

MIRANDA STORIES

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Professor Cassell ends his Article by invoking a metaphor currently in academic favor. "It is time," he implores, "for a new *Miranda* narrative—not the myth that it is costless to indulge this Warren Court invention, but an accurate account of real-world consequences from unprecedented shackles on the police."¹ With charts and graphs as his props, Cassell offers us a horror story. Police compliance with *Miranda*² has decreased the percentage of successful interrogations³ and lowered the police clearance rate for violent crimes.⁴ Even worse, "*Miranda* may have itself increased the crime rate."⁵

The moral of his tale? We must rid ourselves of this pox on the constitutional landscape that prevents police from doing their job and return to the good old days of a due process regime⁶ supplemented by videotaping⁷ of all police interrogations. The villains in his story? Apart from the Warren Court itself, Cassell blames liberal academics like Professors Yale Kamisar⁸ and Stephen Schulhofer⁹ who have defended *Miranda* by unduly minimizing its social costs. The heroes? Richard

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1. Paul G. Cassell, *Miranda's Negligible Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. PUB. POL'Y 327, 345 (1997).

2. *Miranda v. Arizona*, 384 U.S. 436 (1966) (instituting the *Miranda* warning).

3. See Cassell, *supra* note 1, at 329.

4. See *id.* at 333-34 & fig.1.

5. See *id.* at 334-35.

6. See *id.* at 344. While most academics describe the Court's present model for regulating police custodial interrogation as a "*Miranda*" regime, the Due Process "voluntariness" test still applies to any statement made after a valid *Miranda* waiver. However, courts are very reluctant to exclude statements under the Due Process Clause if the police have fully complied with *Miranda* safeguards. Professor Cassell's call for a "return" to the old Due Process era implicitly acknowledges that *Miranda* has, in fact if not in theory, replaced the Due Process Clause as the primary method of regulating police custodial interrogation.

7. See *id.*

8. See Cassell, *supra* note 1, at 333 n.33 (citing Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537 (1990)).

9. See *id.* at 333 n.32 (citing Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987)).

Nixon and Professor Joe Grano. Nixon was right to blame the Warren Court for escalating crime rates¹⁰ and Professor Joe Grano was prophetic in his call for a remodeled due process regime.¹¹

Professor Schulhofer responds to Cassell by offering us a comforting story where the legal battle concerning interrogation is not a zero-sum game. In Schulhofer's tale,¹² *Miranda* benefits all of the legal actors in the criminal justice system: the courts, police, and criminal suspects are all better off than they were in the old due process regime. Schulhofer views Cassell as an academic Chicken Little whose attacks on *Miranda* distract attention from real problems and solutions such as the need to increase law enforcement resources.¹³

Despite Cassell's call for a "new" *Miranda* narrative, neither he nor Schulhofer offer one. Cassell's horror story provides some fresh empirical support for a tale that conservative critics of *Miranda* have told since the Warren Court first announced its decision.¹⁴ In turn, making no claim to novelty, Schulhofer empirically refurbishes a story first suggested by Yale Kamisar.¹⁵

What is particularly striking about the tenacity of these two competing *Miranda* stories is that the last three decades have provided ample reason for rejecting elements of both narratives. Neither the "conservative" nor the "liberal" tale provides a fully plausible account of *Miranda's* impact on our criminal justice system because both stories commit the same fundamental error: exaggerating either *Miranda's* costs (Cassell)¹⁶ or benefits (Schulhofer).¹⁷ Moreover, each story generates an obvious question that neither author answers persuasively. If Cassell's account is accurate, why have the police and a conservative

10. For an account of how Richard Nixon ran against the Warren Court in his 1968 presidential campaign, see FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 9, 15 (1970).

11. See Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

12. Stephen J. Schulhofer, *Bashing Miranda is Unjustified—and Harmful*, 20 HARV. J.L. PUB. POL'Y 347 (1997).

13. See *id.* at 348.

14. *Miranda v. Arizona*, 384 U.S. 436 (1966). "[The] rule announced today . . . is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials." *Id.* at 541 (White, J., dissenting).

