Silence, Speech, and the Paradox of the Right to Remain Silent in American Police Interrogation

Janet Ainsworth

The right to remain silent has long been regarded as one of the most cherished and fundamental principles of American criminal jurisprudence, one with a venerable history stretching back centuries to the English struggle to resist the tyranny of the Star Chamber, which compelled those brought before it to answer accusations or be flogged until they did so. Colonial Americans were just as insistent as their British cousins on the importance of a right against self-incrimination; upon independence, every state constitution incorporated guarantees against compelled self-incrimination even prior to the adoption of the federal Bill of Rights. In contemporary jurisprudence, the right to remain silent has been valorized as foundational to human dignity and to human expressive freedom. The right to remain silent is also likely the criminal law doctrine most recognized by the American general public. In fact, given the worldwide marketing of American movies and television dramas, the Miranda warning, beginning, "You have the right to remain silent," may well be the single most widely known principle of criminal law in the world. Little wonder that even conservative Supreme Court Chief Justice William Rehnquist—no friend to expansive constitutional protections in the criminal context—had to admit that the Miranda formulation of the right to remain silent had become an indelible part of the fabric of American culture. Yet, despite both its deep roots in American legal history and its entrenched status in current popular culture, the right to silence as articulated in Miranda has in recent years been subject to a barrage of judicial limitations, qualifications, and exceptions to the point where it currently can scarcely be said to provide any meaningful constraint on police interrogation at all.

1. The origins of the *Miranda* rule

Throughout the early twentieth century, the Supreme Court struggled with the question of how to constitutionally regulate police practices that undermined civil liberties and threatened to result in the conviction of innocents. In the context of police interrogation, the Court was confronted with cases in which abusive police interrogation methods led to convictions of accused persons who were probably entirely innocent. In addition, the exposure of brutal police interrogation techniques that in effect constituted government-sanctioned torture was increasingly troubling to a nation that was coming to define its national mission as the international promotion of human rights and freedom. An early Supreme Court attempt to constrain coercive police interrogations was by applying the Fourteenth Amendment’s Due Process Clause to prohibit the admission of confessions extracted as a result of beating, whipping, and partial lynching of suspects, holding that the confessions obtained in this manner were involuntary and thus inadmissible because they were the product of police violence and threats during interrogation. Later on, the Court extended its due process analysis to prohibit interrogations that, while not overtly violent, nevertheless appeared to overbear the free will of the suspect through unfair and over-reaching police tactics. In doing so, the Supreme Court noted that involuntary confessions carried with them the risk of unreliability, but it declared that the reason to constitutionally prohibit such interrogations went beyond mere instrumentality:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooting feeling that the police must obey the law while enforcing the law; that in the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

The problem with a due-process-based voluntariness test for the admissibility of confessions, however, is that it required a case-by-case contextual analysis of both the circumstances of each interrogation and the personal characteristics of each suspect—a virtually insurmountable practical challenge for courts attempting to ensure consistent application of the constitutional voluntariness test. In addition, once the voluntariness test was expanded to prohibit over-reaching but non-violent forms of police interrogation, the context-sensitive constitutional voluntariness requirement gave little guidance to the police about what kinds of interrogation techniques might be later found to be constitutionally flawed. Clearly, a test that provided greater certainty to both the police and lower courts was imperative. After a brief flirtation with using the Sixth Amendment right to counsel to provide protections during police questioning, the Supreme Court settled on a Fifth Amendment approach, based on the right against self-incrimination, in *Miranda v. Arizona*.

---

5 *Brown v. Mississippi*, 297 U.S. 278 (1936). The confessions procured from the defendants in that case were the sole evidence used to convict them of capital murder.
6 *Spano v. New York*, 360 U.S. 315 (1959). The confession in that case resulted from an interrogation lasting nearly eight hours, in which the suspect was grilled by more than a dozen officers, including an officer who had been a friend of the suspect’s in school, who lied and told Spano that if he failed to cooperate with the police, he, the friend, would lose his police job. The Court also considered the suspect’s personal background—that he was foreign born, relatively uneducated, emotionally unstable, and unfamiliar with police practices. The combination of all of these factors led the Court to find his confession involuntary and thus inadmissible.
The *Miranda* Court intended to substitute front-end protections against potentially abusive and coercive police questioning for the after-the-fact assessment of coercion required by the voluntariness test for admissibility. The Supreme Court acknowledged that physical coercion during interrogation had thankfully become rare, but it recognized that less brutal interrogation tactics designed to trick, intimidate, pressure, coax, and cajole had an equal capacity to result in potentially unreliable confessions. If the right against self-incrimination—and the attendant right to remain silent under interrogation—meant nothing more than that the police could not forcibly compel someone to answer questions, then only exceptionally strong individuals able to withstand the psychologically grueling gauntlet of protracted interrogation could meaningfully exercise that right. The *Miranda* Court fully understood that such a narrow reading of the right to remain silent would render it practically unavailable to the vast majority of people.

