"Truth Machines" and Confessions Law in the Year 2046

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I. MOVING THROUGH TIME

Miranda v. Arizona,[1] like everything in the universe, is a product of its time. The *Miranda* opinion remains frozen in 1966 amber. Think *Lucy in the Sky with Diamonds*,[2] Bob Dylan, unwashed Levis, long hair, mary jane, and *All You Need is Love*.[3]

To hazard a guess at the future, we must understand the past. For centuries, lawyers and judges professed to believe that judges "discovered" the law from immanent, unchanging principles. Once uncovered, applications of immanent principles could not, of course, be changed, and thus was born the notion of *stare decisis*. Even though we have a different picture of law today, much legal scholarship continues to treat cases like they are independent worlds unto themselves, worlds that can be understood, critiqued, praised, or rejected without regard to context. I plead guilty here, too: My earlier work sought an essentialist understanding of "same offense" in the Double Jeopardy Clause, one that was largely independent of the historical forces that produced the right against double jeopardy.[4]

By the time I wrote my double jeopardy book,[5] I understood that cases are simply the imprints or residue of larger historical and political processes. To understand cases, one must understand the forces that create them. To understand *Miranda*, therefore, one must understand the 1960s. So return with me to that time (when most of you were not yet alive).

The baby boomers were coming of age. JFK had rekindled enthusiasm for making the world better. LBJ, that other Texan president, delivered the Civil Rights

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1 384 U.S. 436 (1966).

2 THE BEATLES, LUCY IN THE SKY WITH DIAMONDS (Abbey Road Studios 1967).

3 THE BEATLES, ALL YOU NEED IS LOVE (Olympic Studios 1967).

4 *See, e.g.*, George C. Thomas III, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1 (1985).

5 GEORGE C. THOMAS III, DOUBLE JEOPARDY, THE HISTORY, THE LAW (1999).

Act of 1964[6] and then crushed Barry Goldwater to bring us the Voting Rights Act of 1965,[7] the War on Poverty, Medicare, Medicaid, and a nascent welfare state.[8] It had taken us a shameful century to insist that the Civil War Amendments mean what they say. But we finally put words on paper designed to make blacks the equal of whites under the law. As 1966 dawned, Americans put their trust in government. It was there to defend us from the evil Soviets and to make our lives better.

The Warren Court found a role to play in this great historical tide that was seeking to give meaning to the norms of equality and inclusion. The Court upheld the Civil Rights Act[9] and the Voting Rights Act,[10] while setting the stage to give women more rights.[11] The Court protected freedom of expression[12] and the right to practice religion.[13] It proclaimed "one man, one vote,"[14] though it surely meant to say, "one person, one vote." By 1970, blacks and poor people were, by law, the equal of the white middle class, and women were on their way to becoming, by law, equal to men.

The Warren Court saw the criminal process as no different from the workplace or the ballot box. Equality and inclusion were the norms everywhere. In majestic language in *Gideon v. Wainwright*,[15] for example, the Court ended the day when "the poor man charged with crime" had "to face his accusers without a lawyer to assist him."[16] This step was so easy it was unanimous, though we have since realized that implementing the *Gideon* norm is far from easy.[17] In *Mapp v. Ohio*,[18] the Court

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[6] 42 U.S.C. § 2000(e) (Thomson/West 2007).

[7] 42 U.S.C. § 1973(c) (Thomson/West 2007).

[8] Lyndon B. Johnson was a persuasive man who was able to get Congress to pass legislation that had been blocked for decades by Southern senators. On January 8, 1964, he gave his State of the Union Address where he declared a War on Poverty to move the twenty percent of impoverished Americans above the poverty line. His opposition to racism produced the Voting Rights Act and the establishment of Affirmative Action by executive order. For a more complete list of legislation passed during his terms, see LBJ's Domestic Policy, 1963-69, http://historicaltextarchive.com/sections.php?op=viewarticle&artid=613 (last visited Sept. 7, 2007).

[9] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[10] *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[11] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (creating a right to sexual privacy within marriage).

[12] *See* United States v. O'Brien, 391 U.S. 367 (1968).

[13] *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203 (1963).

[14] *See* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[15] 372 U.S. 335 (1963).

[16] *Id.* at 344.

[17] *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006); Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339 (2006); Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 115 (1986); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997); George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543. *See also*, Commentary Symposium, *The Promise of* Gideon*: Unfulfilled*, 4 OHIO ST. J.

imposed the Fourth Amendment exclusionary rule on the states because otherwise the right against unreasonable searches and seizures would be but "an empty promise."[19]

But the toughest nut to crack was finding a way to regulate police interrogation. Carried on in private, police interrogation was a black hole from which no light escaped—at least no light that we could be sure was the truth. But what the Court could see at the event horizon of the black hole must have been disturbing to the justices. (The event horizon consists of light that is momentarily too far from the black hole to be pulled in by gravity but not far enough away to escape; it is light that appears frozen in place.[20]) In *Lisenba v. California*, for example, the defendant testified that police officers beat him "black and blue."[21] He was later left alone with one of the officers who had beaten him and who threatened to beat him again if he did not confess.[22] The police denied his story, but this is my point about the lack of verifiable truth escaping the black hole.