15. See Yale Kamisar, *Kauper's Judicial Examination of the Accused Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 30-37 (1974).

16. See *infra* Parts I-II.

17. See *infra* Part III.

Supreme Court shown no interest in eliminating the *Miranda* regime? Conversely, if Schulhofer is right (and I believe he is) that the *Miranda* regime has not impaired law enforcement's ability to secure incriminating admissions, how exactly does *Miranda's* negligible impact demonstrate its success in eliminating the "inherent coerciveness" of police interrogation?

I. EXAGGERATING *MIRANDA'S* COSTS TO LAW ENFORCEMENT

Let's start with the empirical foundation for Cassell's horror story. If you are persuaded by Professor Schulhofer's interpretation of the data,¹⁸ there is none. Far from shackling the police, Schulhofer's revisions suggest that *Miranda* has had a negligible impact on law enforcement.¹⁹ Instead of repeating Professor Schulhofer's arguments, I want to reinforce them by looking at Cassell's empirical study of the Salt Lake police department.²⁰

To illustrate some of the problems with Cassell's use of statistics, consider how he interprets the significance of his finding that 16.3% of arrested suspects in Salt Lake invoked their *Miranda* rights.²¹ Of course, defenders of *Miranda* will immediately use the flip side of this statistic to point out that 83.7% of these suspects did not initially invoke their *Miranda* rights. Cassell's response is to remind us that such a low percentage invocation figure, if applied nationally, would show that approximately 300,000 criminal suspects invoke their *Miranda* rights to make life more difficult for the police.²²

However, the extent of damage fairly attributable to *Miranda* depends in part on Cassell's unstated assumption that many of these suspects would have eventually incriminated themselves in his due process regime because they would not have the power to stop the interrogation process. This assumption is problematic both empirically and normatively.

Cassell found a correlation between a suspect's invocation of

18. See Schulhofer, *supra* note 12, at 351-71.

19. See *id.*; see also Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987).

20. See Paul G. Cassell and Bret Hayman, *Police Interrogation in the 1990's: An Empirical Study of the Effects of Miranda*, 43 U.C.L.A. L. REV. 839 (1996).

21. See *id.* at 859

22. See *id.* at 862; see also Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 440 (1996).

his *Miranda* rights and the suspect's prior felony record.²³ Repeat players in the criminal justice system not only know their "rights," some of them learn the hard way that they cannot talk themselves out of trouble in a police interrogation room. In short, some of these repeat suspects are not relying on their *Miranda* rights as much as their realization that talking to the police in this setting is a lose-lose proposition. Repeat players who have learned this lesson will not talk to the police regardless of the legal regime controlling the interrogation process²⁴ unless the length and pressures of the interrogation sap their will. At least in theory, the due-process taped-interrogation regime Cassell favors would exclude such incriminating admissions. In short, one cannot assume that the abolition of *Miranda* would translate into anything close to a 16% increase in the number of suspects making "voluntary" incriminating admissions. Some portion of this group would not respond to police questions regardless of how long the police

23. See Cassell & Hayman, *supra* note 20, at 895-96. The study, performed by Cassell and a colleague, found "that suspects with a prior criminal record were slightly more likely to invoke their *Miranda* rights . . . although the small sample size means the result is not statistically significant." *Id.* at 895. Their definition of a prior criminal record, which included adult misdemeanor arrests but excluded juvenile felony arrests, probably accounts for their finding of only a slight correlation between prior record and invocation. See also *id.* at 896 (raising the possibility that "our 'prior record' category was too expansive to capture the effect of a serious criminal record").

Police do not need to give *Miranda* warnings unless they are going to interrogate the suspect. Misdemeanor arrests are far less likely to trigger custodial interrogation than felony arrests. For empirical evidence supporting a strong correlation between prior felony record and suspects' decisions to invoke their *Miranda* rights, see RICHARD A. LEO, POLICE INTERROGATION IN AMERICA: A STUDY OF VIOLENCE, CIVILITY, AND SOCIAL CHANGE (1990) (unpublished Ph.D. dissertation, University of California (Berkeley)) at 276-77 (finding a slight difference between suspects with no record and those with a misdemeanor record in willingness to invoke *Miranda* rights but finding a large difference between suspects with no record and those with a felony record). British empirical research also shows that criminal suspects with prior records are significantly more likely to remain silent and request counsel. See PAUL SOFTLEY, HOME OFFICE RESEARCH UNIT, POLICE INTERROGATION: AN OBSERVATIONAL STUDY IN FOUR POLICE STATIONS, ROYAL COMM'N ON CRIMINAL PROCEDURE RESEARCH STUDY NO. 4 (1980).

