You Have The Right To Understand *Miranda:* A Proposal for the Next 50 Years

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The landmark case of *Miranda v. Arizona* turns 50 this year.[1] From Jack Lord to Peter Falk, from Jerry Orbach to Mariska Hargitay, during these five decades television cops have unvaryingly begun to intone, "You have the right to remain silent…" the moment their suspect is handcuffed. Nothing could be more clear-cut than the rule of *Miranda* … as seen on TV. However, real police stations and courtrooms are different. There is no soundtrack, no craft services, and the vitality of *Miranda* is far less certain. Viewed from the perspective of a person in custody, technicalities in case law make it so difficult to successfully invoke *Miranda* protections, and so easy to waive them, that a typical suspect cannot know whether he or she has invoked or waived his or her rights. After 50 years, it is time to update *Miranda,* and fortunately it is possible to mitigate this unfairness without significantly changing the legal doctrine.

Miranda Sprang From The 'Roots of American Jurisprudence'

As the opening lines of the majority's opinion announced, *Miranda* was a case that dealt with "questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the federal Constitution in prosecuting individuals for crime."[2] In this era of terrorism-preparedness and Black Lives Matter, the War on Drugs and the Innocence Project, these questions remain both critical and fiercely disputed. If it is true that "the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law,"[3] the quality of American civilization in the next 50 years will be determined in part by how (and whether) we continue to implement the protections for the accused that *Miranda* sought to establish.

In *Miranda*, a divided Supreme Court held as follows: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Justice Earl Warren, writing for the majority, stated the required "procedural safeguards":

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.[4]

The *Miranda* opinion was only one of a series of cases in which the Court dealt with custodial interrogation and the admissibility of the suspect's statements. These cases exposed a profound lack of consensus on the Court not only as to the proper result in each case, but also as to the proper framework in which to analyze and decide such cases. Part of the Court was deeply suspicious of the use of confessions to obtain convictions, and of the manner in which such confessions were frequently obtained. The other part of the Court was unwilling to impose constitutional restrictions on police, which might result in guilty defendants going free.

The lack of consensus when *Miranda* was decided has never been resolved. Factions of the judiciary have pulled the *Miranda* rule almost to the breaking point. And yet, despite the many exceptions and qualifications to the original rule, courts still occasionally reverse convictions on *Miranda* grounds, and the rule continues to have some effect on the practices of police and prosecutors.

A Confession is 'Most Satisfactory' … Or is It?

Prior to *Miranda*, the Supreme Court had ruled that it was unnecessary to provide any warning to a suspect concerning his rights. In 1896, the Court affirmed a conviction where the defendant testified that he was questioned "without giving him the benefit of counsel or warning him of his right of being represented by counsel, or in any way informing him of his right to be thus represented" while the suspect "was in custody but not in irons."[5] The *Miranda* decision was a reversal of that ruling.

However, the judicial controversy was not merely about whether notification of rights should be required, it was about the nature and value of a suspect's confession as evidence, and the degree to which police should be encouraged or discouraged from relying on confessions to solve and prove cases. In its decision in *Wilson*, the Court opined that a "confession, if freely and voluntarily made, is evidence of the most satisfactory character."[6] Two years before *Miranda*, however, a six-member majority of the Court in *Escobedo v. Illinois* opined that confessions were an inferior and even dangerous form of evidence: "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[7]

The concern expressed in *Escobedo* was not new. The Court had previously remarked upon the likelihood that a suspect might be induced to falsely confess despite the suspect's actual innocence.[8] This was the reason for a rule found in many jurisdictions (and in no way invented by the Supreme Court), requiring corroboration of confessions before they could be used in evidence. Such a rule, the Court had stated, "protects the administration of the criminal law

against errors in convictions based upon untrue confessions alone."[9] Indeed, the *Miranda* majority traced the concept back to the 13th Century, quoting Maimonides, who said: "[T]he principle that no man is to be declared guilty on his own admission is a divine decree."[10] And in 1954, a dozen years before *Miranda*, the Court had held that even mere "admissions" by a suspect "have the same possibilities for error as confessions."[11]