In another case, Tennessee authorities admitted questioning the defendant for thirty-six consecutive hours.[23] Chicago police told a suspect she could keep custody of her children only if she "cooperated."[24] An Arkansas police chief told the defendant that a lynch mob was "outside wanting to get" him, but that the chief would "try to keep them out" if the defendant "wanted to make a confession."[25] A series of cases from the South pitted poorly-educated black men against white officers who questioned relentlessly in small rooms while exploiting every weakness the suspect had.[26] The mere presence of several white law officers in an interrogation room in the Deep South must have been terrifying to young black men (and probably still is).

Thus, one seemingly intractable issue facing the Warren Court in the early 1960s was how to bring the norms of equality and inclusion to bear on the disturbing event horizon of police interrogation.

CRIM. L. 167–222 (2006).

[18] 367 U.S. 643 (1961).

[19] *Id.* at 660.

[20] But the light frozen in the event horizon is, of course, doomed. As the black hole sucks the matter closer to it, the gravitational force increases and the event horizon expands, causing the formerly "frozen" matter to collapse into the black hole. *See* Black Hole, Wikipedia, http://en.wikipedia.org/wiki/Black_hole#Event_horizon (last visited Oct. 5, 2007).

[21] 314 U.S. 219, 230 (1941).

[22] *Id.* at 232.

[23] Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[24] Lynum v. Illinois, 372 U.S. 528, 531 (1963).

[25] Payne v. Arkansas, 356 U.S. 560, 564–65 (1958).

[26] *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960); Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957).

II. THE *MIRANDA* SOLUTION

Given the event horizon described in the last Part, the Court's solution in *Miranda* is truly puzzling, at least viewed from 2006. If abuse of power was the problem, why would *Miranda* warnings change anything? As Justice White pointed out in his *Miranda* dissent, "[t]hose who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers."[27] To solve the problems seen on the 1966 event horizon of police interrogation appeared to require stronger medicine—e.g., a ban on the use of confessions or the presence of a defense lawyer in all interrogations.

But remember to use 1966 eyes. The Beatles told us that all we needed was love.[28] LBJ told us that government could end poverty and racism.[29] Medicare and Medicaid began on July 1.[30] *The Sound of Music* won the Oscar for the best picture.[31] *A Taste of Honey* won the Grammy for best record.[32]

The five members of the *Miranda* majority believed three things that we may fairly doubt today. First, suspects would invoke their rights when they felt too much pressure. Second, police would play it straight with suspects. Third, police would accurately report what happened in the interrogation room. As to the first belief, we now have solid evidence that suspects either waive (80–90%) or do not.[33] Suspects simply do not close down interrogations once they have waived. As to whether police play it straight or accurately report what happened, we lack solid studies—the black hole is still black—but the event horizon is still populated with cases suggesting that police interrogations have not been transformed into tea parties.[34]

Miranda was not a revolution. It was a compromise, a quintessentially mid-60s compromise. Humans matter. They should be treated fairly. They should be treated equally. The rich man should have no greater right to fend off police interrogators than the poor black kid in Mississippi. Yale Kamisar stated the equality-based norm a

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[27] Miranda v. Arizona, 384 U.S. 436, 505 (1966) (White, J., dissenting).

[28] I confess to cheating a bit here. *All You Need Is Love* did not air until 1967, but the ideas that it contains were surely percolating in 1966.

[29] *See supra* note 8.

[30] LBJ signed the Medicare and Medicaid bills into law on July 30, 1965, in Independence, Missouri at the Truman Library. *See* CMS/ Centers for Medicare & Medicaid Services, http://www.cms.hhs.gov/History/ (last visited Sept. 7, 2007).

[31] *See* Best Picture Posters, http://www.oscar.com/legacy/bestpictureposter/?g=4&i=4 (last visited Sept. 7, 2007).

[32] In addition to winning the Grammy for best song in 1965, Herb Alpert also won best instrumental performance, non-jazz and best instrumental arrangement for *A Taste of Honey*. *See* Grammy Award Winners, http://www.answers.com/topic/grammy-awards-of-1966 (last visited Sept. 7, 2007).

[33] *See, e.g.*, Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 tbl.3 (1996) (84%); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 tbl.3 (1996) (78%).

[34] *See, e.g.*, *infra* notes 46–63 and accompanying text.

year before *Miranda*, and more colorfully than the Court: "To the extent the Constitution permits the wealthy and educated to 'defeat justice,' if you will, *why shouldn't* all defendants be given a like opportunity?"[35]

But there is more at stake in interrogation than protecting the dignitary interests of suspects. What the *Miranda* Court, and some of its supporters, insufficiently appreciated is why police interrogate in the first place. Removing evil or corrupt police from the mix—and there is little that the law of confessions can do to prevent evil or corrupt policing—we are left with the noble goal of solving crimes. Now let's remove one more variable from the mix. If we could be sure that police were not pressuring innocent suspects, why would we care if the police pressured confessions from guilty suspects?

