither direct nor derivative evidence can be used against him in a future criminal proceeding. The first requirement ensures that the testimony is accurately transcribed, obtained in a humane manner (by public questioning), and enforced by legal process (threat of contempt, rather than threat of a beating, sleep or food deprivation, or psychological harassment). The second requirement ensures that there is no possibility of future incriminating use of this testimony.[54]

Neither of these requirements is met when police officers coerce statements from suspects in the backroom of the stationhouse. During the majority of custodial interrogations, there is no video or audio recording to transcribe what the suspect actually said and to memorialize what form of compulsion was used.[55] Such questioning is, then, a *private* proceeding where compulsion is exerted by the police officer. Moreover, the suspect has no promise of official immunity pursuant to statute,[56] or even any guarantee that a later court will in fact find a resulting statement coerced and exclude it. Even if such exclusionary findings were uniform among the circuits and predictable, few suspects would be sufficiently conversant with the law to make such an advance judgment.

It is true that the Court has itself imposed an exclusionary rule prohibiting the federal use of testimony that was compelled by a state statute granting immunity.[57] However, Justice Souter's opinion for the Court in the more recent *United States v. Balsys* makes clear that this judicially created immunity is not the appropriate vehicle for enforcing the privilege, but only a "fail-safe" device "to ensure that compelled testimony is not admitted in a

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54. This is not to deny that prosecutors and defendants often engage in less formal immunity grants in exchange for potentially incriminating statements. However, those suspects choose informal procedures with the aid of their attorneys and with full understanding that, if they have any doubts about the integrity of the prosecutor, they can insist on a judicial ruling on the immunity request prior to answering the questions. *See* KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 705 n.b (10th ed. 2002).

55. Two exceptions are Alaska and Minnesota, which require videotaping pursuant to their state constitutions. *See* Stephan v. State, 711 P.2d 1156, 1159 (Alaska 1985); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

56. As Justice Kennedy stated for the plurality in *McKune v. Lile*, 122 S. Ct. 2017, 2025 (2002),

> The mere fact that Kansas declines to grant inmates use immunity does not render the [Kansas Sexual Abuse Treatment Program] invalid. . . . So the central question becomes whether the State's program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right. If there is compulsion, the State cannot continue the program in its present form . . . .

57. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 78–80 (1964).

criminal proceeding" in the absence of a previous grant of immunity.[58] The Court explained:

> The general rule requires a grant of immunity prior to the compelling of any testimony. We have said that the prediction that a court in a future criminal prosecution would be obligated to protect against the evidentiary use of compelled testimony is not enough to satisfy the privilege against compelled self-incrimination. The suggestion that a witness should rely on a subsequent motion to suppress rather than a prior grant of immunity "would [not] afford adequate protection. Without something more, [the witness] would be compelled to surrender the very protection which the privilege is designed to guarantee."[59]

Thus, Mr. Martinez could have been brought in front of a grand jury and "compelled," upon pain of formal judicial sanction, to recount his version of events the night he was blinded and crippled by a police officer, even if such statements might have been incriminating, after an official grant of immunity from the state of California. He may not, however, be secreted to the back room of a stationhouse (or confined to a hospital bed) and subjected to the third degree until he breaks, despite the fact that any resulting statements will never by used in a future criminal proceeding (because they will be properly excluded by the state judge as involuntary, because Mr. Martinez is an innocent man and never charged, or because Mr. Martinez later agrees to testify for the government in exchange for a *nolle pros*).[60] The privilege against self-incrimination and the due process clauses of the Fifth and Fourteenth Amendments are violated by the coercive tactics of harassing Mr. Martinez for forty-five minutes while he screamed in pain and begged to be left alone. This is not the form of compulsion the *Kastigar* Court blessed, and the police did not offer him any immunity.

In the government's world, a statement can be physically or psychologically coerced from a suspect upon the whim of a police officer, and the suspect's invocation of her privilege can be safely ignored. In a world where officer conduct is regulated by the Fifth Amendment, every professional police officer knows (or unless told otherwise by the *Martinez* Court) that such behavior violates the Constitution. Thus, there is uniform agreement among the lower courts that interrogation practices which coerce a statement from a suspect lead to liability under § 1983 absent qualified immunity. Whether those courts call such coercion a violation of the Self-Incrimination Clause or the Due Process Clause, they all agree that the

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58. 524 U.S. 666, 683 n.8 (1998).

59. *Id.* (citations omitted).