24.

The professionals say nothing. No alibis. No explanations. No expressions of polite dismay or blanket denials . . .

For anyone with experience in the criminal justice machine, the point [of saying nothing to the police] is driven home by every lawyer worth his fee. Repetition and familiarity with the process soon place the professionals beyond the reach of a police interrogation.

DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 210 (1991).

Eons ago, I represented indigent criminal defendants as a public defender. Most of my clients waived their *Miranda* rights. The few who did not had very long prior felony records. Most of the defendants in this group were "career" burglars and robbers.

interrogated them in a civilized manner. Some of the rest would have their statements suppressed if they succumbed to police pressure only after a prolonged interrogation.²⁵

Cassell also minimizes the impact of several Supreme Court decisions that provide police with an incentive to ignore suspects' invocation of their *Miranda* rights. *Harris v. New York*²⁶ permits the state to use suspects' statements taken in violation of *Miranda* to "impeach" their credibility if they testify in their own defense.²⁷ *Oregon v. Elstad*²⁸ permits the state to use the evidentiary fruit of most *Miranda* violations in its case in chief. *Elstad* also creates an incentive for the police to delay the giving of *Miranda* warnings until after suspects make the desired incriminating admissions because the exclusion of any unwarned statements will not lead to the exclusion of their repetition by suspects who have received proper warnings and waived their rights. These decisions encourage the police to violate *Miranda* whenever the benefits of the violation outweigh the costs of compliance.²⁹

25. Cassell emphasizes that most of the Salt Lake County police interrogations lasted less than an hour. See Cassell and Hayman, *supra* note 20, at 892. Richard Leo presented similar findings concerning the average length of police interrogation sessions he observed in his study of another police department. See LEO, *supra* note 23, at 267. However, only five of the two hundred cases in Cassell's study involved homicide crimes, and Leo's study did not include any homicide cases because the police did not give him permission to observe such sessions. Police custodial interrogations of homicide suspects frequently last far longer than an hour.

In the privacy of the interrogation room, it requires hours of prolonged effort to break a man to a point where he's willing to admit a criminal act, yet at some point those hours begin to cast doubt on the statement itself. *Even under the best conditions, four to six hours of interrogation are required to break a suspect down, and eight or ten or twelve hours can be justified as long as the man is fed and allowed the use of a bathroom.* (emphasis added)

SIMON, *supra* note 24 at 206.

While Cassell's version of how to regulate police interrogation (e.g., videotaping and application of the due process voluntariness test) does not impose any time limits, prolonged interrogation would certainly be an important factor in assessing the voluntariness of defendants' statements. Having videotapes of protracted interrogations should make it harder for courts to indulge in the fiction that suspects who successfully remained mute for an hour made a "voluntary" choice to incriminate themselves some considerable time later.

26. 401 U.S. 222 (1971).

27. Criminal suspects' pre-arrest silence as well as their post-arrest silence preceding their receipt of *Miranda* warnings can also be used by the state to cast doubt on the veracity of any exculpatory testimony the defendants offer at trial. See *Jenkins v. Anderson*, 447 U.S. 231 (1980); *Fletcher v. Weir*, 455 U.S. 603 (1982).

28. 470 U.S. 298 (1985).

