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Magistrates' Examinations, Police Interrogations,  
and Miranda—Like Warnings in the Nineteenth  
Century

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# Magistrates' Examinations, Police Interrogations, and *Miranda*-Like Warnings in the Nineteenth Century

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*The New York legislature in the early-nineteenth century began to require interrogators to warn suspects of their right to silence and counsel. The Warren Court, in *Miranda v. Arizona*, did not invent the language of the warnings; rather, it resurrected the warnings that were no longer given in New York after the latter half of the nineteenth century. The confessions rule, a judicially created rule of evidence much like the modern voluntariness rule, excluded many statements if any threat or inducement was made to the suspect. Courts in the early-nineteenth century, however, were willing to accept confessions notwithstanding an improper inducement if the suspect had been given the now-famous warnings. The warnings remained in place until the newly elected New York judiciary began to retreat from the strict version of the confessions rule that prompted interrogators to give those warnings. The threat of losing statements to the confessions rule was greater than the threat that suspects would exercise the rights of which police advised them—at least until the judiciary substantially weakened the confessions rule.*

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## I. INTRODUCTION

Police officers in mid-nineteenth-century New York appear to have warned suspects they had the right to remain silent, anything they said could be used against them in a court of law, and they had the right to counsel during an interrogation. When the Warren Court, in

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*Miranda v. Arizona*, required these warnings to be given to all suspects,<sup>1</sup> it did not invent a new procedure for police interrogation. The United States Supreme Court resurrected a practice that New York's earliest officers believed to be an important procedure to insulate confessions from exclusion at the trial.

Magistrates began giving these warnings to suspects about a half decade before police officers started to routinely question suspects.<sup>2</sup> Before cities employed full-time, salaried police forces, local constables and night watchmen, who were part-time officers and often unpaid, did not routinely interrogate suspects.<sup>3</sup> The magistrates, at proceedings resembling a modern probable cause hearing, questioned defendants much as detectives would later do.<sup>4</sup> Like police detectives, magistrates used this opportunity to build the prosecution's case against the suspect in custody.<sup>5</sup> Around the turn of the nineteenth century, these magistrates began to provide suspects with cautions closely resembling what we know now as the *Miranda* warnings.<sup>6</sup>

The law enforcement and popular reaction to the *Miranda* decision in the twentieth century makes it puzzling that nineteenth-century magistrates responsible for extracting confessions would *choose* to inform suspects of their right to silence.<sup>7</sup> An eighteenth-century rule of evidence regulating the admissibility of confessions explains the willingness of early-nineteenth-century interrogators to give these warnings.

In the mid-eighteenth century, English trial courts became concerned about the practice of obtaining confessions by promising leniency or immunity.<sup>8</sup> This concern seems to have been motivated by

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1. 384 U.S. 436, 444-45 (1966).

2. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right To Remain Silent*, 94 MICH. L. REV. 2625, 2660-61 (1996).

3. See David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1204 (1999) (contrasting the "old police," who were unpaid constables and watchmen, with the "new police," who were professional, full-time officers).

4. As Albert Alschuler has described, pretrial examinations by magistrates were "[t]he nearest analogue to police interrogation known to the Framers." Alschuler, *supra* note 2, at 2669.

5. LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 35 (1968).

6. See Bruce P. Smith, *Miranda's Paradoxical Prehistory* 13 (2005) (unpublished manuscript, on file with author).

7. See Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 496 (observing that *Miranda* provoked widespread criticism from police and prosecutors).

8. See JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 218-19 (2003).

a number of cases in which sympathetic suspects who were promised immunity confessed only to find the offer of immunity revoked.<sup>9</sup> Identifying what makes these disingenuous immunity offers illegitimate is difficult in cases where it is clear the confession is reliable. And in cases of stolen goods, confessions are often very reliable because the confession identifies the location of the goods.<sup>10</sup> Fashioning a rule that prohibits the sort of tactics identified as unacceptable, but which allows some coercive pressure using other techniques, proved no easier for eighteenth-century courts than it has for modern courts or legislatures.<sup>11</sup> And surely *some* coercive pressures must be permitted for interrogators if their work is to be expected to yield results with any degree of frequency.

English courts grappled with various formulations of a rule attempting to define the line between appropriate and inappropriate interrogation methods throughout the second half of the eighteenth century, finally settling on the exclusion of confessions obtained by a threat or inducement of any kind.<sup>12</sup> While this test embodied a laudable commitment to respect for individual autonomy, it was utterly unworkable in a world prior to forensic evidence, which depended on confessions for most convictions.<sup>13</sup> Interpreted literally, as it frequently was, the rule prohibited any sort of pressure to encourage a suspect to give a statement. Some courts excluded statements because the magistrate told a suspect that it would be “better” for him to confess.<sup>14</sup> Some courts even excluded confessions merely because the magistrate questioned the suspect rather than just offering him an opportunity to

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9. See *id.* at 218-20.

10. In the eighteenth century, confessions of theft frequently identified the location of stolen goods. Even if the confession was excluded, the fruits of the confession, i.e., the goods, were admitted as they were presumed to be reliable evidence. Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right” in Chavez v. Martinez*, 70 TENN. L. REV. 987, 1023 (2003).

11. The War on Terror has led to consideration of whether there are situations in which even some forms of torture are permissible in interrogations. See Peter Margulies, Essay, *Beyond Absolutism: Legal Institutions in the War on Terror*, 60 U. MIAMI L. REV. 309, 311-12 (2006) (discussing recent scholarship suggesting the permissibility of torture).

12. See Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule* (pt. 1), 53 OHIO ST. L.J. 101, 147-64 (1992) (describing the eighteenth-century development of the confessions rule).

13. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 401 (1995) (observing that pretrial questioning in the eighteenth century frequently led to a confession, which filled gaps in physical evidence).

14. See *People v. Ward*, 15 Wend. 231, 231 (N.Y. Sup. Ct. 1836); *People v. Robertson*, 1 Wheel. Crim. Cas. 66 (N.Y. Gen. Term 1822).

provide a statement.<sup>15</sup> Virtually any statement to the suspect by the examining magistrate threatened exclusion of the subsequent confession under the confessions rule.

Responding to this new rule, magistrates in the late-eighteenth and early-nineteenth centuries began to inform suspects they had the right to remain silent and anything they said could later be used against them.<sup>16</sup> Trial courts found suspects so cautioned were not motivated by inducements that otherwise would have required the exclusion of the suspect's statements.<sup>17</sup> Given the potential that trial courts would interpret the confessions rule literally, the risk that suspects would exercise their right to remain silent once cautioned was far less than the risk a routine interrogation would be suppressed. The practice of cautioning suspects became so common that the New York legislature codified the magistrates' warnings as part of the state's first code of criminal procedure.<sup>18</sup>

With the creation of a full-time, salaried police force in New York City in the mid-nineteenth century, officers began to routinely interrogate suspects for the first time.<sup>19</sup> The confessions rule threatened the exclusion of statements made to officers just as it jeopardized confessions given to magistrates. Quite logically, the early New York Municipal Police Force (Municipal Police), as a matter of policy, gave the warnings to suspects when they arrived at the jail.<sup>20</sup>

The judicial interpretation of the confessions rule, however, did not remain static, and as the rule was reinterpreted to favor law enforcement interests, the incentives for police to give the warnings diminished.<sup>21</sup> The change in the rule is hardly surprising. In 1846, New York ratified a new constitution that replaced appointed trial and appellate court judges with elected judges.<sup>22</sup> Gradually, the newly

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15. See *Rex v. Wilson*, (1817) 7 Holt 596, 171 Eng. Rep. 353, 353.

16. See Alschuler, *supra* note 2, at 2660-61.

17. See *id.*

18. N.Y. CODE CRIM. PROC. §§ 13-15 (1829).

19. See Sklansky, *supra* note 3, at 1204.

20. See REPORT OF JOINT COMMITTEE ON POLICE MATTERS IN THE CITY AND COUNTY OF NEW YORK, AND COUNTY OF KINGS, S. REP. NO. 97, at 75-76 (1856).

21. See *infra* Part IV.

22. Prior to the New York Constitution of 1846, the trial and intermediate appellate judges in New York were appointed. The New York Court of Errors was the highest court in the state, since 1821, and functioned much like the House of Lords. There were four judges appointed to the court, the chancellor, and thirty-two senators. ELLEN M. GIBSON, NEW YORK LEGAL RESEARCH GUIDE I-109 (2d ed. 1998); Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 520 n.92 (1996). The New York Constitution of 1846 made all of the positions elected, a change particularly substantial in light of the fact that the New York Court of Errors did not

elected judges allowed police, who were increasingly interrogating suspects, to apply more pressure to suspects without jeopardizing confessions, even if the suspects were not warned of the consequences of their confessions.<sup>23</sup> Once New York courts permitted police to use trickery and deceit to obtain a confession without undermining the admissibility of the confession, the New York police announced they would no longer provide the warnings to suspects.<sup>24</sup> The warnings had been useful to the police when the confessions rule had made the admissibility of confessions uncertain. Once New York courts modified the confessions rule so that common interrogation practices were not regarded as improper inducements, the warnings were no longer a benefit to the police and cost them the lost confessions of those exercising their right to silence. The legislature had required magistrates to provide the warnings when the confessions rule often risked the exclusion of statements. The legislature remained silent when police refused to warn suspects after the judiciary modified the confessions rule. The warnings would not again become part of routine police practice in New York City until the Supreme Court announced its decision in *Miranda*.<sup>25</sup>

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render a decision on the confessions rule. See FRANCIS BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932*, at 18-26 (1985) (describing the court structure created by the New York Constitution of 1846); 1 JOHN H. COLBY, *A PRACTICAL TREATISE UPON THE CRIMINAL LAW AND PRACTICE OF THE STATE OF NEW YORK* 55-60 (Albany, Weare C. Little 1868) (same).

23. The effect of judicial election was not limited to the criminal justice arena, but the effects of a popularly elected judiciary did not necessarily have the intuitive results that are seen in the modification of the confessions rule. William Nelson has observed that courts set aside legislation infrequently in the early republic, and, when courts did so, they claimed the legislature had usurped the power or liberties of the people themselves. See William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1181-82 (1972). Nelson then notices that in the 1840s and 1850s, the number of statutes courts set aside surged, and the courts justified these decisions on the ground that there were limits on what the elected majority was permitted to do in the constitutional scheme. *Id.* at 1182-85. Jed Shugerman has observed that this process, counterintuitively, occurred in New York as the courts became popularly elected. Jed Shugerman, *Free Soil, Free Courts, Free Men: Barnburners, Hunkers, Antirenters, and New York's Adoption of Judicial Elections in 1846*, at 19-21 (Nov. 18, 2006) (unpublished manuscript, on file with author).

24. *Superintendent Walling: His Trial Before the Police Board*, N.Y. TIMES, Mar. 13, 1875, at 10.

25. While New York police officers did not resume the warnings until ordered to do so by the Supreme Court, federal officers in the twentieth century did begin to give the cautions on their own. Federal officers in the twentieth century, just like New York police in the nineteenth century, provided suspects these warnings to demonstrate that statements were not obtained through improper coercion. A presidential commission, headed by George Wickersham, on law enforcement in 1931 had brought to light "third-degree" tactics of officers interrogating suspects. S. DOC. NO. 71-307, at 11 (1931); see ERNEST JEROME

Drawing lessons from history about modern constitutional interpretation is always a difficult task. Specifically, trying to understand, as the modern Court often does, how the Framers would have considered their document to limit modern practices is, at best, an act of informed speculation.<sup>26</sup> With regard to interrogations, the Framers could not have contemplated jailhouse interrogations because full-time, salaried police forces, a necessary prerequisite to routine police interrogations, were not developed until well into the nineteenth century.<sup>27</sup>

The history of interrogations in New York City reveals, however, that contrary to the assumptions of originalists, there is an historical case to be made for *Miranda*.<sup>28</sup> The confessions rule, in its strictest

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HOPKINS, OUR LAWLESS POLICE: A STUDY OF THE UNLAWFUL ENFORCEMENT OF THE LAW 189-204 (1931) (describing the findings of the commission). In response to the report of the commission, the FBI began to warn suspects that they had the right to silence and the right to counsel during interrogations. John Edgar Hoover contended that these warnings demonstrated officers were not engaging in coercive interrogation tactics. John Edgar Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 IOWA L. REV. 175, 177-82 (1952); see Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37, 56 (G. DANIEL LASSITER ed., 2004) (describing Hoover's promotion of the "scientific" method of interrogation following the Wickersham report).

26. Even originalism's most famous defender recognizes there is substantial uncertainty in reconstructing the past. Justice Scalia merely argues that originalism does a better job of constraining judges than other methods of interpreting the Constitution. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-65 (1989).

27. As Yale Kamisar has observed, reconstructing what the Framers of the Federal Constitution thought about interrogations is an odd inquiry because no one in the eighteenth century thought the terms of the Constitution would apply to state criminal prosecutions. Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387, 426 n.216 (2001).

28. The primary critics of *Miranda*, on historical grounds, have been Justice Byron White in his dissent in the *Miranda* decision itself, and Edwin Meese, who, as Attorney General under Ronald Reagan, had a report written by the Office of Legal Policy (Meese Report) attacking *Miranda* on several grounds. White concluded that the decision in *Miranda* was "at odds with American and English legal history." *Miranda v. Arizona*, 384 U.S. 436, 531 (1966) (White, J., dissenting). The Meese Report argued *Miranda* was "a decision without a past" having "no basis in history or precedent." U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL: THE LAW OF PRE-TRIAL INTERROGATION 118 (1986).

There appear to be no other studies on the interrogation practices of other early American police forces—at least none that I have discovered—that discuss whether the police gave the cautions magistrates routinely gave. In many American jurisdictions, however, it is clear that magistrates were routinely giving these warnings in the early-nineteenth century. New York and Massachusetts both passed statutes in the early-nineteenth century requiring a suspect to be given warnings about the right to silence and counsel before the magistrate's interrogation. N.Y. CODE CRIM. PROC. §§ 13-15 (1829); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 73 n.B (Springfield, G.&C. Merriam 1836). In most other American states in the early-nineteenth century, magistrates were, as a matter of

form, was well known in 1791.<sup>29</sup> Within a few years, magistrates, predecessors of early detectives, would routinely provide suspects the cautions to avoid the risk the confessions rule would exclude the products of unremarkable interrogations.<sup>30</sup> When early police interrogators encountered this version of the confessions rule, they, like their magistrate predecessors, similarly gave the cautions.<sup>31</sup> The Supreme Court in 1966 did no more than require modern police to follow the practices adopted by law enforcement at the turn of the nineteenth century to satisfy courts that statements were not obtained in violation of a rule of evidence known to the Framers.

The history of interrogations makes some of the criticisms of *Miranda* puzzling. History suggests that *Miranda*'s chosen method of regulation demonstrates a respect for, rather than an affront to, law enforcement interests. Surely, requiring the warnings created a risk that more suspects would refuse to give statements than would have refused without the warning.<sup>32</sup> The history of interrogations reveals, however, there are times when police prefer to take the risk associated with giving the warnings. Surely police do not always prefer to take this risk—the police in the latter half of the nineteenth century retreated from the warnings when the courts relaxed the strictness of the confessions rule. But the police preferred the risk associated with

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custom, required to warn suspects of their right to silence. *See, e.g.*, RHODOM A. GREENE & JOHN W. LUMPKIN, *THE GEORGIA JUSTICE* 98-101 (Milledgeville, P.L. & B.H. Robinson 1835) (describing Georgia practice); JOHN H.B. LATROBE, *THE JUSTICES' PRACTICE UNDER THE LAWS OF MARYLAND* 317 (Baltimore, Fielding Lucas, Jr., 3d rev. ed. 1840) (describing Maryland practice). Nineteenth-century Louisiana practice similarly required such warnings, but as trial procedures permitted the prosecution to comment on the suspect's pretrial silence, the warnings included the caveat that silence may not be in the suspect's interest. EDWARD LIVINGSTON, *A SYSTEM OF PENAL LAW FOR THE STATE OF LOUISIANA* 507 (Phila., J. Kay, Jun. & Bro., Pittsburgh, J.L. Kay & Co. 1833) ("The magistrate shall . . . [inform the accused] that, although he is at liberty to answer in what manner he may think proper to the questions that shall be put to him, or not to answer them at all, yet a departure from the truth, or a refusal to answer without assigning a sufficient reason, must operate as a circumstance against him, as well on the question of commitment as of his guilt or innocence on the trial.").

29. Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 916-17 (1995) (describing the confessions rule as firmly established in 1783).

30. *See* Alschuler, *supra* note 2, at 2660-61.

31. *See* REPORT OF JOINT COMMITTEE ON POLICE MATTERS IN THE CITY AND COUNTY OF NEW-YORK, AND COUNTY OF KINGS, S. REP. NO. 97, at 75-76 (1856).

32. Whether the *Miranda* decision has had any effect on the success of interrogations is the subject of intense debate. *Compare* George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933 *passim* (1996) (arguing that *Miranda* has had no effect on the success of interrogations), *with* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 *passim* (1996) (arguing the contrary).

the warnings to the risk that a totality-of-the-circumstances rule would be interpreted, with any degree of regularity, to exclude confessions they had obtained.

*Miranda* was adopted because the Court found the voluntariness rule was not one that could be administered in a predictable way to limit the excesses of jailhouse interrogation.<sup>33</sup> The Court in 1966, dissatisfied with the state of police interrogations, could have added considerations to the voluntariness rule, a method which would have created more uncertainty than the Court's decision to require the cautions.<sup>34</sup> History reveals that police, as well as courts, prefer predictability. If the Court was going to increase its scrutiny of interrogations in the 1960s, it did so with a mechanism least offensive to law enforcement interests. It required the police to give the warnings nineteenth-century police chose to give in the face of a rigorously enforced totality-of-the-circumstances rule.

This Article provides a more detailed account of this nineteenth-century history. Part II describes the origins of *Miranda*-like warnings in the late-eighteenth and early-nineteenth centuries, a time when magistrates performed interrogations. Part III describes the evidence suggesting that early professional police officers in New York, attempting to ensure the admissibility of confessions, were giving these warnings to suspects they interrogated. Part IV describes the end of these warnings in New York as courts became less willing to find interrogation tactics threatened the admissibility of confessions.

## II. INTERROGATIONS AND THE DEVELOPMENT OF *MIRANDA*-LIKE WARNINGS BEFORE PROFESSIONAL POLICE FORCES

The first person ever to inform a criminal defendant he had the right to remain silent and anything he said could be used against him was likely an English magistrate conducting a preliminary hearing around the turn of the nineteenth century. Before police interrogations, magistrates examined those arrested for crimes, much like detectives

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33. See *Miranda*, 384 U.S. at 444-45.

34. Richard Fallon describes *Miranda* as the epitome of a judicially manageable standard, because the question left to be answered after *Miranda* is whether the suspect received his warning. This determination, Fallon states, is well within the competence of a judge, and, once the judge makes this determination, an eminently predictable outcome flows from it. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1306 (2006). The historical evidence demonstrates police and judges have similar preferences for judicially manageable standards, at least in the context of the regulation of confessions.

would later do.<sup>35</sup> As trial courts in the mid-eighteenth century began to apply the confessions rule rigorously, a rule that excluded statements that were the product of any threat or promise, these magistrates bore a heavy burden in demonstrating they were not improperly inducing confessions.<sup>36</sup> In response, magistrates in the late-eighteenth century began to caution suspects using language strikingly similar to the now-famous *Miranda* warnings.<sup>37</sup> These warnings permitted the prosecution to introduce confessions courts would have otherwise excluded as the products of improper inducements. The origins of the *Miranda* warnings thus lie in the response of magistrates to the confessions rule.

A 1555 English statute required magistrates to question those arrested and suspected of a crime.<sup>38</sup> The Marian Pretrial Commitment Act (Marian Act) required magistrates, or justices of the peace, to determine whether the evidence against a person charged with a crime was sufficient to have him held for trial.<sup>39</sup> As part of this hearing, the magistrate was to examine the accusing witnesses as well as the suspect.<sup>40</sup> The statute required magistrates to record those portions of the suspect's statement that were material to the crime alleged against him, and this statement could be used against the suspect at his trial.<sup>41</sup> Often, criminal trials in the seventeenth and eighteenth centuries began with a reading of the defendant's statement to the magistrate.<sup>42</sup>

The statute did not require magistrates to record all of the testimony heard at the examination, only the portions useful to the prosecution.<sup>43</sup> Magistrates quickly took the hint that they were to be performing a law enforcement, rather than judicial, role. Leonard

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35. See LEVY, *supra* note 5, at 325 (“[T]he purpose of the examination was to wring out of [the suspect] a confession of his guilt, unsworn, or enough damaging testimony to put him on trial for the crime.”); Alschuler, *supra* note 2, at 2669; Stuntz, *supra* note 13, at 417 (“Magisterial questioning functioned as police interrogation does today; it offered the government an opportunity to get whatever information it could from an uncounseled, and frequently frightened and confused, defendant.”).

36. See Herman, *supra* note 12, at 158 n.300 (collecting cases).

37. Bruce Smith has recently traced the development of the warnings by English magistrates and has similarly suggested that magistrates started cautioning suspects to reduce the risk that confessions they extracted would be subsequently excluded. See generally Smith, *supra* note 6.

38. Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1231-35 (1932) (describing the Marian Act).

39. See *id.*

40. *Id.* at 1232.

41. *Id.*

42. See LEVY, *supra* note 5, at 35.

43. See *id.*; Kauper, *supra* note 38, at 1231-35.

Levy observed that by the end of the sixteenth century, magistrates' examinations "were becoming quite inquisitorial."<sup>44</sup> Magistrates in the eighteenth century were refusing to hear defense witnesses but were still examining defendants, sometimes quite vigorously.<sup>45</sup> The magistrates were law enforcement officers; they developed and preserved the prosecution's case.

Aside from the long-standing prohibition on physical torture, courts did not concern themselves with the methods magistrates used to induce suspects to confess for roughly the first two centuries of magistrates' examinations.<sup>46</sup> The first suggestion there might be limits on interrogation methods appeared in the 1730 edition of Matthew Hale's *Historia Placitorum Coronae*, which observed that a prisoner's confession to a magistrate should be given "freely without any menace, or undue terror imposed upon him."<sup>47</sup> The treatise did not suggest what courts were supposed to do with statements that had been the product of menace or undue terror.<sup>48</sup> As courts began to grapple with the question of whether a suspect had been improperly induced to confess, their concerns extended beyond those expressed in Hale's treatise. Courts in the 1740s and 1750s began to be concerned that suspects were improperly induced to confess through promises of leniency, with some courts excluding improperly obtained statements and others merely cautioning juries to scrutinize carefully the questionable confessions.<sup>49</sup> By the 1760s, courts had settled on the

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44. See LEVY, *supra* note 5, at 35.

45. See LANGBEIN, *supra* note 8, at 275. John Beattie has observed, however, that by the first quarter of the eighteenth century, preliminary hearings had become more than simply a tool for developing and preserving the prosecution cases because magistrates had begun to release a substantial number of defendants following the preliminary hearing. See J.M. BEATTIE, *POLICING AND PUNISHMENT IN LONDON, 1660-1750: URBAN CRIME AND THE LIMITS OF TERROR* 105-07 (2001).

46. See Herman, *supra* note 12, at 135, 141 (describing the prohibition on torture). John Langbein has concluded that, as late as 1722, English judges were not at all sensitive to claims that suspects had been induced to confess by promises of leniency or absolution. See LANGBEIN, *supra* note 8, at 218 (observing that in the trial of Margaret Wilson at Old Bailey for theft from a dwelling, the defendant's confession was admitted without any discussion despite the fact the prosecutor "'told her if she'd confess they'd forgive her'").

47. Herman, *supra* note 12, at 148 (quoting 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE* 284-85 (Sollon Emlyn ed., London, E.&R. Nutt & R. Gosling Small 1736)). English law long prohibited torture in matters unrelated to state security, and torture even in this context was forbidden with the abolition of the Star Chamber in 1640. See LEVY, *supra* note 5, at 326-27. Levy notes, however, that the *threat* of torture endured at least until the end of the seventeenth century. *Id.* at 327.

48. Herman, *supra* note 12, at 149.

49. See BEATTIE, *supra* note 45, at 365 (describing the exclusion of confessions at the Surrey Assize beginning in the 1740s for promises of favor given to suspects); LANGBEIN,

remedy of exclusion and forbade juries to hear confessions that were the product of a threat or promise.<sup>50</sup>

This formulation of the confessions rule was well in place by the 1760s.<sup>51</sup> An accident of history, however, led nineteenth-century judges and treatise writers to trace the origins of the rule to a 1783 case, *The King v. Warickshall*, heard at the Justice Hall of the Old Bailey in London.<sup>52</sup> The court in *Warickshall* had not grappled with the question of whether a confession ought to be admitted, but it assumed the defendant's statement was inadmissible as it was "obtained by promises of favour."<sup>53</sup> The opinion never even described what promises were held out.<sup>54</sup> The court was only considering whether stolen goods, located as a result of this improperly induced confession, were admissible.<sup>55</sup> The court concluded they were but also noted the rule relating to the admissibility of confessions.<sup>56</sup> Though the court concluded the rule had "no application whatever" to the admission of the fruits of a confession, it nevertheless started with a statement of the rule: "a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."<sup>57</sup> *Warickshall* was

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*supra* note 8, at 221-22 (describing Old Bailey cases from the 1740s); Herman, *supra* note 12, at 151.

50. LANGBEIN, *supra* note 8, at 222.

51. *Id.* at 218.

52. (1783) 1 Leach 262, 168 Eng. Rep. 234. Numerous treatises throughout the nineteenth century cite *Warickshall* as the source of this rule. See, e.g., SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 254 (Boston, Charles C. Little & James Brown 1842); HENRY H. JOY, ON THE ADMISSIBILITY OF CONFESSIONS AND CHALLENGE OF JURORS IN CRIMINAL CASES IN ENGLAND AND IRELAND 29 (Dublin, Andrew Milliken 1842); HENRY ROSCOE, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES 29 (Phila., P.H. Nicklin & T. Johnson 1836); 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 27 (Phila., P.H. Nicklin & T. Johnson 1837).

53. *Warickshall*, 168 Eng. Rep. at 234.

54. *See id.*

55. *See id.* at 235.

56. The court found that the facts discovered as a result of an improperly obtained confession, in this case stolen goods, "must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived." *Id.* Under American law, reliability was long recognized to be the basis of the voluntariness rule. The fruits of an involuntary confession were thus admissible until the Supreme Court's decision in *Rogers v. Richmond*, 365 U.S. 534 (1961), recognized exclusion also served the goal of deterring future misconduct by police officers. For an excellent discussion of the development of the American voluntariness rule, see Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 139-43 (1989).

57. *Warickshall*, 168 Eng. Rep. at 235 (footnote omitted).

the first confession case published in *Leach's Crown Cases*, a well-read collection on both sides of the Atlantic, leading to the case's attribution as the origin of the rule and making its formulation of the rule the standard for over a century.<sup>58</sup>

One year after the *Warickshall* decision, another Old Bailey case, also published in *Leach's Crown Cases*, added an important term to the confessions rule that had existed for decades. In *The King v. Cass*, Judge Gould directed a verdict for the defendant, informing the jury that holding out "the slightest hopes of mercy" to induce a confession rendered a subsequent statement inadmissible.<sup>59</sup> Following *Warickshall* and *Cass*, treatise writers observed that the terms of the confessions rule should be strictly interpreted against the prosecution. Thomas Starkie's evidence treatise noted, for instance, that confessions "can never be received in evidence[] where the defendant has been influenced by *any* threat or promise."<sup>60</sup>

In the early-nineteenth century, the confessions rule frequently led to the exclusion of statements in cases in which very little inducement had been given to the suspect to confess.<sup>61</sup> English and American courts frequently gave very liberal interpretations to the terms "hope" and "fear" in the *Warickshall* test.<sup>62</sup> A statement by a magistrate or an officer that it would be "better" for the defendant to tell the truth often rendered a statement inadmissible during this period.<sup>63</sup> A promise not to prosecute certainly rendered a statement

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58. *See id.*

59. (1784) 1 Leach 293 n., reprinted in CHARLES PETERSDORFF, A PRACTICAL AND ELEMENTARY ABRIDGMENT OF THE CASES ARGUED AND DETERMINED IN THE COURTS OF KING'S BENCH, COMMON PLEAS, EXCHEQUER, AND AT NISI PRIUS 82, 82-83 (London, Baldwin, Cradock & Joy 1827) (emphasis omitted).

60. *See* 2 STARKIE, *supra* note 52, at 27 (emphasis added).

61. *See* GREENLEAF, *supra* note 52, at 255; FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 377 (Phila., Kay & Brother 4th rev. ed. 1857).

62. Lawrence Herman has collected a number of examples of English judges excluding confessions found to be the product of a threat or inducement. *See* Herman, *supra* note 12, at 158 n.300. Modern courts, by contrast, observe that the prosecution bears a heavy burden in demonstrating a confession is voluntary, but they find confessions to be involuntarily obtained in very few cases. As one commentator has observed, "[d]espite *Miranda's* statement that 'a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination,' the Supreme Court has established that a court may apply a preponderance-of-the-evidence standard—the weakest of the three traditional burdens of proof—on the issue of voluntariness." Developments in the Law, *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1374 n.42 (1982) (quoting *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (citation omitted)).

63. Such a statement was a fairly common inducement found improper by courts in the first half of the nineteenth century. *See, e.g., United States v. Charles*, 25 F. Cas. 409, 409

involuntary.<sup>64</sup> Some judges even went so far as to exclude a statement given to a magistrate because the magistrate questioned a defendant, rather than merely asking him whether he had anything to say.<sup>65</sup>

Few confessions could ever be admitted into evidence with such a strict interpretation of the confessions rule. Magistrates therefore devised a method to leave their interrogation methods intact, yet ensure the confessions they were extracting would be admissible. Beginning in the late-eighteenth and early-nineteenth centuries, magistrates began to caution suspects they examined that their statements could be used against them.<sup>66</sup> Courts began to allow statements to be admitted, notwithstanding otherwise improper inducement, if the suspect was cautioned he was not required to answer the magistrate's questions and made aware of the consequences of confessing.<sup>67</sup> As Bruce Smith has described, the Old Bailey Session Papers reveal that magistrates had begun to caution suspects about the consequences of confessing before the turn of the nineteenth century.<sup>68</sup> Courts by the early-nineteenth century were routinely finding the magistrate's warning insulated a confession from a claim that it had been given involuntarily.<sup>69</sup> In *Rex v. Lingate*, for instance, the court admitted the defendant's confession to a magistrate even though the constable who arrested him told him "that it would be better for him to confess."<sup>70</sup>

While cautions did not always purge the taint of a previous inducement, it became clear that warning the defendant of the consequences of making a statement rendered the statement more

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(C.C.D.C. 1813) (No. 14,786); *Rex v. Thomas*, (1834) 6 Car. & P. 352, 172 Eng. Rep. 1273, 1273; *Rex v. Enoch*, (1833) 6 Car. & P. 539, 172 Eng. Rep. 1089, 1089.

64. See WHARTON, *supra* note 61, at 376.

65. *Rex v. Wilson*, (1817) 7 Holt 596, 171 Eng. Rep. 353, 353. In S. March Phillipps and Andrew Amos' evidence treatise, they contend that "[a] confession, obtained without threat or promise, has been received, notwithstanding it was elicited by questions put by a police officer" or a magistrate. 1 S. MARCH PHILLIPPS & ANDREW AMOS, TREATISE ON THE LAW OF EVIDENCE 387 (Boston, Elisha G. Hammond 1839). Phillipps and Amos observed in a footnote, however, that two cases, *Wilson* being one of them, held to the contrary. *Id.* at 114 (citing *Wilson*, 171 Eng. Rep. at 353). Phillipps and Amos seem to have had pro-prosecution leanings and tended to disregard cases that were contrary to the propositions they offered. For another example, see *infra* note 71 and accompanying text.

66. See Smith, *supra* note 6, at 17-18.

67. See, e.g., *Rex v. Lingate*, [1815] Lent Ass., reprinted in PETERSDORFF, *supra* note 59, at 84.

68. See Smith, *supra* note 6, at 13 (describing TRIAL OF ROBERT DAVIDSON, THE PROCEEDINGS OF THE OLD BAILEY 30TH NOVEMBER, 1796 (London, W. Wilson 1796), available at [http://www.oldbaileyonline.org/html\\_sessions/T17961130.html](http://www.oldbaileyonline.org/html_sessions/T17961130.html)).