60. *See* Donald Dripps, *Is the* Miranda *Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT. 19 (2000) (reconciling *Miranda* with recent Fifth Amendment privilege jurisprudence and concluding that *Miranda* is still good law despite recent dicta).

constitutional violation is complete regardless of whether the resulting statement is ever used or offered in a criminal proceeding.[61]

The alternative version of the privilege offered by the Department of Justice does not leave citizens wholly at the tender mercy of police officers during interrogations. Both General Olson and Professor Clymer concede that some interrogations might be unconstitutional at the moment taken.[62] However, they would turn to substantive due process to prohibit only police behavior "so brutal and so offensive to human dignity"[63] and "unjustifiable by any government interest"[64] that it "shocks the conscience."[65] There are numerous disadvantages to the Court forsaking the privilege in favor of due process when regulating the coercion of statements from criminal suspects. The most obvious is that the Court itself rightly disfavors expanding substantive due process. The concept is difficult to describe or cabin, potentially transforming the Court into a "nine-headed Caesar."[66] A related reason is the Court's reluctance to employ substantive due process when there is a more specific provision of the Bill of Rights that speaks to the particular type of

61. *See, e.g.*, Deshawn E. v. Safir, 156 F.3d 340, 348 (2d Cir. 1998) ("The due process clause of the Fourteenth Amendment prohibits self-incrimination based on fear, torture, or any other type of coercion. . . . The question . . . is whether the conduct of 'law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined.'"); Clanton v. Cooper, 129 F.3d 1147, 1158–59 (10th Cir. 1997) (upholding a § 1983 action and denying qualified immunity for a defendant who used a coerced statement and a warrant to arrest the plaintiff, although such statement was never introduced in a criminal case); Weaver v. Brenner, 40 F.3d 527, 536 (2d Cir. 1994) ("[I]f the confession is found as a fact to have been coerced, [this] violates [the plaintiff's] constitutional rights and serves as a predicate for his § 1983 action."); Cooper v. Dupnik, 963 F.2d 1220, 1237 (9th Cir. 1992) (en banc) ("It is irrelevant that Cooper's coerced statements were never introduced against him at trial. The Task Force's wrongdoing was complete at the moment it forced Cooper to speak."); Gray v. Spillman, 925 F.2d 90, 94 (4th Cir. 1991) (holding that an attempt to coerce an incriminating statement gave rise to a viable § 1983 claim for violation of the Fifth and Fourteenth Amendments); Buckley v. Fitzsimmons, 919 F.2d 1230, 1244 (7th Cir. 1990) (declaring that if the prosecutor coerced a confession by "depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon," then the constitutional injury is complete at that moment), *vacated and remanded*, 502 U.S. 801 (1991), *aff'd as modified*, 952 F.2d 965 (7th Cir. 1992), *rev'd on other grounds*, 509 U.S. 259 (1993); Rex v. Teeples, 753 F.2d 840, 843 (10th Cir. 1985) ("We also conclude that [the plaintiff] has stated a constitutional claim arising from the . . . interrogation. Extracting an involuntary confession by coercion is a due process violation."); Duncan v. Nelson, 466 F.2d 939, 945 (7th Cir. 1972) (stating that there "is no indication . . . that physical violence need be present to produce the coercion . . . cognizable under § 1983").

Pre-*Miranda*, pre-incorporation cases likewise allowed a § 1983 claim based upon a coerced confession, regardless of whether the statement was used in court. *See* Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965); Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953); Refoule v. Ellis, 74 F. Supp. 336 (N.D. Ga. 1947).

62. Brief for the United States, *supra* note 20, at 20; Clymer, *supra* note 21, at 476–78.

63. Brief for the United States, *supra* note 20, at 7, 21 (citing Rochin v. California, 342 U.S. 165, 174 (1952)).

64. *Id.* at 7 (citing County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998)).

65. *Id.* (citing *Rochin*, 342 U.S. at 174).

66. Dickerson v. United States, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting).

challenged governmental action.[67] It is odd to attempt to fit the doctrines surrounding compelled statements into the wide-open spaces of substantive due process when we have a history of Fifth and Fourteenth Amendment jurisprudence that is more than up to the task. In reality, the government's move is little more than an attempt to convince the Court to employ a more government-friendly test to regulate its conduct, as the present Court is not so easily shocked.[68]

II.

It seems to me that even where a statement is not "involuntary" or "compelled" within the meaning of the Self-Incrimination and Due Process Clauses, constitutional doctrine should nonetheless permit a civil rights action based upon a police officer's refusal to honor a suspect's invocation of her *Miranda* rights. Unlike the uniform agreement among the courts of appeals that an officer violates the Self-Incrimination and Due Process Clauses when he coerces a statement from a suspect, the courts of appeals sharply disagree over whether a *Miranda* violation (in the form of a failure to deliver the warnings or a refusal to honor a suspect's invocation of rights) is cognizable in a § 1983 claim.[69] Much of this confusion was caused by imprecise language and theoretical disagreement between members of the Court after *Miranda* and before *Dickerson.*

The position that best harmonizes *Miranda*'s purpose and exceptions with the Court's tepid reaffirmation of *Miranda*'s constitutional pedigree in *United States v. Dickerson* is that when law enforcement officers purposefully disregard a suspect's invocation of her *Miranda* right to remain silent,

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67. *See, e.g.*, Albright v. Oliver, 510 U.S. 266, 273–74 (1994) (refusing to recognize a substantive due process right to be free from criminal prosecution absent probable cause where the Fourth Amendment, a more specifically relevant constitutional provision, addresses the matter).

68. *See* Susan R. Klein, Miranda*'s Exceptions in a Post*-Dickerson *World*, 91 J. CRIM. L. & CRIMINOLOGY 567, 580–85 (2001) (summarizing case law where citizens failed to convince the Court that government conduct was shocking or infringed upon a fundamental liberty interest).