Rather than focusing on specific problematic aspects of individual interrogations, as the context-sensitive voluntariness test had, the *Miranda* Court examined the structural dynamics of police interrogation in the abstract. The *Miranda* majority discussed in some detail the interrogation techniques incorporated in the influential Inbau and Reid manual for law enforcement interrogation. The practices recommended by Inbau and Reid were all based on a presumption that the suspect was guilty, such that the only job of the interrogator was to procure a confession rather than to objectively investigate the facts of the case. The *Miranda* majority expressed alarm at the psychologically manipulative, coercive, and deceptive interrogation techniques recommended in what had become the bible of interrogation for American law enforcement.

Understanding what it saw as the inherently coercive context of custodial interrogation, the *Miranda* Court provided what it believed to be a crucial enforcement mechanism for those who wished to avail themselves of the constitutional right to remain silent by requiring warnings prior to interrogation informing the arrestee of the right not to answer questions and providing access to legal counsel for advice on whether to exercise that right. The required warnings were intended to ensure that suspects in custody understood what rights and options they had during police questioning, and that they would therefore be in a position to make rational and informed choices about whether or not to answer police questions. Voluntariness, under this regime, could now be presumed as long as suspects in custody understood their rights and were given the ability to exercise them if desired.

In a later case interpreting the scope of the *Miranda* rule, the Supreme Court made clear that interrogation must end, at least for a period of time, whenever the suspect exercised the right to remain silent. *Mosley* made explicit what *Miranda* impliedly promised—those who wanted to claim the constitutional right to remain silent could do so and thereby immediately put an end to unwanted interrogation. The *Mosley* Court called the suspect's right to cut off questioning a "critical safeguard" of the right to remain silent. Abusive and coercive interrogation tactics could thus be countered whenever the suspect needed to call a halt to them.

Given this legal framework, logically there would be two ways in which someone undergoing police interrogation might attempt to exercise the right to remain silent provided under the *Miranda-Mosley* doctrine: either by not verbally responding to police questioning—literally remaining silent—or by verbally articulating their wish to...
exercise the right to remain silent. As it has turned out, however, neither of these potential choices is likely to be legally efficacious in practice.

2. Remaining silent as an exercise of the right to remain silent

2.1. A linguistic consideration of the meaning of silence

Language researchers analyzing verbal communication might be thought to have little to say about silence—that is, the absence of verbal expression. After all, those analyzing meaning in written texts ordinarily concentrate on the symbols making up the text, not on the blank spaces surrounding them. Silence in communicative interaction, however, is not just the "blank space" setting off the audible elements of spoken utterances. William Samarin once compared the significance of silence within speech to the importance of zero within mathematics; neither silence nor zero should be considered as an absence without meaning, but rather as an absence with functional meaning.13 Speech and silence mutually frame each other in discourse, with this reciprocal contextual framing giving both speech and silence their fullest meaning.14 Within interpersonal interactions, silence can serve a multitude of communicative functions—semantic, pragmatic, and socio-pragmatic.15 In fact, consideration of silence is so crucial to interactional analyses grounded in Conversational Analysis that its transcription conventions measure pauses to tenths of a second, with micro-silences too short to measure indicated in transcription by the use of dots.16

The meaning of silence, like other linguistic practices, is context-dependent, with interpretation of silence impossible without the interactional context that provides its meaning.17 Silence only becomes a communicative act when it occurs within a communicative context—that is, within a structured interaction governed by context-dependent social norms.18 Thus, silence can only be accorded meaning in the light of its communicative context. In that regard, one must distinguish between silence that serves to structure speech through the absence of sound—the "white space on the page between the symbols" sort of silence—and silence that has specific communicative content within the discursive context; that is, silence that can itself bear interpretive meaning.19

Understanding the meaning of being silent in this particular context—police interrogation—is furthered by consideration of what H. P. Grice called the rules of

