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The Gatehouses & Mansions: Fifty Years Later

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THE GATEHOUSES AND MANSIONS: 50 YEARS LATER

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ABSTRACT

In 1965, Yale Kamisar authored “Equal Justice in the Gatehouses and Mansions of American Criminal Procedure,” an article that would come to have an enormous impact on the development of criminal procedure and American norms of criminal justice. Today, that article is a seminal work of scholarship, hailed for “playing a significant part in producing some of the [Warren] Court’s most important criminal-procedure decisions” (White 2003-04), including *Miranda v. Arizona*. The most influential concept Kamisar promoted may have been his recognition of a gap that loomed between the Constitutional rights actualized in mansions (courts) versus gatehouses (police stations). Kamisar passionately detailed how the Constitution and its jurisprudential progeny failed to protect suspects when those rights mattered most: when facing questioning by police. This article discusses where this thesis stands today in light of nearly 50 years of legal developments and social science research.

**Key Words:** *Miranda*, Constitution, interrogation, rights, police, confessions
THE GATEHOUSES AND MANSIONS: 50 YEARS LATER

I. Introduction

In 1965, a voluminous article by Yale Kamisar was squeezed into a very small book published by the University of Virginia Press. Despite its printing in such a tiny tome, that article—“Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to …”—would come to have an enormous impact on criminal procedure and American norms of criminal justice. Today, the article is considered a seminal work of scholarship, having played a critical role in illuminating inequities inherent in the practice and theory underlying United States pre-trial criminal processing. The article has been credited with inciting a revolution within the field of criminal jurisprudence: Kamisar and his scholarship “play[ed] a significant part in producing some of the [Supreme] Court’s most important criminal-procedure decisions” (White 2003-04), including that most controversial of all cases, *Miranda v. Arizona*.

Perhaps the most critical concept to emerge from that article, as the title suggests, was that of mansions (courts) versus gatehouses (police stations). Kamisar passionately detailed the ways in which the Constitution and its jurisprudential progeny—while providing crucial due process safeguards at trial—failed to protect suspects when such rights, from a practical perspective, mattered most: when suspects were being questioned.
As Kamisar explained,

The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah, there’s the rub. Typically he must pass through a much less pretentious edifice, a police station with bare back rooms and locked doors. In this ‘gatehouse’ of American criminal procedure … the enemy of the state is a depersonalized ‘subject’ to be ‘sized up’ and subjected to ‘interrogation tactics and techniques most appropriate for the occasion’: he is ‘game’ to be stalked and cornered. Here ideals are checked at the door, realities faced and the prestige of law enforcement vindicated (Kamisar 1965, 19–20).

Dignity would return once the suspect arrived at the mansion: “Once he leaves the ‘gatehouse’ and enters the ‘mansion’—if he ever gets there—the enemy of the state is repersonalized … the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated” (Kamisar 1965, 20).

Kamisar carefully articulated the ways in which the gatehouse lacked protections for suspects in a manner that would be inconceivable in a court of law.
In the courtroom, the conflict of interest between the accused and the state is mediated by an impartial judge; in the police station, although the same conflict exists in more aggravated form, ‘the law’ passes it by. In the courtroom, a reporter takes down everything; in the police station, there is usually no objective recordation of the events, leading to inevitable disputes over what the police did, or what the suspect said, or both. In the courtroom, the defendant is presumed innocent; in the police station, the proceedings usually begin: ‘All right—we know you’re guilty; come through and it’ll be easier for you.’ In the courtroom … if and when the defendant takes the stand, his lawyer is at his side, not only to shield him from oppressive or tricky cross-examination which angers, upsets, or confuses him, but to guide him on direct examination; in the police station the suspect neither has nor (usually) is advised of his right to counsel. Indeed, leading police manuals emphasize it is unnecessary for an interrogator to warn an offender of his constitutional rights before obtaining his confession (1965, 13-14).

Kamisar powerfully deployed the “gatehouse”-“mansion” analogy to illustrate several key interrelated themes that would be incorporated into the U.S. Supreme Court’s *Miranda* decision only one year later. They included:

1) *Providing suspects with the right to counsel and the privilege against self-incrimination in the interrogation room.* Kamisar viewed custodial police interrogation
as the first stage in the criminal process at which “the state must first provide an indigent person with a lawyer” (1965, 9) because the interrogation (the gatehouse) was for most suspects, in effect, a pre-trial inquisition that ultimately determined the outcome of defendant’s case (bypassing the mansion). Kamisar viewed the two rights as inextricably intertwined: “Questions about the nature and scope of the right to counsel spill into questions about the nature and scope of the privilege against self-incrimination.” These constitutional protections, argued Kamisar, did not merely come into play at trial but were pre-trial rights that applied with every bit as much force and necessity after the suspect had been arrested and detained “for purposes of eliciting incriminating statements” (1965, 10). This seemed obvious from the fact of such constitutional guarantees in the legal system in the first place: “The man in the street would have considerable difficulty explaining why the Constitution requires so much in the courtroom and means so little in the police station” (1965, 21).

2) Protecting the Suspect’s Freedom to Choose to Speak During Custodial Interrogation. The right to counsel and privilege against self-incrimination were just as important inside the interrogation room as they were at trial because they were necessary to prevent a suspect from being compelled by police to make incriminating statements against his will. In other words, these rights were necessary in the stationhouse to protect the suspect’s free choice to consent to or participate in interrogation. Like Bernard Weisberg (1961), Kamisar argued that police interrogation training manuals demonstrated that even psychologically oriented interrogation techniques were heavy-handed, manipulative, and ultimately coercive. Even though the methods of the third degree from the 1920s and 1930s had receded into the past, Kamisar believed that the
conditions of modern custodial interrogation continued to undermine the suspect’s ability to choose freely whether to speak to police (1965, 18-19):

   Police interrogators may now hurl “jolting questions” where once they swung telephone books, may now “play on emotions” where once they resorted to physical violence, but it is no less true today than it was thirty years ago that…the inquisition held by the police before trial is the outstanding feature of American criminal justice….