69. A minority of circuits hold that where a police officer intentionally disregards a suspect's invocation of one of his *Miranda* rights, there is a violation of the Fifth Amendment regardless of whether any resulting statements were actually coerced or used in a criminal trial. *See* Cal. Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 2000) (holding that a police department scheme to continue to question suspects despite the invocation of their *Miranda* rights violated clearly established law and could constitute a § 1983 violation); United States v. North, 920 F.2d 940, 948 (D.C. Cir. 1990) ("[W]here *Miranda* warnings are not given, the constitutional violation occurs independent of the grand jury.").

The majority of circuits hold that a *Miranda* violation cannot constitute a § 1983 action, either because the resulting statement is only presumptively (not actually) coerced, the resulting statement is never used in a criminal trial, the police officers are not the proximate cause of the plaintiff's injury, or the police officer is testifying as a witness and not acting under color of law. *See* Klein, *supra* note 10, at 434–48 (collecting cases and suggesting, as perhaps since accomplished in *Dickerson*, that the Court reconstitutionalize *Miranda*).

they may be liable for monetary penalties pursuant to § 1983. Any officer making a reasonable mistake regarding whether a suspect is entitled to or has invoked her *Miranda* right to silence or counsel would be fully protected by the doctrine of qualified immunity.[70]

Prior to the *Miranda* Court's requirement that police officers inform suspects of their privilege against self-incrimination and right to counsel,[71] officer conduct during custodial interrogation was deemed unconstitutional only if, considering the "totality of circumstances," it overbore a suspect's will.[72] After thirty years of attempting to ensure that police officers do not coerce statements from suspects by examining each confession that came before it, the Court admitted defeat.[73] Thus, the *Miranda* Court demanded the four warnings (or an equally effective alternative) to accomplish two goals. First, it eased its own adjudicative task by providing an objective model against which all custodial interrogations could be measured.[74] The Court simply could not review a sufficient number of cases, and the risk of erroneously admitting involuntary statements was too high.[75] Second, it prevented violations of the self-incrimination clause by issuing a set of "bright-line" rules for police officers to follow during custodial interrogations.[76] It was difficult for honest, law-abiding officers to know in advance when the inherent pressure surrounding custodial interrogations became unconstitutional compulsion. There is no doubt that the *Miranda* Court intended to directly regulate police conduct, as such Court regulation of the police provides the only "assurance that practices of this nature will be

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70. Even where an officer's conduct violated a constitutional right, she is given immunity if she nevertheless could have reasonably, but mistakenly, believed that her conduct did not violate a clearly established constitutional right, because she acted reasonably under the circumstances. Saucier v. Katz, 533 U.S. 194, 201–02 (2001). Thus, if the officer mistakenly believes that the *Miranda* warnings are not required because the suspect is not in custody or is not undergoing interrogation, that the suspect did not unambiguously request an attorney, or that the suspect validly waived her rights, the officer will be protected from liability.

71. Miranda v. Arizona, 384 U.S. 436, 469–72 (1966).

72. This test examines the conduct of the police in interrogating the suspect (threats or promises, trickery, withholding food and water, the duration of the questioning, playing upon sympathy, and the use of family and friends) and the characteristics of the suspect that may make him susceptible to coercion (age, intelligence, education, psychological problems, and physical limitations). *See, e.g.*, Colorado v. Connolly, 479 U.S. 157 (1986); cases cited *supra* note 43.

73. *See* Kamisar, *supra* note 5, at 103 (quoting Justice Black's lament that the due process test was unworkable).

74. *Id.* at 469–72.

75. As Chief Justice Rehnquist noted in *Dickerson*, "[T]he coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . .'" Dickerson v. United States, 530 U.S. 428, 435 (2000).

76. *Miranda*, 384 U.S. at 441–42. As Chief Justice Rehnquist recently explained in *Dickerson*, the *Miranda* Court granted certiorari "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Dickerson*, 530 U.S. at 439 (quoting *Miranda*, 384 U.S. at 441–42).

eradicated in the foreseeable future."[77] The warnings mandated in *Miranda* are best viewed as a compromise between fostering the values enshrined in the Fifth Amendment and protecting law enforcement's interest in crime fighting, a compromise that favors law enforcement.[78]

An optimist might view *Dickerson v. United States*[79] as resolving the issue of whether the *Miranda* warnings are required by the privilege against self-incrimination. In answering affirmatively, Chief Justice Rehnquist noted that "we have consistently applied *Miranda*'s rule to prosecutions arising in state courts . . . . With respect to proceedings in state courts, our 'authority is limited to enforcing the commands of the United States Constitution.'"[80] Though Chief Justice Rehnquist acknowledged that the Court has "repeatedly referred to the *Miranda* warnings as 'prophylactic,'" and thus subject to exceptions by the Court or substitution by Congress, this does not mean that the *Miranda* warnings are "not Constitutionally required" but that "no constitutional rule is immutable."[81]

In fact, though Justice Scalia rightly chides the *Dickerson* majority for refusing to acknowledge this,[82] scholars have long recognized and applauded the Court's duty to develop "constitutional common law" to both prevent and remedy constitutional violations.[83] "Constitutional criminal procedure is rife

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77. *Miranda*, 384 U.S. at 447. As then-Justice Rehnquist stated in *Michigan v. Tucker*, 417 U.S. 433 (1974), "[T]he Court in *Miranda*, for the first time, expressly declared that the Self-Incrimination Clause was applicable to state interrogations at a police station." *Id.* at 443.

