REGRESSION TO THE MEAN: HOW *MIRANDA* HAS BECOME A TRAGICOMICAL FARCE

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INTRODUCTION

Fifteen years ago, when I wrote an article for a symposium issue of this journal, rhetorically entitled, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?*,[1] I harbored no pretensions that it would ultimately have any significant impact. My thesis in the article was that there was not "much left to *Miranda*—the patient [was] either on life support or clinically dead."[2] Since that time, much has been written about *Miranda*, including my revision of the article in a book I wrote on the Fifth Amendment,[3] as well as a scholar's argument intended to "save" *Miranda*,[4] and his forlorn conclusion a decade later "mourning" *Miranda*.[5] More importantly, the preeminent scholar in the field, Yale Kamisar, has recently written an article aptly titled, *The Rise, Decline, and Fall (?) of Miranda*.[6] Professor Kamisar argues that the United States Supreme Court has, in essence, overruled *Miranda* "piece by piece."[7]

What can we add to the debate over *Miranda*'s fate that has not been rehashed by the best scholars in the field? In reflecting on this question, I harked back to a chapter in the path breaking book by the prominent economic scientist Daniel Kahneman, *Thinking Fast and Slow*.[8] In that chapter, Kahneman illustrates the operation of the principle of "regression

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1. Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461 (1998).

2. *Id.* at 462.

3. ALFREDO GARCIA, THE FIFTH AMENDMENT: A COMPREHENSIVE APPROACH (2002).

4. Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998) [hereinafter Weisselberg, *Saving Miranda*].

5. Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519 (2008) [hereinafter Weisselberg, *Mourning Miranda*].

6. Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH L. REV. 965 (2012) [hereinafter Kamisar, *The Rise, Decline, and Fall*].

7. *Id.* at 984.

8. DANIEL KAHNEMAN, THINKING FAST AND SLOW 175–84 (2011).

to the mean." The concept, espoused by Sir Francis Galton in the late nineteenth century, is captured in the adage that "what goes up must come down."[9] Similarly, and by analogy, my central theme is that the Court's *Miranda* jurisprudence has regressed to the mean. Although the Court affirmed the "constitutional" import behind *Miranda* in the *Dickerson*[10] case, it has in the past fifteen years further dismantled the holding and its underlying tenets. In effect, *Miranda* has metamorphosed into a tragicomical farce. It is tragic because the Court has undermined the protections embedded in *Miranda* while simultaneously encouraging the deceptive interrogation procedures the *Miranda* majority condemned. It is comical because the Court has pretended to embrace the doctrine while simultaneously eviscerating its core principles.

This truism is confirmed by one of the most noted *Miranda* scholars, Professor Richard Leo. He has concluded that "[p]olice interrogation in the American adversary system is firmly rooted in fraud."[11] The process is a confidence game in which the police lie to the suspect and pretend to befriend him in an effort to wrest a confession. Although *Miranda* was designed to prohibit such "deceptive stratagems,"[12] the Court has sanctioned, even implicitly encouraged, their use in its effort to whittle down the doctrine's core elements. Indeed, one scholar has documented the training of police officers to question "outside *Miranda*."[13] To a large degree, as David Simon has observed, the detective(s) conducting an interrogation have come to regard *Miranda* as little more than "simply a piece of station furniture."[14]

In my original article, I examined *Miranda*'s historical and social background, discussed its precursors, traced the evolution of the case, and documented the dismantling of the *Miranda* doctrine. I also argued that the doctrine's "seductive appeal" lulled defense counsel into a false sense of security, thereby deflecting reliance on the "voluntariness" standard as a failsafe to *Miranda*. Further, I maintained that a waiver of *Miranda* in some instances served to sanitize an otherwise involuntary confession. Finally, I proposed to "do away" with *Miranda*, to return to the voluntariness standard with one caveat: that the government be precluded from relying on a *Miranda* waiver to establish the voluntariness of a confession.

9. *Id.* at 179.
10. Dickerson v. United States, 530 U.S. 428, 443–44 (2000).
11. RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 25 (2008).
12. Miranda v. Arizona, 384 U.S. 436, 455 (1966).
13. Weisselberg, *Saving Miranda*, *supra* note 4, at 188.
14. DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 211 (1991).

With the benefit of hindsight, I suppose my arguments and conclusions, however prosaic, have stood the test of time. Indeed, it seems in retrospect that most scholars have arrived at the same place. Therefore, I hope to elaborate on the piece by focusing, in Part I, on a couple of cases which illustrate the U.S. Supreme Court's ratification of deception as an integral part of interrogations, despite *Miranda*'s admonitions. Then, in Part II, I will juxtapose those earlier cases with the Court's latest pronouncements on *Miranda*, which reflect the virtual dismantling of the doctrine. In Part III, I will focus on a case that, though based on the Sixth Amendment's right to counsel, threatens to turn *Miranda* on its head. The Conclusion provides a revision of my proposal to return to the voluntariness standard by focusing on factors that will provide better guidance to lower courts in assessing the putative "voluntariness" of a confession.

I. THE U.S. SUPREME COURT'S RATIFICATION OF DECEPTION

Beginning with the landmark case of *Brown v. Mississippi*,[15] the U.S. Supreme Court outlawed violence as a means of securing a confession from a criminal suspect. In response, law enforcement shifted its focus to psychological ploys designed to extract a confession from the suspect. As I have noted, "[T]he effective interrogator relies on guilt, shame, minimization of culpability, and atonement as his fundamental psychological tools."[16] Under the voluntariness standard, the threshold criterion for determining the admissibility of a confession is whether the suspect's will was overborne by the police.[17] *Miranda* supplanted the voluntariness standard with the presumption that custodial interrogation is coercive absent effective warnings and a waiver by the suspect of her right to remain silent and not to be questioned without the assistance of a lawyer. The logical premise behind *Miranda* is that a suspect who invokes either the right to remain silent or the right to an attorney will not be subjected to the psychological games that will induce him to confess.

Invoking *Miranda*'s safeguards, as I have emphasized, deprives the police of the "three pillars for successful interrogation—isolation of the suspect (i.e., privacy), control over the process (a derivative of the first corollary), and the opportunity to preclude the suspect from saying

15. Brown v. Mississippi, 297 U.S. 278 (1936).

16. GARCIA, *supra* note 3, at 61.

17. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534, 544 (1961); Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

anything without an attorney."[18] The heart of the matter is a function of two critical factors: first, the suspect must be in custody and questioned by the police in order to trigger the doctrine; and second, he must assert his rights under *Miranda* to enjoy its protective shield. If the court finds that either custody or interrogation is missing, *Miranda*'s protections vanish. Similarly, if the suspect waives his rights, which the vast majority of suspects do,[19] then the police are not stripped of tripartite advantages of isolation, control, and deprivation of the assistance of an attorney.