29. See Carol Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) (arguing that the Supreme Court's Fourth and Fifth Amendment "decision rule" cases, which identify when illegally obtained evidence can

Cassell reassures us that he found no evidence of such strategic behavior in his Salt Lake County study.³⁰ Unfortunately, not all police departments follow the spirit as well as the letter of the law. A quick perusal of the *Criminal Law Reporter* demonstrates that the police have learned the lessons these cases teach about strategic misconduct.³¹

Cassell has clearly exaggerated the extent to which the *Miranda* regime has hampered law enforcement. But such exaggeration does not mean *Miranda's* prophylactic rules are costless. Decisions like *Edwards*³² and *Minnick*,³³ which bar any police-initiated interrogation even after a suspect has consulted with counsel, place new and costly constraints on the police. Conceding *Miranda's* costs raises what should be the central question in the Cassell-Schulhofer debate: how do we assess whether these costs are justifiable?

II. THE PROBLEM OF FALSE CONSCIOUSNESS

One way of addressing this question is to examine whether the legal actors governed by *Miranda* believe the costs of regulation outweigh its benefits. For example, if *Miranda* truly "shackles" the police, wouldn't some police departments lobby their state legislatures to accept the Court's invitation to replace *Miranda* with alternative safeguards? At the very least, one would foresee some police departments urging the Supreme Court to abandon *Miranda* and some conservative Justices responding favorably to such arguments.

Yet police departments have not urged the Supreme Court or any state legislature to reject *Miranda*. Nor has a single state legislature accepted the *Miranda* Court's invitation to

be used by the prosecution, are internalized by the police as modifications of the "conduct rules" that place constitutional restraints on their behavior). See also Stephen L. Wasby, *Police Training About Criminal Procedure: Infrequent and Inadequate*, 7 POL'Y STUD. J. 461, 466-67 (1978) (arguing that police training materials encourage police to evade rules regulating their conduct).

30. See Cassell and Hayman, *supra* note 20, at 904 (finding no evidence that police used multiple interviews to circumvent *Miranda's* requirements by taking advantage of *Elstad*).

31. See, e.g., *Cooper v. Duprik*, 963 P.2d 1220; see also *California Attorneys for Criminal Justice v. Butts*, 59 Crim. L. Rpt. 1069-71 (BNA) (D.C.C. Cal. Apr. 4, 1996) (permitting two prisoners to proceed in district court with civil rights suit for damages based on their contention that Los Angeles and Santa Monica police departments deliberately violated their *Miranda* rights).

32. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

33. *Minnick v. Mississippi*, 498 U.S. 146 (1990).

experiment with legislative alternatives to the *Miranda* rules. And the Court has not shown any recent inclination to abandon the *Miranda* regime.³⁴ Instead of attacking *Miranda*, conservative Justices have defended its virtues.³⁵

Cassell's story does not offer any explanation for state legislative inaction or the Court's response. Perhaps he believes that liberal academic defenders of *Miranda* like Schulhofer have lulled the Court into a false sense of security by convincing the Justices that *Miranda* imposes negligible social costs. Even if the Justices and state legislatures could be this gullible, how does Cassell explain why the police fighting in the trenches do not seem eager to abandon *Miranda*? Surely, law review articles could not deceive them.

Cassell realizes he must explain why the police have embraced their shackles. His answer: the police do not realize what they are missing³⁶ because most of them never operated in the good old days when men were men and cops were cops. In short, they are suffering from false consciousness.

There are so many problems with this explanation that one does not know where to begin. Perhaps it is sufficient to point out that its empirical premise is suspect. Many of the police administrators currently in policymaking positions are well aware of the world before *Miranda* because they started their careers as cops on the beat in that world. Indeed, it is highly likely that many of these police policymakers opposed *Miranda* when it was first announced because they assumed, like the *Miranda* dissenters, that the Warren Court was bent on eliminating police interrogation. What changed their minds was their realization that they could not only live with *Miranda* but profit from it.³⁷

34. While the Court has made it easier for the police to use evidence generated from *Miranda* violations in its impeachment and "fruit of the poisonous tree" decisions, the Justices have refused to treat *Miranda*'s exclusionary remedy like its disfavored Fourth Amendment counterpart in its *habeas corpus* jurisprudence, *Withrow v. Williams*, 507 U.S. 680 (1993), and have strengthened suspects' protections from future police interrogation when they assert their *Miranda* right to counsel. See discussion *supra* p. 380.