As the Court explained in *Fare v. Michael C.*, 442 U.S. 707 (1978),

> Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.

Id. at 718.

78. Immediately prior to *Miranda*, it looked as though the Court, in *Escobedo v. Illinois*, 378 U.S. 478 (1964), would require suspects to obtain counsel during custodial interrogations. *Id.* at 492 (holding that when the process shifts from investigative to accusatory, the accused must be able to consult with an attorney). Such a move would have all but eliminated the hope of obtaining statements from any suspect, as no attorney with a pulse would permit her client to be interrogated. Instead, *Miranda* specifically permits custodial interrogation after a waiver, on-the-scene questioning, and volunteered statements. *See, e.g.*, Yale Kamisar, Miranda*: The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1076–78 (1984).

The general consensus is that *Miranda* has not significantly harmed law enforcement efforts in this country and that the police have successfully adapted to it. *See, e.g.*, RICHARD A. LEO & GEORGE C. THOMAS III, THE *MIRANDA* DEBATE 236–47 (1998); William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 1021 (2001).

79. 530 U.S. 428 (2000).

80. *Id.* at 438; *see also id*. at 440 n.5 (listing additional cases with the same holding).

81. *Id.* at 437–38, 441.

82. *Id.* at 465 (Scalia, J., dissenting) (pointing out that the majority did not assert that *Miranda*'s protections are required by the Constitution).

83. *See, e.g.*, PAUL BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 752–57 (4th ed. 1996); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 *passim* (2001) (arguing that the

with prophylactic rules, which most often take the form of rebuttable or conclusive evidentiary presumptions or bright-line rules for law enforcement officials to follow."[84] While the majority of these rules overprotect the constitutional right at issue and thus favor the civil liberties of crime suspects, some of them provide safe harbors for government officials following certain procedures and thus favor law enforcement.[85]

Just as it is legitimate to craft prophylactic constitutional rules, it is legitimate to limit their application and to create exceptions to them. As with crafting exceptions to core constitutional provisions,[86] the Court has rightly been willing to craft exceptions to constitutional prophylactic rules and remedies where such exceptions do not hamper the goals of deterrence of executive misconduct or ease of adjudication or where there are other equally weighty interests at stake.

One example of Court-created constitutional common law is the Fourth Amendment exclusionary sanction developed in *Weeks v. United States*[87] and

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rules of germaneness and proportionality that emerge in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), respectively, are actually prophylactic rules designed to enforce the right not to be coerced into waiving one's Fifth Amendment right to just compensation for a taking); Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 14–28 (2001) (applying a *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test to determine the propriety of prophylactic protections); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 906–50 (1986) (suggesting that federal courts have broad power to create federal common law based upon statutes, jurisdictional grants, and the federal Constitution); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 287–88 (1988) (discussing the Court's obligation to fashion deterrent remedies); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 203 (1975) ("[A] surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as . . . a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress."); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (identifying prophylactic rules protecting the First Amendment and suggesting that "'prophylactic' rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law").

84. Klein, *supra* note 17, at 1037.

85. A nonexhaustive list of these rules is provided in *id.* at 1037–47. None of these prophylactic rules or remedies in the Fourth, Fifth, Sixth, and Fourteenth Amendment contexts are specifically mandated by the constitutional clause at issue; rather, the Court finds them necessary to deter police misconduct, prevent future violations, ease future adjudication, and/or return the injured party to the status quo. *Id.* at 1037–44. Similarly, though safe harbor rules underprotect citizens' Fourth Amendment rights, they are necessary, first, because a "single familiar standard is essential to guide police officers," New York v. Belton, 453 U.S. 454, 458 (1981), and second, because they ease the Court's task of adjudication, as it is difficult for the Court to determine ex post whether each particular search was reasonable on its facts.

86. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 309–10 (1967) (allowing police to perform a search in an emergency without a warrant despite the Fourth Amendment); Schenck v. United States, 249 U.S. 47, 52 (1919) (declaring that the First Amendment free speech right does not extend to yelling "fire" in a crowded movie theater).

87. 232 U.S. 383 (1914).

imposed on state actors in *Mapp v. Ohio*.[88] Though this sanction is imposed only after a violation of the Fourth Amendment, the Constitution itself does not demand it as a remedy for the violation. Rather, the exclusionary sanction is a judicially created procedure designed to deter future Fourth Amendment violations, and the Court has not been hesitant to create numerous exceptions to the exclusionary rule whenever its costs (in terms of the truth-seeking function of a criminal trial) outweigh its deterrent effect (in terms of preventing Fourth Amendment violations by police officers).[89]