14 Penelope Eckert and Sally McConnell-Ginet, Language and Gender (Cambridge, UK: Cambridge University Press, 2003), 119.
conversational implicature.20 The interpretive conventions identified by Grice posit that communicative interaction is a rule-governed activity, with participants interpreting each other’s responses as relevant both to the context of the situation and to what has been said earlier in the interaction. For example, imagine the following exchange between friends: “Hey, I have two tickets to tonight’s concert.” “Oh, too bad I have to work late.” On the surface, these appear to be non-sequiturs—one a statement about the possession of tickets and one about a work schedule. But, given the conventions of conversational implicature, the utterance about tickets should be construed as relevant to the hearer, and thus likely to be an indirect invitation to attend the concert with the speaker. The response is also best interpreted as relevant and responsive, that is, as ruefully declining the offer on the basis of a scheduling conflict. Interpretations like this one occur constantly in interactional discourse, generally without conscious awareness by the participants. A literal reading of the meaning of the exchange would distort the actual intended and understood meaning of the parties.

The interpretation of the meaning of silence in contexts marked by power asymmetries between the parties to the interaction must further take into account the fact that the more powerless party may be constrained in his responses and limited in his range of interactional options.21 Police interrogation, obviously, is a context marked by extraordinary power asymmetry between the suspect and the interrogators. Alone, isolated, and unable to leave, the arrestee in police custody is physically and psychologically at the mercy of the interrogation team. Engaging in even the simplest normal human activities—eating, sleeping, smoking, using the bathroom—is now totally within the control of and at the discretion of the interrogating officers. The arrestee cannot control the timing or duration of the interrogation. Once questioning begins, its tone and tempo are set unilaterally by the interrogators, who decide what topics will be entertained and what responses will be considered satisfactory. It is difficult to conceive of a more one-sided interaction with a higher degree of power asymmetry than a custodial police interrogation. In such a situation, the range of available responses to police accusations by the arrested suspect is severely limited. Adding to this power asymmetry is the fact that the arrestee must be acutely conscious of the fact that interrogation is a high-stakes interaction in which life-changing consequences could follow from the interrogation. Therefore, appropriate interpretation of the meaning of responses of an arrestee during police interrogation must take into account both the normal contextualized processes entailed by Gricean implicature as well as special consideration of the power asymmetries inherent in the interrogation context. As will be seen, however, courts routinely fail utterly in both of these regards in assessing whether suspects invoked the right to remain silent.

3. Berghuis v. Thompkins and its consequences for the right to remain silent

Having been told that “you have the right to remain silent,” an arrested person might well think that the wisest course would be to do just that—not to say anything in response to police questioning. Silence by an arrestee after being given the Miranda warning

20 His most prominent essays articulating the function of conversational implicature are collected in H. P. Grice, Studies in the Way of Words (Cambridge, Mass.: Harvard University Press, 1989).

that "you have the right to remain silent and anything you say can be used against you" should logically be understood in terms of Gricean implicature as relevant and responsive to that warning. If remaining silent were so interpreted and thus legally construed as an exercise of the right to remain silent, then, under the Miranda-Mosley framework, interrogation would have to stop once it became clear that the arrestee did not wish to respond to questioning. Officers who continued to interrogate in the face of the claim of the right to remain silent would then be violating that asserted right, and any statements later obtained would be inadmissible.

Before 2010, appellate courts had split on the question of whether a suspect could invoke the right to silence—and thus end police questioning—simply by being consistently silent, but in that year the Supreme Court held in a 5–4 opinion that the only way in which an arrestee could exercise the Miranda-guaranteed right to remain silent was by affirmatively speaking and claiming that right. In Berghuis, the defendant Thompkins was arrested on suspicion of involvement in a year-old murder case. Two officers began to interrogate him on the charge, first reading him his rights from a written Miranda form which they asked him to sign. Thompkins refused to do so. Although the police station where the interrogation took place had recording equipment, it was not used in this case. The interrogators did not ask Thompkins whether he wished to waive his Miranda rights and speak with them, but instead simply launched into an interrogation that lasted nearly three hours. Evidence of what transpired during the interrogation is sparse, based on the testimony of the interrogating officers at two court hearings held in connection with the prosecution. Both officers agreed in their testimony that Thompkins remained essentially silent during a barrage of questioning in which Thompkins was alternately accused of being the shooter, cajoled to cooperate for leniency, and warned about the dire consequences of not providing his side of the story to the police. None of these tactics got a response from Thompkins, whom the officers described in their testimony as "not verbally communicative," mainly saying nothing and sitting "with his head in his hands looking down."