A suspect’s awareness of his constitutional right to counsel and privilege against self-incrimination was necessary to guard against such pressures and align the protections in the gatehouse with those in the mansion.

3) Greater Equality For Suspects in the Interrogation Room Kamisar’s essay is, as the title suggests, fundamentally an indictment of inequality in the American criminal justice system. It is not so much a deep reflection on the nature or variety of inequality in criminal procedure as a clarion call for eradicating one kind of inequality: lack of knowledge about constitutional rights and their potential application in the early stages of the legal process. Kamisar worried specifically about those individuals – presumably all Americans, but especially the poor and underprivileged – who did not know that they could invoke constitutional rights to resist or terminate police questioning, seek the advice of an attorney prior to or during interrogation or simply not make a statement at all. Quoting approvingly from the Court’s decision one year earlier in Escobedo,

Kamisar did not see informing suspects about their rights as dangerous, but as redressing

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2 “No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise [his constitutional]…rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system” (1965, 54).
a fundamentally unfair inequality in an adversary system whose ideals were premised on a level playing field between the state and the accused, even if absolute equality was realistically never possible. “I do contend that so far as it is reasonably possible the state can and should ensure that the choice of the weak and the ignorant and the poor to speak or not to speak is as free and as informed as that of their more fortunately endowed brethren…. That we can never achieve absolute equality between rich and poor is hardly a good reason not to strive for proximate equality” (Kamisar 1965, 11). The gatehouse vs. mansion analogy, of course, suggested that his brand of proximate equality was a long way away.

4) Exposing the Lack of Transparency In the Interrogation Room And Its Consequences. Kamisar was deeply concerned about the secrecy of custodial interrogations, which were conducted in the backrooms of police stations, out of the presence of the accused’s friends, family or counsel, and with no objective recordation. There were several consequences of incommunicado police questioning, one of which of course was that it created and contributed to the above-mentioned psychologically coercive conditions that undermined a suspect’s ability to freely choose whether to participate in the interrogation or agree to make a statement. Kamisar correctly pointed out that it also led to the classic “swearing contest” in which the police asserted one version of the events that occurred during backroom questioning while the suspect asserted another, only to have a judge or jury determine whose version was more likely accurate – not on the basis of any objective record but, instead, on a judgment about the credibility of the participants. The police almost always prevailed. Ahead of his time, Kamisar was an early proponent of the electronic recording of interrogation, but he also
argued that the right to counsel during police questioning was all the more important in a world without electronic recording. “How can we indefinitely postpone the electronic preservation of speech in circumstances where – not just from the point when the subject is ready to confess, but from the very start of the proceedings to the finish – *who said exactly what, precisely how*, is so important? Until that day comes, the case for continued presence (if not the constant advice) of counsel will grow ever stronger” (1965, 86-87).

To Kamisar, one important solution to all of these problems – most suspect’s lack of knowledge of their constitutional rights during police custody, the inherent coercion of psychological methods of interrogation, the secrecy of the interrogation process and, more generally, the inequality between the many who pass through the gatehouses and the few who pass through the mansions of criminal procedure – was to require police to advise custodial suspects of their constitutional rights to silence and counsel and to require an effective waiver prior to questioning. “Why at least don’t the officers themselves tell their “subjects” plainly and emphatically that they need not and cannot be made to answer? That they will be permitted to consult with counsel or be brought before a magistrate in short order?” (1965, 32). Kamisar viewed such warnings as a critical means to mitigate the inquisitorial aspects of police questioning, and thus better align legal practice with legal norms.

One year after “Equal Justice in the Gatehouses and Mansions of American Criminal Procedure” was published, Kamisar’s vision would largely be implemented in the U.S. Supreme Court’s watershed *Miranda* decision. Kamisar’s chapter would go on to become an instant classic in the scholarly literature and one that continues to be widely reprinted, discussed and cited to this day. However, its academic impact pales compared
to its influence in the real world. Kamisar’s passionate lament in 1965 that custodial suspects were rarely, if ever, informed of their rights, would be decimated in 1966 by the power of his pen. After *Miranda*, custodial interrogations could no longer commence in lieu of other safeguards, at least legally, without a declaration of the now iconic *Miranda* warnings, which include a recitation of the accused’s constitutional rights to silence and counsel and a requirement that they be waived in order to proceed. Kamisar’s trailblazing chapter had the kind of effect on the Supreme Court that most law professors only dream of, permanently changing the landscape of American criminal procedure by ensuring that the constitutional rights of all citizens have weight not only in the courtroom but at much earlier stages of the criminal process.

But how much change has Kamisar’s article brought about on the ground, and what is the status of his thesis about the gatehouses and mansions today? As the fiftieth anniversary of Kamisar’s chapter nears, it is an ideal time to reflect on these questions and take stock of the gains that have been made and the opportunities that have been lost. To address these questions, we focus on the *Miranda* decision itself – which we see as the crowning achievement of Kamisar’s precocious and brilliant chapter – and its doctrinal evolution and empirical impact in the real world of criminal procedure. As we describe in more detail below, Kamisar’s article, through *Miranda*, has had significant impact both doctrinally and empirically. However, while *Miranda* signaled a watershed moment in advancing the symbolic rights of suspects, *Miranda* has been battered so thoroughly by subsequent Supreme Court decisions that it has become a shell of its original self, causing one academic commentator to pronounce it “dead” (Weisselberg 2008). Similarly, empirical studies of *Miranda*’s impact – on suspects, police,
prosecutors and courts – have demonstrated that it has largely failed to accomplish the goals set out by the Court in 1966 (Leo 2001).