In 1963, in *Haynes v. Washington,* the Court had vacated the conviction of a suspect whose request for an attorney was denied by the police and who signed a written confession after being held overnight. Other than being denied contact with an attorney, there was no overt coercion by the police. A five-member majority of the Court found that denial of an attorney rendered the confession involuntary. The majority spoke in terms that expressed deep suspicion of police attempts to obtain a confession: "We cannot blind ourselves to what experience unmistakably teaches: that even apart from the express threat, the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from suspects."[12] The majority found such police conduct not merely unconstitutional, but also symptomatic of lazy and perhaps incompetent policing: "[H]istory amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence."[13]

The four dissenters in *Haynes* did not respond to that concern, instead expressing their view that precedent ("the 33 cases decided on the question by this Court") simply did not hold that denial of access to an attorney, by itself, rendered a confession involuntary.[14] The dissent argued that precedent mandated that the determinative question should be "whether the will of the accused is so overborne at the time of the confession that his statement is not 'the product of a rational intellect and a free will,'" which mere deprivation of counsel did not necessarily achieve.[15]

Miranda's Brave New World

When issuing its opinion in *Miranda* in 1966, the majority took the decision in *Escobedo* as a starting point: "We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it."[16] However, whereas the Court's *Escobedo* decision highlighted the unreliability of confessions, in *Miranda*, the majority dealt with that issue only briefly.[17] The majority argued instead that the need for confessions to prove meritorious cases had been exaggerated: "Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the 'need' for confessions. In each case, authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant."[18] Where the need for a confession may be marginal, the majority felt, the documented use by police of physical[19] and psychological[20] "third degree"[21] techniques comes at too high a cost: in addition to harming the individual, "it breeds contempt for law."[22]

In dissent, Justice John Marshall Harlan II called the *Miranda* rules "a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty, and to increase the number of trials,"[23] complaining that "[t]he obvious underpinning of the Court's decision is a deep-seated distrust of all confessions."[24] While the majority focused on the risk of police overreach, the dissent focused instead on the fact that the rule would result in some guilty defendants going free: "In some unknown number of cases, the Court's rule will return a killer, a rapist, or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity."[25] It is this conflict: suspicion of the police versus fear of the guilty, which has driven the lurching course of *Miranda* jurisprudence ever since.

The decade in which *Miranda* was decided was a time of profound change, of which the *Miranda* ruling was only a part. It was only in 1964 that the Court held that the privilege against self-incrimination applied equally to the federal government and the states.[26] In 1964, the Court held that the right to counsel took hold once an individual was interrogated as a suspect, and not, as had been the previous rule, at a later stage such as indictment.[27] The Court was still trying to work out the constitutional basis for its rulings. In *Escobedo*, the right to counsel during interrogation was found in the Sixth Amendment;[28] in *Miranda,* the Court looked primarily to the Fifth Amendment, emphasizing the role counsel can play in protecting an accused's Fifth Amendment privilege against self-incrimination.[29] *Escobedo* identified an obligation on the part of the police to advise suspects of their right to remain silent.[30] What was done in *Miranda*, two years later, was to take this "important new safeguard" and formalize it, making it a requirement in all custodial interrogations.[31]

As the Court explained in 1974: "Before *Miranda,* the principal issue in these cases was not whether a defendant had waived his privilege against compulsory self-incrimination but simply whether his statement was 'voluntary.' … Thus the Court in *Miranda*, for the first time, expressly declared that the Self-Incrimination Clause was applicable to state interrogations at a police station, and that a defendant's statements might be excluded at trial despite their voluntary character under traditional principles."[32] The Supreme Court also held, however, that the *Miranda* safeguards existed side by side with, and did not entirely displace, the previous law rendering coerced confessions inadmissible.[33]

Retrenchment in the Years Following *Miranda*

It requires some force of imagination to look back and see *Miranda* as it appeared to those on the Court at the time it was decided. Justice Harlan, dissenting, interpreted the majority's new rule as follows:

> To forgo [the rights to silence and counsel], some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the state, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth.[34]

Justice Harlan's dissent also identified some of the weaknesses in the Miranda regime, which would ultimately reduce the scope of its protections significantly: "Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the ac-

cused has effectively waived his rights…."[35] These open questions, in particular the question of waiver, have proven to have consequential effects on the practical utility of *Miranda* to criminal suspects.