Occasionally, his response to a question or accusation was to "look up and make eye contact," or to make a brief response, a "yeah" or "no" or "I don't know." One of the officers candidly conceded that the interrogation was essentially "a monologue" by the officers, in which they were unable to "elicit any admissions or denials, for that matter... any sort of reaction" from Thompkins at all. The only specific comments made during the interrogation that either officer could recall were that Thompkins declined the offer of a peppermint and at another point complained that the chair in which he was sitting was hard. Nearly three hours into this one-sided interrogation, the officers switched tactics and asked Thompkins if he believed in God and if he prayed to God. Thompkins answered both questions in the affirmative. He was then asked if he prayed for forgiveness for shooting the victim, and he replied with the single word, "Yes." That single-word confession was admitted at trial over his objection that the interrogation had violated his Miranda rights by continuing for hours despite his exercise of his right to remain silent by not answering questions.

The Berghuis majority disagreed that Thompkins had ever effectively invoked his right to remain silent during the interrogation. His steadfast refusal to engage with the interrogating officers, no matter how long maintained, was legally insufficient to count:

23 Berghuis v. Thompkins (cited in n.22), 2287.
24 Thompkins v. Berghuis, 547 F.3d 572, 576 (6th Cir. 2008).
as an exercise of the right to remain silent, they held. In fact, simply remaining silent under police questioning could never constitute a legally valid invocation of the constitutional right to remain silent, according to the Berghuis majority opinion. Despite the fact that a reasonable person, hearing the warning "You have the right to remain silent, and anything you say can be used against you" might assume that being silent in the face of police questioning would be the quintessential example of how to exercise the constitutional right to remain silent, the Berghuis majority instead mandated that the only legally valid way to exercise the right to remain silent is, paradoxically, to speak and invoke the right to remain silent explicitly.

4. Speaking to claim the right to remain silent

While Berghuis made clear that only a verbal invocation of the right to remain silent will be legally efficacious in claiming that constitutional protection during police interrogation, the Berghuis majority went on in its opinion to stringently prescribe the manner in which such a verbal invocation must be made in order to count as an invocation at all. According to the Berghuis Court, only a clear, unambiguous, and unequivocal exercise of the right to remain silent by the arrestee will count as a legally efficacious invocation. While that may sound reasonable in the abstract, in practice, courts have applied this rule by using hyper-literal parsing of invocations and ignoring normal Gricean implied meanings. As a canvassing of appellate case law will demonstrate, this cramped and narrow approach to understanding attempts to invoke rights makes it nearly impossible for suspects undergoing police interrogation to successfully exercise their rights.

When arrestees attempt to claim the right to remain silent, any linguistic features of their invocations that in any way modify or mitigate a bald assertion of the right will be seized upon by judges to disqualify the invocation and render it legally void. For example, those who soften their exercise of their constitutional rights with language like "I think" will fail to have their invocations respected:

- "I just don't think I should say anything." 26
- "You all are scaring me, I think, yeah, I shouldn't say anymore." 27
- "I think it's about time for me to stop talking." 28
- When asked if he would agree to answer police questions, "Naw, I don't think so." 29

Beginning an imperative statement with expressions like "I think" is commonly used as a way to soften the baldness of imperative demands, without in any way suggesting that the demand is equivocal. For example, the restaurant patron who tells the waiter

25 Prior to Berghuis, many state courts and federal circuits were already requiring suspects to explicitly claim the right to remain silent in an unambiguous and unequivocal manner—a doctrine that the Supreme Court has now mandated that all American courts must utilize.

26 Burkhart v. Angelone, 208 F.3d 172 (4th Cir. 2000).


30 The germinal work detailing use of language that literally appears to be hedging, but that is not intended by the speaker to be equivocal or ambiguous, but rather to express deference or politeness, is Penelope Brown and Stephen C. Levinson, Politeness: Some Universals in Language Use (Cambridge, UK: Cambridge University Press, 1987), 129–71. The use of hedges such as "I think" or "maybe" acts to soften the imposition on the addressee that an imperative would have in the absence of these politeness tokens.
“I think I’ll have the steak” is certainly not expressing uncertainty about what she is ordering. Instead, by softening the order with the lexical hedge “I think,” the customer is mitigating the aggressive edge that an unmitigated demand might otherwise entail. This avoidance of naked imperatives is particularly likely in communicative contexts marked by power asymmetry, in which an unmodified demand by the more powerless speaker would appear presumptuous at best and offensive, even provocative, at worst. However, appellate courts in each of the above cases held that adding the softening “I think” to the invocations here rendered them ambiguous or equivocal, and consequently legally ineffective.