The remainder of this article unfolds as follows. In Part II, we briefly describe the theory and purpose – i.e., the goals -- of *Miranda* as doctrine, showing how it largely parallels Kamisar’s vision from his “Gatehouses and Mansions” chapter, which had been published just one year earlier. In Part III, we describe how subsequent Supreme Court decisions have undermined the original *Miranda* and replaced it with a very different *Miranda*. In Part IV, we describe *Miranda*’s empirical impact, showing how it has largely failed to achieve the goals set out by the Warren Court. Finally, in Part V, we analyze whether *Miranda* was doomed to fail, and in Part VI we offer concluding thoughts about both *Miranda* and Kamisar’s remarkable article in light of almost one-half century of social science research and legal developments. As we illustrate, a divide still looms between the practical rights available to those who grovel in our gatehouses and those who march into our mansions. The most recent empirical scholarship suggests that it has become almost impossible for the rights of the mansion to tumble down to the gatehouse – often for reasons foreshadowed by Kamisar himself.

**II. The Original *Miranda***

As just about anyone who has watched television knows, *Miranda* requires that police warn a suspect of his rights to silence and counsel and that anything he says may be later used against him before custodial questioning can begin. Though *Miranda* is presumed to contain one holding, Schulhofer (1987) has noted that it actually contains at least three separate conceptual steps or holdings that are necessary to understand its doctrinal structure. First, the Court held that the compulsion within the meaning of the
Fifth Amendment privilege against self-incrimination applies not only in formal settings such as at trial but also includes informal settings such as in-custody police interrogation which are inherently compulsive. Second, the Court held that unless adequate alternative protective devices are established to protect a suspect from these inherently compelling pressures, police are required to warn a suspect prior to interrogation of his rights to silence and appointed counsel, and that anything he says may be used against him in Court, in order to protect the privilege. Finally, the Court held that statements obtained during custodial interrogation will only be admissible if a suspect has voluntarily, knowingly and intelligently waived these Fifth Amendment rights. Succinctly stated, according to the Warren Court the purpose of the constitutionally required Miranda warning and waiver regime was to dispel the inherent compulsion of custodial interrogation and thereby protect a suspect’s informed choice about whether to freely participate in police questioning, and thus prevent involuntary statements.

As Weiselberg (2008) has pointed out, the Warren Court made several assumptions about what was necessary for the Miranda warnings to achieve their stated purpose. First, the Court assumed that “custody would distinguish interrogations that contain inherently compelling pressures from those that do not” (Weiselberg 2008,1528). The Court thus only required Miranda warnings when an interrogated suspect was in custody (i.e., when the suspect either is either under arrest or “otherwise deprived of his freedom of action in any significant way”) (Miranda, 444). Second, the Court assumed that police detectives would provide warnings and elicit waivers before employing any interrogation techniques. The Court emphasized that the warnings and waiver must precede any custodial interrogation. Third, the Court assumed that suspects
would be able to understand their rights and thus be able to freely and rationally choose whether to speak or remain silent. In order to be valid, the *Miranda* Court required that a suspect’s waiver be knowingly, voluntarily and intelligently given. Finally, the Court assumed police interrogators “would not begin questioning unless suspects clearly and affirmatively waived their rights, and questioning would cease if suspects who initially waived their rights later indicated that they wished to invoke them” (Weisselberg 2008, 1529). In other words, interrogation could not proceed in the absence of an affirmative waiver or in the presence of an affirmative invocation. The *Miranda* decision thus placed a “heavy burden” on the prosecution to establish that the suspect’s waiver had been properly obtained.

In many ways it is almost a straight line from Kamisar’s chapter to the Warren Court’s description, analysis and holding in *Miranda*. Although others had previously argued that the Fifth Amendment privilege against self-incrimination should be applied to pretrial police interrogation, none had done so as forcefully or persuasively as Kamisar. As Welsh White (2001, 53) has noted, “Kamisar’s powerful exposure of the disparity between the rights afforded suspects during pretrial interrogation and at trial removed this argument from the realm of academic debate, providing it with an immediacy it had previously lacked.” Like Kamisar, the *Miranda* Court drew on contemporary police training manuals to present a picture of psychologically-oriented interrogation that was inherently coercive and thus undermined the ability of the suspect to make an informed and unfettered choice about whether to participate in custodial questioning or give a voluntary statement. Like Kamisar, the Court decried the secrecy of incommunicado police interrogation and its effects, calling it “at odds with one of our most cherished
principles – that the individual may not be compelled to incriminate himself” (Miranda, 457-458). And like Kamisar, the Court viewed the use of warnings and waivers as necessary to constitutionally regulate the admissibility of statements elicited during custodial interrogation. For a brief period of time it seemed that the Warren Court had aligned legal practice in the gatehouse with the legal norms of the mansion.

III. Killing (The Original) Miranda

 But this was an illusion that would not last long. From the day it was decided, Miranda was intensely controversial. In its immediate aftermath, police, prosecutors, politicians and the media assailed the Warren Court’s Miranda opinion. Police and prosecutors complained bitterly that Miranda would handcuff their investigative abilities – preventing them from capturing criminals and solving crime-- and thus become no more than a shield for the guilty. This kind of raw anger was expressed in Justice White’s strident Miranda dissent: “In some unknown number of cases the Court’s rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him” (Miranda, 542). Not to be outdone, politicians linked Miranda to rising crime rates. Republican Presidential Candidate Richard Nixon denounced Miranda as representing a victory of the “crime forces” over the “peace forces” in American society, while individual congressmen called for Chief Justice Earl Warren’s impeachment. Meanwhile, Congress responded by attempting to legislatively overturn the holding of Miranda in the Omnibus Crime Control and Safe Streets Act of 1968, which attempted to reinstate the 14th Amendment Due Process “voluntariness” test as the sole standard by which trial courts could determining the admissibility of confession evidence. Newspaper editorials deplored the
Warren Court’s “coddling of criminals” while cartoonists lampooned the logic of the *Miranda* decision (Graham 1970; Baker 1983).