III. RETHINKING POLICE INTERROGATION

I can hear my audience gasping already. I have tried this idea on several seminars at Rutgers and, to my knowledge, I have yet to convince anyone. But like Don Quixote, I keep sallying forth. This is 2006, not 1966. We (at least I) no longer believe that all we need is love. As Donald Dripps has pointed out in his excellent book, *About Guilt and Innocence*,[36] what we need is not a debate about privacy or autonomy of suspects and defendants but a criminal process that convicts the guilty and does not convict the innocent. Doesn't sound all that hard, but DNA evidence establishes that we convict far too many innocent defendants.

We now know that a non-trivial number of innocent suspects confess, including the men falsely convicted of raping the Central Park jogger.[37] Richard Leo, Richard Ofshe, the late Welsh White (and others) discuss *why* innocents confess.[38] In my forthcoming book *The Supreme Court On Trial*, I construct a rough estimate of up to

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[35] Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From* Powell *to* Gideon, *from* Escobedo *to* . . ., *in* CRIMINAL JUSTICE IN OUR TIME 79–80 (A. E. Dick Howard, ed., 1965).

[36] DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE (2002).

[37] *See* Mark Costanzo & Richard A. Leo, *Research and Expert Testimony on Interrogations and Confessions*, *in* EXPERT PSYCHOLOGICAL TESTIMONY FOR THE COURTS 69–70 (Mark Constanzo, Daniel Krauss, Kathy Pezdek, eds., 2007).

[38] *See, e.g.*, Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201 (2005); Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUDIES IN LAW, POLITICS, AND SOCIETY 189 (1997); WELSH S. WHITE, *MIRANDA'S* WANING PROTECTIONS: POLICE INTERROGATION AFTER *DICKERSON* (2001).

10,000 wrongful felony convictions each year,[39] a substantial number of which are based on false confessions.

In a perfect world, we would convict many more guilty arrestees and convict many fewer innocent arrestees. Let us play out a thought experiment. If we could be absolutely certain that no innocent suspects would be subject to interrogation, what limits would we set for the police? To help us think about that, let us return to *Lisenba* and accept the police version of the interrogation. Rather than beat the defendant black and blue, the police testified that an officer slapped him once "as the result of an offensive remark" he made about Mary, his dead wife.[40]

Now consider the crime admitted by the defendant and his accomplice, named perversely enough, "Hope." Lisenba and Hope conspired to kill the defendant's wife and collect the double indemnity insurance on her life. To that end, Hope "procured rattlesnakes which were to bite and kill Mary." On August 4, 1935, Lisenba "blindfolded his wife's eyes, tied her to a table, had Hope bring one of the snakes into the room, and caused the reptile to bite her foot." They left her tied to the table all night, blindfolded and the victim of a poisonous snakebite. Imagine the night that she endured.

In the morning, she was still alive. Lisenba told Hope that "he was going to drown his wife." Hope "aided him in carrying the body to the yard," where they placed "the body face down at the edge of a fish pond with the head and shoulders in the water."[41] Lisenba went to his job as a barber. That evening, "he took two friends home for dinner." When they arrived the house was dark and empty and the body was found in the fishpond. "An autopsy showed the lungs were almost filled with water," meaning that she was alive when they put her in the water. "The left great toe showed a puncture and the left leg was greatly swollen and almost black."[42]

Lisenba had apparently also killed his first wife, in her case by crushing her skull with a hammer. He collected on a double indemnity life insurance policy on her life. One of the ironies of *Lisenba* is that the police had given up trying to solve Mary's drowning death and revived the case only when the life insurance company refused to pay the proceeds because they suspected Lisenba of murder.

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[39] GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS (forthcoming 2008). Over 1,000,000 felony convictions result from guilty pleas each year. *See* Bureau of Justice Statistics, *Criminal Sentencing, 2002 data, available at* http://www.ojp.usdoj.gov/bjs/sent.htm (noting 1,114,000 felony convictions in 2002) (last visited Oct. 5, 2007); Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties 2002*, at tbl.23, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf (last visited Oct. 5, 2007) (showing that 97% of convictions resulted from guilty pleas),. McConville and Baldwin concluded that two percent of the guilty pleas in their British study were of doubtful validity. MICHAEL MCCONVILLE & JOHN BALDWIN, COURTS, PROSECUTION, AND CONVICTION 66 (1981). If we discount that estimate by 50% to 75%, to be conservative, and apply it to the 1,000,000 felony guilty plea convictions, it gives us 5,000 to 10,000 guilty plea felony convictions of innocent defendants.

[40] Lisenba v. California, 314 U.S. 219, 230 (1941).

[41] *Id.* at 224.

[42] *Id.*

If we are one hundred percent certain that the man being interrogated committed this gruesome crime, what limits to interrogation would we accept? As long as we have *Miranda*—and I come to praise *Miranda*, not to bury it—we know that Lisenba was told of his right to silence and his right to a lawyer. In our thought experiment, we will have him explicitly waive these rights.

Knowing that Lisenba committed this crime, what other rights should he have? Though I might feel differently if this were a terrorist who had set a nuclear bomb that was soon to go off, suspects interrogated for past crimes have the right not to be physically coerced. The slap was a violation of that right, but it occurred in the first interrogation and was unlikely to be the cause of the confession at the end of the second interrogation eleven days later. According to the police, other than the slap, he was not threatened or harmed in any way. But the interrogation *was* grueling. Police interrogated him for thirty-two hours on one occasion—until he fell asleep or passed out—and then for about ten hours on a second occasion.