Likewise, in the Fifth Amendment context, the Court has limited the judicial consequences of a violation of *Miranda*'s constitutional prophylactic rule where imposing exclusion from a criminal trial would not deter police misconduct or would otherwise have unacceptable costs. Thus, in a series of cases the Court has excluded statements taken in violation of *Miranda* only from the prosecutor's case-in-chief, allowing the use of such statements for impeachment purposes if the defendant chooses to testify and permitting the use of derivative evidence. After the Court considered the serious costs of applying the exclusionary rule in those circumstances, such as a "license to use perjury by way of a defense,"[90] blocking a witness's voluntary decision to testify,[91] or excluding reliable derivative evidence,[92] it decided to limit the exclusionary sanction to the prosecutor's case-in-chief. Where public safety is at risk, the Court has gone even further, admitting statements in the prosecutor's case-in-chief despite a *Miranda* violation.[93]

Just as the Court has limited *Miranda*'s exclusionary remedy when deterrence is not fostered and other values are at stake, it has extended *Miranda*'s exclusionary sanction when necessary to deter police coercion and to ease the Court's task of adjudication. Thus, the Court held in *Arizona v. Roberson* that police cannot initiate interrogation, even about other crimes, once a suspect has invoked his *Miranda* right to counsel.[94] As Justice Kennedy explained, after *Miranda* was extended again in *Minnick v.*

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88. 367 U.S. 643 (1961).

89. *See, e.g.*, Penn. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 368–69 (1998) (holding that evidence obtained in violation of the Fourth Amendment could be used at a parole violation hearing because the deterrent effect of applying the exclusionary rule would not outweigh the cost); United States v. Leon, 468 U.S. 897, 925–26 (1984) (creating a "good faith reliance on warrant" exception to the Fourth Amendment's exclusionary rule); Stone v. Powell, 428 U.S. 465, 493–96 (1976) (holding that the Fourth Amendment's exclusionary rule need not be cognizable on habeas if the defendant had a full and fair hearing at the state level, as imposing the exclusionary rule in this context would not produce a noticeable deterrent effect).

90. Harris v. New York, 401 U.S. 222, 226 (1971); *see also* Oregon v. Hass, 420 U.S. 714, 722 (1975).

91. Michigan v. Tucker, 417 U.S. 433, 449–52 (1974).

92. Oregon v. Elstad, 470 U.S. 298, 316, 318 (1985).

93. New York v. Quarles, 467 U.S. 649, 651–60 (1984) (holding that public safety interests in removing a gun from a grocery store outweighed the deterrent effect of the prophylactic rule).

94. 486 U.S. 675, 685–88 (1988).

Mississippi to cover situations where suspects had consulted with an attorney, this rule "ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness . . . . [The] rule provides 'clear and unequivocal' guidelines to the law enforcement profession."[95]

It is not surprising that all but one of these exceptions developed in cases concerning unintentional police violations of *Miranda*.[96] An unintentional violation cannot be deterred, and thus exclusion of such evidence for impeachment purposes appears unduly harsh. None of the cases expanding or contracting *Miranda*'s exclusionary remedy speak to the Court's willingness to allow police departments to develop schemes to refuse to deliver the *Miranda* warnings, in the absence of public safety considerations, without constitutional liability. Moreover, no case condones a government-sanctioned plan to ignore a suspect's invocation of her rights. Such action by police officers should be labeled unconstitutional, particularly in the wake of *Dickerson*, regardless of whether judicially created prophylactic rules or remedies exclude or admit statements taken in violation of this constitutional provision.

The Supreme Court could accomplish this goal in one of two ways. It could limit *Miranda*'s exceptions to unintentional violations and exclude statements and derivative evidence generated by deliberate *Miranda* violations even for impeachment purposes. Some circuit courts have chosen this path.[97] Alternatively, officer misconduct could be deterred by means less costly to the truth-seeking function of trial than exclusion, such as civil rights actions. At least one court has taken this route.[98] However, the Court cannot continue to allow the exceptions to *Miranda*'s exclusionary remedy to stand when the violations are intentional and at the same time preclude monetary

95. 498 U.S. 146, 151 (1990).

96. For a description of these exceptions, see Klein, *supra* note 17, at 1061–63.

97. *See, e.g.*, United States v. Patane, 304 F.3d 1013, 1029 (10th Cir. 2002) (holding that physical evidence obtained by police as a result of a statement obtained by a negligent violation of *Miranda* must be suppressed after *Dickerson*); United States v. Faulkingham, 295 F.3d 85, 93–94 (1st Cir. 2002) (holding that physical evidence obtained by a negligent violation of *Miranda* need not be suppressed after *Dickerson*); United States v. Orso, 275 F.3d 1190, 1194–95 (9th Cir. 2001) (Trott, J., dissenting from denial of rehearing en banc) (holding that where federal postal inspectors deliberately failed to offer *Miranda* warnings before engaging in custodial interrogation, a second confession obtained after the warnings were delivered was fruit of the poisonous tree and inadmissible). *But see* United States v. Sterling, 283 F.3d 216, 218–19 (4th Cir. 2002) (holding that the exceptions to *Miranda*'s exclusionary rule remain good law after *Dickerson*); United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001) (same).

98. *See* Cal. Attorneys for Criminal Justice v. Butts, 195 F.3d 1039, 1050 (9th Cir. 1999) (finding that the cities of Los Angeles and Santa Monica had a policy of interrogating custodial suspects "outside *Miranda*," and holding that this policy violated a clearly established constitutional right so as to defeat a qualified immunity defense to civil rights liability).

liability for such violations. That path would both seriously undermine the credibility of the Court and render *Miranda* ineffectual.