Retrenchment from the forward position staked out by the *Miranda* majority began not long after the decision was made. In 1971, the Supreme Court held that statements obtained in violation of *Miranda* could be used for impeachment because "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[36] In 1984, the Supreme Court carved out a "public safety" exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence.[37] The Court has repeatedly declined to apply the "fruit of the poisonous tree" doctrine to evidence traceable to a *Miranda* violation.[38]

'All Silent and All Damned'

Perhaps the most significant modifications to *Miranda* jurisprudence were developments in the rules controlling how a suspect might invoke, and how he or she might waive, his or her *Miranda* protections. In 1979, in *North Carolina v. Butler,* the Supreme Court began to expand the concept of waiver of *Miranda* rights. The Court held that waiver of *Miranda* rights need not be explicit, but can be "inferred from the actions and words of the person interrogated."[39] By way of contrast, in his *Miranda* dissent, Justice Harlan expressed the understanding that for a suspect to forgo his *Miranda* rights, "some affirmative statement of rejection is seemingly required."[40] In 1994, the Supreme Court in *Davis v. United States* took the fateful step of requiring an unambiguous request for an attorney by the suspect before the suspect could be said to have invoked his *Miranda* rights and thereby triggering the duty to cease questioning.[41] This was a sharp departure from the procedure originally set forth in the *Miranda* ruling, which provided that the suspect could "indicate in any manner" the intent to invoke his or her right to silence or an attorney.[42]

The decisions in *Butler* and *Davis*, together with the multitude of decisions that have applied and embellished them, have resulted in a landscape where is it very hard to effectively invoke one's *Miranda* rights and very easy to waive them. Even worse, as the rules of invocation and waiver have become more intricate and baroque, it has become essentially impossible for an ordinary person in custodial interrogation to accurately understand, at any particular moment, whether they have invoked or waived their *Miranda* rights.

For example, a suspect's statement to police that "I wanted to see if we could push this to where I could get my lawyer" has been ruled too ambiguous to be an effective invocation of the right to an attorney.[43] Where the questioner told the suspect, "If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time," and the suspect responded "I'm going to wait," was held *not* to be an unambiguous invocation of the suspect's rights.[44] Saying "I don't want to talk to you anymore" is not an unambiguous invocation.[45] Refusing to sign a waiver form is not an effective invocation.[46] Statements by the suspect containing any kind of contingent or qualifying element, such as a suspect's statement that he "was *going* to get a lawyer"[47] (emphasis added), have been found to be insufficient to constitute an unambiguous invocation of the right to counsel.

Even after invoking the *Miranda* privileges—if the suspect can get that far—any further speech by the suspect *might* be found to effect a waiver of that privilege. For example, the Second Circuit recently held that a suspect's remark to police "that he 'was not a bad guy … initiated conversation" with his interrogators, permitting them to restart questioning.[48] The Seventh Circuit held that a suspect (who had been unlawfully questioned after invoking his right to remain silent), waived his rights by quoting the Bible verse "the truth shall set you free."[49] (Spoiler alert: It didn't.)

One of the most counterintuitive innovations in the law of *Miranda* invocation and waiver is one of the most recent. A police officer tells a suspect, "You have the right to remain silent." In response, the suspect … remains silent. How many people would be aware that in 2010, the Supreme Court ruled that remaining silent is *not* an effective way to invoke the *Miranda* right to remain silent? Yet this is exactly what the Supreme Court did in *Berghuis v. Thompkins* (in a 5:4 decision). Having been read a standard *Miranda* warning, which included the statement, "You have the right to remain silent," the suspect sat silently while the police asked him questions for nearly three hours. The Supreme Court held that this was not an effective invocation of the right to remain silent because "[a]t no point during the interrogation did Thompkins *say* that he wanted to remain silent."[50] Writing for the four dissenters in *Salinas v. Texas,* a case that restated and expanded the ruling of *Berghuis*, Justice Stephen Breyer wrote: "The plurality says that a suspect must 'expressly invoke the privilege against self-incrimination.' But does it really mean that the suspect must use the exact words 'Fifth Amendment?' How can an individual who is not a lawyer know that these particular words are legally magic?"[51]