Including a temporal specification was similarly fatal to the attempts by these defendants to invoke their rights:

- “I don’t think I can talk. I guess I don’t want to discuss it right now.”
- “I don’t want to talk about it right now.”
- Officer: “Are you telling me you don’t want to talk to me anymore, John?”
  Defendant: “Not right now. Y’ all tryin’ to pressure this on me.”

Adding any reasons to an attempt to invoke the right to remain silent doomed these defendants trying to exercise their constitutional rights:

- “I really can’t say no more right now. My head is splitting, I need some rest, I really do,” with police responding “Yes, you can. It’s got to come out. It’s going to kill you if it doesn’t.”
- By a developmentally disabled arrestee: “I don’t want to talk about it. I’m tired.”
- “I really don’t want to talk about it. I mean, I ain’t the one that did it.”
- “I don’t even like talking about it, man... I mean, I don’t even want to, you know what I’m saying, discuss no more about it, man.”

Preceding the invocation with an “if” clause rendered the following invocation legally void:

- “Okay, if you’re implying that I’ve done it, I wish to not say any more. I’d like to be done with this. Cause that’s just ridiculous. I wish I’d... I don’t wish to answer any more questions.”

The Deen court found the invocation in that case to be equivocal because it began with the stipulation that the defendant only wanted to claim the right to remain silent under the condition that the police were insinuating his guilt. The fact that, in this case, the
police indeed were implying he had “done it” did not save his invocation from being disallowed as insufficiently clear and unequivocal.

Some courts interpreted attempts to invoke the right to be silent as ineffective because the arrestee phrased the invocation as unwillingness to make a statement but not separately articulating an unwillingness to answer questions:

- Officer: “Do you want to make a statement to us?” Arrestee: “Nope.”40
- Officer: “Do you want to make a statement now?” Arrestee: “No.”41
- “No, I do not want to declare anything. I just, I do not want to declare anything.”42

In each of these cases, the invocations were held to be unclear—and thus legally meaningless—because the courts thought that it was possible that the suspects were saying only that they wanted to avoid making declarative statements, but that they might have agreed to answer questions. The fact that they weren’t asked by the officers about answering questions, only about making statements, did not stop the appellate courts from concluding that the invocations were defective for failing to spontaneously include an objection to answering police questions as well as a refusal to make a statement.

Frequently courts have invalidated attempted invocations by characterizing them as reflecting emotional reactions of the suspects rather than crediting them with intending to put an end to interrogation by asserting the protections of the law:

- “I don’t want to talk about it anymore, it hurts too much.”43
- “I can't even talk right now.”44
- “I can't say anything more now, because that’s blowing my mind away.”45

When people use the modal verbs “can” or “can’t” in their attempts to invoke their rights, courts often disqualify these invocations as nothing more than statements about the suspects’ ability to answer questions, not their affirmative intention not to do so. For example, the Anderson court explained its invalidation of the invocation in that case by pointing out that, by using the modal verb “can”, the defendant was simply expressing his emotional inability to respond to police questions rather than articulating his desire not to respond. In another case featuring similar judicial reasoning, the defendant responded to police accusations in the following language:

- “I don’t wanna say, man … I don’t wanna say that, I don’t want to. NO MORE, NO MORE.”46 (emphasis in appellate record)

The court in this case ignored the plain meaning of the words of the suspect’s attempts to end the questioning, and instead speculated that his invocation was only “an expression of an unwillingness to confront reality … merely a difficult catharsis.” Based on this assumption, the court felt free to hold the invocation to be legally meaningless.

---

40 James v. Marshall, 322 F.3d 103 (1st Cir. 2003).
Other courts have indulged in similar speculations to explain away what appear to be attempts to exercise the right to remain silent, thereby holding them insufficiently clear to have legal effect.

• "I'm not going to talk. That's it. I shut up."[47]

This defendant's clear assertion that he refused to talk to the police was instead characterized by the Jennings court as a statement of "momentary frustration and animosity, not invocation." Other defendants' invocations were dismissed as nothing more than expressions of a bad attitude or hostility to the police:

• "I ain't got shit to say to y'all."[48]
• "You can't make me say nothing."[49]
• "I'm not going to talk about nothin'".[50]

The Sherrod court called this clear statement of intent "as much a taunt—even a provocation—as it was an invocation of the right to remain silent." Having imagined that the defendant's words could be seen as a taunt to the police trying to interrogate him, the court concluded that the attempted invocation was therefore too ambiguous to be given legal effect.