From a political perspective, it may not be surprising that the conservative Supreme Courts that followed the Warren Court would reinterpret (the original) *Miranda* doctrine in a way that was hostile to its intent. Subsequent decisions of the high court – *Miranda*’s progeny – have, in effect, killed the version of *Miranda* that the Warren Court, following Kamisar’s lead, had laid out. In its place these Supreme Court decisions have ushered in a very different kind of *Miranda*, one that has been so persistently watered down that it has failed to achieve the goals initially set out for it.

While a doctrinal analysis of *Miranda*’s progeny in the last half-century is beyond the scope of this article, we identify three trends that have destroyed the foundation of the original *Miranda*.

First, in a series of decisions, the Burger and Rehnquist Courts in the 1970s and 1980s de-constitutionalized Miranda, declaring that the Miranda warnings are “not themselves rights protected by the Constitution” but instead are “prophylactic safeguards,” that is, “measures to insure that the right against compulsory self-incrimination [is] protected” (*Michigan v. Tucker* 1974, 444). Doctrinally, this move turned the original *Miranda* on its head, since the Warren Court had clearly indicated—less than one decade earlier—that the *Miranda* warnings were firmly rooted in the Constitution and flowed directly from the 5th Amendment privilege against self-incrimination. Five years after *Michigan v. Tucker*, in *New Jersey v. Portash* (1979), the Burger Court continued the doctrinal assault on *Miranda*’s constitutional foundations, making it clear that a violation of *Miranda* is not the same as a violation of the Fifth
Amendment: “A defendant’s compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use against him in a criminal trial” (New Jersey v. Portash 1979, 450). In other words, the rules for testimonial evidence taken in violation of the Fifth Amendment were different than the rules for testimonial evidence taken in violation of Miranda. Re-affirming this idea, in Oregon v. Elstad (1985), the Court, in language that has been widely quoted since, wrote that the Miranda exclusionary rule “sweeps more broadly than the Fifth Amendment itself” (306).

The effect of doctrinally divorcing *Miranda* from its constitutional underpinnings and relegating it to the status of a mere prophylactic rule, has been profound. It has led some police, prosecutors and even courts to interpret Miranda as a non-constitutional rule of evidence, and it has incentivized police interrogators to disregard the original Miranda warning and waiver regime altogether (Weisselberg, 1998). In addition to de-coupling Miranda from the Constitution, subsequent Supreme Courts created a number of exceptions to Miranda, even though there are no exceptions to the Fifth Amendment privilege against self-incrimination, on which the original *Miranda* was based. In *Harris v. New York* (1971), the Burger Court created the “impeachment exception,” holding that a statement taken in violation of Miranda could nevertheless be used to impeach a defendant if he testified at trial (even though a statement taken in violation of a constitutional right cannot). George Thomas (2001) has called this “the best example of the disconnect between Miranda and the Fifth Amendment” (1089). In *New York v. Quarles* (1984), the Court created a “public safety” exception, holding that an officer need not give Miranda warnings in situations where they are otherwise required if the questions he seeks to ask are “reasonably prompted by a concern for public safety” (P.
And, by divorcing Miranda from the Constitution, the Court created, in effect, a “fruit of the poisonous tree” exception. The Fruit of the Poisonous Tree doctrine establishes that secondary evidence derived from a constitutional violation cannot be used against a defendant at trial, but since a Miranda violation is no longer a constitutional violation, the Fruit of the Poisonous Tree doctrine no longer applies.\(^3\)

The single biggest doctrinal assault by the Court, however, may not be its de-constitutionalization of *Miranda* or the numerous ad hoc exceptions it has created. Rather, it may be how the Court has both watered down the legal meaning of custody at the front end of the *Miranda* ritual, and lowered the legal standard for an acceptable waiver at the back end. Custody and interrogation are the two conditions that trigger the need for an officer to provide Miranda warnings (*Miranda v. Arizona*, 1966). The Warren Court had defined custody as any situation in which the suspect was either under arrest or has been “deprived of his freedom in a significant way” (*Miranda*, 444). In *California v. Beheler* (1983), however, the Court ruled that a suspect who made a statement at the stationhouse but was not arrested until a few days later was not in custody at the time of his interrogation and therefore no *Miranda* warnings were required. As a result, as we will see in the next section, police have come to give “Beheler” warnings in place of *Miranda* warnings. By telling a suspect he is not in custody or that he is free to leave, the interrogator need not tell a suspect of his rights to silence and appointed counsel or that anything he says may be used against him at trial. In *North*

\(^3\) Although the Rehnquist Court in *Dickerson v. United States* (2000) declared that Miranda had announced a constitutional rule, it soon retreated from and returned to the position that Miranda was just a prophylactic rule to which the fruit of the poisonous tree doctrine does not apply. See *U.S. v. Patane* (holding that the fruit of the poisonous tree doctrine does not apply to physical evidence derived from a Miranda violation).
Carolina v. Butler (1979), the Court held that a waiver to Miranda can be “implicit,” even though the Warren Court in Miranda had underscored that the prosecution has a “heavy burden” to demonstrate a knowing and intelligent waiver. And most recently, in Berghuis v. Thompkins (2010), the Supreme Court has declared that a suspect must (ironically) speak in order to assert the right to silence: remaining silent isn’t enough. Thus, the Supreme Court has increasingly opened the door for police interrogators to merely read the Miranda warnings and then launch into interrogation. As Mark Berger (1988, 1063) has observed, “in practice, it appears that as long as the warnings are given and the suspect exhibits no overt signs of a lack of capacity to understand them, his waiver will be upheld.”