Did the police treat Lisenba kindly? No. Fairly? Who's to say? But remember what he did to his wife. Now I know the civil libertarians in my audience will say that guilty suspects deserve fair treatment and that we should not pre-judge guilt. I agree, up to a point. But if we could be one hundred percent certain that Lisenba was the man who did those horrible things to his wife, I think police should be entitled to exert quite a bit of pressure to get him to talk. Indeed, I think a good case can be made for the proposition that Lisenba voluntarily confessed despite those intense interrogations.

For one thing, Lisenba endured the initial thirty-two-hour interrogation, the one in which he said the police beat him black and blue, without incriminating himself. The second interrogation was eleven days later and was, by his own account, much milder. Moreover, he did not confess until the police told him that Hope had confessed, putting most of the blame on him. Lisenba said, on two occasions, "that there were not enough men in the District Attorney's office to make him talk, and if Hope had not talked he would never have told the story."[43] All of this suggested to the Court that the decision to tell a story that put most of the blame on Hope was a result "of his free choice to admit, to deny, or to refuse to answer."[44] And in our hypothetical based on *Lisenba*, he received and waived, at least twice, his *Miranda* rights.

A final reason to think that Lisenba confessed voluntarily is that current case reports contain cases finding confessions voluntary despite lengthy, intense interrogations. These cases suggest that, if a suspect waives *Miranda*, courts tend to assume that a voluntary waiver makes everything after that also voluntary.[45] A classic case is *Chavez v. State*.[46] Detectives in three different shifts interrogated Chavez for thirty hours with minimal breaks. After thirty hours, he was allowed to sleep for six

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[43] *Id.* at 233–34.

[44] *Id.* at 241.

[45] *See, e.g.*, George C. Thomas III, *Stories About* Miranda, 102 MICH. L. REV. 1959 (2004).

[46] 832 So. 2d 730 (Fla. 2002).

hours—on the floor of the police interview room.[47] He was then interrogated for another twelve hours. During both sessions, he waived *Miranda* repeatedly, leaving him with the protection of only the due process voluntariness doctrine.

Twice during the marathon thirty-hour interrogation of Chavez, a polygraph examiner told him that he had failed the polygraph test. The state court opinion avoids telling us whether the examiner's statement was true or false, but in many cases police admit lying about polygraph tests and other evidence.[48] The Florida Supreme Court, with not a single dissenting justice, held that Chavez's interrogation produced a voluntary confession that complied with due process.

The *Chavez* opinion is a vivid example of the manipulability of the voluntariness test. The court describes the hours between interrogations spent on the floor as a "rest period."[49] The court never mentions that he had to sleep on the floor—his comes from Alfredo Garcia's study of the trial record[50]—but the court does seem to think it important that he was offered a blanket and a pillow, as if this somehow reduced the pressure of the interrogation.[51] The police twice took him to the scene of the crime while questioning him about where he had hidden the body.[52] The court viewed these trips as a *respite*, noting that the interrogation was "interspersed with time away from the police facilities for visits to various properties,"[53] as if being brought to the scene of the crime while being interrogated was a pleasure trip. What was the most important indicator of voluntariness? "He was repeatedly given *Miranda* warnings, in Spanish, and indicated each time that he fully understood them."[54] And why was the state court so determined to avoid a finding of coercion? Chavez admitted raping and murdering a nine-year-old boy, then cutting his body into parts and hiding the parts in metal barrels.[55]

While I believe the Florida Supreme Court was in error in finding the confession voluntary, cases like *Chavez* suggest that the *Lisenba* outcome is hardly an outlier. My principal, and perhaps only, objection to the interrogation in *Chavez* is that the police did not know he was guilty. To be sure, he confessed in a way suggesting that he was guilty, but an innocent person could know incriminating details about the crime if the police advert to those details in their questions. Moreover, though it is

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[47] Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, Or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 500 (1998). Garcia provides the best description of what happens in *Chavez*, more accurate, I believe, than the Florida Supreme Court's description. *See id.* at 499–503.

[48] *See, e.g.*, State v. Cayward, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989); Whittington v. State, 809 A.2d 721 (Md. Ct. Spec. App. 2002); Sheriff, Washoe County v. Bessey, 914 P.2d 618 (Nev. 1996).

[49] *Chavez*, 832 So. 2d at 737.

[50] *See* Garcia, *supra* note 47, at 500.

[51] *Chavez*, 832 So. 2d. at 749.

[52] *Id.* at 738.

[53] *Id.* at 749.

[54] *Id.*

[55] *Id.* at 740–41.

somewhat counterintuitive, pressure as intense as Chavez endured could persuade an innocent person to confess if the police promised a substantial benefit in exchange for the confession—for example, that he would receive treatment rather than punishment.