One of the most effective means of producing an admission is to lie to the suspect in order to make his predicament seem hopeless. Even in the case of an obstinate suspect, a clever lie will sometimes yield the desired result. Consider the police's frustration in the case of Mr. Rogers.[20] Even in the face of overwhelming evidence against him, Rogers refused to confess, despite enduring a six hour interrogation.[21] Then the chief of police, who was brought in to question the suspect, told Rogers he would arrest his wife, who was suffering from arthritis, unless he confessed.[22] That strategic lie prompted Rogers to confess. Justice Frankfurter observed that a confession induced by either psychological or physical coercion "cannot stand."[23] Decided in 1961, *Rogers* was a pre-*Miranda* case, and its holding a product of the voluntariness test.[24]

Let us fast forward to an oft-neglected post-*Miranda* case that, although different factually from *Rogers*, nonetheless implicates the concerns highlighted in *Rogers*. While investigating a burglary, police uncovered a suspect after questioning the victim. As it turned out, the victim of the house burglary identified her son's "close associate," Carl Mathiason, as the sole potential suspect.[25] Mathiason was on parole and the investigating officer contacted Mathiason by leaving a card on his apartment door, requesting Mathiason reach the officer. When both parties spoke, Mathiason expressed no preference for a meeting place, and the officer suggested he come down to the station, which was located about two blocks from the suspect's apartment.[26]

18. GARCIA, *supra* note 3, at 95.

19. GEORGE C. THOMAS III. & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 9 (2012) ("Suspects waive their *Miranda* rights 80% of the time.").

20. *Rogers*, 365 U.S. at 534.

21. *Id.* at 535–37.

22. *Id.*

23. *Id.* at 540.

24. *Id.* at 539.

25. Oregon v. Mathiason, 429 U.S. 492, 493 (1977).

26. *Id.*

Eventually, the suspect met the officer at the station, where they spoke behind closed doors. The officer informed Mathiason that "he was not under arrest."[27] In addition, the officer told Mathiason he wished to discuss a burglary and that "his truthfulness would possibly be considered by the district attorney or judge."[28] Thereafter the officer relied on a strategic lie: He told Mathiason that his fingerprints were found at the scene. As the Court observed, these events "occurred within five minutes after the defendant had come to the office."[29] Predictably, the officer then read the *Miranda* warnings to the suspect and obtained a taped confession.[30]

As contrasted with Rogers' resistance for a period of six hours before he confessed, Mathiason's confession was exactly a swift five minutes.[31] In both cases, however, deception played a critical role in triggering the suspect's confession. Contextually, the lies the police employed to induce the confessions were equally effective. In Rogers' case, his concern for his ill wife's condition overpowered his resistance; in Mathiason's, unimpeachable evidence of his guilt, coupled with his parole status, underscored the inevitability of his fate.[32] In both cases, it is extremely unlikely either suspect would have confessed absent the falsities purveyed by the police. Indeed, the Oregon Supreme Court reasoned that Mathiason's predicament, stemming from his parole status and the police falsely informing him that his prints were left on the scene, were not offset by the suspect's visit to the station upon a request or by the fact that he was told he was not under arrest.[33]

Would Mathiason's confession be deemed involuntary under the voluntariness standard? The Oregon Supreme Court seemed to concur: it branded the confession as being a product of a "coercive environment."[34] Although it is plausible to argue that the speed with which the suspect confessed militates against a finding of the police "overbearing" the suspect's will, it is also logical to maintain that the suspect's vulnerable position and the putative foolproof evidence of guilt against him would provoke an involuntary confession. The three key factors, moreover, critical for a successful interrogation by the police were at play in the case:

27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 494.
31. *Mathiason*, 429 U.S. at 493.
32. *Id.*
33. *Id.* at 493–94.
34. *Id.* at 494 (quoting the opinion of the lower court).

Mathiason was isolated, the officer was in control, and he was afforded neither the benefit of counsel nor the administration of the *Miranda* warnings before he confessed.[35]

Relying on *Miranda*'s presumptions, however, the *Mathiason* majority held that the suspect was not in custody "or otherwise deprived of his freedom of action in a significant way."[36] More telling was the majority's assessment that the officer's lie about finding the suspect's fingerprint at the scene was irrelevant to the custody issue.[37] Agreeing that perhaps the suspect was not in custody, Justice Marshall, in dissent, nevertheless cogently pointed out that the circumstances resembled the "coercive aspects of custodial interrogation."[38] Likewise, Justice Stevens maintained that the *Miranda* warnings were inapposite in the "parole context."[39] More important for our purposes, Justice Marshall emphasized the obvious: The police subjected Mathiason to the same "deceptive stratagems" that prompted *Miranda* and that the opinion decried.[40] Justice Marshall also presciently observed that he hoped that police officers would not "circumvent" *Miranda* in the future by deliberately delaying the arrest and the need to administer the warnings until they secured an admission.[41]

Deception comes in many shapes and forms. A vulnerable suspect in the throes of a hostile environment and confronting shrewd interrogators is likely to lose the confidence game. But what if the suspect is not expressly deceived, but his lawyer is? The lawyer falsely receives assurances from the police that they will not question the suspect without her presence; she is expressly duped. Meanwhile, the suspect is implicitly deceived and he is deprived of critical information that will affect his decision to speak. In summary fashion, that is precisely the factual basis of *Moran v. Burbine*.[42] Although the opinion raises many questions, the crucial one relates to the viability of a *Miranda* waiver when a suspect's most vital right under the decision is at risk: the option not to speak with the police without an attorney.

35. *Id.* at 494.
36. *Id.* at 495.
37. *Mathiason*, 429 U.S. at 495–96.
38. *Id.* at 498 (Marshall, J., dissenting).
39. *Id.* at 500 (Stevens, J., dissenting). Justice Stevens wrote that "as a practical matter, it seems unlikely that a *Miranda* warning would have much effect on a parolee's choice between silence and responding to police interrogation. Arguably, therefore, *Miranda* warnings are entirely inappropriate in the parole context." *Id.*
40. *Id.* at 498 (Marshall, J., dissenting).
41. *Id.* at 499 n.5.
42. Moran v. Burbine, 475 U.S. 412 (1986).