IV. The Empirical Studies

As English experience indicates, … [a]ny rule requiring a warning is … likely to be ineffectual since the significance and effect of a warning depend primarily on emphasis and the spirit in which it is given. A warning can easily become a meaningless ritual (Kamisar 1965, 81-82).

Kamisar proved prescient in his recognition that warnings could quickly devolve into “a meaningless ritual,” and thus become grossly ineffective as a means to protect basic rights (1065, 81-82). Since Kamisar offered this warning almost fifty years ago, numerous scholars have empirically studied the effects of Miranda on the ground. These scholars have repeatedly stressed several issues that undermine Miranda’s effectiveness in practice. These include 1) the timing with which warnings are given (Leo 2008;
Weisselberg 2008); 2) the manner in which the warnings are presented (Leo 1996; Leo & White 1999); 3) suspects’ comprehension of those warnings (Grisso 1980; Owen-Kostelnik, Reppucci & Meyer 2006; Rogers et al 2009); 4) the increased acceptance of implicit (versus explicit) waivers by courts (Leo 2008; Weisselberg 2008); and 5) Miranda’s sanitizing effect on post-waiver interrogation practices and outcomes (White 2001; Thomas 2000, 2004).

a. The Timing and Location of Warnings

As stated above, one of the most broadly recognized of Miranda’s weaknesses involves the timing of when warnings must be given. Warnings must be provided only in advance of custodial interrogations, not in advance of non-custodial ones. In practice, American police routinely avoid the legal necessity of having to give Miranda warnings by, instead, telling a suspect immediately prior to interrogating him that he is not under arrest and is free to leave -- sometimes even after detectives have transported the suspect to the stationhouse with the express purpose of questioning him inside the interrogation room and eliciting incriminating information (Leo 2008). As we have seen, this so-called Beheler admonishment allows police to avoid having to tell a suspect that he has a right to silence or counsel during interrogation or that anything he says may be used against him. In this way, police circumvent the legal necessity of having to issue Miranda warnings or invocation rules and thus avoid the risk that the suspect will terminate the interrogation by exercising any constitutional rights (Leo 2001). While such admonishments are not conclusive green lights to interrogate sans Miranda and do raise the risk that a suspect will leave rather than stay and answer questions, many field
manuals counsel such statements as a minimum to help ensure questioning remains outside *Miranda*’s scope (Weisselberg 2008, 1542-47).

**b. The Presentation of Rights**

Three police practices relating to *Miranda*’s presentation have similarly minimized the warnings’ effectiveness. The first can best be described as “softening up” a suspect: by starting with relatively innocuous questions and putting the suspect at ease, law enforcement agents commence a pattern of questioning (by police) and answering (by suspects) that becomes challenging for suspects to break when the questions grow increasingly serious and related to the incident at hand (Leo 1996, 661). By the time *Miranda* warnings are finally given, a rapport has often been established that encourages suspects to talk; even when a rapport is not established, some suspects become so used to the pattern of question and response that they continue to cooperate out of habit.

The second tactic involves deemphasizing the warnings’ importance (Leo 1996, 662-63). By framing the warnings as an irrelevant bureaucratic procedure, police are able to increase the likelihood that suspects will waive their rights, not recognizing the import of their actions. In this way, the “time out” that the Supreme Court envisioned *Miranda* providing—a space in which suspects could rationally decide whether to invoke their rights—becomes not a time out at all (Weisselberg 2008, 1562), but a moment that simply blurs into the background.

The third tactic is to suggest to suspects that providing information to police could lead to the suspect’s case being viewed more favorably, or even more leniently, in court (Leo & White 1999, 440-447; Weisselberg 2008, 1548, 1558). David Simon, Richard Leo, and Welsh White have documented numerous instances of this technique in the
interrogations of adults (Simon 1991; Leo 1996; Leo & White 1999). Barry Feld has observed this tactic used with particular effectiveness with juvenile suspects (2006). A related maneuver is to imply that a suspect’s relationship with police is non-adversarial (Feld 2006, 258): that the police are neutral fact-finders who can help him, and opening up to these powerful “friends” is the only way to improve his situation (Leo 2008). Drawing on these studies, Kamisar (2007, 187) has recently suggested that police interrogators are not so much adapting to *Miranda* as circumventing, evading and disregarding it:

> According to Simon, Leo and White, in a significant number of instances what the police are doing *in effect* is explaining to the suspect (or persuading him) why it is in his best interest to talk to them and why it will be so much worse for him if he decides not to do so. I do not think it an exaggeration to say that in a significant number of cases, the police, in effect, are *talking the suspect out of asserting* his rights *before* the “waiver of rights” transaction ever takes place.\(^4\)

c. Suspect Comprehension: the “Haves” versus “Have Nots”

The ability of suspects to comprehend their rights, once presented with warnings, has also been the subject of much empirical and theoretical investigation. Largely unanticipated by the Supreme Court in the 1960s, the difficulty that many suspects have understanding their rights has played a major role in limiting *Miranda*’s effectiveness. The inability to understand has been driven by two factors: first, *Miranda* warnings are phrased differently in various jurisdictions; some phrasings are easier to comprehend

\(^4\) As the Warren Court in *Miranda* indicated, “any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege” (*Miranda*, 476).
and/or more likely to elicit a knowing waiver than others (see, e.g., Weisselberg 2008, 1565). The second factor focuses not on the characteristics of the warnings, but on the characteristics of suspects. Suspects with limited education, juveniles, non-English speaking populations and the mentally impaired have all been found to face particular difficulties understanding their rights. This issue especially touches on Kamisar’s concern with ensuring that those who are poor or otherwise disadvantaged are as protected as others, a worry the Supreme Court parroted in Miranda (472-73).