Take, for example, the Jackson Burch case. When police questioned him about a murder, he maintained his innocence for hours.[56] Police then fabricated incriminating evidence against him to "lever a confession," and had him take a fake lie detector test. They lied to him when they told him he had failed the test. The detective told Burch that it was up to him whether he got charged with capital murder or second-degree murder. If he confessed, and explained the circumstances, the officer said, he might be charged with second-degree murder and serve as few as seven years. Burch confessed to being present at the scene but said he could not remember the assault that killed the girl.

After Burch incriminated himself, the State charged him with capital murder, of course, not second-degree murder. He was convicted and sentenced to die (the state supreme court overturned the death sentence).[57] As Alex Wood described the situation Burch faced, the police told him, "we've got you, and you could face the death penalty. But if you confess, you may be able to persuade us to send you to prison for as little as seven years." Wood asks, "Why should that kind of pressure work only on a guilty person?"[58] It is a very good question.

Now consider a case where we know the victim of relentless police interrogation was innocent. Poor police work led police in Escondido, California to decide that fourteen-year-old Michael Crowe had killed his younger sister in the family home.[59] The inept police investigation led them to conclude that it was impossible for anyone to have broken into the house. Once that flawed assumption was in place, it led to Michael because he had said he was angry with his sister. Remarkably, the police rejected Raymon Tuite as a suspect even though they knew that he was a drifter with "a prior criminal record and a history of mental problems" and that he had been seen "knocking on doors and peering in windows in the Crowe neighborhood on the night of the killing."[60]

Michael repeatedly denied killing his sister during ten hours of interrogation that spanned two days. He offered to take a lie detector test. It was, at worst, inconclusive, but the police lied and told him that he had failed it. Despite his denials, a weak motive at best, and no evidence that he was lying, the police stuck to their theory. They chose to believe Tuite when he admitted being in the Crowe neighborhood but denied entering any homes. They chose not to believe Michael.

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[56] The facts about the *Burch* case come from *Burch v. State*, 343 So. 2d 831, 832 (Fla. 1977).

[57] *Id.* at 834.

[58] Alex Wood, *Lying Accepted Investigative Tool*, *in* CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION, AND THE STRUGGLE TO FREE A "WRONG MAN" 41 (Donald S. Connery ed., 1996).

[59] The facts about Michael Crowe's case that follow are drawn from WHITE, *supra* note 38, at 172–179.

[60] *Id.* at 172.

Police repeatedly told Michael that there was no doubt as to his guilt and all that remained was to "get down to why it was done."[61] The interrogators lied to him repeatedly about various tests they said proved his deception in answering questions. They told him over and over that if he cooperated with the police and confessed, he would receive help and not jail time. At one point, after saying yet again that he couldn't "do this to her," Michael said "I can't even believe myself anymore. I don't know if I did it or not. I didn't, though."[62]

The interrogator responded, "Well I think you are on the right track. Let's go ahead and think through this now." To which Michael replied, "I don't think—if I did this, I don't remember it. I don't remember a thing." When the interrogator said it was possible he did not remember, Michael said, "What's going to happen to me now? Even though I don't even know that I did it. What's going to happen?"[63]

The picture here is clear even if the psychological mechanism by which innocent people confess is still largely shrouded in mystery. Michael Crowe was fourteen years old, in shock over the murder of his sister, removed from his home and family, and subjected to relentless interrogation by adults who were certain of his guilt. When the interrogators repeatedly lied to him about the evidence against him and then promised him help rather than jail time, Michael could no longer sort the truth from what the adults believed was the truth. Two friends of Michael's were arrested and also ultimately gave incriminating, and false, accounts of their involvement in Michael's murder of his sister. The three boys spent seven months in juvenile detention before they were cleared by DNA testing.

But for DNA testing, all three boys might have been sentenced to long prison terms. The police ultimately found Stephanie's DNA on the clothes of—you guessed it—the drifter Raymond Tuite. Why Michael was viewed as a better suspect than the drifter is truly mysterious. Perhaps the police thought that the crime would be more sensational, and thus draw more attention to their work, if the killer was the victim's brother. Perhaps the answer is found in the dark psyches of the police detectives. Or perhaps the answer is as simple as their first theory had Michael as the killer.

My readers can feel sympathy for Lisenba if they wish. I will reserve mine for Michael Crowe and for all the innocent suspects put in the positions of Chavez and Burch.

The exquisite *Miranda* concern with dignitary and autonomy interests of suspects is frozen in the Beatles amber of 1966. This is 2006. I think it almost self-evident that protecting innocent suspects from conviction is a weightier value than protecting dignitary and autonomy interests of suspects generally. A short proof will suffice.[64] Three overlapping due process norms evolved in the American law of interrogation: police should be fair; the suspect's autonomy should be respected; and false

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[61] *Id.* at 173.

[62] *Id.*

[63] *Id.*

[64] A longer proof can be found in Chapter 2 of THOMAS, *supra* note 39.

confessions must be avoided. One method for obtaining confessions that violates all three norms is torture. Torture is obviously unfair, the suspect's autonomy is rejected as irrelevant, and the resulting confession will often be false.