Brian Burbine became a suspect in a murder of a young woman shortly after he was arrested on a burglary charge in Cranston, Rhode Island.[43] The detective in charge of the burglary case administered the *Miranda* warnings to the suspect but he refused to execute a written waiver of his rights. Since the murder occurred in Providence, the detective who attempted to question Burbine called the detectives in charge of the homicide investigation, who arrived at the police station in Cranston within an hour of being notified. Subsequently, Burbine's sister, unaware of his status as a suspect in a murder, sought the assistance of the public defender who previously represented him. Ultimately, another lawyer in the office agreed to represent Burbine, and she called the Cranston police and emphasized that he was not to be questioned or placed in a line up without her presence.[44] The officer who spoke to Burbine's attorney assured her that they "were through with him for the night."[45] Less than an hour later, Providence detectives brought Burbine to the interrogation room, where they received three written *Miranda* waivers from the suspect. Burbine eventually "signed three written statements fully admitting to the murder."[46] After unsuccessfully seeking to suppress the confession, Burbine was tried and convicted of the murder.[47]

The First Circuit Court of Appeals granted Burbine's writ of habeas corpus, holding that Burbine's *Miranda* waiver was not knowingly or voluntarily given.[48] Rather, it was a product of the police's chicanery in misleading the attorney, thereby "vitiating" the state's argument that his waiver of the right to counsel was knowing and voluntary.[49] The lower court also characterized the police behavior as "deliberate or recklessly [irresponsible]" and deemed the police's misleading statements to Burbine's attorney "blameworthy."[50]

Reversing the First Circuit's decision, the U.S. Supreme Court held that external events unknown to the suspect are irrelevant to his decision to waive the *Miranda* rights.[51] The *Burbine* majority was forced to acknowledge the obvious: the suspect probably would not have confessed if he had been informed that an attorney was representing him.

43. *Id.* at 412.
44. *Id.* at 416–17.
45. *Id.* at 417.
46. *Id.* at 417–18.
47. *Id.* at 418.
48. *Burbine*, 475 U.S. at 419.
49. *Id.*
50. Burbine v. Moran, 753 F.2d 178, 185 (1st Cir. 1985), *rev'd*, 475 U.S. 412 (1986).
51. *Burbine*, 475 U.S. at 423.

Nevertheless, the majority cited its precedent for the proposition that the "Constitution [does not] require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."[52] In other words, "what the suspect doesn't know will not hurt him." Notice the irony underlying the *Burbine* majority's sophistry: We acknowledge the suspect might not have confessed with his lawyer at his side, but police deception achieved the desired result, that is, his confession. Of course, in Burbine's case, what he did not know really did hurt him.

At bottom, one can explain the decision as rooted in the role of confessions as the "queen of proofs in the law."[53] Indeed, the *Burbine* majority gives significant weight to the central role confessions play in the criminal justice system. Justice O'Connor, writing for the majority, takes pains to assure us that confessions are not merely "desirable," but rather "essential" to society's "compelling interest" in apprehending criminals.[54] A more difficult issue is the extent to which the Court is willing to sanction police deception and trickery as a means to obtain admissions of guilt from a criminal suspect. Furthermore, the Court is also content with the notion that a waiver of *Miranda* rights must not impede the compelling goal of securing confessions from criminal suspects. The suspect's self-interest is subservient to society's overriding need for the "queen of proofs" in a criminal case.

How else can we reconcile the *Burbine* majority's rationale with the overwhelming majority of contrary lower court precedents and ABA criminal justice standards?[55] As Justice Stevens observed in dissent, the *Burbine* majority ignored "this Court's previous expression of deep concern about incommunicado questioning."[56] Justice Stevens was referring to the twenty-one hour detention of the suspect that resulted in his confession. He contrasted the majority's approach with the established precedent, especially *Miranda*, which places a "heavy burden" on police to prove the validity of a waiver given during "incommunicado interrogation."[57] In poignant and acerbic language, Justice Stevens

52. *Id*. at 422 (citations omitted).

53. PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 9 (2000).

54. *Burbine*, 475 U.S. at 426.

55. *Id.* at 427. The majority acknowledged "that a number of state courts have reached a contrary conclusion." *Id*. Further, it also recognized "that our interpretation of the Federal Constitution, if given the dissent's expansive gloss, is at odds with the policy recommendations embodied in the American Bar Association standards for Criminal Justice." *Id*.

56. *Id.* at 438 (Stevens, J., dissenting) (citations omitted).

57. *Id.* at 438 n.9.

accused the Court of approving "incommunicado" questioning as "a societal goal of the highest order that justifies police deception of the shabbiest kind."[58]

If one distinguishes a purposeful omission from a deliberate falsehood then it is plausible to support the *Burbine* Court's holding that a suspect can waive his *Miranda* rights based on the police withholding of information that would affect the waiver. Nevertheless, this distinction is flawed because a suspect's reaction to a generic right to the presence of an attorney during questioning is quite different from information that a specific attorney is willing and able to assist him in the process.[59] In essence, what the Court has endorsed and condoned in both *Burbine* and *Mathiason* involves the deception that Miranda sought to eradicate from the stationhouse. In *Mathiason*, the Court relied on custody as the missing piece that justified the deliberate falsehood that induced the suspect to confess; in *Burbine*, the majority stressed the "ignorance is bliss" apothegm to validate the *Miranda* waiver.[60]

As a complement to its desire for confessions as an essential component of the criminal justice system, the Court has facilitated the waiver of *Miranda* rights by creating a wide path through which the police can secure a valid waiver. *Burbine* furnishes just one example of the Court's broad construction of *Miranda* waivers.[61] The linchpin of this interpretation is evident in the *Connelly* case,[62] in which the Court held that a valid *Miranda* waiver need only be supported by a preponderance of the evidence.[63] In upholding a waiver of Miranda rights by a paranoid schizophrenic, the *Connelly* Court not only set forth a low burden of proof for *Miranda* waivers but also emphasized that Connelly's illness affected only his volitional, not cognitive, ability and therefore did not invalidate his waiver. As I have pointed out, the opinion "makes a waiver of the vaunted, and overvalued, *Miranda* rights a relatively easy burden for the prosecution to satisfy."[64]

Inexorably, the Court's ratification of deception as an effective antidote to the *Miranda* warnings has borne fruit. I recall a conversation

58. *Id.* at 439.