If the Court excludes from civil rights liability unreasonable violations of constitutional prophylactic rules, manifested in *Martinez* by the officer's decision not to read the warnings (in violation of *Miranda*) and subsequent decision not to "scrupulously honor" Mr. Martinez's invocation of his right to remain silent (in violation of *Michigan v. Mosley*[99]), these rules will lose their utility in protecting the privilege. Exclusion alone is ineffective for a number of reasons. First, it fails to protect the innocent suspect, who will never face trial. Second, the exclusionary rule is actually invoked in only a tiny fraction of all serious criminal cases. Well over ninety percent of felony cases are resolved by plea.[100]

Moreover, even in those cases where exclusion from the prosecutor's case-in-chief is a possibility, this remedy alone is plainly insufficient to persuade the police to obey Supreme Court commands. Consider the present incentive structure for an honest officer intent on solving a crime. Where it is clear that a suspect is in custody and undergoing interrogation—the two triggers of the *Miranda* rule—the rational officer should take the following course of action. First, she should deliberately fail to warn a suspect. If the suspect is silent, she can use that silence to impeach her later testimony.[101] Should the suspect make a statement, not only can it be used to impeach her trial testimony, but the officer can "cure" the violation by "Mirandizing" the suspect at that point and obtaining a waiver.[102] From the suspect's point of view (lacking the knowledge that the first statement is inadmissible), the "cat is out of the bag" and a waiver and second statement is likely. Once the officer either obtains a first statement or ascertains that the silence will continue, she should read the warnings. Eighty percent of suspects waive

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99. 423 U.S. 96 (1975).

100. Between October 1999 and September 2000, 93.8% of defendants in federal criminal cases pleaded guilty, 1.8% were convicted or acquitted after bench trials, and 4.4% were convicted or acquitted after jury trials. Statistical Div., Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary* tbl. D-4, http://www.uscourts.gov/judbus2000/appendices/d04sep00.pdf (Sept. 30, 2000).

101. Fletcher v. Weir, 455 U.S. 603, 607 (1982) (declaring that the prosecutor can cross-examine the defendant who claimed self-defense with his post-arrest silence, since *Miranda* warnings had not yet been delivered); Jenkins v. Anderson, 447 U.S. 231, 240 (1980) (holding that the prosecutor could impeach the testifying defendant's claim of self-defense with his pre-*Miranda* warning failure to report the stabbing to the authorities); *see also* Anne Bowen Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L. REV. 191, 193–94 (1984) (discussing the state's ability to impeach a criminal defendant's testimony by presenting evidence of the defendant's pretrial silence).

102. *See* Oregon v. Elstad, 470 U.S. 298, 310–11 (1985) (holding that a "careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible").

their *Miranda* rights,[103] and the officer can correctly predict that she will most likely obtain an admissible statement.

Should the suspect actually invoke her rights rather than waiving them when she finally receives the warnings, the officer is encouraged to continue to interrogate the suspect nonetheless. An officer who honors a suspect's invocation of her right to remain silent or consult with an attorney obtains absolutely no benefit from such behavior—she gets no statement or fruits. On the other hand, a rational police officer who ignores a suspect's invocation of his *Miranda* rights, at least in the absence of monetary liability under § 1983, has nothing to lose and much to gain. If her continued questioning succeeds in convincing a suspect who has invoked her *Miranda* right to surrender them instead, she may obtain a useful statement. Though such a statement will be excluded from the prosecutor's case-in-chief, it can be used to keep the defendant off the stand[104] and to lead to other witnesses[105] or physical evidence of the crime.[106]

Thus, without either civil rights liability or a change in the rules regarding admissibility, there are no disadvantages to ignoring a *Miranda* invocation, but there are numerous advantages. We should therefore not be surprised by the widespread training in California advocating the violation of *Miranda*.[107] Nor should we be surprised by the en banc Ninth Circuit's

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103. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996).

104. Oregon v. Hass, 420 U.S. 714, 723–24 (1975) (holding that statements taken after an assertion of rights are admissible to impeach a testifying defendant); Harris v. New York, 401 U.S. 222, 225–28 (1971) (5-4 decision) (holding that statements taken even in the absence of warnings can be admitted to impeach a testifying defendant).

This was precisely the opposite of the Court's refusal to admit, for impeachment or any other purposes, statements that were actually coerced or involuntary in violation of the privilege. *See* New Jersey v. Portash, 440 U.S. 450, 459–60 (1979) (holding that testimony given before a grand jury in response to a grant of legislative immunity could not be used to impeach the defendant at his subsequent criminal trial); Mincey v. Arizona, 437 U.S. 385, 401–02 (1978) (declaring that a statement coerced from a defendant in a hospital bed was inadmissible for impeachment purposes). The Court distinguished these cases from *Harris* and *Hass* because the police behavior in the latter cases "departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." Michigan v. Tucker, 417 U.S. 433, 446 (1974).