The current state of *Miranda* doctrine is such that even seemingly clear invocations of *Miranda* may only be honored on appeal. For example, in *Sessoms v. Grounds* it took over 10 years and *en banc* review by the Ninth Circuit to determine that when the suspect said, "Give me a lawyer," this was indeed an unambiguous and effective invocation of the right to counsel.[52] In another case, a *Miranda* waiver form asked "Having these rights in mind, do you wish to talk

The decade in which Miranda was decided was a time of profound change, of which the Miranda ruling was only a part. It was only in 1964 that the Court held that the privilege against self-incrimination applied equally to the federal government and the states. In 1964, the Court held that the right to counsel took hold once an individual was interrogated as a suspect, and not, as had been the previous rule, at a later stage such as indictment.

to us now?" and the suspect wrote "No." The district court held this was *not* an invocation of *Miranda*, and it took an interlocutory appeal to enforce the suspect's rights.[53] Given the immense pressures on criminal defendants to plead guilty, justice delayed—as in cases like these—will mean justice denied in the majority of cases.

Although the federal courts like to repeat dicta that "a suspect need not speak with the discrimination of an Oxford don"[54] and "no ritualistic formula is necessary in order to invoke the privilege," these memorable turns of phrase are demonstrably false.[55] To be sure of successfully invoking *Miranda* privileges without waiver, one would have to be fully familiar with decades of case law.

'Confusion Now Hath Made His Masterpiece'

The *Miranda* doctrine has developed to a point where—leaving aside the policy merits of the doctrine as it is—the people who are supposed to be protected by the doctrine have no hope of understanding it. And without understanding it, such people will only effectively obtain the post-warning protections of *Miranda* if by sheer dumb luck their conduct happens to coincide with what the present doctrine requires. Knowing that *Miranda* rights exist, but not knowing how to invoke and maintain them, could be more dangerous to a suspect than not having the rights at all. For example, a suspect might chat with officers to defuse the mood, not realizing that any words spoken carry the risk of waiver of all *Miranda* rights. Believing himself secure, he plunges into greater danger. *Miranda* is a "prophylactic"[56] rule—as with other types of prophylactics, unknowing reliance on a defective one may be worse than having none at all.

So many technicalities have been baked into the law of invocation and waiver, that where the police do not omit the *Miranda* warning entirely, the protections *Miranda* affords to the average suspect are more illusory than real. Even worse, because courts presume that where a *Miranda* warning is given, any confession that follows is voluntary and free from compulsion, the protections formerly afforded by the due process clause have been significantly diminished.[57] A voluntariness enquiry asks whether the suspect's humanity has been respected. Now, courts ask whether the suspect's rights have been respected. Highly technical and increasingly hypothetical, these rights are "scrupulously honored" more in the breach than the observance.[58] As the Supreme Court recently observed: "[G]iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings … tends to end with the finding of a valid waiver."[59]

The existence of *Miranda*, then, seems to have substantially weakened the due process doctrine without effectively replacing it. For the same reasons that *Miranda* was rightly decided when the decision was issued 50 years ago, we must revisit and modernize *Miranda* to ensure that it does not damage the very interests it was created to protect. The problems with the doctrine itself can't be fixed without a consensus that remains elusive. By updating the Miranda warning, however, some fairness can be restored to the system.

How Do We Solve a Problem Like *Miranda*?

The Supreme Court has consistently declined to dictate the precise words that the police must say to give a lawful *Miranda* warning,[60] not wanting to force the police to recite a particular script. Indeed, the Supreme Court has held that a *Miranda* warning is sufficient unless one of its four elements is "entirely" omitted.[61] But the text of the warning remains important. In the beginning, the four-element warning required by *Miranda* served to accurately inform the suspect of the essential elements of his rights. Now that the *Miranda* doctrine has evolved, the four-element warning no longer accurately communicates the suspect's rights. It would be reasonable, then, to require police to inform suspects of the additional elements that have become part of *Miranda* doctrine over the last half century. The police should be required to inform suspects that the only way in which they can invoke their rights is in unambiguous spoken words. The police should also be required to warn that continuing to speak—about anything—can constitute waiver.