59. *Id.* at 456 (citing State v. Haynes, 602 P.2d 272, 277 (1979), *cert. denied*, 446 U.S. 945 (1980)).

60. *Burbine*, 475 U.S. at 419–20.

61. *See, e.g.*, Colorado v. Spring, 479 U.S. 564, 577 (1987) (stating that awareness of the crimes that will be covered in the interrogation is not necessary for a valid *Miranda* waiver).

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

63. *Id.* at 157.

64. GARCIA, *supra* note 3, at 74.

with a friend who has been a police officer for a long period of time, and who is also a lawyer, about the impact of *Miranda*. His first response, accompanied by hearty laughter, was to tell me how "we" (the police) can lie to suspects and "get away with it." This anecdote is empirically confirmed by a prominent scholar in the field. Charles Wiesselberg notes that "the basic psychological approach to interrogation described in the *Miranda* decision remains prevalent in the United States."[65] Yale Kamisar points to the ultimate paradox underlying *Miranda*: Although the warnings must be administered to suspects as a condition precedent to custodial interrogation, the police can "intimidate, mislead, deceive, bluff, coax, or trick these same suspects into 'waiving' their rights."[66] The evolution of *Miranda*, doctrinally and in the real world, illustrates my thesis: it has become a tragicomical farce. The Court has shaped the ideal conditions for police to exploit the three factors necessary for successful interrogations: isolation, control, and deprivation of counsel.

II. THE COURT'S LATEST PRONOUNCEMENTS ON *MIRANDA*

But is there anything "left" to *Miranda*? Two prominent and distinguished scholars believe the doctrine retains a modicum of viability. George Thomas and Richard Leo counter my point of view by maintaining that they "do not despair as much as Thompson or Garcia."[67] Rather, these eminent scholars maintain that since *Dickerson*[68] "affirmed" *Miranda* and that the decision can be construed as providing "due process notice," we should not yet "mourn" *Miranda*'s passing.[69] I am not as sanguine as Thomas and Leo. In particular, three decisions recently handed down by the U.S. Supreme Court sound the clear death knell, in practice rather than in theory, for *Miranda*. These decisions provide useful bookends to *Mathiason* and *Burbine* and illustrate the majority of the Court's disdain for *Miranda*.

How do we reconcile the de facto death of *Miranda* with the *Dickerson* opinion "affirming" *Miranda*? Why would then Chief Justice Rehnquist write the opinion that categorized *Miranda* as a constitutional rule rather than a mere prophylactic designed to safeguard a suspect's

65. Weisselberg, *Mourning Miranda*, *supra* note 5, at 1529.

66. Kamisar, *The Rise, Decline, and Fall*, *supra* note 6, at 1015.

67. GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND 218 (2012); Sandra Guerra Thompson, *Evading* Miranda*: How* Seibert *and* Patane *Failed to "Save"* Miranda, 40 VAL. U. L. REV. 645, 683 (2006). Thompson concluded, "[T]here is truly nothing left of *Miranda*." Thompson, *supra*.

68. THOMAS & LEO, *supra* note 67, at 218.

69. *Id.*

privilege against self-incrimination? Yale Kamisar has observed that *Dickerson* upheld *Miranda*, but in its diluted form. All of the qualifications and the public safety exception remained intact post-*Dickerson*.[70] As I have observed, Chief Justice Rehnquist "recognized that in its current form *Miranda* poses little, if any, obstacles to law enforcement."[71] He observed that the Court had, through its narrowing of the doctrine, "reduced the impact of the *Miranda* rule on legitimate law enforcement."[72] Perhaps Chief Justice Rehnquist came to the realization that the Court had transformed *Miranda* into "useful station house furniture."

Indeed, the Court has provided a potent tool for the police to secure a confession from a suspect by watering down, if not almost rendering meaningless, the waiver of the right to remain silent under *Miranda*'s edict. In the process, *Miranda* has become very useful station house furniture. Recall my discussion of the extent to which the Court facilitated the waiver of *Miranda* rights in *Burbine*. In that case, the Court dismissed critical external factors, such as an attorney's vain attempt to assist a suspect in parrying potential questioning by the police, as irrelevant to the waiver issue. It also sanctioned police deception of the lawyer as irrelevant to the waiver issue.[73] In a recent opinion, however, the Court has poked a wide hole into *Miranda* by holding that a suspect validly waived his right to remain silent in the wake of a three hour attempt by the police to convince the suspect to confess.

Berghuis v. Thompkins[74] offers a revealing glimpse of *Miranda*'s demise. Yale Kamisar argues that the *Thompkins* Court "inflicted a heavy blow on *Miranda*."[75] My take on the case is that the Court has confirmed what we already know: It is willing and able to disassemble *Miranda* as long as the objective is to find that the confession complied with the doctrine. Viewed in tandem with *Connelly* and *Burbine*, *Thompkins* converts the process of obtaining a valid *Miranda* waiver into a virtual sham.

Imagine being a murder suspect, taken into an eight by ten foot interrogation room, forced to sit in a hard chair that resembles a school desk, and then read your *Miranda* rights. You refuse to sign a written

70. Yale Kamisar, *Foreword: From* Miranda *to § 3501, to* Dickerson *to . . .*, 99 MICH. L. REV. 879, 889 (2001). Kamisar wrote that the *Dickerson* Court had preserved "all the qualifications and exceptions the much-criticized case had acquired over the decades." *Id.*

71. GARCIA, *supra* note 3, at 112.

72. Dickerson v. United States, 530 U.S. 427, 442 (2000).

73. Moran v. Burbine, 475 U.S. 412, 423 (1986).

74. Berghuis v. Thompkins, 130 S. Ct. 2250, 2259 (2010).

75. Kamisar, *The Rise, Decline, and Fall*, *supra* note 6, at 1008–21.

waiver of the rights indicating you understood those rights. There is "conflicting evidence" whether you indicated verbally that you understood those rights. What follows is a three hour interrogation session during which you do not speak, other than to give a few monosyllabic responses, such as "yeah," "no," or "I don't know." Growing frustrated with his inability to secure a confession, the lead detective relies on a strategic psychological stratagem. He asks you whether you "believe and pray to God," and you answer positively. Then the detective delivers the coup de grace. He states, "Do you pray to God to forgive you for shooting that boy down?" You answer, "Yes," as your eyes well up with tears and look away. You refuse to make a written confession and the interrogation ends about fifteen minutes later.[76]

The question raised in the *Thompkins* case was whether the preceding facts constituted a valid waiver of the suspect's *Miranda* right to remain silent when questioned by the police.[77] Intuitively, a layperson would respond that the suspect did not waive his rights; rather, the police badgered him into confessing after wearing down his resistance. Three crucial factors led to the confession: the three hour interrogation in the cramped confines of a small room, the blatant appeal to the suspect's conscience and belief in God, and the absence of an attorney to assist the suspect.[78] In other words: isolation, control (in the form of several officers, close quarters, and an effective psychological ploy), and the absence of an attorney to even the odds. What option(s) did you have after refusing to sign a written waiver, resisting answering questions for three hours, and then being subjected to an appeal to your conscience? As a suspect, you had no chance of winning the confidence game.