Once we move away from torture, however, the fairness/autonomy norms become surprisingly difficult to implement. Assume that we have a universe of confessions and an epistemology that allows us to determine which confessions are true and which are false. Begin with the sub-universe of true confessions of guilt. Here we *know* that the suspect is guilty and the value of protecting innocence is thus fully served. Some of these cases will generate a consensus that the police methods were unfair and trenched too harshly on the suspect's autonomy—for example, if the suspect confesses after thirty-six hours of interrogation, with only one break for food.[65]

But most cases will sharply divide us on fairness and autonomy issues. Earlier, I argued that, despite enduring a total of forty-two hours of police interrogation, Lisenba confessed voluntarily. It appears, from the Court's opinion in any event, that he weighed the option of facing a jury with his accomplice's confession and without his more exculpatory version, or confessing and trying to mitigate the accomplice testimony. He made a choice between two bad options. Why wouldn't this be voluntary? Reasonable minds could at least differ.

It is otherwise in the sub-universe of confessions known to be false. There will be no debate. Whatever the virtues of admitting confessions obtained from guilty suspects after intense interrogation, no argument can be deployed to justify admitting a false confession from an innocent suspect. Moreover, this judgment holds *even if the suspect was treated fairly and even if his privacy and autonomy were respected.* To use a false confession would make any conviction illegitimate. The single due process value that trumps all other values in police interrogation is therefore to avoid eliciting incriminating statements from innocent persons.

Of course, we lack the epistemology that would permit us always to be certain that any confession is false. Thus, due process demands a set of procedures that creates an acceptably low risk that the confession is false. The greater the risk of false confessions from any given set of procedures, the less likely it is that due process is satisfied. For example, in case A, police use the third degree, beating the suspect with a telephone book until, wracked with pain, he confesses. In case B, the police lie to the suspect about finding his fingerprints at the crime scene. Both cases involve unfair police methods that do not respect the suspect's autonomy. But the critical difference between these methods is that the third degree seriously threatens innocence and the trick does not.[66] The Court recognizes this fundamental difference. The case A confession is suppressed; the case B confession is admissible.[67]

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[65] *See* Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[66] Before my readers get too exorcized, I recognize that sufficient deception coupled with offers of leniency can induce a false confession. The Michael Crowe case is an example.

[67] *Compare* Brown v. Mississippi, 297 U.S. 278 (1936) (reversing convictions based on confessions obtained by torture), *with* Frazier v. Cupp, 394 U.S. 731 (1969) (unanimously affirming

In sum, protection of innocent suspects in the interrogation room is the dominant value that should be served by the law regulating police interrogation. As the future unfolds, we will probably be able to use technology to sort the guilty from the innocent early in the process. How will that technology affect the law of confessions?

IV. MOVING THROUGH TIME WITH "TRUTH MACHINES"

The case A versus case B hypo at the end of the last Part is, of course, old news. The Wickersham Commission condemned police "third degree" interrogation in 1931.[68] Jerome Frank had this to say about the third degree: "To our shame be it said that the English, who do not tolerate the 'third degree,' call it the 'American method.'"[69] What about the future? The title to my paper promised revelations about the law of confessions in 2046. But it was just a tease. In 1970, Alvin Toffler argued that technological change occurs at an ever-increasing speed.[70] Computers, Moore's law, and the internet suggest that Toffler was correct. Forty years ago, no one could have predicted that DNA evidence would provide rock solid evidence of innocence and guilt in many cases. The procedures that will sort the guilty from the innocent in 2046 are thus beyond our ability to conceive.

One general fact is almost a cinch: The way forward will be scientific in nature. Remember Woody Allen's "orgasmatron" in his futuristic movie, *Sleeper*?[71] Imagine a similar booth that will provide a one hundred percent accurate reading of innocence. Before we get to the pragmatic benefits and liabilities of my "truth machine," we should consider whether it creates any constitutional problems. The most obvious potential problem is the Fifth Amendment privilege against being compelled to provide self-incriminating testimony. The key question is whether the results of a "truth machine" would constitute testimony under the Fifth Amendment. If so, then it would violate the Fifth Amendment to compel a suspect to submit to the truth machine.

Schmerber v. California[72] held that the results of a DUI blood test did not constitute testimony under the Fifth Amendment because the composition of blood was not a communicative act on the part of the suspect. Though the opinion is not very helpful on this point, the Court seems to have in mind that the results of a blood test are not connected in any way to the suspect's conscious thoughts. The Court's

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conviction based on confession obtained after police falsely told suspect that his friend had already confessed).

[68] NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

[69] JEROME FRANK, COURTS ON TRIAL 100 (1949).

[70] ALVIN TOFFLER, FUTURE SHOCK (1970).

[71] SLEEPER (Rollins-Joffe Productions 1973).

[72] 384 U.S. 757 (1966).

polygraph example is illuminating. Physiological responses to the examiner are not conscious thoughts, but the Court suggested that these responses are nonetheless "essentially testimonial."[73] Perhaps the reason is that the responses are triggered by questions that provoke conscious thoughts.

My hypothetical truth machine seems to fall somewhere between a blood test and a polygraph test. Unlike blood, memory consists of events that were recorded via a conscious thought process. Unlike a polygraph, memory (in theory) can be probed without invoking a current thought process. Thus, I am uncertain whether a machine that probes memory would produce testimonial evidence.