105. *Tucker*, 417 U.S. at 452 (holding that the testimony of a witness discovered through a *Miranda* violation was admissible in the prosecutor's case-in-chief).

106. Oregon v. Elstad, 470 U.S. 298, 318 (1985) (6-3 decision) (holding that the fact that the police had obtained an earlier statement in violation of *Miranda* did not bar the admission of a subsequent statement obtained after the warnings were delivered). In *Elstad*, the refusal to treat the second statement as the tainted fruit of the earlier unlawful conduct was justified, according to Justice O'Connor (for the majority), because "a simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Id*. at 306 n.1.

107. *See* Peter Arenella, Miranda *Stories*, 20 HARV. J.L. & PUB. POL'Y 375, 380 (1997) (describing officers' intentional decisions to violate *Miranda*); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 132–37 (1998) (discussing the widespread practice in California of questioning in violation of *Miranda*); Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121, 1129–30 (2001) (stating that the Los Angeles and Santa Monica police departments' practice of training their officers to interrogate suspects "outside

description in *Cooper v. Dupnik*[108] of an Arizona police agency's decision to ignore *Miranda* invocations in high profile cases.[109] When the Court limits the adverse consequences of violating a substantive rule, we will, of course, see an increase in such violations.[110] Professor Clymer asserts that this is all as it should be. He maintains that there is no misconduct to deter when police officers deliberately disregard the *Miranda* rules, so long as they are "willing to suffer the exclusionary consequences."[111] This position is short-sighted. Professor Clymer has apparently forgotten why the Court instituted the warnings in the first place. They are necessary to dispel the coercion inherent in every custodial interrogation and to assist the Court in adjudicating the admissibility of statements. Should the Court in *Martinez* agree with Professor Clymer and General Olson and inform federal, state, and local police agencies that the constitutional prophylactic rules developed in *Miranda* (and throughout constitutional criminal procedure) are actually *optional*, it will send the intolerable signal that judicial restraints on abusive police tactics have been abandoned.

III.

The Department of Justice (DOJ) argued in *Martinez* that the Court should reject civil rights liability for intentional violations of *Miranda* and for intentional and coercive behavior to obtain involuntary confessions, in part, so that police officers may "obtain potentially life-saving information during emergencies."[112] Three pages of the DOJ's brief are devoted to discussions of public safety, imminent threat of harm, and exploding bombs.[113] The simplest answer to this argument is that no such emergency existed in either *Martinez* or any of the numerous other cases where police

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Miranda" is no defense); *see also* United States v. Patane, No. 01-1503 (10th Cir. 2002); United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002); United States v. Orso, 275 F.3d 1190 (9th Cir. 2001); Cal. Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999).

108. 924 F.2d 1520 (9th Cir. 1991).

109. *Id.* at 1523–25 (describing the decision of the joint task force of the Tucson Police Department and the Pima County Sheriff's Department to disregard the defendant's request for counsel since 1981 but finding no civil rights liability), *rev'd en banc*, 963 F.2d 1220, 1238–50 (9th Cir. 1992) (finding violations of the Fifth and Fourteenth Amendments).

110. *See, e.g.*, Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442–43 (1987) (hypothesizing that Justice Holmes's "bad man of the law" might author a manual advising police to continue to interrogate a suspect despite his request for counsel or silence); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2544 (1996) ("[W]hile there may be some police officers who will attempt to obey the law as they understand it, regardless of any sanction that may be imposed, there are no doubt other officers who will purposefully violate the law in the absence of sanctions, usually because they believe they can achieve law enforcement objectives by doing so.").

111. Clymer, *supra* note 21, at 450.

112. Brief for the United States, *supra* note 20, at 7.

113. *Id.* at 23–25.

departments are regularly employing this tactic. Any alleged criminal conduct in *Martinez* was terminated, there were no weapons at large, and there were no victims unaccounted for. The case involved simple evidence-gathering. The government's thinly veiled reference to domestic and foreign terrorism should not persuade the Court to dilute or eliminate Fifth and Fourteenth Amendment protections for citizens in ordinary cases.

Should an actual emergency arrive, judicial and executive branch officials have ample means of safeguarding the public. First, there is already an exception to *Miranda* where public safety is at issue, excluding civil rights liability even for intentional *Miranda* violations in such scenarios.[114] Second, there is nothing to prevent the Court from creating a narrow emergency exception for instances of actual rather than presumed coercion should the appropriate case arise.[115] Finally, the government can choose to ignore *Miranda* and the privilege itself if convinced that a life may be at stake and simply pay the price of exclusion of the testimony in a criminal trial and monetary damages to the victims.[116] Officers will generally have little to fear by way of jury verdicts in favor of mass killers and international terrorists.

IV.

There have been recent attempts by scholars and by the government at "reforming" both *Miranda* and the privilege against self-incrimination. Professor Clymer, for example, suggests that we interpret the privilege as a mere evidentiary rule rather than as a substantive regulation of police conduct.[117] Though such an interpretation forecloses the possibility of civil rights liability not only for violations of the *Miranda* rules but also for police conduct that coerces a confession from a suspect, he assures us that we might expect an equivalent gain in civil liberties when the Court is forced to

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114. *See* New York v. Quarles, 467 U.S. 649, 657 (1984) (establishing a public safety exception to *Miranda*); *see also* Alan Raphael, *The Current Scope of the Public Safety Exception to* Miranda *Under* New York v. Quarles, 2 N.Y. CITY L. REV. 63, 81 (1988) (discussing the *Quarles* public safety exception).