The standard for an effective waiver is that it be made “knowingly and intelligently” (Miranda, 479) as well as voluntarily (Weisselberg 2008, 1563). Voluntariness is assessed by looking into whether suspects have made a “free and deliberate choice” to waive their rights, and determining whether that choice was free of coercion. Grisso (1980), Fulero and Everington (2004), and Rogers et al (2007, 2008, 2009) are among those who have participated in a groundswell of research into the ability of suspects to understand Miranda warnings such that an informed choice can occur. For example, Rogers and his colleagues have reported on the general understandability of the warnings. Using the Flesch-Kincaid measurement of grade-equivalent reading ability, they discovered that an eighth-grade reading ability, on average, is needed to understand the right to counsel, while a tenth-grade reading ability is needed to understand the right to appointment of counsel. Because criminal defendants are often less educated than the general population (Weisselberg 2008, 1569), this relatively-high reading requirement can have a startling impact on the ground.

Those suspects who are mentally disabled (Cloud et al 2002), borderline mentally disabled (Cloud et al 2002), psychiatric inpatients (Cooper & Zapf 2008), juveniles
(Grisso 1980; Viljoen et al 2007), or non-native English speakers (Einesman 1999; Rogers et al 2008) are especially at risk. For example, Cooper and Zapf found that approximately 60 percent of 75 psychiatric inpatients they tested were unable to understand even one *Miranda* right (2008, 400). Cloud et al.’s findings were similarly disturbing: the disabled subjects they tested understood only 20 percent of the words that make up the *Miranda* rights and comprehended the right to remain silent only 22 percent of the time. The right to consult with an attorney and the warning that anything said could be held against them was understood only 31 percent of the time (Cloud et al 2002, 548-50).

As for juveniles, most individuals fifteen and younger tested by Grisso (1980) failed to understand at least one warning. In another study, Viljoen and his colleagues reported that 78 percent of eleven to thirteen year olds and 62.7 percent of fourteen to fifteen year olds were impaired with respect to understanding their rights when compared with adults (2007). *Miranda* warnings that have been rephrased to increase youth comprehension may, ironically, be even less accessible than the standard warnings (Rogers et al 2008; Weisselberg 2008, 1573). And once juveniles do talk, they are especially at risk of offering false confessions: in a study of 340 wrongful convictions, 42 percent of juveniles provided false confessions, as compared with 13 percent of adults (Gross et al 2005).

The warnings are similarly inaccessible to non-English speakers. For example, while Spanish-language warnings are generally easier to comprehend than those in English, they also tend to convey less information, incorporate errors, or be missing information (Weisselberg 2008, 1573-74). Some errors are so egregious as to exclude
entire rights, such as the right to counsel or silence (Rogers et al 2009). Additionally, once non-English speakers do waive their rights, they are—like juveniles—especially at risk of falsely confessing. This is due, in part, to the inflated power differential underlying interrogations where the suspect does not speak English and the interrogator does (Berk-Seligson 2009).

Despite this research demonstrating significant inequality with respect to who understands the warnings, officers are generally trained under the assumption that “all suspects can understand the admonition” (Weisselberg 2008, 1574). And if police issue warnings and suspects indicate they are willing to talk, their statements are almost always found admissible in court, regardless of the suspect’s personal characteristics (Weisselberg 2008, 1575).

So who heeds the warnings? Leo’s 1996 study found that suspects with felony records are three to four times more likely to assert their Miranda rights than suspects with no prior record (1996). Thus, it appears to be experience, more than words, that provides an educative effect for individuals in police custody.

d. Suspects’ Invocation of Rights

The rights Miranda safeguards have been further jeopardized by courts’ increasing recognition of implicit waivers. While investigators once had the burden to establish suspects had explicitly waived their rights before statements could be admitted into evidence, that burden has shifted. Today, something as simple as answering investigators’ questions following Miranda warnings can be interpreted by courts as an implied waiver. Further, the original practice of asking suspects whether they “understand” their rights and/or whether they are willing to talk after hearing the
warnings has largely fallen to the wayside (Leo 2001; Weisellberg 2008, 1588). Often, rights are read and then questioning simply ensues, blurring into each other, leaving little room for either an invocation or an explicit waiver.

Even as the ability for investigators to establish a waiver has become easier, the ability to assert one’s rights has become more difficult. For example, in a 1994 case, *Davis v. United States*, 512 U.S. 452, the Supreme Court found the statement “maybe I should get a lawyer” too uncertain to obligate the police to stop questioning a suspect. Weisellberg (2008, 1588-89) has stressed that *Davis*, in combination with the implied waiver doctrine, has essentially remade both *Miranda’s* standard of proof and burden of proof. As he explains, “we no longer require a suspect’s clear articulation of waiver as the ‘green light’ that permits interrogation to go forward. Rather we require a suspect’s clear and firm articulation of invocation as the ‘red light’ to stop it” (Weisellberg 2008, 1588-89). In case there was any doubt remaining, this was recently confirmed by the Supreme Court in *Berghuis v. Thompkins* (2010), in which the Supreme Court declared that not speaking is not enough to assert one’s right to silence; instead, the invocation must be explicit.