In some cases, it is frankly impossible to tell what purported deficiency in the arrestee's invocation caused reviewing courts to find them insufficiently clear:

• "I don't have anything to say."[51]
• "I don't got nothing to say."[52]
• "I don't want to talk about it."[53]
• "I don't wanna talk no more."[54]

In one particularly perplexing case, an arrestee was asked by the officer whether he would answer police questions. He answered, "No, sir." It is hard to imagine a more clear, unambiguous, and unequivocal response claiming the right not to answer police questions. Nevertheless, the reviewing court found that the officer was justified in believing that the defendant must have misunderstood the question or misspoken, and that he was therefore allowed to "clarify" what the defendant wanted and to persuade him to talk.[55]

Cases such as these show courts avoiding giving legal effect to attempts by defendants to invoke the right to remain silent by adopting strained interpretations of the invocations, seizing upon supposed qualifications within the invocations, and inventing alternative emotional reasons other than invocation to explain away suspect refusals to answer police questions. Principles of Gricean implicature tell us that utterances ought to be interpreted contextually as responsive to the circumstances in which they are made. Yet, in these cases, courts instead take a suspect's words out of context, twist them to see if they are susceptible to any conceivable meaning other than invocation.

50 United States v. Sherrod, 445 F.3d 980 (7th Cir. 2006).
52 United States v. Banks, 78 F.3d 1190 (7th Cir. 1996).
and thereby invalidate what seem obvious attempts to claim the constitutional right to remain silent. As a result, for most arrestees in police custody, the constitutional protections of *Miranda* are, as a practical matter, beyond their reach. The right to remain silent envisioned by the *Miranda* Court as a protection against abusive police interrogation has, to all intents and purposes, vanished. True, *Miranda* rights are still routinely read to suspects in police custody, but claiming the rights articulated in the warning has become a verbal shell game in which suspects inevitably pick the wrong shell.

### 5. Does *Miranda* matter anymore?

Empirical research shows that the vast majority of arrested suspects fail to exercise their right to remain silent and make incriminating statements to the police, notwithstanding the near-universal police practice of reciting *Miranda* warnings. Assuming that most suspects understand the rights contained in the warnings, this seems puzzling. It is conceivable that the infrequency with which *Miranda* rights are claimed is because few suspects actually wish to exercise the right to remain silent. However, the stringency of the current legal regime defining legally effective invocations of the right to remain silent makes that conclusion questionable, since successfully invoking constitutional rights in interrogation is virtually impossible for anyone without a detailed understanding of the precision with which courts require invocation to be made.

The arrestee who naively attempts to exercise the right to remain silent by simply not responding gets no protection whatsoever. The arrestee who tries to verbally exercise the right to remain silent fares little better. Only the most perfect, unmitigated articulation of an invocation will count as efficacious under the hyper-technical reading of current invocation law applied by most courts. The odds that an arrestee who truly wants to exercise the right to remain silent can successfully do this are further reduced by the fact that the *Miranda* warnings themselves—likely the sole source of the suspect's information about constitutional rights—fail to inform the suspect that the precise language used to claim the right to remain silent will be legally dispositive and that any deviations from the magic formula for invocation will render it void.

One powerful data-point suggesting that the *Miranda* framework is not working at all to overcome the coercive impact of police interrogation is that, after interrogation has begun, almost no suspects ever later successfully invoke their right to remain silent and cut off interrogation. Surely as an interrogation becomes more pointed and the web of inculpatory evidence tightens, suspects who understood that they could end the interrogation immediately by claiming the right to remain silent would be inclined to exercise that right. The fact that this almost never happens, no matter how coercive and accusatory the interrogation turns, strongly suggests that arrestees do not understand

---


57 This assumption is highly questionable, however. In a recent study, jail inmates and college students were read a standard *Miranda* warning and then surveyed on their understanding of the specific rights encompassed by the warning. Both populations showed significant misperceptions about their *Miranda* rights. Richard Rogers, Jill E. Rogstad, Nathan D. Gillard, Eric Y. Drogin, Hayley L. Blackwood, and Daniel W. Shuman, 'Everybody Knows Their *Miranda* Rights: Implicit Assumptions and Countervailing Evidence' (2010) 16 Psychology, Public Policy and Law 300. The syntactic and lexical opacity of the warnings has been criticized by linguists as likely to lead to a lack of comprehension of the *Miranda* rights by many arrestees. See, for example, Roger W. Shuy, 'Ten Unanswered Questions About *Miranda* ' (1997) 4 International Journal of Speech, Language, and Law 175.

that they have the right to end the interrogation at any time, or that even when they
do, they are unable to articulate their desires with sufficient hyper-precision to satisfy
judicial requirements for effective invocations.