But it almost does not matter whether the truth machine results are testimonial because today we live in a brave new world that features *Chavez v. Martinez*.[74] *Chavez* held that the Fifth Amendment privilege is not violated until the compelled testimony is introduced against a defendant in a criminal trial. Thus, the State can force a suspect to answer questions without violating the Fifth Amendment, though the State would not be permitted to use the compelled answers to prosecute the suspect. Similarly, the State could compel a suspect to submit to the truth machine even if the results are held to be testimonial. Though the results would be inadmissible, the police could seek other evidence of guilt, confident that the suspect was guilty.

By forcing all suspects to experience the "truth machine," we would accomplish two important, and salutary, goals. First, innocent defendants would emerge from the booth, as Woody Allen did from the orgasmatron, dazed and pleased (but presumably without smoking hair) and then walk free. As police are pragmatists, they would have no interest in wasting their time pursuing suspects who are innocent. Second, the police will *know* that those who fail the truth machine are guilty. Now it is only a matter of building a case against them the old-fashioned way, without using the results of the truth machine.

To be sure, *Chavez* held that suspects have a due process right not to be forced to endure police methods that "shock the conscience," but I think my truth machine passes the low bar set in *Chavez*. There, the police relentlessly questioned a suspect who had been shot, who was in excruciating pain, who thought he was dying, and who begged the police to stop interrogating him. Not a due process violation, held the Court. On that understanding of due process, forcing a suspect into the truth machine booth easily passes muster.

It may appear that I have solved all problems—I certainly hope it appears that way. But one remains. Peter Henning pointed out that I was using "innocence" as an indisputable fact in the universe.[75] I either killed my enemy or I did not. But what if the issue is mens rea? Now the fact in the universe about guilt begins to grow fuzzy.

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[73] *Id.* at 764.

[74] 538 U.S. 760 (2003).

[75] E-mail from Peter Henning, Professor of Law, Wayne State University, to author (Sept. 23, 2006) (on file with author).

What if the crime under investigation is a white collar crime rather than a common law crime? *Is* there a fact in the universe about, for example, conspiring to restrain trade?

This suggests that a truth machine as I have envisioned it may not ever be possible. Or that it will be useful for investigating some crimes and not others. Perhaps it will read either "innocent" or "unknown." This would be less helpful to the police, and would leave some innocents in harm's way, but we would still be far better off than today because we would weed out of the system those whose innocence is a fact in the universe.

But my truth machine is, at best, years in the future. As an interim step, we might consider requiring suspects who are under arrest to take a lie detector test. New research shows that lie detectors, when used in experiments, are quite accurate. The median accuracy of fifty-two different data sets was 0.86, and one half of the results fell within the 0.81 to 0.91 range.[76] To be sure, experts believe that the experimental results are "degraded" when polygraphs are administered in real cases.[77] My good friend, and sometimes co-author, Richard Leo believes that lie detector tests are "theoretically flawed," while Albert Alschuler asserted to me at another symposium that the results in the field are no better than a coin flip.[78]

To avoid that empirical morass, let us simply assume that on the way to a truth machine that is almost infallible, we can produce a testing regimen that is eighty-five percent accurate. That means that fifteen percent of the guilty suspects will test innocent and fifteen percent of the innocent suspects will test guilty.

It is of course a major achievement to have the police know about the innocence of the eighty-five percent who test innocent. Moreover, the fifteen percent false negative rate among the guilty population should not concern us. In most cases, police will have other, powerful evidence of guilt against these suspects (but not, presumably, against the eighty-five percent true negatives who are innocent).

The rub, of course, is the fifteen percent false positives. Though the police will, in most cases, lack powerful evidence of guilt against the false positives, police will be encouraged to continue to develop a case against these innocent suspects, who would have been better off if they had never taken a lie detector test. I believe that this cost is more than compensated for by the gain in the likely dismissal of the eighty-five percent true negatives, but reasonable people could differ.

Some innocents will remain in the system under my interim proposal and perhaps even with the truth machine. This suggests the need for reform beyond a truth machine. Here are two. Add this warning to the *Miranda* litany: "You may invoke your right to silence or to counsel at any time and regardless of what you have said to

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[76] COMMITTEE TO REVIEW THE SCIENTIFIC EVIDENCE ON THE POLYGRAPH, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMY OF SCIENCES, THE POLYGRAPH AND LIE DETECTION 122 (2003).

[77] *Id.* at 353.

[78] E-mail from Richard A. Leo, Associate Professor of Law, University of San Francisco, to author (Nov. 11, 2006) (on file with author); Albert Alschuler, question to author during "Cautions and Confessions: *Miranda v. Arizona* after 40 Years," Oct. 20, 2006, University of Colorado School of Law.

us." My review of confessions literature persuades me that suspects do not think they can invoke *Miranda* once they have waived it. The *Miranda* opinion is clear that the rights may be invoked at any time,[79] and that right should be included in the warnings.

Yale Kamisar argued during the symposium that the "right to terminate" warning would make it even more likely that suspects would waive their rights and incriminate themselves.[80] Yale's theory is that giving the suspects an "out" later in the interrogation would make them more willing to test the waters of the interrogation. Perhaps. My intuition is that, on balance, innocent suspects would benefit from this warning because they will want to terminate the interrogation once it is clear that the police do not believe that they are innocent.