69. See sources cited *infra* notes 70-71.

70. [1815] Lent Ass., reprinted in PETERSDORFF, *supra* note 59, at 84.

likely to be admitted.<sup>71</sup> A doctrine bearing some resemblance to modern law on attenuation governed whether the magistrate's warning was sufficient to overcome the influence of a previous threat or inducement.<sup>72</sup> As Baron Wood stated the test in 1811:

The effect of an antecedent promise of favour, in rendering a confession before a magistrate inadmissible must depend upon the nature of the promise, the time and circumstances in which it was made, and on the situation of the person from whom the promise came. A promise held out by the prosecutor, recently before the examination, or by the constable who had the prisoner in custody, may be supposed to have great influence. On the other hand, a promise made some time before, by some indifferent person, who interfered officiously without any kind of authority, and promised without the means of performance, can scarcely be deemed sufficient to produce any effect, even on the weakest mind, as an inducement to confess.<sup>73</sup>

Applying this principle, a New York court excluded a confession given to a police clerk by a suspect after one of the marshals transporting her to the clerk threatened to hang her if she did not confess to the clerk.<sup>74</sup>

The benefits of giving cautions were nevertheless widely publicized. Treatise writers observed that while a threat or promise to a suspect rendered his subsequent statement involuntary and thus inadmissible, a caution by a magistrate could overcome the preceding

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71. See, e.g., *People v. Robertson*, 1 Wheel. Crim. Cas. 66 (N.Y. Gen. Term 1822) (holding magistrate's improper inducement in telling prisoner's wife that if wife's account of facts was true it would be better for prisoner to confess was not overcome by magistrate's caution that prisoner should not expect favor as a result of confession); see also 1 ESEK COWEN, ASSISTED BY NICHOLAS HILL, JR., NOTES TO PHILLIPPS' TREATISE ON THE LAW OF EVIDENCE 430 (New York, Banks, Gould & Co. 3d ed. 1850) (describing the case). Such cases were, however, the exception to the rule. As Cowen observed, an "improper influence once exerted may yet be countervailed by a subsequent influence [such as a caution], so as to make an after confession receivable." COWEN, *supra*, at 429 n.257.

72. Under modern law, warnings themselves do not purge the taint of unlawful police tactics and permit the introduction of a subsequent confession. *Brown v. Illinois*, 422 U.S. 590, 605 (1975). Courts must consider whether the taint of the illegality has been purged by looking to four factors: (1) whether the *Miranda* warnings were given, (2) the temporal proximity of the police misconduct and the confession, (3) the presence of intervening circumstances, and (4) the purpose and flagrancy of the police misconduct. *Id.* at 603-04; see Brent D. Stratton, Comment, *The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic*, 75 J. CRIM. L. & CRIMINOLOGY 139, 147-49 (1984).

73. See *Rex v. Hardwick*, [1811] Lent Ass., reprinted in PETERSDORFF, *supra* note 59, at 84, 84-85.

74. *People v. Rankin*, 2 Wheel. Crim. Cas. 468, 469 (N.Y. O.&T. 1823), cited in COWEN, *supra* note 71, at 430.

inducement.<sup>75</sup> Many treatise writers concluded that it was the duty of magistrates to caution defendants they were not required to give a statement of any kind and any statement they gave could be used against them.<sup>76</sup> Failure to give the warnings, these writers observed, was not itself a basis for excluding the statement as involuntary, but the message to magistrates was clear: warn suspects of their right to silence to assure the admissibility of confessions.<sup>77</sup> New York magistrates were giving some form of the warnings by the early 1820s.<sup>78</sup>

Late in the eighteenth century, magistrates were permitting suspects who could afford lawyers to have their counsel present during the examinations.<sup>79</sup> Warnings about the right to counsel did not, however, become a routine part of the magistrate's caution. In one English case, Judge Littleton observed that while a confession was technically receivable even though the suspect had been denied counsel at the preliminary examination, the case "ought not . . . be further pressed."<sup>80</sup> Littleton's recommendations in this case notwithstanding, neither the presence of counsel at the examination, nor a magistrate's warning that the suspect has a right to counsel at the preliminary hearing, seems to have been a factor courts considered in assessing the admissibility of confessions.

Warnings about the right to silence and counsel did, however, find its way into New York's statutory provisions regarding pretrial

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75. See COWEN, *supra* note 71, at 429; GREENLEAF, *supra* note 52, at 257-58. Though magistrates appear to have started warning suspects about their right to silence before American treatises began to address the issue of warnings, English treatises that were widely read in the United States concluded as early as 1813 that it was a magistrate's duty to caution suspects before interrogating them. See 1 WILLIAM DICKINSON, A PRACTICAL EXPOSITION OF THE LAW RELATIVE TO THE OFFICE AND DUTIES OF A JUSTICE OF THE PEACE 457 (London, Reed & Hunter 1813); see also 1 CHITTY, *supra* note 28, at 84-85 (London, A.J. Valpy 2d ed. 1816).

76. See 1 CHITTY, *supra* note 28, at 84-85 (London, A.J. Valpy 2d ed. 1816); 1 DICKINSON, *supra* note 75, at 457. But see 1 PHILLIPPS & AMOS, *supra* note 65, at 387 (arguing that cautions by magistrates were not required).

77. The cases revealed that the warnings were a great benefit to interrogators hoping to admit confessions in criminal trials. See GREENLEAF, *supra* note 52, at 257-58; 1 PHILLIPPS & AMOS, *supra* note 65, at 387. New York courts specifically seemed willing to admit statements following a caution even if improperly induced. See discussion *infra* note 78 and accompanying text.

78. See *People v. Robertson*, 1 Wheel. Crim. Cas. 66 (N.Y. Gen. Term 1822), cited in COWEN, *supra* note 71, at 430 (noting that magistrate cautioned defendant not to expect any favor as a result of confessing).

79. See J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660-1800, at 276 (1986).

80. See COWEN, *supra* note 71, at 420.

interrogations. New York codified the terms of the Marian Act as one of its earliest acts after the ratification of the Federal Constitution.<sup>81</sup> Like the Marian Act, New York's original statute providing for magistrates' examinations contained no provisions requiring suspects to be warned of their rights to silence or counsel. Magistrates began to provide suspects warnings about their right to silence on their own to avoid the risk the statements they extracted would be excluded.<sup>82</sup>

During New York's codification of its laws, the Marian Act was rewritten to require the cautions. In 1829, the New York Legislature engaged in a codification of its laws so they would be better organized and reflect current practices, to the extent current practices were inconsistent with the statutes as currently in force.<sup>83</sup> In the legislature's revision of the statute on magistrates' examinations, the legislature enacted the first statute in the Anglo-American legal tradition requiring a suspect be cautioned about his right to silence and counsel before the interrogation.<sup>84</sup> The statute provided that "the prisoner shall be informed by the magistrate[] that he is at liberty to refuse to answer any question that may be put to him."<sup>85</sup> The statute also provided that "the prisoner shall be allowed a reasonable time to send for and advise with counsel" prior to the examination.<sup>86</sup> The prisoner was entitled to have counsel present during the examination of the prosecution's witnesses and during his own examination.<sup>87</sup>

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81. Act of Jan. 30, 1787, ch. 8, 1787 N.Y. Laws 12. There is, however, one difference between the 1787 statute and the 1829 statute that suggests the statutory revisers saw the function of the preliminary hearing differently than did the legislature of 1787. The 1787 statute borrowed from the Marian Act and required the magistrate to put in writing the substance of the evidence heard at the preliminary hearing "or as much thereof as shall be material to prove the offence." *Id.* at 14. This description of a magistrate's recording duties remained the same until 1829. *See* Act of Mar. 24, 1801, ch. 70, 1802 N.Y. Laws 302; Act of Apr. 12, 1813, ch. 55, 1813 N.Y. Laws 507. The statutory revision of 1829 provided that the "answer of the prisoner to the several interrogatories shall be reduced to writing" and given to him to correct or supplement, after which point, the magistrate is to certify that the answers are accurate. N.Y. CODE CRIM. PROC. § 16 (1829). The statute further provided that the magistrate was to reduce to writing the witnesses' statements. *Id.* § 19. The revision, therefore, rendered the magistrate a recorder of *all* the information at the hearing, not just the parts which he felt would be helpful to the prosecution.

82. *See* Kauper, *supra* note 38, at 1233-36.

83. *See* CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 132-53 (1981).

84. N.Y. CODE CRIM. PROC. §§ 13-15; *see* 1 COLBY, *supra* note 22, at 191-95 (describing New York law on magistrates' examinations); GEORGE C. EDWARDS, *A TREATISE ON THE POWERS AND DUTIES OF JUSTICES OF PEACE AND TOWN OFFICERS, IN THE STATE OF NEW-YORK, UNDER THE REVISED STATUTES* 206-09 (Bath, N.Y., David Rumsey 1830).

85. N.Y. CODE CRIM. PROC. § 15.

86. *Id.*

87. *Id.* § 14.

The point of the revision had not been to reform the law but to arrange the laws in a more organized fashion, i.e., to rewrite the laws “with a view to placing the topics in a logical order under titles and subtitles.”<sup>88</sup> New York’s statutes had never previously recognized a duty by magistrates to warn suspects of their rights upon interrogation. Previous volumes collecting New York statutes had, however, cited to treatises which observed that magistrates had a duty to caution suspects of their right to silence.<sup>89</sup> None of the treatises or cases referred to in the annotations to previous laws on the subject found there was a right to counsel—or a duty on the part of magistrates to inform prisoners of their right to counsel—at the preliminary hearing.<sup>90</sup> The revisers, therefore, most likely viewed themselves as codifying the practice of many magistrates in the early-nineteenth century in England and New York to permit counsel to appear with those prisoners who could afford a lawyer.

The practice of giving warnings, which the legislature codified, had been developed to advance a law enforcement interest. This was something early-nineteenth-century critics of the warnings did not understand. Jeremy Bentham in 1827 sounded much like a twentieth-century critic of *Miranda* when he complained that the warnings “turned [criminals] loose again into society to afflict it with fresh crimes.”<sup>91</sup> The custom of giving the warnings was a symptom of a doctrine that was problematic to law enforcement interests, not the problem itself.

The warnings were developed in response to the confessions rule, the origins of which were incorrectly attributed to *Warickshall* throughout the nineteenth century.<sup>92</sup> *Warickshall* was, from a public-relations standpoint, the *Miranda* of the late-eighteenth and early-nineteenth centuries. It was resoundingly criticized as interfering with the ability of prosecution to introduce reliable evidence.<sup>93</sup> As the New

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88. See ERNEST HENRY BREUER, THE NEW YORK REVISED STATUTES—1829: ITS SEVERAL EDITIONS, REPORTS OF THE REVISERS, COMMENTARIES AND RELATED PUBLICATIONS UP TO THE CONSOLIDATED LAWS OF 1909, at 1 (1961); see also COOK, *supra* note 83, at 131-53 (describing New York’s codification movement).

89. See Act of Apr. 12, 1813, ch. 55, 1813 N.Y. Laws 507.

90. See *id.*

91. See 2 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 311 (London, Hunt & Clarke 1827); see also 1 DICKINSON, *supra* note 75, at 457.

92. (1783) 1 Leach 262, 168 Eng. Rep. 234; see *supra* notes 52-57 and accompanying text.

93. See GREENLEAF, *supra* note 52, at 255 (“[I]t cannot be denied, that [the voluntariness] rule has been sometimes extended quite too far, and been applied to cases,

York Commissioners on Pleading and Practice (Commissioners) observed in 1849: “There is perhaps no rule of evidence in criminal cases, which has given rise to more discussion in the courts, than that which relates to confessions.”<sup>94</sup>

In the mid-nineteenth century, courts would respond to these criticisms and retreat from the very strict interpretation of the confessions rule, and, when they did so, the warnings would no longer be necessary. To retreat from the strict version of the confessions rule, courts appealed to what they described as the reason for the rule—reliability.<sup>95</sup> *Warickshall* itself, the supposed origin of the confessions rule, permitted the admission of physical evidence discovered as a result of an improperly induced confession because there was no risk the physical evidence provided unreliable information.<sup>96</sup> New York courts in the mid-nineteenth century, in *redefining* the confessions rule, would reason that only inducements to make *false* confessions would render a statement inadmissible.<sup>97</sup> Throughout the latter half of the nineteenth century, New York courts would find increasingly coercive interrogation tactics acceptable, even without preinterrogation cautions, because they did not risk a false confession.<sup>98</sup> Until they redefined the confessions rule, however, the warnings served a valuable law enforcement function, permitting interrogators to place pressure on suspects to confess, while ensuring the confessions obtained would be admissible at trial. Warnings did not guarantee admissibility, but they went a long way toward ensuring the work of an

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where there could be no reason to suppose, that the inducement had any influence upon the mind of the prisoner.”). The criticisms of the broad applications of the voluntariness rule began almost at its inception. The Old Bailey Session Papers reveal that a judge in 1788 felt bound to exclude a confession as involuntary, though he lamented that “it were to be wished, that the [voluntariness] principle should not be extended quite so large as it has been.” See LANGBEIN, *supra* note 8, at 223 n.196 (quoting SAMUEL CHESHAM & JAMES SHERRARD, OLD BAILEY SESSION PAPERS 170, 172 (1788)).

94. N.Y. ASSEMB. COMM’RS ON PRACTICE & PLEADING, REPORT OF SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE, REP. NO. 78-150, at 225 (1855).

95. See *Duffy v. People*, 26 N.Y. 588, 590-91 (1863).

96. See *Warickshall*, 168 Eng. Rep. at 234-35.

97. See *People v. Smith*, 3 How. Pr. 226, 229 (N.Y. Sup. Ct. 1848) (“In determining . . . whether a confession be admissible or not, the only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one . . . .”); see also *Rex v. Court*, (1836) 7 Car. & P. 486, 173 Eng. Rep. 216; *Rex v. Thomas*, (1836) 7 Car. & P. 345, 173 Eng. Rep. 154; 2 WILLIAM OLDNALL RUSSELL & CHARLES SPRENGEL GREAVES, A TREATISE ON CRIMES AND MISDEMEANORS 846 (Phila., Johnson 1845); 1 PHILLIPPS & AMOS, *supra* note 65, at 386 (observing that reliability was the “main point to be considered” in evaluating the voluntariness of a confession).

98. See discussion *infra* Part IV.

interrogator would not be lost to a very literal interpretation of the confessions rule.

### III. THE NEW YORK MUNICIPAL POLICE INITIALLY RETAIN THE WARNINGS

Coercive interrogation became a threat in the mid-nineteenth century in a way that could not have been anticipated by the Framers of the Federal Bill of Rights—or the framers of similar declarations of protected liberties contained in all of the earliest state constitutions.<sup>99</sup> At the time the federal and original state constitutions were drafted, magistrates' interrogations were the only interrogations contemplated.<sup>100</sup>

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99. See Carol S. Steiker, "First Principles" of Constitutional Criminal Procedure: A Mistake?, 112 HARV. L. REV. 680, 688-90 (1999) (reviewing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997) and criticizing Akhil Amar's originalist view of the Fifth Amendment for its failure to account for changes professional police forces brought to interrogation practices).