The *Miranda* framework as currently implemented fails to provide most arrestees with
either the knowledge or the ability to cut off coercive questioning, contrary to the original
intent of the Supreme Court in enacting *Miranda*. One might ask, what difference does it
make whether current case law is faithful to the intent of the Supreme Court in enacting
the *Miranda* regulatory framework? Whether *Miranda* works today does indeed matter,
however, because, practically speaking, the *Miranda* framework has become the exclusive
legal constraint on potentially abusive police interrogation. Under the *Miranda*-governed
interrogation regime, police interrogators are permitted to conduct lengthy incommuni-
cado interrogations in which they are free to lie to the suspect, manufacture false "evidence"
of guilt, and alternately browbeat the suspect with exaggerated threats of punishment and
sweet-talk him with implied promises of leniency, as long as *Miranda* warnings precede
the ordeal and the right to halt interrogation is within the power of the suspect. As the
rules regarding invocation of constitutional rights have become increasingly stringent,
however, this power has become almost entirely illusory. Far from being a bulwark against
potential coercion and over-reaching in police interrogation, the empty doctrinal shell of
the *Miranda* framework now acts instead primarily to shield interrogation from judicial
review as to the reliability and voluntariness of statements procured.

The consequences of unfettered police interrogation have begun to surface in many
of the recent DNA exonerations in which innocent people were nevertheless convicted
of crimes. In one large sample of these cases of erroneous conviction, one quarter of these
defendants confessed under police interrogation, despite being entirely innocent of the
crimes and despite having been given *Miranda* warnings. It is hard for most people
to believe that any innocent person would ever confess to a crime. We are all sure that
we never would. And yet, the growing number of exonerated defendants—a surprising
number of whom confessed to the crimes they didn't commit—ought to give the crimi-
nal justice system pause. Modern police interrogation methods are quite psychologically
sophisticated, but their very sophistication inherently entails the possibility of trap-
ing the innocent along with the guilty. In particular, certain classes of suspects—the
young, the emotionally and mentally unsound, the developmentally disabled—are
especially vulnerable to police pressure in police interrogation.

59 Although most American courts have been quite willing to permit the police to lie and to confront
suspects with false evidence during interrogation, the practice has long been criticized by scholars. See,
e.g., Welsh S. White, 'Police Trickery in Inducing Confessions' (1979) 127 *University of Pennsylvania Law
Law Review* 425; Miriam Gohara, 'A Lie for a Lie: False Confessions and the Case for Reconsidering the


61 Steven Drizen and Richard A. Leo, 'The Problem of False Confessions in the Post-DNA World'

62 For a detailed description of the processes of modern American police interrogation and its ten-
dency to construct culpability in its subjects, see Richard A. Leo, *Police Interrogation and American

63 Jessica Owen-Kostelnik, N. Dickson Reppucci, and Jessica R. Meyer, 'Testimony and Interrogation

64 Allison Redlich, 'Mental Illness, Police Interrogations, and the Potential for False Confessions'

65 Morgan Cloud, George Shepherd, Alison Barkoff, and Justin Shur, 'Words Without Meaning:
The Constitution, Confessions, and Mentally Retarded Suspects' (2002) 69 *University of Chicago Law
Review* 495.
Certain personality types—highly suggestible individuals, acquiescent persons eager to please those in authority, those with low self-esteem, and conflict-avoiding personalities—are all disproportionately likely to agree with police accusations that are untrue. Situational factors such as sleep deprivation, fatigue, and substance abuse have all been demonstrated to predispose people to falsely confessing under pressure. Innocent people, too, may be at special risk because they enter the interrogation room convinced that there are no dangers there for them as a consequence of their being innocent of the crime. Psychologically manipulative and coercive techniques are routinely a part of the standard police interrogation protocols, undermining the suspect's ability to resist complying with the police-desired outcome: admission of guilt. The more we know about the many factors and processes that sometimes lead innocent people to falsely confess, the more it becomes clear that our folk belief—that people don't confess unless they are guilty of the offense—is a myth with dangerous consequences for justice.

Given the persistence of the myth that innocent people don't confess, however, it should not be surprising that conviction nearly always results when an admission of guilt—whether reliable or otherwise—is obtained. Once a suspect makes incriminating statements to the police, the police investigation immediately narrows in its focus to proving the guilt of the suspect. Evidence that undermines the plausibility of a confession tends to be disregarded by the police, who concentrate subsequent investigative efforts on bolstering the case against the confessing suspect. Witnesses in the case who learn of a confession become more entrenched in their belief in the suspect's guilt, or may change their minds and even their testimony if they had initially doubted guilt. As the case against the confessing suspect develops, all evidentiary roads come to converge on a finding of guilt.