Throughout the last 50 years, the debate on the Supreme Court over the value and risks of reliance on confessions has remained unresolved. When holding that courts should carefully scrutinize alleged waiver of *Miranda* rights by minors, the five-member majority of the Court in *J.D.B. v. North Carolina* opined in 2011 that "the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed."[62] The dissent in that case complained: "In its present form, *Miranda*'s prophylactic regime already imposes high costs by requiring suppression of confessions that are often highly probative and voluntary by any traditional standard."[63] In 2013, a different five-justice majority in *Berghuis* sought to reduce the "significant burden on society's interest in prosecuting criminal activity" imposed by *Miranda*.[64] The dissent in *Berghuis* countered: "By bracing against the possibility of unreliable statements in every instance of in-custody interrogation, *Miranda's* prophylactic rules serve to protect the fairness of the trial itself."[65] In *Salinas*, Justice Breyer again expressed the concern that the *Berghuis/Salinas* rule would lead to self-incrimination by innocent people.[66] The Warren Court debated the exact same issues, also without consensus.

Perhaps, however, these opposing sides in the *Miranda* debate could agree on proposed modifications to the traditional warning. The additional warnings could be quite simple. For instance, "If you wish to invoke your rights, you must tell me clearly in words," and, "You may waive your rights if you continue talk to me after you say you want to invoke your rights." This would require no modification to the *Miranda* procedure—the warning would be required (or not required) under the exact same circumstances as today. Such a modification of the warning (adding a fifth and sixth required element) would not seriously hamper the police, and the change would only modestly affect the jurisprudence. These additional notifications do not require reversal of the narrowing decisions of *Butler, Davis,* and *Berghuis/Salinas*. To the contrary, they acknowledge them as a (presumably) permanent part of the *Miranda* landscape. At the same time, however, they reduce the risk that unfairly obtained or unreliable confessions will result. When developed, the original Miranda warning closely mirrored the underlying legal doctrine. It is time that the *Miranda* warning be revised to accurately reflect the doctrine as it is today.

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Miranda Rights For the Next Generation

In some ways, the *Miranda* decision has carried the day and is now unassailable. Its holding that when in custodial interrogation a suspect has the right to remain silent and to have an attorney is essentially unquestioned. So, too, no one questions that the police must advise the custodial suspect of the existence of these rights. Indeed, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[67] Even with qualifications such as the safety exception in place, it is still generally true that "[i]n order for an accused's [custodial] statement to be admissible at trial, police must have given the accused a Miranda warning."[68] The weaknesses of *Miranda* are exposed in circumstances where a warning has been given, and the difficulty of successfully invoking the *Miranda* privileges and avoiding waiver of them works to deprive people of their protections. By modifying the required warning in a way that respects the precedent that has accumulated since *Miranda* was originally decided, we can revitalize *Miranda* for the next 50 years. ⊙