Guilty suspects, on the other hand, might continue to add more lies to their story until the entire structure collapses, at which point it is too late to terminate the interrogation. To the extent my friend Yale is worried about guilty suspects falling into a trap set by my proposed "right to terminate," then he and I just disagree about its utility. If giving a "right to terminate" warning causes more guilty suspects to waive and babble to the police, that, to me, is a net gain for society.

Beyond adding a "right to terminate" to the *Miranda* warnings, I join dozens of scholars who embrace a requirement that interrogations be recorded. Recordings make it easier for courts to discover when innocent suspects are tricked or worn down. Many jurisdictions now require, by state law or local police practice, the recording of interrogations.[81] Two pleasant surprises attend those experiments. First, police who have experience with recording are uniformly supportive of it, largely because a record typically makes admission of the confession easier. Second, recordings of interrogations "dramatically reduce" defense motions to suppress.[82] Along the way, of course, recording will radically reduce the incentive for rogue cops to use coercion or other unfair tactics.

Current recording regimes are often criticized because nothing would keep a rogue cop from threatening violence if the suspect does not say what the cop wants to hear during the recording. One can imagine a cop who is convinced that the suspect is guilty and who threatens to beat him with a baseball bat if he doesn't confess on the record. Moreover, a cop could lie to the suspect about the evidence of guilt or make promises of leniency prior to the recording. While I doubt very many police officers would resort to these tactics, a recording regime needs more assurance of its integrity than my intuition about the ethics of police officers.

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[79] Miranda v. Arizona, 384 U.S. 436, 473–74 (1966) ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.").

[80] Yale Kamisar, comments to conference participants, *Miranda* at Forty symposium, *supra* note * (Oct. 6, 2006).

[81] *See* Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, SPECIAL REPORT, NORTHWESTERN UNIVERSITY SCHOOL OF LAW CENTER ON WRONGFUL CONVICTIONS, NUMBER 1 (2004).

[82] *Id.* at 8.

Elaborate solutions to pre-recording threats have been proposed, for example, requiring that interrogations occur only in a room with a video camera that is triggered by motion inside the room. But even the most elaborate regime can be circumvented by a determined rogue cop. What we need is a low-tech solution that is difficult to circumvent. I would forbid interrogation until the suspect has met with an "ombudsman," perhaps a clerk from the office of the criminal court judge. The clerk would inquire about conversations that the suspect has had with the police. The conference with the ombudsman would be recorded, made part of the court record, and given to defense counsel. I think most suspects who have been threatened by the police would reveal that fact to someone identified as working for the judge. Moreover, the graver the threat, the more likely the suspect will be to confide it. I cannot imagine that a threat to beat the suspect black and blue would not be reported to the clerk. It also seems likely to me that suspects would naturally report promises of favorable treatment because they would want reassurance that the promise will be kept.

Lies about evidence present a more difficult issue. The ombudsman could be required to ask specifically whether the police have described the case against the suspect and, if so, the details of the description. While guilty suspects might be vague about the description of evidence, innocent suspects would surely remember the (false) evidence that the police claimed to have. The difficulty is that the ombudsman would not know that the evidence was false. The best solution is simply not to permit interrogation if the police have described the case against the suspect prior to recording. Once recording begins, of course, any description of the evidence will be part of the record, impossible for police to deny later.

After I presented this paper, some in the audience were skeptical that suspects would reveal threats, while others worried that suspects would invent threats, promises, and descriptions of evidence. To the extent these reservations imply that my system is imperfect, I acknowledge the criticism. But to the extent these comments are intended to doom my proposal, naturally I disagree. All legal systems put their faith in the honesty of witnesses and in the ability of judges and juries to ferret out most of those who lie. If suspects have an opportunity to reveal police misconduct and choose not to do so, the fault is not in the system. If suspects lie about police conduct, how is that different from current suppression hearings? The great advantage to my system is that if interrogation proceeds, it will do so in front of a recording machine.

If the ombudsman concludes that the police used threats or unfair promises, he would not permit interrogation. If the evidence is murky, he would submit the record of the hearing to the judge. Knowing that the suspect will confer with an ombudsman, in a recorded interview that the judge and defense counsel will see, should create a powerful incentive for the police not to play games. A particularly strong incentive would exist not to describe the case against the suspect prior to recording because that would shut down interrogation entirely. Presumably, the ombudsman conference

would be, in almost all cases, a routine matter of recording the suspect saying that no threats had been made. In those cases, the interrogation would proceed.[83]

V. CONCLUSION

With all respect to Yale Kamisar, *Miranda* is not the end of the line for the law of confessions. And with all respect to civil libertarians who think that the most important goal is a decorous interrogation, the Supreme Court is not going to go beyond *Miranda* and legislatures are not going to insist on a decorous interrogation. Every aspect of the universe, including law, changes with time. The law of confessions has experienced dramatic changes over the past five hundred years. And it will change again. Bring on "truth machines."

[83] If defense counsel later disagrees with the ombudsman's judgment that the pre-taping police conduct was permissible, she can file a motion to suppress the confession on the ground that the interrogation should not have been permitted.