Janet Ainsworth (1993) has similarly argued that the increasingly stringent requirement that suspects clearly and unequivocally assert their rights to counsel and silence has furthered the gap between the protections *Miranda* provides “haves” and “have nots.” She and Marcy Strauss (2007) have noted the tendency of some women and minorities to speak in uncertain language, which courts frequently interpret as ambiguous. As Ainsworth explains, those with relatively low social status “adopt this register to convey uncertainty, to soften the presumptiveness of a direct statement, or to
forestall opposition from the addressee … [each of which] is a typical communicative strategy of the powerless” (1993, 291). She underscores that such disparity “in linguistic usage between men and women appears to be greatest among lower socioeconomic classes, the persons who are most likely to find themselves the subject of police interrogation” (292). This differential is especially exacerbated during interrogations, where it is common for police officers to “enhance the perceived power of the interrogator and the suspect’s feelings of vulnerability” to increase the likelihood that suspects will answer interrogators’ questions (293). As Weiselberg has noted, “[s]uspects are in a position of powerlessness in the stationhouse. Certainly the most common interrogation techniques operate by instilling this belief” (2008, 1589). In the gatehouse, issues of relative power become exacerbated, which has a dampening effect on the likelihood a suspect will effectively assert his or her rights.

e. Post-Waiver Interrogation Practices and Outcomes

Once the Miranda rights are waived (implicitly or explicitly) – and studies show that 78-96% of suspects do in fact waive (Leo 1998) -- Miranda typically plays no role in mitigating the process or outcome of the subsequent interrogation (White 2001). Any protection Miranda might have offered a suspect usually evaporates as soon as the rights are waived and the accusatory interrogation begins – which is exactly when a suspect is mostly likely to feel the inherently compelling pressures of police-dominated custodial questioning. Once issued and waived, Miranda neither regulates nor restricts psychologically manipulative or deceptive interrogation techniques, hostile or overbearing questioning styles, lengthy interrogation or confinement, or any of the stressful conditions of modern accusatorial interrogation (Leo 1998). As Slobogin has
concluded, “*Miranda* has had little effect on police behavior during interrogation[s]” (2003, 310).  

For example, the use of deception (or “trickery”) by police remains unmitigated once a waiver has been obtained (Young 1996; White 2001; Leo 2008). While courts tend to disapprove of police lying to suspects and often criticize the police for doing so, they have repeatedly affirmed convictions that were predominately generated on the basis of deception (Leo 2008, 190), which has allowed such practices to flourish. Indeed, the leading police interrogation manual continues to encourage tactics that incorporate trickery (Inbau et al 2001), such as evidence ploys that include exaggerating the magnitude of the evidence police have accrued against a suspect. Leo and others have repeatedly found such ploys to be among the techniques most frequently used by police to induce confessions (Leo 1996; Ofshe and Leo 1997). Importantly, *Miranda* has done nothing to abate the rampant use of deception, which has potential ramifications both for the reliability of subsequent confessions and for a suspect’s dignity interests.  

Further, the *Miranda* warnings, which come and go quickly prior to interrogation, fail not only to affect the subsequent police practices that the *Miranda* majority railed

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5 Shortly after *Miranda* was decided in 1966, social scientists and legal scholars began to empirically study its impact on confession, clearance and conviction rates (see Leo 2001 for a review). The general consensus of these studies has been that police have successfully adapted to *Miranda’s* requirements, that almost all suspects waive their rights, and that the *Miranda* warnings have had little effect on such rates. While Paul Cassell has argued that *Miranda* substantially reduced confession, clearance and conviction rates (Cassell 1996; Cassell and Hayman 1996; Cassell and Fowles 1998), his work has been challenged as unreliable for reasons of bias and methodological weakness (see, e.g., Scholhofer 1996a, 1996b, 1997; Thomas 1996a, 1996b; Arenella 1997; Donahue 1998; Garcia 1998; Leo and Ofshe 1998; Weisselberg 1998; White 1998; Leo and White 1999; Feeney 2000; Leo and Ofshe 2001). In short, apart from Professor Cassell, who is an outlier, the consensus in social science and legal scholarship is that the *Miranda* requirements have not adversely affected law enforcement outcomes.
against for many pages (1966, 448-455), but to change the “swearing contest” that
Kamisar so eloquently decried. Today, five decades after *Miranda*, most interrogations
and confessions are still not memorialized and therefore often result in a swearing contest
about what actually transpired. And, as White has pointed out (2001, 119), “In weighing
the credibility of police officers’ and suspects’ conflicting versions as to what transpired
during an interrogation, moreover, judges are as inclined to credit the police today as they
were in the pre-*Miranda* era.” The *Miranda* warnings may even undermine the
protection that constitutional law provides suspects under the 14th Amendment due
process clause against coercive interrogation and involuntary confessions. As many
scholars have pointed out, most trial courts find a suspect’s confession voluntary so long
as there was a *Miranda* waiver prior to the interrogation that led to the confession, even
though these are supposed to be separate lines of legal analysis (Leo 1998; Thomas 2000,
2004; Slobogin 2003; White 2001; Weisberg 2008). In other words, trial judges often
use 5th Amendment *Miranda* waiver analysis as a proxy for the 14th Amendment
voluntariness analysis (Garcia 1998).