Endnotes

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).
[2]*Id.* at 537.
[3]*Id*. at 480.
[4]*Id.* at 444-445.
[5]*Wilson v. United States*, 162 U.S. 613, 621-623 (1896).
[6]*Id.* at 622.
[7]*Escobedo v. Illinois*, 378 U.S. 478, 489 (1964). *See also* Deuteronomy 19:15 "One Witness is not enough to convict anyone accused of any crime or offense they may have committed."
[8]*See Warszower v. United States*, 312 U.S. 342, 347 (1941).
[9]*See id.*
[10]*Miranda*, 384 U.S. at 459 (quoting Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6, III Yale Judaica Series 52-53).
[11]*Opper v. United States*, 348 U.S. 84, 91 (1954).
[12]*Haynes v. Washington*, 373 U.S. 503, 514 (1963).
[13]*Id.* at 519.
[14]*Id.* at 523-524 (Clark, J., dissenting).
[15]*Id.*
[16]*Id.* at 442.
[17]*Id.* at 447, 456, fn. 24 ("Interrogation procedures may even give rise to a false confession.").
[18]*Id.* at 481.
[19]*Id.* at 445-446.
[20]*Id.* at 448-456.
[21]*Id.* at 455.
[22]*Id*. at 480.
[23]*Id*. at 541 (Harlan, J., dissenting).
[24]*Id*. at 537 (Harlan, J., dissenting).
[25]*Id.* at 543 (Harlan, J., dissenting). Justice Harlan went so far as to suggest that the *Miranda* rule would deprive suspects of the psychological benefits of confession, as well as of the opportunity to pass through the modern penological system whose aim was to "as soon as possible to return the convict to society a better and more law-abiding man than when he left." *Id.* at 538, 541, 543. Justice Harlan argued: "[I]t is by no means certain that the process of confessing is injurious to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation. … It may well be that in many cases [application of the *Miranda* rules] will be no less than a callous disregard for his own welfare as well as for the interests of his next victim." No one could seriously make such an argument today, when long sentences, degrading conditions, and extensive use of solitary confinement have become routine.
[26]*Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 77-78 (1964).
[27]*Escobedo*, 378 U.S. at 490-491.
[28]*Id.* at 491.
[29]*Miranda*, 384 U.S. at 468-469 (the Fifth Amendment is the basis of the *Miranda* ruling). *But see id*. at 466 fn. 35 (deprivation of access to an attorney during interrogation also a Sixth Amendment violation). *See also McNeil v. Wis.*, 501 U.S. 171, 177-178 (1991) (distinguishing between the "the Sixth Amendment right to counsel and the *Miranda-Edwards* 'Fifth Amendment' right to counsel").
[30]*See Escobedo*, 378 U.S. at 491.
[31]*Johnson v. New Jersey*, 384 U.S. 719, 730 (1966).
[32]*Michigan v. Tucker*, 417 U.S. 433, 441-443 (1974) (emphasis added).
[33]*See Johnson*, 384 U.S. at 730.
[34]*Miranda*, 384 U.S. at 504-505 (Harlan, J., dissenting).
[35]*Id.* at 545.
[36]*Harris v. New York*, 401 U.S. 222, 224 (1971).
[37]*New York v. Quarles*, 467 U.S. 649, 655 (1984).
[38]*Michigan v. Tucker*, 417 U.S. 433, 448-449 (1974); *Oregon v. Elstad*, 470 U.S. 298 (1985); *United States v. Patane*, 542 U.S. 630 (2004).
[39]*North Carolina v. Butler*, 441 U.S. 369, 373 (1979).
[40]*Miranda*, 384 U.S. at 504-505 (Harlan, J., dissenting).
[41]*Davis v. United States*, 512 U.S. 452, 459 (1994) ("But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.") (citing *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)).
[42]*Miranda*, 384 U.S. at 444-445.
[43]*United States v. Carrillo*, 660 F.3d 914, 919 (5th Cir. 2011).
[44]*United States v. Amawi*, 695 F.3d 457, 484-485 (6th Cir. 2012).
[45]*United States v. McWhorter*, 515 Fed. Appx. 511, 517 (6th Cir. 2013).
[46]*See United States v. Plugh*, 648 F.3d 118, 122-123 (2d Cir. 2011).
[47]*United States v. Scarpa*, 897 F.2d 63, 68 (2d 1990).
[48]*United States v. Oehne*, 698 F.3d 119, 121 (2d Cir. 2012).
[49]*Robinson v. Percy*, 738 F.2d 214, 221 (7th Cir. 1984).
[50]*Berghuis v. Thompkins*, 560 U.S. 370, 375, 380-381 (2010) (Kennedy, J.); *see also Salinas v. Texas*, 133 S. Ct. 2174, 2182 (2013).
[51]*Salinas*, 133 S. Ct. at 2190 (Breyer, J., dissenting).
[52]*Sessoms v. Grounds*, 776 F.3d 615, 617 (9th Cir. 2015).
[53]*United States v. Scott*, 693 F.3d 715, 720 (6th Cir. 2012).
[54]*Davis*, 512 U.S. at 459.
[55]*See, e.g., Salinas*, 133 S. Ct. at 2178.
[56]*J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011).
[57]*See Berkemer v. McCarty*, 468 U.S. 420, 433 (1984) ("We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a

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manipulating the assignment power, in violation of the unspoken norms of the institution he headed. Only thing is: it wasn't true. Even after five years on the tribunal, and numerous instances where the chief unexpectedly changed his position when he saw he would be on the losing side, Burger never assigned O'Connor to write the Court's opinion in any big cases.