How could your monosyllabic response, "Yes," to the entreaty of asking for God's forgiveness translate into an implicit waiver of your *Miranda* right to remain silent in response to custodial interrogation? Justice Alito, writing for the majority in *Thompkins*, emphasized that "there is no evidence that Thompkins' statement was coerced."[79] He acknowledged that the interrogation took place in a "standard-sized" room and that the suspect sat in a "straight-back chair" for three hours.[80] Nonetheless, Justice Alito observed that such factors, without threats, sleep and food deprivation, and sedation of the suspect, were not "inherently

76. *Thompkins*, 130 S. Ct. at 2256–57.
77. *Id.* at 2260.
78. *Id.* at 2256.
79. *Id*. at 2263.
80. *Id.*

coercive.'"[81] Furthermore, Justice Alito portrayed the appeal by the detective to Thompkins' conscience as irrelevant because "[t]he Fifth Amendment privilege is not concerned with 'moral and psychological pressures to confess emanating from sources other than official coercion.'"[82] In short, the psychological ploy employed by the officers to break Thompkins' will was an extraneous cause removed from the confession.

Is Thompkins' obstinacy in refusing to confess qualitatively different from Rogers' resistance? From a quantitative standpoint, Rogers was questioned for six, rather than three, hours before the chief of police threatened to arrest his ill wife. Thompkins was interrogated for three hours before the police employed moral suasion, rather than threats, to induce an admission. Thompkins is somewhat redolent of the *Innis* case,[83] in which the Court held that a moral appeal to a suspect was not the functional equivalent of questioning for *Miranda* purposes because the police were not aware that the suspect was vulnerable to such an appeal.[84] Even if we agree with Justice Alito's conclusion that these circumstances did not amount to coercion, is three hours of "incommunicado interrogation," coupled with a well-timed psychological stratagem, sufficient to infer a waiver of the right to silence under *Miranda*?

That was the obstacle the Court had to surmount in order to validate the confession. The first hurdle was easy to overcome. *Miranda* required the prosecution to establish a "heavy burden" to show a waiver. *North Carolina v. Butler*[85] interpreted that threshold to encompass implied waivers. Justice Alito quickly, and correctly, noted that "this 'heavy burden' is not more than the burden to establish waiver by a preponderance of the evidence," citing to *Colorado v. Connelly*.[86]

The second hurdle was a bit more difficult to overcome. How can one argue that a suspect who has refused to sign a written *Miranda* waiver, is subjected to three consecutive hours of interrogation, and remains silent, by and large, for the entire period of time, suddenly waives his right by speaking? Relying on *Butler*, Justice Alito concluded that because Thompkins "understood" his rights, chose to answer the question whether he prayed to God for forgiveness for shooting the victim, and was not

81. *Id.*

82. *Thompkins*, 130 S. Ct at 2263 (citing Oregon v. Elstad, 470 U.S. 298, 305 (1985)).

83. Rhode Island v. Innis, 446 U.S. 291, 304 (1980).

84. *Thompkins*, 130 S. Ct. at 2263 (reminding that the Fifth Amendment privilege is not concerned with moral and psychological pressures).

85. North Carolina v. Butler, 441 U.S. 369, 379 (1979).

86. *Thompkins*, 130 S. Ct. at 2261 (citing Colorado v. Connelly, 479 U.S. 157 (1986)).

coerced, he impliedly waived his right to remain silent.[87] Justice Alito reasoned that, by replying to the officer's question, Thompkins demonstrated, according to *Butler*, a "'course of conduct indicating waiver' of the right to remain silent."[88]

Paradoxically, the *Thompkins* majority emphasized that Thompkins' admission was not "coerced."[89] This conclusion is at odds with *Miranda*'s core tenet that custodial interrogation is inherently coercive absent the warnings and a knowing and voluntary waiver of the rights. Yet, the *Thompkins* Court embraces the absurd notion that, after enduring a three hour interrogation, followed by an effective and poignant appeal to his conscience, Thompkins "impliedly" waived his right to remain silent. What if Thompkins had been a more "hardened" suspect and instead had said, in response to police accusations, "I'm done. I'm ready to go home and I did not do this and if I did do it, I want you all to show me that I did do it."[90] Perhaps we can speculate that this is what Thompkins really wanted to say. If he had spoken these words, of course, then he would have signaled, unambiguously, as the Court requires, his desire to cut off questioning. [91] As Yale Kamisar succinctly puts it, "*Thompkins* requires a suspect to prove that he invoked his right to remain silent instead of requiring the prosecution to prove that the suspect waived that right."[92] One can posit that Thompkins was "coerced" into waiving his right to silence. Therein lies the irony behind the case.