100. See 1 LEONARD MCNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN: ILLUSTRATED FROM PRINTED AND MANUSCRIPT TRIALS AND CASES 296 (Dublin, Butterworth 1802) (noting that examinations of defendants may not be read into evidence unless judicially taken); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 749 n.574 (1999) (observing that officers were not permitted to interrogate suspects at the time the Bill of Rights was drafted). It also appears that New York law specifically forbade officers to take statements from arrested suspects. The *New York Herald* complained in 1840 that police were taking the deposition of arrested suspects contrary to the express prohibitions of the revised statutes. See *Investigations into Abuses of the Police Office*, N.Y. HERALD, Feb. 22, 1840, at 2. The process of examination by magistrates, however, was well known at the time the Bill of Rights was drafted. Alan G. Gless, *Self-Incrimination Privilege Development in the Nineteenth-Century Federal Courts: Questions of Procedure, Privilege, Production, Immunity and Compulsion*, 45 AM. J. LEGAL HIST. 391, 397 (2001) (observing that the first Congress was doubtlessly aware that justices of the peace in most states interrogated suspects). Eben Moglen has noted there was an inconsistency between self-incrimination clauses contained in most state constitutions and the Marian Act pretrial practice of interrogating defendants before magistrates. Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1111 (1994). New York was not among the states with a privilege against self-incrimination in its Bill of Rights, leading Edmund Morgan to conclude that New York was indifferent to the privilege. E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 22-23, 23 n.88 (1949). When New York adopted a constitutional provision providing for the privilege, the pretrial procedure remained the same. Oliver Barbour's nineteenth-century treatise for New York magistrates, however, contended that the pretrial interrogation was perfectly consistent with the privilege against self-incrimination because only voluntary statements could be taken. OLIVER L. BARBOUR, THE MAGISTRATE'S CRIMINAL LAW 487 (1841). Barbour noted that suspects are warned of their right to silence and counsel before the interrogation and are therefore under no compulsion to speak. *Id.* at 486-87. The Commissioners, who unsuccessfully proposed a Code of Criminal Procedure to the New York legislature in 1849, 1850, and 1855, did, however, believe that questioning by a magistrate was contrary to the privilege against self-incrimination. They, therefore, proposed permitting magistrates to give defendants an opportunity to give a statement but not questioning them at the preliminary hearing. See N.Y. ASSEMB. COMM'RS

While concerns were raised about overbearing magistrates during pretrial examinations, both before and after the Framing Era, magistrates' interrogations were public affairs; police questioning would become a very private affair.<sup>101</sup> Police detectives shifted the primary interrogation from the public magistrate's office to a secluded jail cell or secure interrogation room.<sup>102</sup> The only witnesses to interrogation practices became the accused and the officers conducting the interrogation. Public scrutiny no longer served as a check on an interrogator's aggression. Questioning could continue for days, and physical violence became a possibility.<sup>103</sup> If warnings were required to demonstrate that improper inducements did not lead to confessions before magistrates in the early-nineteenth century, then it would have been logical to assume police officers should give similar warnings before interrogating suspects. And for the first few years of its existence, the Municipal Police appears to have drawn just that conclusion.

With the creation of a full-time, professional police force, dedicated to suppressing and investigating crime, the transition from magistrates' examinations to police interrogation began. An inefficient system of policing in New York City prior to 1845 gave law enforcement officers little incentive to aggressively investigate crime

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ON PRACTICE & PLEADING, REPORT OF SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE, REP. NO. 78-150, at 99-101 (1855).

101. See *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10-11 (1986) (observing that throughout the nineteenth century, preliminary hearings were public proceedings that could be closed only for good cause). Even in this public setting, magistrates were quite aggressive. The Commissioners, in their proposed Code of Criminal Procedure in 1849, specifically noted the aggressive nature of questioning by magistrates. See N.Y. ASSEMB. COMM'RS ON PRACTICE & PLEADING, REPORT OF SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE, REPORT, REP. NO. 78-150, at 92-95; see also Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda,"* 54 U. CHI. L. REV. 938, 941 (1987) (observing that very aggressive questioning was permitted by mid-nineteenth-century magistrates); Morgan, *supra* note 100, at 14, 22-23.

102. See Deborah Young, *Unnecessary Evil: Police Lying in Interrogation*, 28 CONN. L. REV. 425, 437-38, 442 (1996) (discussing the change from public to private interrogation and the increase in lying and coercion when police took over the role of interrogators).

103. This possibility became a frequent reality by the end of the nineteenth century, as the Wickersham Commission's 1931 report revealed. See S. DOC. NO. 71-307, at 11 (1931). The opportunity for public scrutiny of interrogation methods has led many influential commentators to propose a return to examination by magistrates. See, e.g., Amar & Lettow, *supra* note 29, at 908; Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 713-16 (1968); Kauper, *supra* note 38, at 1255; Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. AM. JUST. CRIM. L. & CRIMINOLOGY 1014, 1017 (1933-34); John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 87 (1892).

or assist in the development of the prosecution's case.<sup>104</sup> Prior to 1845, officers had little incentive to interrogate suspects.<sup>105</sup> In fact, interrogations by officers appear to have been quite rare. Interrogations of suspects by law enforcement officers began to become more common with the creation of a salaried, full-time police force in New York City, the Municipal Police, though interrogations in the early years of the Municipal Police were still not common. When these early officers interrogated suspects, however, they appear to have followed the procedures used by magistrates.

Until the mid-nineteenth century, New York was policed by a system of constables and night watchmen who had little incentive to aggressively investigate crimes.<sup>106</sup> Many of these officers received no salaries, and the compensation for the remainder of the officers was very meager.<sup>107</sup> Rewards for the return of stolen property served as the primary compensation for the constables and watchmen, and all officers had other employment.<sup>108</sup> Officers had little incentive to investigate any crime other than one in which property could be potentially recovered, and powerful incentives deterred any aggressive action by constables and magistrates.<sup>109</sup> A constable or watchman who took a suspect into custody was required to appear before a magistrate as soon as possible and explain the basis for the arrest, a requirement that often forced the officer to lose wages from his regular employment.<sup>110</sup>

Full-time, salaried officers, created for the first time in the mid-nineteenth century, had incentives to discover and ensure the successful prosecution of crime. These officers were not torn between their law enforcement duties and their gainful employment. Their tenure in office and promotions turned on their effectiveness as police officers.<sup>111</sup> These full-time, salaried officers had incentives to use

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104. See JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901*, at 3-50 (1970).

105. See 1 PHILLIPPS & AMOS, *supra* note 65, at 380 ("Confessions of prisoners are often made in the course of their examination before magistrates."). For an example of a rare complaint of coercive police interrogation prior to 1845, see *Investigations into the Abuses of the Police Office*, *supra* note 100, at 2.

106. See WILBUR R. MILLER, *COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON 1830-1870*, at 16-24 (1973); RICHARDSON, *supra* note 104, at 3-50.

107. RICHARDSON, *supra* note 104, at 3-50.

108. See EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 637 (1999); RICHARDSON, *supra* note 104, at 20, 30-31.

109. RICHARDSON, *supra* note 104, at 31.

110. See 3 I.N. PHELPS STOKES, *THE ICONOGRAPHY OF MANHATTAN ISLAND 642-44* (photo. reprint 1998) (1915) (describing arrest procedures).

111. See MILLER, *supra* note 106, at 17-18.

aggressive tactics that their predecessors had only rarely, if ever, used.<sup>112</sup> In the abstract, a more powerful police force is precisely what New Yorkers wanted in 1845. A series of riots in northeastern cities had prompted calls in New York and elsewhere for the creation of a full-time police force modeled after the London Police Force created by Sir Robert Peel in 1829.<sup>113</sup> It was unclear what specific powers these new officers would possess. It was not obvious to New Yorkers in the mid-nineteenth century that police interrogation would accompany the creation of a professional police force. Nor was it obvious that New Yorkers would be willing to tolerate a police force with the authority to interrogate suspects.

The creation of a professional police force in New York had first been proposed in 1836 but was rejected because of a fear of entrusting hired men with substantial authority to intrude upon the liberties of citizens.<sup>114</sup> Fears of standing armies, a concern of the Framers as well as mid-nineteenth century New Yorkers, combined with concerns about the antidemocratic character of a police force hired to ensure compliance with the law, stalled the establishment of the Municipal Police.<sup>115</sup> Discussions about how to address these concerns focused on structural and cosmetic issues: who had the power to appoint officers and whether the new officers would have uniforms and badges.<sup>116</sup>

Despite the objections and concerns, the City of New York had its first full-time, salaried police force in 1845.<sup>117</sup> The 800 full-time officers of the newly formed Municipal Police were given written instructions on the scope of their responsibilities and the limits on their power.<sup>118</sup> Though the instructions were fairly detailed, nothing in them even remotely suggested officers were going to begin interrogating arrested suspects. These instructions were contained in a manual, published by the City of New York, that described, in fairly minute

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112. Material witness detentions, which had rarely occurred in New York City before 1845, also began to occur regularly after the creation of the Municipal Police. See Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J.L. & LIBERTY 726, 742-46 (2005).

113. See DAVID R. JOHNSON, *POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE 1800-1887*, at 9 (1979). See generally DAVID BENTLEY, *ENGLISH CRIMINAL JUSTICE IN THE NINETEENTH CENTURY* (1998) (describing the creation of the London police force in 1829).

114. See BURROWS & WALLACE, *supra* note 108, at 636 (describing the response to the proposal by New York Mayor Cornelius Lawrence).

115. *Id.*; see MILLER, *supra* note 106, at 19 (describing an 1836 article in the *Journal of Commerce* observing that the police force was contrary to American democratic culture).

116. See RICHARDSON, *supra* note 104, at 38.

117. See *id.* at 51-59.

118. *Id.*

detail, the limits on officers' power to arrest, search, and seize.<sup>119</sup> The manual, by contrast, never mentioned interrogations. One example of search and seizure provisions in the manual reveals the detailed regulation of officers' conduct.<sup>120</sup> Officers were informed that if they had inadequate suspicion to arrest a suspect for stealing, they were permitted to stop the suspect and question him about the source of the goods in his possession.<sup>121</sup> If the officer, however, lacked any articulable suspicion that property had been stolen, he was limited to following and observing the individual.<sup>122</sup> Once the officer had developed probable cause to believe a suspect had committed a crime, he was to arrest the suspect and immediately bring him before a magistrate.<sup>123</sup>

The absence of any description of interrogation in this detailed manual suggests that few people anticipated these officers would routinely interrogate suspects. In one respect, police officers had been instructed to act as examining magistrates. The manual required officers to carry a small notebook with them in which they were to record any information that would be helpful in prosecuting alleged offenses.<sup>124</sup> Magistrates at preliminary hearings had similarly been required to record all of the evidence from the hearing that was helpful to the prosecution, including the statements given by the defendant.<sup>125</sup> But this provision certainly does not reveal that city officials preparing the manual expected officers to take on the role of examining magistrates. Magistrates had been required to examine arrested suspects. Arresting officers had, from time immemorial, been forbidden to examine arrested suspects, though an occasional confession to a constable can be found. If a change in the long-standing prohibition had been contemplated by those writing the manual, it seems the manual would have been more explicit.<sup>126</sup>

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119. CITY OF N.Y., RULES AND REGULATIONS FOR THE GOVERNMENT OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK (1846).

120. *Id.* § 83, at 36.

121. *See id.* Obviously, this is the standard the Supreme Court adopted in *Terry v. Ohio*, 392 U.S. 1 (1968), for investigative detentions.

122. *Id.*

123. *Id.* § 12, at 8; *id.* § 83, at 36.

124. *Id.* § 8, at 7.

125. N.Y. CODE CRIM. PROC. § 16 (1829). The Marian Act contained a similar provision, which had remained in effect since that time. *See Kauper, supra* note 38, at 1232-33.

126. *See Davies, supra* note 10, at 1003; *Davies, supra* note 100, at 749 n.574.

This manual did, however, reveal that the officers would be given an opportunity and incentive to engage in routine interrogations.<sup>127</sup> The manual observed that magistrates could commit suspects “for examination.”<sup>128</sup> This was a term of art meaning the suspect could be held pending a preliminary examination by magistrates.<sup>129</sup> This period of detention gave officers an opportunity to “work up the case” against the suspect prior to the examination.<sup>130</sup> A confession would obviously have provided the officers with the evidence they needed to formally charge a suspect with a crime.

It does not appear, however, that police interrogations were commonplace for the first five to ten years of the Municipal Police.<sup>131</sup> Newspaper articles and appellate reports through the early 1850s contain few instances of confessions to police officers.<sup>132</sup> The Report of the Commissioners, recommending the adoption of a Code of Criminal Procedure in 1849, provides further evidence that police interrogations did not immediately become a routine practice of the new police force.<sup>133</sup> The Commissioners supported the existing statutory requirement that magistrates warn suspects they had the right to silence and counsel before interrogating them.<sup>134</sup> Their reasoning for supporting the warnings would have applied with equal force to interrogations conducted by police officers. The Commissioners reasoned that a frightened, recently arrested suspect is unlikely to have the wherewithal to recall and invoke his legal rights when questioned about the circumstances of a crime:

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127. See CITY OF N.Y., *supra* note 119, § 27, at 14.

128. *Id.*

129. N.Y. ASSEMB. PRISON ASS'N, FOURTH ANNUAL REPORT, DOC. NO. 243, at 159 (1849).

130. The term “work up the case” is frequently used in discussions about magistrates’ discretion to detain a suspect “for examination,” suggesting the practice of detaining suspects without adequate foundation had become quite common. See REPORT OF JOINT COMMITTEE ON POLICE MATTERS IN THE CITY AND COUNTY OF NEW-YORK, AND COUNTY OF KINGS, S. REP. NO. 97, at 6 (1856); RICHARDSON, *supra* note 104, at 60-61 (1970).

131. As one commentator observed, “[i]t is hard to say exactly when police interrogation, as we now know it, began.” *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1040 (1964). And as Smith has recently observed, much less is known about the history of interrogations in the United States than is known about the history of interrogations in England. Smith, *supra* note 6, at 2. There is necessarily some speculation about any description of the nature and origins of police interrogations in nineteenth-century America.

132. Certainly some police interrogation did occur during this era, but it was rare. See *supra* note 105 and accompanying text.

133. N.Y. ASSEMB. COMM’RS ON PRACTICE & PLEADING, REPORT OF SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE, REP. NO. 78-150, at 95-100 (1855).

134. *Id.*

In the proceedings after his commitment, and upon his trial, his instincts teach him to seek the aid of those whose profession and experience may ensure the protection of his rights. But in the early stages of the accusation—when he is hurried before a magistrate upon a charge of which he may be innocent, and of which, even if he be otherwise, the law has not yet adjudged him guilty—the first dictate of duty seems to be, to inform him of his rights, and to afford him every opportunity to throw around himself the protection of the law. And yet, according to the existing system of practice, upon the idle fiction that every man is presumed to know the law, he is supposed to be informed of the first right secured to him by the constitution—that of appearing and defending himself by counsel.<sup>135</sup>

The Commissioners therefore recommended the retention of the warnings of a suspect's right to silence and counsel.<sup>136</sup> The Commissioners, however, made no reference to police interrogations whatsoever. One can only conclude that they did not perceive interrogations by police officers to be commonplace events.

If police interrogations were commonplace in 1850, one also would have expected the Commissioners to have discussed them in connection with the requirement that officers immediately bring arrested suspects before magistrates, where suspects would receive the warnings. The Commissioners proposed a rule requiring arrested defendants to be brought immediately before a magistrate.<sup>137</sup> The Commissioners observed that this was a new rule designed to ensure that those arrested were timely provided with bail.<sup>138</sup> The Commissioners did not note that the provision would guard against improper police interrogation. When the legislature, in 1864, passed a statute requiring officers to bring arrested suspects immediately before magistrates under penalty of a minimum fine amounting to ten days' worth of the officer's salary, it was commonly recognized that this

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135. *Id.* at 92-94. The Commissioners attempted to introduce these same provisions in three different legislative terms—1849, 1850, and 1855—with no alteration in the terms of the code. See John T. Fitzpatrick, *Procedural Codes of the State of New York*, LAW LIBR. J., Oct. 1924, at 12, 20 (describing failed attempts to pass the Code of Criminal Procedure in the mid-nineteenth century). The annotations were added in the 1850 proposal, but no changes were made in the version proposed in 1855. *Id.* The assumptions about current practices reflected in the Code and its commentary therefore reflected practice in 1850, but not necessarily in 1855. In fact, it appears that police interrogation was becoming commonplace by 1855.

136. N.Y. ASSEMB. COMM'RS ON PRACTICE & PLEADING, REPORT OF SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE, REP. NO. 78-150, at 95-100 (1855).

137. *Id.* § 163, at 83.

138. *Id.*

provision was designed to prevent improper police interrogations.<sup>139</sup> Improper police interrogation techniques—in fact, police interrogations of any kind—did not seem to be a concern in the early 1850s but had become a pressing concern by 1864.<sup>140</sup>

The law was thus silent on whether police officers were required to give warnings prior to interrogation. When New York police officers began to interrogate suspects routinely, however, it appears they were providing the warnings to suspects much like magistrates had been required to give since 1829. The early Municipal Police shared with magistrates the motivation that led magistrates to begin giving the warnings. Courts well into the nineteenth century were strictly applying the confessions rule and excluding statements to police officers, just as they did statements to magistrates, that were the product of a threat or inducement of any kind.<sup>141</sup>

Two New York cases from the 1840s sent strong signals to police officers that warning suspects about their rights before questioning them would insulate confessions from challenge. In the first case, an improper inducement was overcome by a caution.<sup>142</sup> The case involved a theft in which a constable had been summoned to search for stolen property.<sup>143</sup> The victim told the suspect that if they settled the matter and paid the constable for his time, the case would go away.<sup>144</sup> When the constable arrived, he informed the suspect the case could not be settled, after which the suspect nevertheless made an incriminating statement.<sup>145</sup> The New York Supreme Court of Judicature held the warning had rendered the suspect's otherwise involuntary statement

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139. See discussion *infra* note 234 and accompanying text.