35. Justice Kennedy authored the majority opinion in *Minnick*. See *supra* text accompanying note 33. Justice O'Connor has observed that "[*Miranda*] as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights . . ." *Moran v. Burbine*, 475 U.S. 412, 424 (1986).

36. See Cassell, *supra* note 1, at 342 n.60.

37. An American Bar Association report found that "[a] very strong majority of those surveyed—prosecutors, judges, and police officers—agree that compliance with *Miranda*

One of the many ironies in the Cassell-Schulhofer exchange is that the liberal's defense of *Miranda* best explains why both a conservative Supreme Court and the police prefer the *Miranda* regime to the one it replaced. In Schulhofer's story, the only actors in the criminal justice system who suffer from a form of false consciousness are criminal suspects, because police compliance with *Miranda* deludes them into thinking that they have nothing to fear by talking to the police.

III. EXAGGERATING *MIRANDA*'S PROTECTION OF SUSPECTS' PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION

In Schulhofer's tale, *Miranda* protects suspects' privilege against self-incrimination without unduly hampering law enforcement's need to secure incriminating admissions from most arrested suspects. How does this happen?

According to Schulhofer, criminal suspects are better off than they were in the due process era because police no longer use physical force or mental coercion to generate confessions.³⁸ *Miranda* not only encouraged the police to use more subtle forms of persuasion, it made such ploys more effective. Police learned how to create an interrogation environment where their rendition of the warnings led suspects to believe that they had the power to stop police questioning whenever they wished. Emboldened by this shift in the power-balance, suspects now believe that they can talk their way out of trouble without subjecting themselves to prolonged interrogation and eventual incrimination. Of course they are mistaken, but the Constitution is not offended when criminal suspects make foolish decisions that do not promote their self-interest.³⁹ Since *Miranda* does not bar the police from using deceit and trickery to gain suspects' confidence once they have waived their rights, the police are free to play a confidence game in which their eventual betrayal of that trust generates *non-coerced* incriminating admissions.⁴⁰

Civil libertarians are happy because they get crime control

does not present serious problems for law enforcement." SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, AM. BAR ASS'N, CRIMINAL JUSTICE IN CRISIS 28 (1988).

38. See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 562 (1996).

39. See *id.*

40. See *id.*; but see *infra* pp. 383-86 (discussing how this police confidence-game's efficacy depends to a large degree on the inherent coerciveness of custodial interrogation).

without empowering the state to use the sort of physical or mental coercion that might coerce an innocent person (such as themselves) to confess falsely. Police like *Miranda* because it provides them with clear guidelines for initiating interrogations and does not eliminate their power to manipulate suspects once they have waived their *Miranda* rights. Following these guidelines virtually guarantees the admission of any incriminating statement made by criminal suspects.⁴¹ Moreover, police compliance with *Miranda* demonstrates their commitment to professionalism and respect of suspects' rights. The Supreme Court is happy because the courts are freed from applying a fact-sensitive, labor-intensive, due process test in most of the cases where police complied with *Miranda*. In sum, *Miranda* generates benefits to all of the legal actors in the criminal justice system that easily outweigh the relatively insignificant costs of a few lost incriminating admissions.

Schulhofer's account of how the police and courts benefit from *Miranda* explains why neither the Rehnquist Court nor the police are interested in jettisoning this Warren Court landmark. As Schulhofer suggests, any alternative to *Miranda* "that takes the Fifth Amendment seriously will almost certainly be more restrictive and harder for police to live with than the now-familiar *Miranda* safeguards."⁴² In Schulhofer's tale, the only people suffering from false consciousness, apart from the vast majority of criminal suspects who foolishly waive their *Miranda* rights, are conservative academic critics of *Miranda* like Paul Cassell who do not realize how good they have it.