115. *See supra* note 86 (citing cases in which the Court has found an exception to a constitutional right); *Quarles*, 467 U.S. at 686, 687 (Marshall, J., dissenting) (arguing that "without a 'public safety' exception, there would be occasions when a defendant incriminated himself by revealing a threat to the public, and the state was unable to prosecute because the defendant retracted his statement after consulting with counsel and the police cannot find independent proof of guilt"). Professor Pizzi has suggested that the privilege should not control "where the police are functioning in a situation which is primarily noninvestigative and where life is at stake." William T. Pizzi, *The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. CRIM. L. & CRIMINOLOGY 567, 596 (1985).

116. *See Quarles*, 467 U.S. at 664 (O'Connor, J., concurring).

117. Clymer, *supra* note 21, at 540.

eliminate *Miranda*'s exceptions.[118] After all, if the privilege is properly viewed as an evidentiary device, every instance of compulsion demands that we exclude the resulting statement and any physical fruits in the case-in-chief and for impeachment purposes. However, in reality the current conservative Court will not retract *Miranda*'s exceptions should it preclude civil rights liability for police tactics which compel statements. Instead the Court will give us doctrinal incoherency—by both eliminating civil rights liability and retaining all of *Miranda*'s exceptions.[119] This will leave a world where no right to silence is enforced.

Professors Amar and Lettow have recently revived a proposal that first appeared in the academic literature in 1932, suggesting that magistrate interrogation is more "humane" than police interrogation[120] and arguing that the privilege as currently drafted permits this type of questioning so long as the fruits of the compelled confession, but not the confession itself, are admitted in a subsequent criminal trial.[121] Unfortunately, Amar and Lettow do not recommend replacing police interrogation with magistrate interrogation; rather, they suggest supplementing it.[122] This, again, would be the worst of all worlds for those wishing to remain silent—the government has twice the opportunity to question suspects, and the suspect has no enforceable right to remain silent outside the courtroom.

In short, it appears that many proposed *Miranda* "reforms" will in fact almost wholly eviscerate the right, regardless of whether such was the intent of the reformer. Criticisms of legal doctrines surrounding the taking of confessions are misdirected—*Miranda* simply applies the privilege to the stationhouse. The culprit generating such unhappiness is the privilege itself.[123] No doubt a plausible argument can be made for repealing the privilege against self-incrimination as an unattractive right—it assists the guilty, it is too costly for law enforcement, it is bad policy. However, if there is no longer a right to remain silent, this repeal should be accomplished by

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118. *Id.* at 539–50.

119. Professor Clymer describes this result as "both troubling and likely." *Id.* at 528.

120. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 713–16 (1968) (suggesting the same and assuming the proposal would not be adopted without a constitutional amendment); Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1228 (1932) ("Third degree methods could be largely repressed if police were forced to present their prisoner immediately before a magistrate."); *see also* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2669 (1996) (suggesting interrogation before a magistrate, but allowing the suspect to remain unsworn and imposing no penalty for refusal to answer).

121. Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 898–900 (1995). I criticize this piece extensively in Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 LAW & SOC. INQUIRY 533, 550–56 (1999).

122. Amar & Lettow, *supra* note 121, at 927–28.

123. Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 719–27 (1988).

amending the Constitution honestly through the political process, rather than dismembering the privilege judicially.

Whether it is wise to retain a right to remain silent depends upon what values we believe such a right fosters. If the privilege was enshrined in our Constitution solely to assure reliability of convictions, then perhaps a modified version of Professor Amar's proposal is in order. We could eliminate all police questioning (as innocent persons can be coerced into falsely confessing), compel magistrate questioning on pain of contempt, and admit only reliable and corroborated derivative evidence. The suspect's statement itself should be excluded based upon reliability concerns, since some innocent defendants make bad witnesses or may be impeachable with prior convictions. Likewise, if one believes that the privilege was designed solely as a rule of evidence, then General Olson and Professor Clymer's proposal might be palatable. Any government activity not both "unjustified by any government interest" and "shocking" is constitutional so long as the defendant retains the right to exclusion of such evidence and its fruits at a criminal trial. However, if there is some value in deterring disapproved police tactics (ranging from beating a confession out of suspects, threatening to remove their children from their care, making false promises of leniency, stripping them naked, and lying about the facts of the crime and the evidence linking the suspect to that crime, to more subtle psychological pressure such as false sympathy or minimizing the offense)[124] and in maintaining an accusatorial criminal justice system that does not require a suspect to hang herself, a robust privilege protected by *Miranda* warnings and enforceable in a civil rights action is critical.

124. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978); Haynes v. Washington, 373 U.S. 503 (1963); Lynum v. Illinois, 372 U.S. 528 (1963); Watt v. Indiana, 338 U.S. 49 (1949); Aschcraft v. Tennessee, 322 U.S. 143 (1944); Brown v. Mississippi, 297 U.S. 278 (1936).