140. See N.Y. ASSEMB. COMM'RS ON PRACTICE & PLEADING, REPORT OF SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE, REP. NO. 78-150, at 92-95.

141. See *People v. Ward*, 15 Wend. 231, 231 (N.Y. Sup. Ct. 1836) (excluding a confession given to a magistrate who told the defendant it would be “better for him to make a full confession”). The New York Supreme Court of Judicature had recognized, as early as 1835, that the same standards ought to govern the admissibility of statements made to magistrates, police officers, or other persons. See also *People v. White*, 14 Wend. 111 (N.Y. Sup. Ct. 1835) (finding that oral recollections of statements to magistrates ought to be admissible just as oral recollections of statements outside magistrates' examinations ought to be admitted). It seems reasonable that concerns about improper inducements would be regarded as applying to police interrogations just as they applied to magistrates' examinations. The police interrogation seems of greater concern because it was held in secret.

142. *Ward v. People*, 3 Hill 395 (N.Y. Sup. Ct. 1842).

143. *Id.*

144. *Id.*

145. *Id.*

admissible; the constable's warning had overcome the inducement for the suspect to provide a statement.<sup>146</sup>

In the second case, an inadequate warning failed to overcome the inherently coercive nature of the interrogation.<sup>147</sup> The circumstances of the case suggested the suspect was particularly susceptible to inducement, but, even so, the Supreme Court of Judicature ruled that a complete warning would have rendered the suspect's statement admissible.<sup>148</sup> The defendant, though accused of murder, was extraordinarily sympathetic. She had been accused of setting a fire that caused the death of her sister-in-law and niece, who lived next door to the defendant.<sup>149</sup> As suspicion centered on her, she left her home in Richmond County, New York, and wandered the streets of New York City for two days before she was encountered by an acquaintance who told her that she was being sought in connection with the deaths.<sup>150</sup> She was taken by this acquaintance to the residence of a New York City alderman who instructed that the defendant be turned over to the police.<sup>151</sup> As the court described the defendant's plight just before her arrest:

It must be remembered, in this case, that the prisoner had been driven from her father's house in the night-time, by the suspicions which her own relatives had expressed of her guilt; that for two days and nights, in the dead of winter, she had wandered about the streets of this city; that during her wanderings alone, and in the night-time, she had fallen down in a fit, and had hurt herself; and that when taken before the alderman, she was doubtless in the pains of child-birth; that she was very much depressed and broken down, tired, and very much excited, was among strangers, arrested for a heinous crime, exclaiming, in the extremity of her despair, that "she had no friends; they were the first to suspect her."

This was by no means a favorable state of mind from which to elicit the truth, or one in which the prisoner would be likely to be able to appreciate the force and effect of what, in her mental agony, she might utter . . . .<sup>152</sup>

The prosecution sought to introduce the statements the defendant made to the alderman, who testified he cautioned the defendant that "she was not obliged to answer any questions that would criminate

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146. *Id.*

147. *People v. Bodine*, 1 Edm. Sel. Cas. 36, 64 (N.Y. Sup. Ct. 1845).

148. *Id.*

149. *Id.* at 61.

150. *Id.* at 61-62.

151. *Id.* at 62.

152. *Id.* at 64.

herself.”<sup>153</sup> The court observed that the alderman “did not tell her that what she said would be used against her.”<sup>154</sup> But the court also noted that “he [did not] use any threats, or hold out any inducements to her.”<sup>155</sup> The court noted there were three concerns at issue when the prosecution sought to introduce a defendant’s confession: (1) whether the defendant was in an adequate mental state to give an accurate statement, (2) whether any inducements or threats had been given to the suspect to confess, and (3) “whether the prisoner was made fully aware that what she said might be used . . . against her.”<sup>156</sup>

The court noted that Lord Denman had recently decided a statement given by a prisoner to a London police officer, without a caution that it could be used against him, would be inadmissible.<sup>157</sup> The court found that the caution the defendant had been given was inadequate to render her statement voluntary, because she had not been warned that any statement she gave could be used against her.<sup>158</sup> She had, obviously, been warned that she was not required to give a statement of any kind.<sup>159</sup> The court asserted that it was not going as far as Lord Denman had gone; “[s]uch a caution may not always be necessary to warrant evidence of a prisoner’s statements, but sometimes that may be a very proper and necessary measure, dependent on the condition of the prisoner’s mind, and the circumstances under which the statement may be made.”<sup>160</sup> The court’s cue to interrogators, whether intentional or not, was nevertheless very clear. Even in a case this extreme, in which the court had sincere concern about the defendant’s capacity to give an accurate statement,

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153. *Id.* at 62.

154. *Id.*

155. *Id.* The alderman described the defendant as “quite broken down, very much depressed and distressed, very much excited, tired and worn out.” *Id.* at 64.

156. *Id.* at 63. While the court recognized each concern must be satisfied, it clearly found the concern about the accuracy of the confession the most pressing. The court noted cases in which false testimony had been given and noted with particular concern a recent case “in one of the eastern States, where, after conviction, one of the accused confessed his guilt; yet, before the day appointed for his execution, it was ascertained that no murder had, in fact, been committed, but that the supposed victim was still in life.” *Id.*

157. *Id.* Though the court did not cite the specific case, it is obvious that the court was referring to *Regina v. Arnold*, (1838) 8 Car. & P. 621, 173 Eng. Rep. 645, which received a great deal of attention by treatise writers in the United States. As Smith has recently demonstrated, *Regina v. Arnold* did not settle the law on whether warnings were required before police could question arrested suspects. See Smith, *supra* note 6, at 18; see also Benner, *supra* note 56, at 82-83 (describing the impact of *Arnold*).

158. *Bodine*, 1 Edm. Sel. Cas. at 64.

159. *Id.*

160. *Id.* at 63-64.

the court suggested that a complete caution would have permitted the defendant's statement to be admitted.<sup>161</sup>

Simon Greenleaf's evidence treatise, published in Boston in 1842 and widely read throughout the country, described the incentive for officers to warn suspects before interrogating them.<sup>162</sup> Greenleaf observed that the creation of any hope or fear by the defendant would render a subsequent confession inadmissible, but this strict requirement could be fairly easily overcome by cautioning the suspect before questioning him:

[W]here an inducement has been held out by an officer, or a prosecutor, but the prisoner is subsequently warned by the magistrate, that what he may say will be evidence against himself, or that a confession will be of no benefit to him, or he is simply cautioned by the magistrate not to say any thing against himself, his confession, afterwards made, will be received as a voluntary confession.<sup>163</sup>

Greenleaf's treatise was written before the creation of full-time, professional police forces in major American cities, but his lesson was surely as applicable to police interrogators as it was to magistrates: cautions ensured the admissibility of subsequent confessions.<sup>164</sup>

By the mid-1850s, it was becoming apparent that police officers were, in fact, engaging in interrogations. Newspaper reports alleging abuses by police in interrogations provided the first evidence that police interrogations were regularly occurring. One story referred to suspects in a robbery, a mother and her son, being "roughly marched into the 'star chamber' of Mr. Matsell, by his special aid, where they were closely questioned in regard to the gold coin found in their

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161. *Id.* Roughly contemporaneously with this decision, in a case involving similar facts, the Pennsylvania Supreme Court held that warnings were not required in order to make statements to an officer admissible. *Commonwealth v. Mosler*, 4 Pa. 264, 265 (1846). When the defendant was arrested, witnesses described him as appearing to be a "crazy man." *Id.* The court relied on a different English authority, *Rex v. Richards*, (1832) 172 Eng. Rep. 993, 993, to conclude that, as long as there were no threats or inducements, warnings were not required before statements given to police officers were admissible. *Id.* The only distinction between the two cases appears to be the gender of the defendants; the defendant in *Mosler* was a man and the defendant in *Bodine* was a woman.

162. See GREENLEAF, *supra* note 52, at 257.

163. *Id.* at 257-58.

164. Modern criminal procedure similarly recognizes that, under certain circumstances, warnings can attenuate the taint of a preceding illegality. See *Oregon v. Elstad*, 470 U.S. 298, 314, 332 (1985). But see *Missouri v. Seibert*, 542 U.S. 600, 615-17, 627-28 (2004) (finding postwarning statements inadmissible when prior questioning was done to get the cat out of the bag).

possession.”<sup>165</sup> An editorial in the *New York Daily Times* almost two months later described the rough treatment of immigrants accused of crimes—specifically, the editorial offered a hypothetical example of an Irish maid accused of theft.<sup>166</sup> In the hypothetical, the maid was accused, brought to the police station, and “put to the rack.”<sup>167</sup> It is somewhat difficult to know what to make of these accounts. The Municipal Police, which existed until 1857, was under the control of the city democrats, to which the *New York Daily Times* served as the chief media opposition.<sup>168</sup> The stories of systemic abuses, therefore, may be exaggerated, but surely they reveal that police interrogations had begun to occur regularly.

The *New York Daily Times* blamed the improper interrogations on George Matsell,<sup>169</sup> Chief of Police from 1848 to 1857, who would become a police commissioner and president of the police board in the 1870s.<sup>170</sup> Twenty years later, a prominent New York lawyer would similarly attribute the origins of routine coercive interrogations to Matsell’s reign as Chief of the Municipal Police. In 1875, Abraham Oakey Hall, former district attorney and mayor of New York, who was then practicing as a criminal defense lawyer, complained about the interrogation of one of his clients, noting that such abuses had first been observed in 1855.<sup>171</sup> Describing the police station where his client was interrogated in January of 1875, Hall observed that the “arrangement of Mulberry street, with its Doge-like appurtenances of doors and bridges, and Venetian burlesquery is admirably calculated to restore in 1875 the Matsell compulsion vagaries of 1855, that our

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165. *The Bank Robbery in Wall-Street—The \$20 Gold Pieces Not Identified*, N.Y. DAILY TIMES, Jan. 20, 1855, at 4 [hereinafter *Bank Robbery*].

166. Editorial, *When Justice Is Wide Awake*, N.Y. DAILY TIMES, Mar. 12, 1855, at 4.

167. *Id.*

168. See MEYER BERGER, *THE STORY OF THE NEW YORK TIMES: THE FIRST 100 YEARS: 1851-1951*, at 36-37 (1970).

169. See *Bank Robbery*, *supra* note 165, at 4.

170. See RICHARDSON, *supra* note 104, at 56, 59.

171. Abraham Oakey Hall’s criticism of Matsell in 1875 cannot be explained in purely partisan terms. Matsell was chief of police when it was under the control of city Democrats. See RICHARDSON, *supra* note 104, at 51-108. Hall, who had been the district attorney during Matsell’s tenure as police chief, had been a Whig, then a Republican in the late 1850s, but had become a Democrat after the outbreak of the Civil War because of his view that the Lincoln administration had engaged in several constitutional abuses. See LEO HERSHKOWITZ, *TWEED’S NEW YORK: ANOTHER LOOK* 89 (1978) (explaining Hall’s departure from the Republican Party); James Michael Lee, *The Political Genius of A. Oakey Hall 17-38* (1956) (unpublished master’s thesis, Columbia University) (on file with the author) (explaining Hall’s various political affiliations as district attorney of New York); Letter from A. Oakey Hall to Theodore Tilden (Jan. 22, 1862) (on file with the New York Public Library).

citizens supposed had perished, along with the old street-pumps and whale-oil avenue lamps.<sup>172</sup>

Matsell began his law enforcement career interestingly enough, as a magistrate assigned to the Tombs from 1840 to 1845. The Tombs were built to be New York's primary pretrial detention facility in 1838.<sup>173</sup> Chief Matsell therefore understood interrogation very well. He also likely understood some confessions would be lost if suspects were taken to magistrates who gave them warnings about the right to silence and counsel before they were questioned by police.

Chief Matsell either instructed his officers to inform arrestees of their rights to silence and counsel upon arrival at the stationhouse or was at least politically savvy enough to create the impression that warnings were routinely given. The New York Legislature investigated alleged abuses by the Municipal Police in 1856.<sup>174</sup> James Nesbit, a police clerk in New York City, was asked if suspects were ever questioned by police clerks outside the presence of magistrates.<sup>175</sup> Nesbit admitted that he was familiar with this practice.<sup>176</sup> Nesbit was asked how long suspects were typically detained before they were finally taken before magistrates for their preliminary hearings.<sup>177</sup> Nesbit said he did not know the answer to that question.<sup>178</sup> The committee's counsel then expressed a concern about how these suspects, questioned by police officers, would learn of the rights of which the magistrate was required to apprise them.<sup>179</sup> Nesbit testified that a prisoner was typically informed of his right to counsel as soon as he was taken to jail.<sup>180</sup> Nesbit interestingly testified that it was not his understanding that a prisoner had a right to be informed of his rights, but he testified that the police generally gave the warnings. It certainly would not have been obvious in 1856 that officers could lawfully question suspects without first giving them the warnings magistrates

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172. *The Police: Charges Against the Commissioners and Superintendent*, N.Y. WORLD, Feb. 12, 1875, at 6 [hereinafter *Charges Against the Commissioners*].

173. See 4 APPLETON'S CYCLOPAEDIA OF BIOGRAPHY 260-61 (James Grant Wilson & John Fiske eds., N.Y., D. Appleton & Co. 1888) (providing a biography of George Matsell). For a history of the Tombs, see CHARLES SUTTON, THE NEW YORK TOMBS: ITS SECRETS AND ITS MYSTERIES (New York, U.S. Publ'g 1874).

174. REPORT OF JOINT COMMITTEE ON POLICE MATTERS IN THE CITY AND COUNTY OF NEW-YORK, AND COUNTY OF KINGS, S. REP. NO. 97 (1856).

175. *Id.* at 75.

176. *Id.*

177. *Id.* at 76.

178. *Id.*

179. *Id.*

180. *Id.* at 75-76.

were required to give.<sup>181</sup> At least some members of the legislative committee assumed that there should be no distinction between interrogations by police and interrogations by magistrates, and the police in 1855 did not appear to have been publicly trying to carve such a distinction.<sup>182</sup>

It is not at all clear how often these officers actually gave suspects the warnings. While it seems doubtful that officers of the Municipal Police carried around a card containing warnings to give arrestees before questioning them, it is clear that some powerful incentives did exist for officers to provide some kind of caution to suspects.<sup>183</sup> And when asked about their practices, the police department in 1856 claimed that officers provided the warnings.<sup>184</sup> Surviving briefs from the nineteenth century provide some further evidence that police in the mid-century had actually been cautioning suspects much as modern officers are required to do.

In an 1867 appeal to the New York Court of Appeals, defense counsel's argument assumed that officers were required to warn suspects before custodial statements could be admitted.<sup>185</sup> And the court's opinion suggests that this may indeed have been the prevailing view in the 1850s.<sup>186</sup> The defendant had been arrested at a murder scene and, after an exchange with an officer, had given an incriminating statement.<sup>187</sup> The officer appears to have suggested that

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181. Case law providing such distinctions would appear in New York and elsewhere in the next few years, but in 1855, no such decision existed. *See* *People v. Hartung*, 17 How. Pr. 151, 152-53 (N.Y. Sup. Ct. 1859) (noting that an officer would not be required to warn every suspect to avoid the possibility that the suspect would be improperly induced into confessing and holding, in this case, that agitation or fear outside of a magistrate's examination had never been held a basis for excluding a statement); *Commonwealth v. Mosler*, 4 Pa. 264 (1846) (observing that warnings are only required only in magistrates' examinations, not police interrogations).