Thompkins may have "fired point blank at *Miranda*."[93] Yet, the one fortress that had withstood, unscathed, the Court's assault on *Miranda* was the *Edwards*[94] doctrine. That fortress was partially breached by *Maryland v. Shatzer*.[95] *Edwards* created a "presumption of involuntariness" when a suspect invokes his right to end questioning under *Miranda* by unequivocally requesting a lawyer. The Court extended *Edwards*'s reach by holding that it applies when a suspect is questioned by a different law enforcement agency,[96] when a subsequent interrogation relates to a

87. *Id.* at 2261–63.
88. *Id.* (quoting *Butler*, 441 U.S. at 373).
89. *Id.* at 2263.
90. Deviney v. State, No. SC 10-1426, 2013 WL 627140, at *18 (Fla. Feb. 21, 2013).
91. Davis v. United States, 512 U.S. 452, 461 (1994) (establishing a clear and unambiguous request for invoking the *Miranda* right to counsel).
92. Kamisar, *The Rise, Decline, and Fall*, *supra* note 6, at 1019.
93. *Id.*
94. Edwards v. Arizona, 451 U.S. 477 (1981).
95. Maryland v. Shatzer, 559 U.S. 98 (2010).
96. Minnick v. Mississippi, 498 U.S. 146 (1990).

different crime,[97] and even when the suspect has had an opportunity to consult with an attorney after the first interrogation session.[98] The issue in *Shatzer*, briefly put by Justice Scalia who wrote the majority opinion, was "whether a break in custody ends the presumption of involuntariness established in *Edwards v. Arizona*."[99]

Shatzer presented a difficult issue because a two and a half year break had elapsed between the suspect's invocation of his right to counsel under *Miranda* and the subsequent interrogation about the same crime.[100] Presumably, the Court would have had a difficult time justifying the principle that no suspect could ever be re-interrogated once he invoked his right to terminate police questioning without the presence of counsel. *Shatzer*, moreover, dealt with a prisoner serving time for child sexual abuse who was suspected of sexually abusing his three-year-old son.[101] After the suspect invoked his right to counsel under *Miranda*, the interrogation ceased. Two and a half years later, after new evidence surfaced, police officers questioned the suspect after obtaining a written *Miranda* waiver from Shatzer.

Distinguishing *Edwards*, *Roberson*, and *Minnick*, Justice Scalia pointed out that since Shatzer had been released from custody and returned to a "normal life" after the initial interrogation, there is "little reason to think that his change of heart regarding interrogation without counsel has been coerced."[102] Shatzer had not really "returned to a normal life" after the first interrogation, since he remained incarcerated during the entire intervening period and was in prison when the police questioned him about the crime. What is curious about Justice Scalia's rationale is his emphasis on the lack of "coercion" surrounding the second interrogation. This emphasis is all the more puzzling since Justice Scalia denigrated *Miranda*, as the Court had done before the *Dickerson* opinion, as a "judicially prescribed prophylaxis" that is "justified only by reference to its prophylactic purpose."[103] Such a rule, Justice Scalia continued, is justified only if its "benefits outweigh its costs."[104] Coercion, in other words, is not necessarily a product of police custodial interrogation; and, *Miranda* is a prophylactic measured by weighing its cost and benefits. This treatment of

97. Arizona v. Roberson, 486 U.S. 675 (1988).
98. *Minnick*, 498 U.S. at 146.
99. *Shatzer*, 559 U.S. at 100.
100. *Id*. at 101.
101. *Id*. at 100.
102. *Id*. at 107.
103. *Id*. at 105 (citation omitted).
104. *Id*. at 106 (citation omitted).

Miranda is analogous to the Court's reliance on cost-benefit analysis in construing a comparable "judicially created" remedy to protect the Fourth Amendment's right against unreasonable searches and seizures: the exclusionary rule.[105]

In determining the threshold for the break in custody that would dissipate *Edwards*' presumption of "coercion," Justice Scalia manufactured an arbitrary, fourteen-day period.[106] No member of the Court argued that the two and a half year break in *Shatzer* was insufficient to dispel *Edwards*' presumption. What is disingenuous about the *Shatzer* majority's arbitrary fourteen-day period, as Justice Stevens observes in his concurring opinion, is the conclusion that such a short interval will magically dissipate the inherent pressure of custodial interrogation.[107] More important, it is counterintuitive to suggest that a prisoner who is visited by the police will feel no pressure to accede to police questioning, and waive his *Miranda* right to counsel, because he has had a two week "break" from custody.[108]

As Professor Amy Ronner observes, this arbitrary fourteen-day period provides police with an incentive to evade *Edwards*.[109] Rather simply, "[w]hen prisoners request counsel, all the interrogator needs to do is ship them back to their cell, count 14 days, and then start over without counsel present."[110] Underpinning the cost-benefit rationale supporting *Shatzer* is the recognition that *Miranda* is a dead letter, destined to serve as a prop for the police to manipulate as a means of securing a confession.

Since the *Shatzer* Court did not need to decide whether Shatzer was in "custody" under *Miranda*, it left the issue of whether incarceration is "custody" for *Miranda* purposes for another day.[111] But Justice Scalia hinted that the Court would not look favorably on a test that would automatically deem imprisonment as custody under *Miranda*. He noted that the *Miranda* "freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody."[112] The wall enveloping *Miranda* custody started to crumble when the Court decided the issue in *Howes v. Fields*.[113]

105. United States v. Leon, 468 U.S. 897, 906–07 (1984); *see also* Massachusetts v. Sheppard, 468 U.S. 981, 990–91 (1984).

106. *Shatzer*, 559 U.S. at 110–12.

107. *Id*. at 121–27 (Stevens, J., concurring).

108. *Id*. at 123–25.

109. Amy D. Ronner, *Recreating Dead House: The Ouster of* Miranda *from Our Prisons*, 50 CRIM. L BULL. (forthcoming 2013–14).

110. *Id.*

111. *Shatzer*, 559 U.S. at 111–12.

112. *Id*. at 112.

113. Howes v. Fields, 132 S. Ct. 1181 (2012).

Randall Lee Fields faced a daunting set of circumstances, which would have tested the resolve of the vast majority of individuals subjected to questioning by police officers. In jail serving a sentence for a minor offense (disorderly conduct), he was taken to a separate interview room in the jail, late at night, by a correctional officer where he was questioned, for at least five and possibly seven hours, by two police officers about whether he had sex with a twelve-year-old boy.[114] Let us reflect for a moment on these circumstances. Fields is in jail and is, unexpectedly, taken out of his cell late at night, and two police officers level a serious accusation against him. Midway through the interview, Fields becomes agitated, starts yelling, but at no time requests to return to his cell. Several times during the interview, Fields tells the deputies he does not want to speak.[115] Of course, Fields confesses to the crime.

Assume we are evaluating these facts without the benefit of *Miranda*. Was Fields' confession involuntary because his "will" was overborne? A five to seven hour interrogation, late at night, with a vulnerable suspect who was incarcerated, by two officers, approximates, without the element of deception, the facts of *Spano v. New York*.[116] In that case, the Court held that the suspect's will was overborne, rendering the confession involuntary.[117] A factor missing in *Fields*, as distinct from *Spano*, is the police's use of a "false friend" in *Spano* to induce the suspect's confession. But Spano was not in jail, he was interrogated at the police station; and, he was not unexpectedly removed from his cell by a correctional officer.[118] He was not ignored by the officers when he became "agitated" during the interview.[119] In short, one can plausibly argue that, under the voluntariness standard, Fields' confession was involuntary.