How, then, did O'Connor and Ginsburg use the law to change the world, as *Sisters in Law*'s subtitle claims they did? Very similarly and very differently. Although Hirshman admires both women, she does not paint them as being above the rough and tumble required to succeed in the legal profession and, ultimately, to be named to the Supreme Court. She often describes O'Connor in political terms, as calculating what battles to fight while she served in the Arizona legislature and how to vote on the high court. And one is left to ponder what Justice William Brennan meant when he called his "over-the-top" (Hirshman's term) dissent, which insulted O'Connor during her first year on the Court, "the worst mistake I ever made." As for Ginsburg, during her time at the ACLU, she revealed a "steel-trap mind behind the velvet modesty" when jousting over which lawyers should handle oral arguments before the Supreme Court.

Sisters in Law's dust jacket describes the book's author, Linda Hirshman, as a lawyer and a cultural historian. She is most known for her highly controversial book *Get to Work: A Manifesto for Women of the World.* In *Sisters in Law*, Hirshman sees the lives and careers of O'Connor and Ginsburg through a feminist lens, and, accordingly, wrote *Sisters in Law* with a feminist pen.

Hirshman describes the personal element behind the word "sisters" in the title of the book:

> And from the beginning she [O'Connor] did what she could to make sure Ginsburg succeeded. Ginsburg's first assignment was not the traditional "dog" case, where the Court is unanimous and the opinion uncomplicated. Instead, Chief Justice Rehnquist handed her a contentions 6-3 decision on one of the most complex federal statutes. "Sandra," Ginsburg asked her predecessor plaintively, "how can he do this to me?" O'Connor (who was on the other side in the decision) made her typical flat-tire response. "Just do it." Oh, and do it before he makes the next set of assignments, she advised. O'Connor knew—and it was one of the many unwritten rules of the institution that newbies must learn somewhere—that Chief Justice Rehnquist would not give Ginsburg another assignment until she had turned in the one she had. "Typical," Ginsburg remembered years later, of her predecessor's no-nonsense guidance. She called O'Connor "the most helpful big sister anyone could have." O'Connor welcomed her sister's delivery of her first opinion with a note: "This is your first opinion for the Court, it is a fine one, I look forward to many more."

After she was appointed to the Court, O'Connor was treated for breast cancer. Later, when Ginsburg was treated for colon cancer, O'Connor gave her colleague advice about when to schedule treatments in order not to miss any conferences among the justices or oral arguments.

In *Sisters in Law*, Hirshman describes both O'Connor and Ginsburg as courageous and focused. They never believed that their genders should be a barrier. Instead, they persevered. They maximized their educations, talents, and prospects. But their unique experiences as women gave them special sensitivity to gender matters before the Court. One was described as the only woman whom Ronald Reagan would have found palatable to nominate, and the other was called the Thurgood Marshall for women, and both have indeed managed to change the world. ⊙

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self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."). *Accord Dickerson v. United States*, 530 U.S. 428, 444 (2000).

[58]For example, a suspect's invocation of his or her rights is "scrupulously honored" if the police wait half an hour and recite the *Miranda* warning again before resuming questioning. *See United States v. Hsu*, 852 F.2d 407, 409-410 (9th Cir. 1988) (citing *Michigan v. Mosley*, 423 U.S. 96 (1975)).

[59]*Missouri v. Seibert*, 542 U.S. 600, 608-609 (2004) (Souter, J.) (citing *Berkemer*, 468 U.S. at 433, n. 20).

[60]*Florida v. Powell*, 559 U.S. 50, 60 (2010) (Ginsburg, J.) ("This Court has never indicated that the rigidity of *Miranda* extends to the precise formulation of the warnings given a criminal defendant.") (quoting *California v. Prysock*, 453 U.S. 355, 359 (1981)).

[61]*Powell*, 559 U.S. at 62. *See also Johnson v. Laxalt*, 624 Fed. Appx. 492 (9th Cir. 2015) (officer's "rambling … ambiguous" response to the suspect's question concerning the scope of his possible waiver of Miranda construed against the suspect).

[62]*J.D.B.*, 564 U.S. at 269 (Sotomayor, J.) (citations omitted).

[63]*Id.* at 288 (Alito, J., dissenting).

[64]*Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (Kennedy, J.).

[65]*Id.* at 404 (Sotomayor, J., dissenting).

[66]*Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting).

[67]*Dickerson*, 530 U.S. at 443.

[68]*Berghuis,* 560 U.S. at 388.