182. A recent history of the New York Police Department concluded that in the 1850s, "[i]t was up to a precinct captain to decide whether to let a prisoner see a lawyer, and there were no *Miranda* rules about interrogation." JAMES LARDNER & THOMAS REPPETTO, *NYPD: A CITY AND ITS POLICE* 34 (2000). The story of police interrogation in the first decade of Municipal Police seems more complex than this. It is certainly not clear how often police officers were actually warning suspects about their right to counsel, or respecting invocations of this right, but it does appear that police in the 1850s embraced the practice of giving the warnings magistrates were required by statute to give.

183. Modern officers typically have the *Miranda* warnings printed on a card, which they read to suspects. *See* WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 79 (2001).

184. *See* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 323-24 (1998).

185. *O'Brien v. People*, 48 Barb. 274 (N.Y. 1867).

186. *Id.*

187. *Id.*

he would allow an angry mob to kill the defendant, and this appears to have prompted the defendant to confess.<sup>188</sup> Someone at the scene threatened the defendant, exclaiming “Jerry is going to die.”<sup>189</sup> The arresting officer staved off the threat by stating that he, the officer, “was worth two dead men yet,” but the officer immediately noted that “it would probably cost the country a good deal to try” the defendant.<sup>190</sup> O’Brien replied that he had committed the crime and that he would plead guilty to save the county the expense of trying him.<sup>191</sup> The following day, the same officer took O’Brien to the Coroner’s inquest and told him his case was a “hard one.”<sup>192</sup> The defendant then offered more incriminating statements.<sup>193</sup>

On appeal, the defendant’s attorney argued that the “absence of any warning to the prisoner, that his confession might be used against him should effect their [*sic*] rejection.”<sup>194</sup> The court found warnings to be required whenever any sort of threat may have induced a confession and made no distinction between magistrates and police officers.<sup>195</sup> The court observed that confessions are to be excluded “[w]hen made under the effect of threats, or the sanction of an oath, without the proper caution being given that he need not answer, and that what he says may be used against him, and some other circumstances, the admissions are excluded.”<sup>196</sup> The court offered no citation for this principle, suggesting that the principle was widely and long accepted.<sup>197</sup> And, as described in the preceding Part, in the first half of

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188. *Id.*

189. *Id.* para. 401.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Brief of Defendant-Appellant, *O’Brien v. People*, 48 Barb. 274 (Sup. Ct. N.Y. 1867), in 13 *Oakey Hall, Briefs and Arguments in Cases in Which A. Oakey Hall Was Interested* (on file with New York Public Library). The New York Court of Appeals had previously rejected an argument by a defendant that no statement given to a police officer by a suspect in custody could be heard in evidence. *People v. Rogers*, 18 N.Y. 9 (1858). The court observed that the defendant had cited to cases, which the court had examined, that supported the proposition that unwarned statements are to be excluded, but the court rejected the argument. *Id.* at 13-14. The court did not provide citations to the cases the defendant provided, but there certainly were English cases at this time announcing this rule. See discussion *infra* note 292.

195. *O’Brien*, 48 Barb. 274.

196. *Id.* New York certainly was not the only state to require that a threat or inducement be overcome by a warning before a statement to a police officer could be admitted. See THOMAS W. WATERMAN, A DIGEST OF DECISIONS IN CRIMINAL CASES 140-49 (New York, Baker, Voorhis & Co. 1877) (collecting cases).

197. *O’Brien*, 48 Barb. 274.

the nineteenth century, courts very readily interpreted statements to suspects to be improper threats or promises. Under this rule requiring cautions to overcome improper inducements, warnings by police officers would have been very common in the first half of the nineteenth century.

The court, however, found that the warnings were not required in this case.<sup>198</sup> An officer's implicit suggestion that he would permit a crowd to murder a suspect unless the suspect confessed would doubtlessly have been regarded an improper inducement in the first half of the nineteenth century. As will be discussed in the next Part, the judiciary's interpretation of improper threats or promises changed quite substantially in the latter half of the nineteenth century.<sup>199</sup> Justice Leonard, writing for a unanimous court, stated that "I am unable to perceive that the prisoner was actuated in making his statement in the slightest degree by hope or fear."<sup>200</sup> By this time, New York courts were interpreting the terms "hope" and "fear" in a manner that gave police great leeway in their interrogation practices. The case, nevertheless, reveals that in a world in which hope and fear were strictly interpreted against law enforcement, warnings would have been common. And before New York courts in the late 1850s and 1860s retreated from these formalistic interpretations of the voluntariness rule, warnings would frequently have been necessary to ensure the admissibility of confessions.

#### IV. WARNINGS DISAPPEAR AS COURTS LESS READILY EXCLUDE UNWARNED CONFESSIONS AS INVOLUNTARY

In the latter half of the nineteenth century, courts retreated from their strict interpretation of the confessions rule, which was identified as the voluntariness test by the mid-nineteenth century.<sup>201</sup> With this changed judicial attitude, officers no longer gave suspects warnings before questioning them.<sup>202</sup> Warnings always imposed a risk on law

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198. *Id.*

199. See discussion *infra* note 203 and accompanying text.

200. *O'Brien*, 48 Barb. at 274. The court also noted that the facts of the murder were very well established by other evidence, so there was no concern about the admissibility of the evidence. *Id.*

201. There had been attempts to legislatively alter the judiciary's interpretation of the voluntariness rule. The Proposed Codes of Criminal Procedure would have permitted courts to exclude only confessions that were the product of threats. See N.Y. ASSEMB. COMM'RS ON PRACTICE & PLEADING, REPORT OF SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE, REP. NO. 78-150, § 449, at 225 (1855).

202. See MILLER, *supra* note 106, at 77-78.

enforcement because the warnings sometimes had the effect of causing a suspect to refrain from speaking.<sup>203</sup> When, however, officers risked losing the statements they were obtaining without warnings, the warnings served an important law enforcement function. As courts became less eager to define interrogation techniques as improperly inducing a confession by hope or fear, warnings were no longer necessary to overcome the impact of an improper inducement.

Police interrogators in the second half of the nineteenth century began using a variety of interrogation techniques, the origins of which were attributed by the Supreme Court's opinion in *Miranda* to the early twentieth century.<sup>204</sup> Interrogators began to present suspects with evidence that suggested their guilt.<sup>205</sup> Officers confronted suspects with evidence actually in their possession and began to lie to suspects, suggesting that evidence existed implicating the suspects when no such evidence existed.<sup>206</sup> In the first half of the nineteenth century, these interrogation tactics were forbidden, though a caution preceding the suspect's statement could often save the confession from exclusion.<sup>207</sup> As New York courts began to permit these psychological interrogation methods, the warnings no longer had any benefit for law enforcement.<sup>208</sup> Interrogators therefore ended their practice of cautioning suspects, as their interrogation practices ran little risk of

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203. The number of suspects appearing before magistrates who gave statements declined after magistrates started cautioning them that they had the right to silence and counsel at the interrogation. Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800-1865*, 22 J.L. & Soc'y 443, 452 (1995). In the records of the appellate cases handled by Hall, there is a transcript of a preliminary examination in which it is clear that warnings about the right to counsel and silence caused a suspect to exercise these rights. When the magistrate asked the suspect if she had anything to say, she responded, "I am perfectly innocent and unable now from illness to explain. I trust that time will show it, and by advice of my counsel I decline answering any further questions at present." *Record of Magistrate's Examination*, *People v. Cunningham*, in 6 HALL, *supra* note 194.

It is surely true in modern times as well that warning suspects that they are not required to answer questions will reduce the number of admissible confessions given. See Paul G. Cassell, *Miranda's "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL'Y 327, 329 & n.14 (1997); Cassell & Hayman, *supra* note 32, at 854-62 (documenting the decline in police questioning following *Miranda*).

204. See *Miranda v. Arizona*, 384 U.S. 436, 448-55 (1966) (citing FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 40-55 (1962)). Inbau and Reid instruct officers to create an "aura of confidence in [the suspect's] guilt" and "induce a confession out of trickery" by erroneously telling the suspect that evidence incriminates him. *Id.* at 453, 455. New York police officers began using these tactics in the mid-nineteenth century.

205. INBAU & REID, *supra* note 204, at 187.

206. *Id.*

207. EDWARDS, *supra* note 84, at 209; GREENLEAF, *supra* note 52, at 257.

208. BENTHAM, *supra* note 91, at 311.

undermining the admissibility of confessions. The New York legislature became aware of the fact that interrogators were dispensing with the statutorily required warnings and did nothing to require compliance.<sup>209</sup>

The acceptance of psychological interrogation techniques by New York courts occurred over a decade beginning in the late 1850s. During this decade, courts relaxed the strict application of the voluntariness rule by observing that the rule was intended to prevent the jury's consideration of unreliable confessions.<sup>210</sup> Interrogation techniques that did not threaten the accuracy of confessions were therefore perfectly acceptable. Throughout the decade, courts gained increasing faith that police tactics would not produce false confessions and ultimately permitted police to use trickery and deception to extract a confession.<sup>211</sup>

The judiciary's initial retreat from the very strict interpretation of the voluntariness rule began shortly after the New York Constitution of 1846 replaced appointed trial and intermediate appellate judges with elected judges.<sup>212</sup> Early in the nineteenth century, a confession would have been inadmissible if preceded by an admonition that it would be better for the defendant to tell the truth.<sup>213</sup> This limitation on the admissibility of confessions had been one of the most strenuously criticized by nineteenth-century commentators.<sup>214</sup> In 1848, the New York Supreme Court for New York County permitted the admission of a defendant's confession that he had burnt a barn over his objection that the confession had been the product of an improper inducement.<sup>215</sup> The defendant offered the officer who arrested him ten dollars if he could get him out of trouble.<sup>216</sup> In response, the officer said, "*if you burnt the barn you had better tell me of it.*"<sup>217</sup> The suspect then provided an incriminating statement.<sup>218</sup> The court reasoned that the

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209. See *infra* notes 301-302 and accompanying text.

210. MILLER, *supra* note 106, at 78.

211. *Id.*

212. N.Y. CONST. of 1846 art. VI, §§ 2, 4, 12-14, 17.

213. See, e.g., *People v. Ward*, 15 Wend. 231, 231 (N.Y. Sup. Ct. 1836) (excluding statement after magistrate informed suspect that it "would be better for him to make a full confession."); see also discussion *supra* notes 71, 141 and accompanying text.

214. See *supra* note 100 and accompanying text.

215. *People v. Smith*, 3 How. Pr. 226, 229-30 (N.Y. Sup. Ct. 1848).

216. *Id.* at 229.

217. *Id.* at 230.

218. *Id.*

confession was appropriately admitted as there had been no inducement to make a false confession.<sup>219</sup>

A decade later, New York courts began to send much stronger signals that they would retreat from the rigorous interpretation of the voluntariness rule that had prompted the warnings. In *People v. Rogers* the defendant argued that his confession was improperly admitted because it was given to a policeman while the defendant was in custody.<sup>220</sup> An English case had just a few years previously forbidden the admission of any statements given to police officers unless an officer warned the suspect of his right to silence, even when the suspect was not in custody.<sup>221</sup> Though the court's opinion is sparse, it appears that the defendant argued for an even stronger rule. The defendant argued that statements given to officers while in custody should never be admitted.<sup>222</sup> The court of appeals rejected the defendant's proposed rule, citing American decisions permitting the admission of statements given to police officers.<sup>223</sup> One of the American decisions described by the court was a Pennsylvania case holding that while magistrates were required to give the suspects warnings before interrogating them, police officers were not required to give these warnings.<sup>224</sup> The argument the defendant made in *Rogers* did not require the court to decide whether different rules applied to magistrates' examinations and police interrogations, and the court did not address the question in *dicta*. The court's approving citation of the Pennsylvania case, however, seems to have been a strong foreshadowing of its future holdings.

One year later, the New York Supreme Court for Albany County explicitly held that police interrogations would be governed by different standards than magistrates' examinations. In *People v. Hartung*, the defendant had been arrested for the murder of her husband, and after two months of incarceration, she admitted to the sheriff that she had written a letter that implicated her in the murder.<sup>225</sup> The letter had led to her being suspected of the crime and ultimately to her arrest.<sup>226</sup> Her statement had followed a question she posed to the

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219. *Id.* at 230-31.

220. 18 N.Y. 9, 13 (N.Y. 1858).

221. See discussion *infra* note 287.

222. *Rogers*, 18 N.Y. at 13.

223. *Id.* at 14.

224. *Id.* (citing *Commonwealth v. Mosler*, 4 Pa. 264 (1846)).

225. *People v. Hartung*, 17 How. Pr. 151, 151-52 (N.Y. Sup. Ct. 1859).

226. *Id.* at 153.

sheriff, asking him “What do you think they will do to me?”<sup>227</sup> The court never indicated what the sheriff’s response was but observed that it was very likely that the defendant was “under the influence of fear” from his response.<sup>228</sup> The court admitted the statement finding that “mental agitation, induced by the emotions of hope or fear” was not a basis for excluding a confession obtained outside a “judicial investigation.”<sup>229</sup> The court strongly suggested that this confession would not have been admissible if it had been given in the course of a magistrate’s examination.<sup>230</sup>

The legislature does appear to have responded to the judiciary’s initial signs of retreat from the strictly interpreted voluntariness rule. And the legislature’s response overlapped with public criticism of coercive police interrogation practices.<sup>231</sup> A statute, passed in 1864, required that suspects be brought immediately before magistrates upon their arrest.<sup>232</sup> Suspects who were arrested and not promptly brought before magistrates could file complaints against the officers arresting them.<sup>233</sup> An administrative hearing would then be held, and officers found guilty of failing to comply with this requirement were to be sanctioned by a minimum administrative fine of ten days of their pay or a maximum penalty of dismissal from the force.<sup>234</sup> Oakey Hall, District Attorney for New York in 1864, described the statute a decade later “as a remedy for the mischievously oppressive star-chamber

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227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. See discussion *supra* notes 100 and accompanying text.

232. 1864 N.Y. Laws 403. Prompt appearance requirements had existed since well before the drafting of the Bill of Rights, but there had been statutory penalties for failure to comply with this requirement prior to the New York statute. See Kauper, *supra* note 38, at 1229. The in-house counsel to the New York Police Department had occasion in 1877 to observe that the prompt appearance requirement was a long-existing common law requirement, considerably older than the New York statutory requirement. See OPINIONS OF COUNSEL TO THE BOARD OF POLICE AND OF COUNSEL TO THE CORPORATION 185 (1882) (opinion of W.C. Whitney, May 3, 1877). The common law had not, however, established an upper bound on the length of detention permitted prior to producing a prisoner before a magistrate. See 1 CHITTY, *supra* note 28, at 72 (“[T]here appears to be no precise limitation of the time, which must depend on the circumstances of each particular case . . .”); see also *Gerstein v. Pugh*, 420 U.S. 103, 114-15 (1975) (recognizing that at common law an arresting officer was required promptly to bring the suspect before the magistrate).

233. 1864 N.Y. Laws 403.

234. *Id.*

procedure which had characterized the first Municipal Police system whereof Mr. Matsell was head.<sup>235</sup>

For somewhat obvious reasons, this statute was doomed to be an ineffective remedy for coercive interrogation. A complaint gained the suspect nothing beyond reprisals from the police as he received no part of the fine. Not surprisingly, very few accounts remain of officers being charged with failure to bring arrestees before magistrates in a timely manner.<sup>236</sup> And a prompt initial appearance before a magistrate did nothing to prevent police officers from attempting to interrogate the suspect thereafter. Even for those who could afford counsel and retained it before the magistrate's examination, the contours of the right to counsel had not been fleshed out sufficiently to forbid officers from questioning them without counsel present after their initial appearance.<sup>237</sup> The legislature must have been aware of the 1859 case, *Hartung*, in which officers secured incriminating statements from a suspect accused of capital murder two months after her arrest.<sup>238</sup> The defendant in that case was represented by counsel, yet no issue was raised about the propriety of a police interrogation two months after her preliminary examination before the magistrate.<sup>239</sup> Even after the

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235. *Vigorous Charges Against the Police Department*, N.Y. TIMES, Feb. 12, 1875, at 10 [hereinafter *Vigorous Charges*].

236. I have discovered only two during the research of this project. One was the charge brought against George Walling in 1875, which is described in much more detail below. See *infra* notes 272, 275-276 and accompanying text. The other was also against a superintendent of the Municipal Police in 1875, in an unrelated case. See *Trial of Superintendent John S. Folk*, BROOKLYN EAGLE, Aug. 10, 1875, at 4.