Once formally charged with the crime by the prosecutor, the suspect who has confessed under police questioning is unlikely to be offered a plea bargain, since the prosecutor knows that the confession makes the case a strong one at trial. If the suspect insists on going to trial, the odds of acquittal are small once the jurors hear the confession, even if it is recanted immediately. Even in cases in which the confession is obtained through coercive interrogation techniques and where there is strong objective evidence casting doubt on the reliability of the confession, jurors are highly likely to convict nonetheless. Studies involving mock jury trials have demonstrated the power of confessions to bias jurors in favor of guilty verdicts. In one experiment, mock trial jurors were exposed to a confession that was obtained through abusive police questioning. The jurors were

70 Richard A. Leo, "Inside the Interrogation Room" (1996) 86 Journal of Criminal Law and Criminology 266.
71 For example, in one psychology experiment, some witnesses to a staged crime who had correctly identified the "perpetrator" changed their minds about their accurate eyewitness identification when told that someone else had "confessed" to the crime. They conformed their eyewitness identification to the newly learned evidence of the confession, even though the conforming identification was now wrong; Lisa E. Hasel and Saul M. Kassin, "On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?" (2009) 20 Psychological Science 122.
cautioned by the “judge” to ignore the confession. In interviews after their deliberations, jurors agreed that the confession was coerced and they reported that it had no impact on their verdict. However, those jurors were dramatically more likely to convict than were jurors hearing identical mock trial evidence minus the coerced confession.73

In the real world, suspects who confess under police questioning are unlikely to discover whether jurors in their cases can look beyond a confession in deciding the verdict. Their own defense lawyers will likely strongly encourage them to plead guilty once it is clear that the confession is going to be admitted at trial, knowing how powerful confession evidence is in persuading jurors of guilt. If the defendant goes to trial and is—as expected—convicted, judges routinely impose their harshest sentences on defendants who claim innocence and thereby fail to accept responsibility for the offense.74 Thus, the consequences for a suspect of succumbing to police coercion in interrogation are drastic and, in the vast majority of cases, unredressable at any later point in the criminal process.

Despite the significant number of recent cases in which coercively obtained confessions have been conclusively shown to have resulted in innocent people being convicted of crimes they did not commit,75 the attitude of the current US Supreme Court towards providing legal protection for suspects from abusive police interrogation has changed radically from its stance in the 1960s. Whereas the Miranda Court recognized the very real potential for coercion by the police during custodial interrogation, and consequently insisted that the government should have a “heavy burden” to prove that a suspect waived his right to remain silent,76 the current Berghuis Court seems oblivious to the possibility of coercion that could result in unreliable confessions. Instead, they have inverted the presumption of Miranda that the government bears the burden of clearly showing a knowing and voluntary choice by the suspect to answer questions. The Miranda Court categorically rejected the notion that a waiver of constitutional rights could be proven simply by showing that the suspect at some point during interrogation responded to a police question, saying, “A valid waiver will not be presumed ... simply from the fact that a confession was in fact eventually obtained.”77 In contrast, the legal rule as announced in Berghuis now substitutes the presumption that any utterance at any time by a suspect in custody is sufficient to demonstrate that the suspect must have intended to waive the constitutional right not to answer police questions.78

As Justice Sotomayor in her dissent in Berghuis noted, the current Supreme Court has “turned Miranda upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, counter-intuitively, requires them to speak,” a result which she calls “inconsistent with the fair-trial principles” on which Miranda and its progeny are based.79 Worse still, Berghuis requires that a suspect trying to invoke the right to remain silent must do so using scrupulously precise language that cannot under any stretch of the judicial imagination be interpreted to be ambiguous or equivocal.


76 Miranda v. Arizona (cited in n.9), 475.

77 Miranda v. Arizona (cited in n.9), 475.

78 Berghuis v. Thompkins (cited in n.22), 2262–3.

79 Berghuis v. Thompkins (cited in n.22), 2278.
Little wonder, then, that successful exercise of the constitutional rights guaranteed by *Miranda* as protection against abusive police interrogation practices has become vanishingly rare. Unless the current Supreme Court is willing to reconsider its jurisprudence gutting *Miranda*—an unlikely eventuality—American police interrogation will continue to remain largely unconstrained, with the inevitable result being future miscarriages of justice.