V. Has Miranda Failed?

As we have seen, the purpose of Miranda was “to afford custodial suspects an
informed and unfettered choice between speech and silence and, at the same time,
prevent involuntary statements” (Weisberg 2008, 1521). On its own terms, *Miranda*
has largely failed to achieve this goal for the reasons we have described above. The
Burger and Rehnquist Courts have successively and successfully so chipped away at the
original Miranda’s doctrinal foundations that the new Miranda – de-coupled from the
Constitution, riddled with exceptions, and weakened with gaping loopholes at both ends
of the warning and waiver ritual – has become a pale shell of its former self. Empirical studies of *Miranda’s* impact on the ground have demonstrated that the underlying assumptions necessary for Miranda to successfully achieve its stated goals simply have not been met in practice. As Charles Weisselberg (2008) has demonstrated most elegantly, custody is no longer a marker for whether interrogation contains compelling pressures; police often circumvent, evade and disregard Miranda’s clear commands by providing warnings only after interrogation has begun; many suspects do not comprehend the warnings; and waivers are assumed from the reading of the warnings themselves rather than any evidence or documentation that they were knowingly or voluntarily given. Perhaps Miranda’s failure is not entirely surprising, as even Schulhofer, one of Miranda’s most ardent supporters, has noted: “The notion that police-initiated warnings really can “dispel” [the] inherent compulsion seems dubious at best” (2006, 173). Psychological police interrogation since *Miranda* seems to go on as it did before *Miranda*, and so the inherently compelling pressures remain, sometimes made worse by the fact that the voluntariness of the waiver is treated by many trial courts as a proxy for the voluntariness of the confession itself.

To be sure, *Miranda* cannot be said to be a complete failure because in some cases, however rarely, police interrogators provide *Miranda* warnings prior to custodial interrogation, suspects invoke one or more of their rights, and this decision is honored, thereby dispelling – aborting really -- any compulsion by terminating questioning before any interrogation could begin (Thomas 2004).

Still, because Miranda has largely become little more than a meaningless ritual in the overwhelming majority of cases, it is reasonable to ask whether this failure was
inevitable. Certainly neither Kamisar nor the Warren Court could have foreseen fifty years of judicial dominance by one increasingly conservative Court after another. Had more liberal courts succeeded the Warren Court, perhaps the original *Miranda* would have survived more or less intact or even flourished. However, it is extremely unlikely.

Regardless of the politics of the Supreme Courts that followed the Warren Court, the original Miranda was destined to fail on its own terms for several structural reasons, which Kamisar himself foresaw. First, the Warren Court delegated the function of giving the *Miranda* warnings to the very group who would be most inclined to undermine its potential effect (Kamisar 1965, 35-36): “[W]hen we expect the police dutifully to notify a suspect of the very means he may utilize to frustrate them – when we rely on them to advise a suspect unbegrudgingly and unequivocally of the very rights he is being counted on not to assert – we demand too much of even our best officers.” Second, Miranda did not and could not change the adversarial nature of American police interrogation. By the time police detectives reach the interrogation stage, they are no longer neutral investigators or mere fact-finders, but rather have become partisan advocates whose singular goal is to build a case against the accused by eliciting and constructing incriminating statements in order to help the state achieve a successful prosecution (Leo 2008). Not only does Miranda fail to dispel interrogation compulsion prior to the warning and waiver ritual, but it also fails to dispel interrogation compulsion afterwards as well, for, as Bill Stuntz (2001, 988) has pointed out, “almost no one invokes his *Miranda* rights once questioning has begun.”

Although the doctrinal and empirical evidence is clear that the original *Miranda* decision has largely failed on its own terms, whether *Miranda*’s legacy is ultimately
viewed as a success or failure (or some combination of both) depends on the standard to which it is compared. Kamisar (2007) and other proponents of *Miranda* (Herman 1987; Schulhofer 1981, 2006) often compare it to a vague, subjective, and indeterminate 14th Amendment voluntariness test that failed to prevent police abuses, but was the sole constitutional criterion of a confession’s admissibility prior to *Miranda*. They argue that, by contrast, *Miranda* represents an advance because it is an objective, bright-line, and predictable test that provides police interrogators with necessary guidance. Historically, *Miranda* has exerted a civilizing effect on police behavior and contributed to the professionalization of the interrogation process (Leo 1996b). Others have pointed out that *Miranda* also serves educational and symbolic functions. *Miranda* has increased popular awareness of the right to counsel and the privilege against self-incrimination, so much so that the Rehnquist Court in *Dickerson v. United States* (2000) concluded that *Miranda* has “become embedded in routine police practice to the point where the warnings have become part of our national culture” (443-444; See Thomas and Leo 2002). But *Miranda*’s greatest triumph may be symbolic, as Schulhofer (2006, 179) points out:

*Miranda* is a grand but largely symbolic gesture. The symbolic importance of criminal procedure guarantees, however, should not be underestimated. Symbols like *Miranda* underscore our societal commitment to a government of limited powers. Such symbols serve, however imperfectly, to encourage restraint in an area where emotion easily runs uncontrolled. They can help educate and persuade the thousands of front-line officials upon whose voluntary compliance the constitutional order ultimately depends.
VI. Conclusion: Returning to the Gatehouses and Mansions

This, of course, suggests a paradox: *Miranda*’s symbolic impact may be significant even if it has had little practical impact today. Perhaps the take away lesson from the almost fifty year experiment with *Miranda* that Kamisar helped launch is that mere warnings and waivers administered and elicited by police can neither effectively combat the compelling pressures of custodial interrogation nor protect the values underlying the privilege against self-incrimination and the right to counsel. Instead, to meaningfully protect and assure the suspect of “an informed and unfettered choice between speech and silence,” it is necessary to shift the interrogation function to someone other than police – such as magistrates, as Kamisar noted (1965, 30) – and return the purpose of the interrogation process to truth-finding rather than self-incrimination.

Whatever one thinks of the successes and/or failures of *Miranda*, however, the more fundamental problem of the gatehouses and mansions in American criminal procedure remains. In the five decades since Kamisar’s seminal article, little has changed in this regard. The disparity between the transparent rights and protections of the adversarial trials in the mansions continues to contrast with the secrecy and absence of meaningful safeguards of the “de facto inquisitorial system” in the gatehouses. Much work remains to be done to advance Kamisar’s vision of equal justice, ensuring that Kamisar’s remarkable chapter remains as compelling as it was 50 years ago.
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