237. Even if the right to counsel did attach at a suspect's initial appearance before a magistrate in the nineteenth century, this point was moot for most defendants as they could not afford counsel. The Supreme Court did not require states to provide counsel to all indigent criminal defendants facing jail time until *Gideon v. Wainwright*, 372 U.S. 335, 338-39 (1963). As George Fisher points out, though, most states did appoint counsel to indigent defendants in murder cases in the nineteenth century. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 919 (2000). Defendants charged with murder surely represented the minority of all defendants. Even for defendants with counsel, there was no meaningful protection against interrogation after the preliminary hearing. The prohibition on contact with a defendant after the attachment of the right to counsel was not to be determined at the federal level until *Massiah v. United States*, 377 U.S. 201, 204-07 (1964). Clearly, the law imposed little constraint on police interrogation after the initial appearance before a magistrate in the nineteenth century.

238. 17 How. Pr. 151, 152 (N.Y. Sup. Ct. 1859). Mrs. Hartung's case was quite well known in New York. As the *New York Times* described, "[h]er trial has excited intense interest . . . . The prisoner is quite young and handsome, and her case has created the greatest sympathy." *The Case of Mrs. Hartung*, N.Y. TIMES, Feb. 8, 1859, at 5.

239. See *Hartung*, 17 How. Pr. at 152-53. New York courts in the nineteenth century appear to have appointed counsel to all indigent defendants facing the death penalty as a matter of practice. See Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1329 (2002).

initial appearance, then, no law appeared to prohibit police interrogation.

It is, however, not inconceivable that legislators thought this statute would prevent at least some coercive interrogations. The Commissioners on Pleading and Practice, who unsuccessfully proposed a Code of Criminal Procedure in the 1840s and 1850s, noted that suspects are most vulnerable to the intimidation of magistrates' questioning when they are first arrested.<sup>240</sup> The Commissioners noted that a caution, alerting the prisoner to his right to silence and counsel, served to remind him of those things which he would ordinarily remember were he not rattled by his recent arrest.<sup>241</sup> Even for those without the ability to retain counsel, the appearance before the magistrate, who provided the defendant with a set of warnings, may have afforded a type of cooling-off period, calming the suspect and making him somewhat less susceptible to some interrogation tactics. The lack of incentives for victims to report violations and the opportunity for police interrogation after the initial appearance, however, undermined this marginal deterrent to police coercion. The law therefore allowed legislators to appear responsive to civil libertarian concerns without substantially affecting police practices.<sup>242</sup>

With a largely ineffective legislative scheme in place to prevent abusive interrogation, judicial limitations on the admissibility of confessions remained as the primary limit on police interrogation methods. And by the 1860s, it seemed that courts were prepared to give police greater leeway. It was not clear, however, what interrogation methods would be permitted. Specifically, it was not clear whether an interrogator could ask questions that assumed a suspect's guilt, confront the suspect with evidence against them known to the police, or lie to a suspect about the existence of evidence

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240. N.Y. ASSEMB. COMM'RS ON PRACTICE & PLEADING, REPORT OF SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE, REP. NO. 78-150, at 93-94 (1855).

241. Earl Warren's opinion in *Miranda* noted that there had been few claims of improper interrogation in the federal system because the *Federal Rules of Criminal Procedure* long had a rule requiring arresting officers to promptly bring arrested suspects before magistrates. 384 U.S. 436, 463 (1966). Federal courts, however, were not excluding statements that were obtained from defendants who were not promptly taken before magistrates as required by FED. R. CRIM. P. 5(c). See *Mallory v. United States*, 259 F.2d 796, 798 (D.C. Cir. 1958).

242. This seems to have been a common practice of the New York legislature in the nineteenth century. In 1881 and 1883, the New York legislature responded to civil libertarian concerns about the detention of material witnesses, but only after the police observed that the existence of material witness detentions had made witnesses unwilling to reveal that they had material information. See Oliver, *supra* note 112, at 778-80.

implicating him. New York cases had not answered the question, and the English cases relied on by treatise writers had given inconsistent answers. In *Burley's Case*, an English court permitted the admission of a confession after the suspect was incorrectly informed that his accomplices were already in custody.<sup>243</sup> Fifteen years later in *Rex v. Mills*, however, another English court held that a constable's description of evidence against a suspect rendered a subsequent confession inadmissible.<sup>244</sup> The constable said to his prisoner: "It is of no use for you to deny it, for there is the man and boy who will swear they saw you do it."<sup>245</sup> The court held the subsequent confession involuntary as the constable's statement had been "an inducement to say something."<sup>246</sup> The court in *Mills* never indicated whether the evidence referred to existed. *Mills* thus appears to have stood for the very broad principle that interrogators could never confront suspects with evidence against them, a principle in sharp contrast with *Burley's* holding that interrogators could lie to suspects about the existence of evidence against them. With no New York case law on the issue, it was far from clear what specific methods of interrogation were permitted.

Notwithstanding ambiguity in aspects of the case law, deceit and trickery had long been presumed to be off-limits in New York. George Edwards' treatise for New York magistrates in 1830 had been very

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243. See 1 PHILLIPPS & AMOS, *supra* note 65, at 386 (citing *Burley's Case*, East 7, 1818).

244. *Rex v. Mills*, (1833) 6 Car. & P. 165, 172 Eng. Rep. 1183, 1183.

245. *Id.* It is not clear from the opinion whether the officer in *Mills* was being truthful in asserting that the witnesses would, in fact, make these statements. One contemporary treatise writer concluded that "[t]he circumstance that some deception has been practised, in order to obtain a prisoner's confession, will not render it the less receivable in evidence." 1 PHILLIPPS & AMOS, *supra* note 65, at 386. Phillips and Amos, however, do not mention the *Mills* case, and the cases they cite do not necessarily lead to this broad proposition. In three of the five cases, the trickery involved telling the suspect that evidence he provided would not be used against him. *Id.* (citing *Rex v. Thomas*, (1836) 173 Eng. Rep. 154, 154; *Rex v. Shaw*, 172 Eng. Rep. 1282). These cases just seem inconsistent with the bulk of the voluntariness cases decided during this era. In one of the cases they cite, the constable asked a suspect a question that clearly assumed her guilt. *Id.* It is hard to describe this case as involving trickery. In the final case Phillips and Amos cite for this proposition, a suspect confessed after an officer incorrectly told him that some of his accomplices were in custody in order to induce him to make a statement. *Id.* Phillips and Amos seem to have had a pro-prosecution leaning and excluded cases that were inconsistent with the conclusions they were drawing about the law. For another example, see discussion *supra* note 55. A modern American decision, *New York v. Quarles*, 467 U.S. 649, 673 (1984), concluded that confessions induced by trickery were never admissible in English criminal trials.

246. *Mills*, 172 Eng. Rep. at 1183. English courts, in modern times, continue to forbid officers from misrepresenting the evidence in interrogating witnesses. See Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH. J. INT'L L. 423, 441 (2001).

clear that providing a suspect incorrect information would render a subsequent confession inadmissible.

No improper influence, either by threat, promise, or misrepresentation, should be employed by the magistrate, or permitted by him; for, however slight the inducement may have been, a confession so obtained, cannot be received in evidence, on account of the uncertainty and doubt, whether it was not made rather from a motive of fear or interest, than from a sense of guilt.<sup>247</sup>

Subsequent editions of the treatise in 1834 and 1840 contained identical language.<sup>248</sup> This limitation seems consistent with the interpretation of the voluntariness rule as a protection against admitting unreliable confessions. Deceit, by its nature, is the most likely psychological interrogation tactic to produce a false confession.<sup>249</sup> Even the long-recognized prohibition on this tactic, however, would not survive the New York judiciary's reevaluation of the scope of the voluntariness rule.

The New York Court of Appeals in 1867 reached out in *dicta* to approve deceit, trickery, and other psychological interrogation techniques that would later be described in a manual on police interrogation, which in part compelled the Supreme Court to adopt the *Miranda* warnings.<sup>250</sup> The facts of *People v. Wentz* only required the court to consider whether an interrogator may ask questions that assumed a suspect's guilt.<sup>251</sup> The court, however, used the opinion as an opportunity to license the use of deceit and trickery in interrogations as Inbau and Reid would later recommend as a matter of routine in interrogations.<sup>252</sup>

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247. EDWARDS, *supra* note 84, at 211.

248. GEORGE C. EDWARDS, A TREATISE ON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE 211 (Ithaca, Mack & Andrus 2d ed. 1834); GEORGE C. EDWARDS, A TREATISE ON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE 217 (Ithaca, Mack, Andrus, & Woodruff 4th ed. 1840). I have not been able to locate a copy of the third edition but have no reason to believe that identical language would appear in the second and fourth editions but not in the third.

249. Modern commentators have, for some time, observed the relationship between deceit in interrogations and false confessions. See William T. Pizzi & Morris B. Hoffman, *Taking Miranda's Pulse*, 58 VAND. L. REV. 813, 841-42 (2005) ("[S]ome kinds of police trickery, though not rising to the level of unacceptable police misconduct, may be of the type likely to produce a false confession."); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 618 (1979) (observing that deceptive police practices should be understood as threats or promises).

250. See *People v. Wentz*, 37 N.Y. 303 (N.Y. 1867).

251. *Id.* at 304, 306.

252. See *id.* at 307; *Miranda v. Arizona*, 384 U.S. 436, 453 (1966) (citing INBAU & REID, *supra* note 204, at 58-59).

A policeman interrogated Frederick Wentz who was in jail on suspicion of arson.<sup>253</sup> Apparently, a number of arsons had been committed in his community and suspicion fell on Wentz.<sup>254</sup> The court described the policeman as someone who “did not have the prisoner in his charge,” suggesting that the officer was part of an emerging corps of detectives who would, by the end of the nineteenth century, routinely interrogate suspects.<sup>255</sup> The policeman told Wentz that he “was in a bad fix, and that he had got caught at last.”<sup>256</sup> He asked Wentz who else was involved in the fires.<sup>257</sup> Wentz, in response, asked the officer if he had arrested two other men, Delaney and Gray.<sup>258</sup> The officer asked if these men knew anything about the fires, and Wentz indicated that they did.<sup>259</sup> The officer then asked Wentz which of the fires he was first involved in.<sup>260</sup> Wentz told the officer that the fire at his father’s barn was his first and that the neighbor’s barn was his second.<sup>261</sup> The officer testified at the trial, as seems to have been common, that he held out no threats or inducements to the prisoner.<sup>262</sup>

The court observed that the officer’s questions, which assumed the defendant’s guilt, did not render the statement inadmissible.<sup>263</sup> This conclusion was pretty clearly true under existing law. New York courts had decided that statements assuming a defendant’s guilt were not considered likely to induce a false statement.<sup>264</sup> And an intermediate appellate court had determined earlier that same year that an officer’s statement to a prisoner that his case was “a hard one” did not involve a threat or inducement and therefore did not render the prisoner’s subsequent confession involuntary.<sup>265</sup> The issue before the court in *Wentz* did not require the court to chart any new ground. The court, however, drew a conclusion that was neither necessary to support its decision nor supported by the facts of any of the cases it cited. The court held that “a confession is admissible, although it is elicited in

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253. *Wentz*, 37 N.Y. at 303-04.

254. *See id.* at 304.

255. *Id.* at 303.

256. *Id.* at 304.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 307.

264. *Id.* at 306.

265. *O’Brien v. People*, 48 Barb. 274 (N.Y. Sup. Ct. 1867).

answer to a question which assumes the prisoner's guilt, *or is obtained by artifice or deception*.”<sup>266</sup>

A changed judicial attitude toward interrogation techniques seems to have led to the end of the warnings. The judiciary's attitude towards the confession rule changed almost immediately after elected judges began to consider the admissibility of confessions. While it is not clear that police were regularly warning suspects of their right to counsel and silence in the mid-nineteenth century, the police department did claim to be giving such warnings. And *Wentz* appears to have changed that. It is not clear how soon after the *Wentz* decision police officers stopped giving warnings. It is clear, however, that by 1875 the New York Police had no intention of cautioning suspects about their legal rights and, in serious cases, little interest in respecting the law that required a prompt appearance before a magistrate.

In a world without appointed counsel, it is difficult to gather enough information about interrogation practices to determine when police ceased giving suspects cautions and when they stopped complying with the prompt appearance statute. A high-profile case, in which the interrogated suspects were represented by a nineteenth century version of a celebrity lawyer, provides a rare glimpse into the interrogation practices in New York City police stations in 1875. On January 17, 1875, thirty-two messenger safes, containing approximately \$70,000 in bonds, were stolen from the Adams Express Company located at 59 Broadway.<sup>267</sup> Suspicion quickly focused on Daniel Haurey, a driver for Adams Express.<sup>268</sup> The company hired private detectives to investigate the matter, and Police Superintendent George Walling took a particular interest in the case assigning one of

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266. *Wentz*, 37 N.Y. at 306 (emphasis added). The court cited two cases for this proposition, each of which involved only questioning that assumed the defendant was guilty. *Id.* The court cited *Thorton's Case*, where an officer told a fourteen-year-old boy who had been held for an entire day without food, that he was certain that the suspect had committed the arson, and *Gibney's Case*, where the prisoner was asked by one officer “Did you kill the child?” and second officer then said, “Were you not a terrible man to do such a thing?”. *Id.* The court also, interestingly, cited *Regina v. Arnold*, (1838) 8 Car. & P. 622, 173 Eng. Rep. 645, the English decision in which Lord Denman held that an officer was required to caution a defendant about the right to remain silent—and the fact that his statements could be used against him—before his statements in custody would be admissible. *Wentz*, 37 N.Y. at 307. The court cited *Arnold* for the proposition that the voluntariness test was designed to ensure the reliability of confessions. *Id.*

267. *The Story of a Robbery: How the Adams Express Robbery Was Accomplished: The Detection of the Robbers—Recovery of Large Part of the Stolen Property*, N.Y. TRIBUNE, Feb. 9, 1875, at 2.

268. *Id.*

his best detectives, Dick King, to the matter.<sup>269</sup> Detective King discovered that Haurey, using the alias John Phillips, had been “keeping” two women, having recently provided each of them with large sums of money, groceries, and goods from Lord & Taylor.<sup>270</sup> Police arrested Haurey and his cronies John Sweeney and James Drew on Friday, February 5, 1875, hoping to get confessions from them.<sup>271</sup>

Certainly, George Walling was aware of the long-standing requirement that arrestees be taken promptly to a magistrate.<sup>272</sup> Walling, however, ordered that the suspects be placed in adjacent cells and discretely informed that the other was being held next to him.<sup>273</sup> The two began to talk to each other, the police eavesdropped, and as Walling reported in his memoirs, “the robbers, as usual, ‘gave themselves away.’”<sup>274</sup> It is clear, though, that Walling and others questioned the suspects over the three days of their confinement before their initial appearance before the magistrate on Monday.<sup>275</sup>

Shortly after the arrest, Sweeney’s sister, using proceeds from the robbery, retained Oakey Hall, former district attorney and mayor of New York, to represent the three men.<sup>276</sup> Hall’s term as mayor ended in 1873 under a shroud of controversy after it was alleged that he was part of the Tweed Ring that bilked the City of New York out of millions of dollars for the grossly inflated costs of constructing a new courthouse.<sup>277</sup> Boss Tweed was convicted of corruption and died in prison, and Oakey Hall, the youngest district attorney in New York history who had won the mayoral contest by a landslide, was prosecuted three times for his alleged involvement.<sup>278</sup> Twice juries acquitted him; the third jury deadlocked, and his case was never

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269. *Id.*

270. *Id.*

271. *Id.*; *Vigorous Charges Against the Police Department*, *supra* note 235, at 10.

272. In his memoirs, George Walling admitted that he “purposely and deliberately” violated the prompt appearance requirement. GEORGE W. WALLING, RECOLLECTIONS OF A NEW YORK CHIEF OF POLICE 223 (1887).

273. *Id.* at 222.

274. *Id.*

275. *Superintendent Walling: His Trial Before the Police Board*, *supra* note 24, at 10.

276. *Local Miscellany: Superintendent Walling’s Trial*, N.Y. TRIBUNE, Mar. 13, 1875, at 12 [hereinafter *Local Miscellany*]. Sweeney had given his sister a package of the stolen money and told her that if he should get into trouble that she was to use the money to hire him a lawyer. *Id.*

277. See KENNETH D. ACKERMAN, BOSS TWEED: THE RISE AND FALL OF THE CORRUPT POL WHO CONCEIVED THE SOUL OF MODERN NEW YORK 268 (2005); HERSHKOWITZ, *supra* note 171, at 207-33.