There is, however, a paradoxical aspect to both Schulhofer's defense of *Miranda* and the decision itself. Let us start with *Miranda*. If police custodial interrogation is as inherently coercive as *Miranda* assumed, then why did the Warren Court

41. In theory, suspects who make valid *Miranda* waivers can still argue that their due process rights were violated by police interrogation tactics that rendered their statements involuntary. In practice, very few due process challenges are successful:

In the quarter century since *Miranda*, the Court has reversed only two convictions on the ground that post-*Miranda* custodial interrogation produced an involuntary statement. This record contrasts with twenty-three Supreme Court reversals of convictions on voluntariness grounds in the comparable time period immediately preceding *Miranda*. Not surprisingly, in the face of this silence at the top, many lower courts have adopted an attitude towards voluntariness claims that can only be called cavalier.

Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 745-46 (1992).

42. Schulhofer, *supra* note 38, at 560-61.

permit suspects to waive their privilege in this coercive environment after receiving *Miranda* warnings from police? After all, we know that the police will give these warnings in a manner designed to persuade suspects that the invocation of their *Miranda* rights will harm them.⁴³ Why did the Court not characterize police solicitation of suspects' waivers in the absence of contact with counsel as involuntary because the police were exploiting the inherent coerciveness of the setting to secure waivers? The notion that the warnings themselves were sufficient to dissipate this coercion is clearly a legal fiction, a point that Schulhofer made in one of his earlier essays on *Miranda*.⁴⁴

Schulhofer explains the problem of *Miranda* waivers by admitting the obvious. The Warren Court did not want to eliminate successful police interrogation; the Court just wanted to regulate it by reducing some of its coerciveness. If the Court had followed the logic of its "inherently coercive" rationale to its bitter end, it would not have permitted suspects to waive their *Miranda* rights without the advice of counsel. But requiring the advice of counsel before permitting a valid *Miranda* waiver would have seriously eroded the police's ability to engage in successful custodial interrogations. To avoid this law enforcement nightmare, the Court compromised by permitting waivers of *Miranda* rights before consultation with counsel. *Miranda*'s pragmatic compromise is an old story that has been told many times,⁴⁵ even if conservative critics of *Miranda* like Cassell choose to ignore it.

Schulhofer, however, appears to forget his concession about the coercive nature of *Miranda* waivers when he discusses what follows them. He relies on recent observational studies of interrogation by David Simon and Richard Leo to support his conclusion that

today's suspects typically confess not because of fear of mistreatment but primarily because of misplaced confidence

43. David Simon offers a superb description of how Baltimore detectives in homicide cases communicate the *Miranda* warnings in a manner that sends, in essence, the following message to suspects: invoke your right to silence or a lawyer and we cannot help you; but if you talk to us and give us your side of the story, we can help you. See SIMON, *supra* note 24, at 196-97.

44. See Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 882-83 (1981).

45. See, e.g., Kamisar, *supra* note 15.

in their own ability to talk their way out of trouble. . . .
[C]onfessions are now mostly the result of persuasion and the suspect's overconfidence, not of pressure and fear. That difference in method is crucial.⁴⁶

Without diminishing the important role *Miranda* has played in reducing police use of physical force, the question remains whether *Miranda* has done anything to eliminate or reduce the mental coercion police employ to persuade suspects to incriminate themselves. Does the confidence-game model that Simon uses to describe police custodial-interrogation techniques support the dichotomy drawn by Schulhofer between impermissible mental coercion—"pressure and fear"—and permissible "persuasion" and manipulation of the suspect's overconfidence? Simon doesn't think so. After describing a typical post-waiver interrogation session in which the police threaten, cajole, control, and manipulate the suspect, Simon concludes:

[I]f the . . . intent of the *Miranda* decision was, in fact, an attempt to "dispel the compelling atmosphere" of an interrogation, then it failed miserably.

And thank God. Because by any standards of human discourse, a criminal confession can never truly be called voluntary. With rare exception, a confession is compelled, provoked, and manipulated from a suspect . . .⁴⁷

Of course, the ultimate question is not whether suspects' statements are voluntary in the sense that they would have made the statements in the absence of police custodial interrogation. The difficult normative question at the heart of the *Miranda* controversy is how much pressure is too much? Many, including both Cassell and Schulhofer, will agree that it is permissible for police to deceive suspects in a way that prevents them from making rational, self-interested decisions about whether to incriminate themselves. Few would be concerned if such manipulation and deceit occurred in an environment where the manipulator did not have absolute control over the manipulated. But when the efficacy of the police confidence game depends so heavily on police custodial control of the suspect in a very hostile, threatening environment, how can

46. Schulhofer, *supra* note 38, at 561-62.

47. SIMON, *supra* note 24, at 199.

Schulhofer so easily distinguish between persuasion and fear? Schulhofer insists that "the difference in method [between persuasion and fear] is crucial"; yet the Simon study illustrates the impossibility of separating persuasion from fear in this environment.