Why, therefore, did Fields' attorney not raise the voluntariness issue? As I pointed out in my article, it is because the *Miranda* doctrine provided a false security blanket, deflected the voluntariness question, and lulled counsel with its seductive appeal. I do not blame Fields' counsel for failing to raise the voluntariness issue. After all, Fields was never given the *Miranda* warnings or told he did not have to speak to the officers.[120] Given the facts, most criminal lawyers would have felt reasonably certain that *Miranda* would be a winning argument. Ironically, if Fields had been

114. *Id*. at 1185–86.
115. *Id*. at 1186.
116. Spano v. New York, 360 U.S. 315 (1959).
117. *Id.* at 323–24.
118. *Id.* at 318–19.
119. *Fields*, 132 S. Ct. at 1186.
120. *Id*. at 1186.

given the warnings, the confession would have been suppressed under *Miranda*. Fields did what Thompkins failed to do, and what the *Thompkins* holding requires: he spoke by saying he did not want to speak to the officers any longer.

But as I observed, the *Shatzer* Court left open the possibility that incarceration would not necessarily constitute "custody" under *Miranda*. And that is precisely how the *Fields* majority reasoned the suspect was not in "custody," despite compelling facts suggesting that Fields was indeed in custody when he was questioned by the deputies. Justice Alito, writing for the majority, resorted to sophistry and sleight-of-hand to hold that Fields was not in custody for *Miranda* purposes. How did he pull this magical feat?

First, Justice Alito had to distinguish the Court's holding in *Mathis*, which stands for the proposition that, when an inmate is removed from the general prison population and interrogated about criminal conduct that took place outside the jail or prison, the inmate is in "custody" for purposes of *Miranda*.[121] He had the benefit of *Shatzer*, in which the Court deferred on a ruling on the issue; and he relied on *Mathiason* for the notion that even station house questioning did not amount to custody under *Miranda.*[122] An intriguing facet to *Mathiason* is the point made by Justice Stevens in dissent that, since Mathiason was on parole, he did not have much of a choice but to meet with the police officer. In essence Mathiason was, given the circumstances, in quasi-custody by virtue of being on parole.[123]

Justice Alito, relying heavily on *Shatzer*, focused on three reasons for dismissing the notion that a prisoner has his freedom of action constrained in a "significant way" pursuant to *Miranda*. A prisoner, already incarcerated, does not suffer the "shock" associated with an arrest.[124] Further, a prisoner is less likely to be swayed to speak by a "prompt release."[125] Finally, he argued that an inmate who has not been convicted "knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence."[126] Nevertheless, Justice Alito had to contend with the facts justifying a finding of custody: the lengthy interrogation, the time of the interrogation, the armed deputies, and the harsh language and profanity one deputy directed at Fields. Justice Alito argued those facts were counterbalanced by mitigating circumstances.

121. Mathis v. United States, 391 U.S. 1, 5 (1968).
122. *Fields*, 132 S. Ct. at 1188.
123. Oregon v. Mathiason, 429 U.S. 492, 500 (1977) (Stevens, J., dissenting).
124. *Fields*, 132 S. Ct. at 1191.
125. *Id.*
126. *Id.*

Fields was told he was free to return to his cell, he was not "physically restrained or threatened" and was interviewed in an "averaged-sized conference room" (maybe eight by ten feet). Therefore, Fields was not in custody for *Miranda* purposes.[127]

The *Fields* majority opinion borders on the absurd. Would a layperson buy his arguments? I seriously doubt it. A jail inmate somehow feels less compelled to speak because he figures the police cannot make his adverse condition any worse? A prisoner "probably" knows that police officers lack the authority to affect his sentence? Would Fields, in jail for a minor offense, believe that two officers questioning him about a more serious offense, do not have the ability to exacerbate his situation? I raise these rhetorical questions to underscore my skepticism. We are asked to suspend animation while embracing the proposition that Fields was "not uncomfortable" when he was interrogated in a not-too-small "conference room" in the jail. As Justice Blackmun once remarked in dissent, his brethren and sisters on the Court sometimes seem to overlook the "significant realities that so often characterize a criminal case."[128] More to the point, he trenchantly wrote that "[t]here is a real world as well as a theoretical one."[129] The *Fields* majority evidently prefers to live in the "theoretical" rather than the "real" world of criminal law.

It is difficult for the *Fields* majority to conceal its distaste for *Miranda*. At one point in the opinion, Justice Alito feels compelled to quote *Berkemer v. McCarthy*, *Shatzer*, and *Mathiason* for the following caveat to *Miranda*: "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated."[130] It is unlikely that the *Miranda* majority would deem an interrogation in a room at the jail, lasting for five to seven hours, and conducted by two armed police officers, as not implicating the concerns it sought to alleviate with the warnings: the inherent compulsion of custodial interrogation.

127. *Id*. at 1192–93.
128. Lee v. Illinois, 476 U.S. 530, 547–48 (1986) (Blackmun, J., dissenting).
129. *Id*. at 548.
130. *Fields*, 132 S. Ct. at 1192.

III. MONTEJO V. LOUISIANA

As a postscript to this article, I wish to briefly discuss a decision that, though rooted on the Sixth Amendment right to counsel, underscores the hostility of the Court toward affording either criminal suspects' or defendants' protection against police questioning. I will argue that this decision gives police "two bites" at the interrogation apple.

One impregnable safeguard for criminal defendants against police questioning after the right to counsel has attached was the Court's holding in *Michigan v. Jackson.*[131] *Jackson* held that once the right to counsel under the Sixth Amendment attaches, the police may neither question the suspect nor secure a waiver of the right without the presence of the lawyer.[132] In *Montejo v. Louisiana*,[133] the Court gratuitously overruled *Jackson*. Justice Scalia, again resorting to the cost-benefit rationale, maintained that the rule "does not 'pay its way'" as a justification for overruling *Jackson.*[134] Henceforth, the police may question a criminal defendant after the Sixth Amendment right to counsel has attached and obtain a valid confession based on a valid *Miranda* waiver.