278. Lee, *supra* note 171, at 20, 79.

retried.<sup>279</sup> After leaving the mayor's office, Hall returned to the private practice of law, specializing in criminal defense and other matters for which his tenure in city government had given him expertise.<sup>280</sup>

Hall was a colorful personality in his demeanor and his attire. He was noted for his flamboyant dress and his oratory skill.<sup>281</sup> A newspaper reporter in New Orleans, an editor of the *New York World*, an actor, and a playwright, Hall's prominence in the New York community was dimmed, but certainly not destroyed, by the convictions of his former Tammany Hall associates.<sup>282</sup> Hall's undeniable legal talent and very public profile ensured that his challenge to the interrogation practices of Superintendent Walling would come under intense scrutiny, both in the courts and in the media.

Hall drafted a letter to his new client and instructed Margaret Sweeney, sister of one of the suspects, on Saturday, to deliver it to him at the police station.<sup>283</sup> Doubtless the letter advised the suspect to refrain from saying anything to the police. At the station, Ms. Sweeney met with Superintendent Walling, who refused to let her see her brother and refused to deliver Hall's letter.<sup>284</sup> Margaret Sweeney, apparently acting on Hall's direction, further insisted that he take the suspects immediately before a magistrate.<sup>285</sup> Walling refused all of her requests.<sup>286</sup> He told the woman that he would keep her brother detained

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279. *Id.* at 203-20.

280. On January 10, 1876, Oakey Hall relocated his law office from 291 Broadway to the Tribune Building. He sent out a card indicating the relocation of his office, which indicated that he would "hereafter confine himself as ADVOCATE to the following SPECIALTIES: Cases connected with Criminal Law, Personal Remedies, Libel Defences, Actions Against Sheriffs and Marshals, Copyright and Theatrical Law, Surrogate Procedure and Municipal matters." The announcement further noted that he would "As COUNSEL, specially take charge of questions affected by Commercial Fraud, Police Investigations, Attempts at Social Extortion, or which require Diplomatic Negotiations." See Oakey Hall, Announcement in Miscellaneous Papers, Mss. and Legal Papers (1875) (on file with New York Public Library).

281. CROSWELL BOWEN, *THE ELEGANT OAKEY* 3-4 (1956).

282. *Id.* at 198-282 (providing account of Hall's life after the third trial).

283. *Vigorous Charges*, *supra* note 235.

284. *Local Miscellany*, *supra* note 276.

285. *Id.*

286. *Id.* The plight of these defendants is obviously analogous to the circumstances surrounding the interrogation of Danny Escobedo, which the Supreme Court found to violate the Due Process Clause of the United States Constitution. *Escobedo v. Illinois*, 378 U.S. 478, 480 (1964). *Id.* Escobedo's lawyer was in the police station attempting to see him. *Id.* The police did not let Escobedo see his lawyer and did not advise Escobedo that he had a right to see his attorney. *Id.* There is no evidence in Hall's case, though, that his clients were asking to see him, though one of his clients, Sweeney, had given his sister money to retain a lawyer

“as long as he saw fit” and that if the lawyer interfered, he would send her brother and Hall to the state prison.<sup>287</sup> When the suspects were presented to the magistrate on the following Monday, Superintendent Walling had secured his confession.<sup>288</sup>

On Tuesday morning, February 9, Hall wrote a letter to Mayor William H. Wickham complaining about the treatment of his clients and bringing charges against Commissioner Walling and the other officers involved in the interrogation.<sup>289</sup> Hall complained that Walling failed to comply with the requirement that an arrested suspect be immediately brought before a magistrate, even though magistrates were sitting during his client’s detention.<sup>290</sup> Hall further observed that police interrogation of suspects in custody, without first giving them a warning that they were not required to answer questions, was clearly contrary to recent decisions of English courts.<sup>291</sup> English judges, Hall noted, had concluded that because magistrates were required to warn suspects of the consequences of giving a statement—even a statement the suspect believed to be helpful to his case—police officers were similarly required to give such warnings.<sup>292</sup>

Under the procedures established by the 1864 Act, which provided for a sanction for failure to comply with the prompt appearance requirement, the police commissioners conducted a trial to

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in the event he was arrested. *Local Miscellany*, *supra* note 276. So it actually seems possible that at least one of the suspects made that request.

287. *Vigorous Charges*, *supra* note 235.

288. *Trial of Mr. Walling*, N.Y. WORLD, Mar. 13, 1875, at 8. On Sunday morning, February 7, Superintendent Walling dispatched Detective King to Oakey Hall’s residence with a note instructing him that his client would be brought before the magistrate the following morning. *Id.* Walling testified that he instructed King to “hurry up for fear that Mr. Hall should be at church.” *Id.* This led to a comic moment in Walling’s trial for failure to comply with the prompt appearance requirement. Hall had only one question for Walling on cross-examination: “Did I understand you to say ‘fearing’ I should be at church?” *Id.*

289. *Charges Against the Commissioners*, *supra* note 172; *Charges Against the Police Board*, N.Y. TRIBUNE, Feb. 12, 1875, at 10; *Vigorous Charges*, *supra* note 235. The contents of this letter have to be taken from the various newspaper accounts, none of which appear to have a verbatim text of the entire letter.

290. *Vigorous Charges*, *supra* note 235.

291. *Charges Against the Commissioners*, *supra* note 172.

292. *Id.* Hall’s description of the state of English law appears to be accurate. Laurence Benner observes that in 1854, an English trial court refused to accept an unwarned statement given to an officer by a suspect who was not even in custody. *See* Benner, *supra* note 56, at 103 (citing *Regina v. Berriman*, (1854) 6 Cox C.C. 388, 389). Nine years later, an English trial court suggested that any questioning by police officers was inappropriate. *Id.* (citing *Regina v. Mick*, (1863) 176 Eng. Rep. 376, 376). In 1872, another English trial judge would observe that “after the prisoner is taken into custody it is not the duty of the police-constable to ask questions.” *Id.* at 104 n.192 (citing *Regina v. Reason*, (1853) 12 Cox C.C. 228, 229).

determine whether Superintendent Walling had violated the statute.<sup>293</sup> Walling admitted that he had violated the act but believed that it was his duty to do so in order to “detain the prisoners until I could procure the witnesses necessary to secure a conviction.”<sup>294</sup> Oakey Hall cross-examined Walling at the trial.<sup>295</sup> Hall asked whether Walling had given the suspects warnings about their rights to silence and counsel, which they would have received had they been properly taken to a magistrate.<sup>296</sup> Walling asserted that police were not required to give the statutorily required cautions, which were enacted before police began to interrogate suspects routinely and, by their terms, applied only to magistrates.<sup>297</sup> “I don’t think it is the duty of the Police to warn prisoners not to make any statement that might be used against them; there is no statute which makes it the duty of the Police to do so,” Walling responded.<sup>298</sup>

Walling could not have made a more brazen defense. He did not suggest that circumstances unique to this case kept him from complying with the prompt appearance requirement or that this case particularly required resolution. He argued that it was his duty to disregard the prompt appearance rule whenever complying with it would impair his ability to obtain a confession, which would arguably be true in every case in which the suspect did not immediately confess.<sup>299</sup> Given his defense, it is not remarkable that the Police Board found him to be in violation of the statute.<sup>300</sup> It is, however, remarkable that the Board imposed the minimum possible fine: ten days of his salary, a slap on the wrist for a violation of which he boasted and had all but vowed to repeat.<sup>301</sup>

Neither the New York legislature, nor the Mayor of New York, took the opportunity to criticize this blatant disregard of the law, even though both vigorously attacked the police commissioners on other grounds in the months that followed. In August 1875, a legislative

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293. The 1864 Act providing for the administrative fine for failing to comply with the prompt appearance requirement was made a part of the New York City Charter in 1870. 1870 N.Y. Laws (Apr. 5, 1870). When the City Charter was rewritten in 1873, this provision remained. 1873 N.Y. Laws 335, § 52.

294. *Superintendent Walling: His Trial Before the Police Board*, *supra* note 24, at 10.

295. *Id.*

296. *See id.*

297. *See id.*

298. *Id.*

299. *Id.*

300. WALLING, *supra* note 272, at 222-23.

301. *See id.*

committee on crime presented formal charges against the police.<sup>302</sup> The frivolity of some of the charges reveal that they were clearly brought by enemies of the sitting police commissioners looking for any possible charge. The president of the police board, George Matsell, was attacked, for instance, for the immorality he displayed in publishing a newspaper article describing the crime in the city.<sup>303</sup> In the charges, John Townsend, counsel for the committee described the newspaper as “a periodical . . . catering to the taste for vice and crime.”<sup>304</sup> Legitimate charges were brought as describing specific acts of police brutality, dereliction of duty, and misappropriation of property.<sup>305</sup> No mention was made of Walling’s well-publicized trial, though the charges did allege that the Police Commissioners had failed to make “[r]ules to prevent the undue detention of prisoners” contrary to the statute requiring prompt appearance.<sup>306</sup>

Initially, it certainly appears that the legislative committee was concerned about the recent assertions by Commissioner Walling. A closer look at the context reveals, however, that the legislature was merely using this charge to capitalize on recent events to lengthen the list of charges against certain members of the Police Board. The charges were brought against three members of the Board, but not against Walling.<sup>307</sup> If the legislature was truly concerned about interrogation practices, Walling, the only member of the Board to have been publicly implicated in an interrogation controversy, would have been charged.<sup>308</sup> And when Mayor William H. Wickham presented the charges to the Board, he apparently told them privately not to address the issues that had been raised previously by Oakey Hall.<sup>309</sup> These were obviously the charges relating to abuses in the interrogation process.

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302. *The Police Commission: The Expected Charges Made*, N.Y. TIMES, Aug. 21, 1875, at 8 [hereinafter *The Police Commission*].

303. See John D. Townsend, *Charges Against the Municipal Police Board*, Aug. 19, 1875, at 4, in Papers of Mayor William H. Wickham (on file in the New York Municipal Archives).

304. See *id.*

305. *Id.* at 2-10.

306. *Id.* at 3.

307. See *The Police Commission*, *supra* note 302.

308. *Id.*

309. See Letter from Abraham Disbecker to William H. Wickham, Mayor of New York (Oct. 14, 1875), in Papers of William H. Wickham, *supra* note 303.

The charges were successful in producing the resignations of members of the Board.<sup>310</sup> This was the goal of the committee and the mayor, not the improvement of interrogation techniques that were exposed by Walling's testimony. When this same legislative committee wrote its report in February, no mention was made of failures to comply with the prompt appearance requirement or improper interrogation techniques. And certainly no concern was expressed that police were not warning suspects before interrogating them. To the contrary, the committee endorsed more rigorous interrogation methods by magistrates. The committee complained that magistrates had not complied with "the plain letter of the statute governing the examination of prisoners."<sup>311</sup> When defendants, personally or through counsel, indicated that they did not wish to be examined, magistrates, the committee complained, merely recorded the prisoner's name and age and noted that he had waived examination.<sup>312</sup> Such a result was not intended by those who framed the statute, the committee concluded.<sup>313</sup> The committee concluded that the defendant had a right to refuse to answer individual questions, but did not have a right to preclude any questions from being asked:

It was designed that the prisoner should have no right of waiving examination, although, of course, he could not be constrained to answer any question unless he felt disposed so to do; but it was the duty of the magistrate to examine him rigorously as to the circumstances of the case . . . .<sup>314</sup>

Perhaps most remarkably, the Committee concluded that the statute providing for the magistrate's pretrial examination of suspects was intended to inject a measure of the continental inquisitorial justice

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310. *The Police Board Crisis: Explanation of the Resignations of Commissioners Smith and Voorhis*, N.Y. TIMES, Oct. 11, 1875, at 8.

311. N.Y. ASSEMB. SELECT COMM. APPOINTED BY THE ASSEMB. OF 1875 TO INVESTIGATE THE CAUSES OF THE INCREASE OF CRIME IN THE CITY OF N.Y., REP. NO. 106, at 39 (1876).

312. *Id.*

313. *Id.* The intent of the statute's framers would actually be quite difficult to parse. The origin of the statute is the Marian Pretrial Examination Statute of 1555, which was adopted by the New York Legislature in 1787. The 1829 statutory revision added a caution that a defendant was not required to speak, but it was consistent with the practice of magistrates to give this caution since the turn of the nineteenth century. Identifying "those who framed the statute" would, first, be no easy task. Second, the practice of accepting the defendant's invocation of his right to silence without further comment, or allowing the defendant to make an exculpatory statement in the narrative form, with minimal questioning from the judge, seems to have long been the practice under the statute. Divining a different intent from the framers of this statute would be no simple task.

314. *Id.* at 39-40.

system into the Anglo-American adversarial system. “The object apparently intended by the law-makers was to give the magistrate a power of cross examination, so to speak, something like that possessed by a *juge d’instruction* in France, excepting that the prisoner here may have the presence of counsel if he desires.”<sup>315</sup>

This characterization of the pretrial examination had been expressly rejected by the Commissioners who included a provision for maintaining the pretrial examination in the Code of Criminal Procedure that they unsuccessfully proposed in 1849, 1850, and 1855.<sup>316</sup> Aggressive questioning by magistrates had been rejected by the commissioners as an abusive process permitted on the Continent, but not part of the Anglo-American criminal justice system.<sup>317</sup> The 1875 commission’s invocation of the continental model can only be interpreted as an attempt to permit more vigorous interrogations than had previously been contemplated by the legislature.

The committee was aware that police were taking over the magistrate’s role of interrogating suspects and that the police were not giving the warnings magistrates were required to give. Superintendent Walling had made the interrogation practices of the Municipal Police very clear. Rather than require the police to follow the statutory procedures mandated before magistrates’ interrogations, the committee proposed that magistrates be permitted to operate more like Walling’s police force.<sup>318</sup> But of course, the legislature could now consider permitting more aggressive interrogation practices, with fewer procedural protections, as courts had recently signaled their reluctance to find that confessions had been extracted by hope or fear.

Concern about an increase in crime is certainly one way of explaining this reinterpretation of a magistrate’s appropriate role in conducting a preliminary examination. It does not, however, explain the timing of this proposal. Crime had been a political issue throughout the nineteenth century, when frequent investigations of the various incarnations of the New York Police Department had sought to determine why crime had not been sufficiently suppressed.<sup>319</sup> Until 1876, however, there was no proposal to permit more aggressive questioning of suspects by magistrates. And the legislatively required

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315. *Id.*

316. N.Y. CODE CRIM. PROC. 99-101 (1829).

317. *Id.* at 99.

318. *See id.*

319. *See* MILLER, *supra* note 106, at 60-61, 70-71.

*Miranda*-like warnings at preliminary hearings had been uncontroversial for a half-century.

After the judiciary's reinterpretation of the voluntariness rule, cautioning suspects before interrogation, which Jeremy Bentham described as treating suspects too tenderly, came with a cost, but no benefit.<sup>320</sup> Bentham seemed to miss the point that magistrates were actually preserving evidence by cautioning suspects that they did not have to give testimony. This was no longer true in the latter part of the nineteenth century, when much more coercive interrogations could be conducted without fear of losing evidence. In 1829, when courts were readily excluding evidence as involuntarily obtained, the warning embraced by the courts struck a middle ground between the very strict confessions rule and the law enforcement interest in unrestricted interrogations. Once police were given substantial leeway to use psychological interrogation techniques, the warnings were no longer a middle ground and potentially hampered law enforcement efforts.

## V. CONCLUSION

Magistrates in the early nineteenth century preferred the risk that suspects would exercise their right to silence than gamble that a confession without the warning would be excluded. This calculation depended, of course, on a rule of evidence, fashioned and applied by an appointed judiciary, that made the exclusion of a confession a very real possibility. A shift to an elected judiciary began a retreat from this rule of evidence and changed the calculation for interrogators.

The Supreme Court's decision in *Miranda v. Arizona* is, in large measure, this story in reverse. The Court in the 1950s and 1960s was increasingly scrutinizing the voluntariness of confessions. But rather than reach a level of scrutiny under the voluntariness rule that regularly threatened the admissibility of confessions, the Court adopted a method of regulation that history reveals is preferred by the law enforcement community—warnings.

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320. See discussion of BENTHAM, *supra* note 91 and accompanying text.