Yale Kamisar once wrote that those who complain about *Miranda's* shortcomings should remember that "[w]hatever its shortcomings . . . [*Miranda*] tried to take the police interrogation-confession problem by the throat."⁴⁸ To which a prominent scholar replied:

I am not so sure. *Miranda* undoubtedly serves important symbolic functions. It also affords certain concrete advantages over the due process test . . . *Miranda* does not [however] . . . come directly to grips with the dilemma arising from our simultaneous commitments to the privilege against self-incrimination and to a law enforcement system in which police interrogation is perceived as a necessity. If anything, *Miranda's* technique for denying this dilemma, for insuring that we can have our cake and eat it, is infinitely less candid than the due process balancing analysis . . . Seen as a compromise, *Miranda* is well worth retaining. Whether *Miranda* represents the best possible compromise, and indeed whether compromise is required at all, remain open questions.⁴⁹

That scholar was Stephen Schulhofer. Perhaps, in the heat of battle with Cassell, he forgot his own wise counsel.

IV. CONCLUSION

What is striking about the Cassell-Schulhofer exchange is the realization that their contrasting takes on the data do not motivate their debate or their answer to the most important question raised by the tension between police custodial interrogation and suspects' privilege against compelled self-incrimination: how much pressure is too much? When all is said and done with the statistics, it turns out that both Cassell and Schulhofer agree that only a small percentage of criminal suspects assert their *Miranda* rights.⁵⁰ Even if Cassell is correct that the percentage of post-arrest incriminating admissions has

48. YALE KAMISAR, POLICE INTERROGATIONS AND CONFESSIONS 223 (1980).

49. Schulhofer, *supra* note 44, at 883-84.

50. See discussion *supra* p. 377.

dropped substantially during the *Miranda* regime, he would not be telling his horror story unless he also believed, as he does, that the Warren Court exceeded its constitutional authority when it “shackled” the police with *Miranda* safeguards.⁵¹ Even one lost incriminating admission is too much if what triggers that loss is a legal regime that lacks constitutional justification.

Cassell’s point is that defenders of *Miranda* should not pretend that *Miranda*’s costs are negligible.⁵² Schulhofer’s response is that all constitutional constraints on police behavior have costs and that these costs should not be viewed as sufficient by themselves to resolve a debate about the normative justifications for the legal regime.⁵³ In the end, we are back where we started. Cassell believes the Court exceeded its constitutional authority when it created the *Miranda* regime; Schulhofer sees *Miranda* as an appropriate constitutional response to an intractable problem, a response that improved upon the Due Process regime it replaced.

Ironically, the Warren Court’s *Miranda* decision also ducked the normative question at the heart of this debate. While giving criminal suspects “rights” that in theory could eliminate police custodial interrogation, the Court made sure that the police could profit from the interrogation room’s compelling atmosphere in most cases. Everyone apart from criminal suspects should have rejoiced at this pragmatic compromise. Unfortunately, the Warren Court’s rhetoric about eliminating police compulsion has been taken far too seriously by conservative academics like Cassell and the general public. The legal regime’s constitutional ideology about eliminating compelled incrimination has generated a particularly virulent form of false consciousness. Because scholars such as Professor Cassell believe *Miranda* has shackled the police by giving criminal suspects far more protection than they deserve, they fail to see how *Miranda* has actually legitimated moderately coercive interrogation practices. We are left with a legal regime that simultaneously gives the public what it wants while denying it can do so.

51. See Cassell, *supra* note 1, at 328, 345

52. See *id.* at 327-28, 345.

53. See Schulhofer, *supra* note 12, at 347-49.