The facts of *Montejo*, as one scholar has remarked, were "outrageous."[135] Jesse Montejo, after being arraigned at a preliminary hearing on a first degree murder charge, was paid a visit in his cell by two police officers. The officers asked Montejo to take a trip with them to locate the murder weapon, which he supposedly threw in a lake. Before the "excursion," Montejo was read his *Miranda* rights and accompanied the officers on the trip during which he wrote a letter of apology to the victim's widow.[136] Understandably, his attorney, who met Montejo after these events, "was quite upset that the detectives had interrogated his client in his absence."[137]

There are several doctrinal flaws inherent in *Montejo.* I will not delve into those problems. One scholar has done a magnificent job of questioning *Montejo*'s problematic amalgamation of the Sixth Amendment right to counsel and the *Miranda* right to counsel, as well as the extent to which a *Miranda* waiver is an adequate substitute for a Sixth Amendment

131. Michigan v. Jackson, 475 U.S. 625 (1986).
132. *Id*. at 636.
133. Montejo v. Louisiana, 556 U.S. 778 (2009).
134. *Id*. at 797.
135. Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 37 (2010).
136. *Montejo*, 556 U.S. at 781–82.
137. *Id.* at 782.

waiver of counsel.[138] Rather, I wish to underscore how *Montejo*, by overruling *Jackson*, affords the police with two opportunities to obtain a confession from a criminal suspect.

Assume that, before the initiation of criminal proceedings and the attachment of the Sixth Amendment right to counsel, police officers had sought to interrogate Jesse Montejo in his prison cell. He invoked his *Miranda* right to counsel and the police left the cell. Montejo was subsequently arraigned on the charge of murder and counsel was appointed to represent him, thereby triggering his right to counsel under the Sixth Amendment. Three weeks later, officers visit Montejo again in his prison cell, obtain a valid *Miranda* waiver, and Montejo confesses. Presumably, more than two weeks have elapsed since Montejo invoked his *Miranda* right to counsel, and thus the break in custody was sufficient to permit the officers to re-interrogate the suspect under *Shatzer*. The prohibition against police questioning after the Sixth Amendment right to counsel has attached, as outlined in *Jackson*, has been lifted by *Montejo*. Indeed, Justice Scalia in *Montejo* stressed the *Edwards* protection against police "badgering" of a suspect as a safeguard against a defendant's right to counsel under the Sixth Amendment.[139] This result would really be "outrageous." Nonetheless, it might not be far-fetched under the Court's novel exegesis.

CONCLUSION

Sequels seldom, if ever, match or surpass the quality of the originals. This article is no exception to that rule. I wanted to provide more than a cursory comment as a postscript to the article. This leads to my review of the proposal in the original piece: that *Miranda* should be overruled with the caveat that a *Miranda* waiver not be weighed in determining the voluntariness of a confession. The problem with my proposal is the ambiguity and ambivalence of the much maligned voluntariness standard.

Professors Thomas and Leo have proposed a "moral choice" theory under which the relevant inquiry is "whether the choice the suspect faced was one that society permits the police to force on a suspect."[140] Similarly, Professor Mark A. Godsey recommends replacing the voluntariness standard with a test that emphasizes whether the police threatened the suspect with an "objective penalty."[141] Those tests, however, are as equally

138. Eda Katharine Tinto, *Wavering on Waiver:* Montejo v. Louisiana *and the Sixth Amendment Right to Counsel*, 48 AM. CRIM. L. REV. 1335, 1335 (2011).

139. *Montejo*, 556 U.S. at 794–95.

140. THOMAS & LEO, *supra* note 19, at 226.

141. *Id.* at 227 (citing Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward*

amorphous and mushy as the voluntariness standard, a conclusion with which these same scholars agree.[142]

My modest suggestion, whose foundation was laid by two eminent scholars on the law of confessions, Christopher Slobogin and Welsh White,[143] is that the voluntariness standard focuses on some discrete variables in determining the voluntariness of the confession. Of course, the length of the interrogation is a critical factor. Similarly, as the application of *Miranda* has shown, the mentally impaired are particularly susceptible to police interrogation. Intelligence of the suspect impacts a suspect's ability to understand, not only *Miranda*, but the realities of his or her predicament. And, as the U.S. Supreme Court has recently recognized in *J.D.B. v. North Carolina*,[144] a juvenile's perception and understanding of interrogation is quite different from that of an adult and should be taken into account. Deception, I am afraid, is firmly embedded as a useful adjunct for interrogators and is here to stay.[145] It should, nevertheless, be subject to the restraints imposed by a vigorous interpretation of the voluntariness test. As for the videotaping of confessions, I remain skeptical that it will be widely adopted as a requisite of a valid confession, but commend the attempt set forth in the Uniform Electronic Recordation of Custodial Interrogations Act.[146] Taping, or the lack thereof, should also weigh on the voluntariness standard.

a Workable Test for Identifying Compelled Self-Incrimination, 93 CALIF. L. REV. 465, 538 (2005)) ("The initial use of Miranda warnings should stem from a compulsion analysis informed by the objective penalties test rather than the amorphous voluntariness analysis employed today.").

142. *Id.* at 227 ("An imprecise test that at least asks the right question is better than an incoherent inquiry that is also imprecise."); Godsey, *supra* note 141, at 538 ("[E]xisting due process doctrines should serve to buttress the court's confession analysis where the objective penalties test falls short.").

143. *See generally* Christopher Slobogin, *Confessions and Police Disclosure: Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1290–99 (2007) (discussing and analyzing in depth police deception during interrogation); WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATIONS AFTER DICKERSON 190–95, 201–14 (2001) (examining whether *Miranda* adversely impacted law enforcement or reaffirmed individual rights).

144. J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

145. *See* Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1168–72 (2001).

146. UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT (2010), *available at* http://www.uniformlaws.org/shared/docs/electronic%20recordation%20of%20 custodial%20interrogations/uerocia_final_10.pdf; *see* Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW J.L. & SOC. POL'Y 400, 410–11 (2012) (summarizing the Act's major provisions).

At the outset of this article, I argued that the *Miranda* doctrine has regressed to the mean. Despite the Court's feeble attempt to uphold *Miranda*'s constitutional footing in *Dickerson*, it has interpreted the doctrine, as I argued in my original article, out of existence. I doubt, therefore, that any proposals to invigorate *Miranda* will bear much fruit. Rather simply, *Miranda* is here to stay, as a perfectly embalmed cadaver playing a two-bit role in a tragicomical farce.