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**THE COURT AND THE SUSPECT:
HUMAN FRAILITY, THE CALCULATING
CRIMINAL, AND THE PENITENT
IN THE INTERROGATION ROOM**

SCOTT E. SUNDBY*

TABLE OF CONTENTS

INTRODUCTION.....	124
I. THE ELUSIVE MEANING OF VOLUNTARINESS	126
II. THE RUGGED INDIVIDUAL AND POLICE INTERROGATION.....	131
A. <i>Introducing the Rugged Individual</i>	131
B. <i>How the Rugged Individual Archetype Turns Voluntariness into a Special Circumstances Inquiry</i>	136
III. THE “EASILY SEDUCED” MIND AND THE SUSCEPTIBLE INDIVIDUAL	139
A. <i>The Rugged Individual Finds an Alterego</i>	139
B. <i>Miranda v. Arizona: The Susceptible Individual Archetype Triumphant</i>	147
IV. THE RUGGED INDIVIDUAL’S RESURRECTION: RATIONALIZING CONFESSIONS THROUGH THE CALCULATING AND PENITENT SUSPECTS	150
A. <i>Giving One’s Self Up to the Law: The Calculating Rugged Individual and the Battle of Wits</i>	151
B. <i>Giving One’s Self Up to the Law: The Interrogation Room As Confessional</i>	157
V. JUDGING THE STRUGGLE BETWEEN THE RUGGED AND SUSCEPTIBLE INDIVIDUAL	160
A. <i>Critiquing the “Battle of Wits”</i>	161
B. <i>Critiquing the Interrogation Room as Confessional</i>	165
C. <i>False Confessions</i>	168
D. <i>Beyond False Confessions: Miranda and the Citizen-Government Relationship</i>	178
CONCLUSION	185

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INTRODUCTION

With each new Supreme Court opinion, *Miranda v. Arizona*¹ increasingly resembles an aging film star, making a major splash when first coming onto the scene, persevering through mid-career ups and downs, and then gradually losing vitality until finally receiving a Lifetime Achievement Award that tacitly suggests the best years belong to the past.² But even if *Miranda*'s star power now appears to be fading, few doctrines have commanded such a vast number of legal paparazzi chronicling the case's every step or engendered such fervent arguments over whether *Miranda*'s oeuvre should be judged a success or failure.³ *Miranda*, in short, is one of those cases that lies at the convergence of so many flashpoint issues—ranging from views of judicial activism to concerns over police abuse—that we inevitably are tugged back to the most basic question that can be asked: What role should the Constitution play in regulating police interrogation?

To someone new to the area, that may seem like an exceedingly odd question to still be asking since the Supreme Court has had over a half-century to elaborate upon *Miranda*.⁴ The strangeness only grows, however, when one realizes that *Miranda* is simply one episode in a far longer struggle by the Court. Indeed, it would be quite understandable if someone were to develop constitutional vertigo trying to trace the Supreme Court's approach to police interrogation practices through the various constitutional byways of the Due Process Clause, the Sixth Amendment right to counsel, and the Fifth Amendment privilege against self-incrimination.⁵ At times the Court has adopted a strongly regulative approach toward individuals undergoing police questioning, only to then turn around and espouse a far more laissez-faire attitude toward what happens in the interrogation room.

1. 384 U.S. 436 (1966).

2. See *infra* notes 141–146 and accompanying text (discussing *Dickerson v. United States*, 530 U.S. 428 (2000) and the dilution of *Miranda*'s protections).

3. Two recent symposia on *Miranda*'s fiftieth anniversary capture both the continued fascination with the opinion and the wide breadth of views held about the opinion and its merits. See Symposium, *The Fiftieth Anniversary of Miranda v. Arizona*, 97 B.U. L. REV. 685 (2017); Symposium, *Entering the Second Fifty Years of Miranda*, 50 TEX. TECH. L. REV. 1 (2017).

4. Professor Kit Kinports aptly described the Supreme Court's approach as a "love-hate relationship" with the *Miranda* decision. See Kit Kinports, *The Supreme Court's Love-Hate Relationship with Miranda*, 101 J. CRIM. L. & CRIMINOLOGY 375 (2011). Professor Ron Allen, after objecting that the term "incoherent" is too often used and misused in legal writing, left no doubt that the term did, however, apply to *Miranda*: "The *Miranda* debate, and much that preceded it, is literally incoherent in that it makes no sense at all." Ronald J. Allen, *Miranda's Hollow Core*, 100 NW. U. L. REV. 71, 73 (2006).

5. See Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 10–14 (2015) (tracing the different constitutional rationale that the Court has used to regulate confessions).

As would be expected, a fair amount of attention has been devoted both to decrying and to attempting to explain these doctrinal mood swings.⁶ However, while the scholarship is both insightful and thought provoking, this Article contends that a key inroad into understanding the Court's interrogation cases has largely been overlooked.

A tour through the Court's cases, beginning with the Court's early Due Process cases and proceeding through *Miranda* and beyond, reveals that much of the Court's muddled jurisprudence regarding police interrogation is a result of the Justices' differing views of *why* individuals confess. Whether approached as a Due Process inquiry, a Fifth Amendment privilege issue, or a Sixth Amendment right-to-counsel challenge, the Court has cast the critical inquiry as a question of historical fact: did the defendant "voluntarily" decide to confess or waive his rights?⁷ It turns out, however, that answering the voluntariness question requires making assumptions that transform the decision maker into as much psychoanalyst as fact finder. And once we begin to pay close attention to the Court's various depictions of

6. For an eclectic sampling of critiques and perspectives, see Donald A. Dripps, *Miranda for the Next Fifty Years: Why the Fifth Amendment Should Go Fourth*, 97 B.U. L. REV. 893 (2017) (reviewing many of the differing views of *Miranda* as a way to make insightful comparisons between Fourth and Fifth Amendment caselaw developments since *Miranda*); Susan R. Klein, *Transparency and Truth During Custodial Interrogations and Beyond*, 97 B.U. L. REV. 993 (2017); Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163 (2007) (detailing the "sad reality" of *Miranda*); Allen, *supra* note 4; Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004); William Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975 (2001); Donald A. Dripps, *Is the Miranda Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT 19 (2000); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995).

7. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961); *see also* *Miller v. Fenton*, 474 U.S. 104 (1985) (prioritizing the voluntariness question in evaluating the constitutionality of a confession). This Article uses voluntariness as the umbrella concept to assess the Court's approach to confessions. While the Fifth Amendment privilege against self-incrimination speaks in terms of compelled statements and the Court's Due Process cases use voluntariness, the concepts for all practical purposes have merged. And, of course, *Miranda* as the Court's central Fifth Amendment case revolves around the idea of whether the warnings were voluntarily waived. As Professor Godsey has accurately observed, even if *Miranda* originally was crafting out its own law around compulsion, the Court "has [since] unmoored the warnings from the *Miranda* concept of compulsion, and now considers them a first-step litmus test for determining the voluntariness of a confession." Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 811 (2006) (citation omitted). *See also*, Allen, *supra* note 4 at 75–76 (critiquing *Miranda* for addressing the Due Process voluntariness test's problems through what essentially was another voluntariness test simply preceded by warnings); Laurence A. Brenner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 147–54 (1989). After *Montejo v. Louisiana*, 556 U.S. 778, 788 (2009), even the Court's Sixth Amendment right-to-counsel cases in the interrogation context, which at one time appeared to articulate a distinct rationale, are now merged with *Miranda*'s inquiry whether the rights were voluntarily waived when being questioned by the police. *See* Eda Katharine Tinto, *Wavering on Waiver: Montejo v. Louisiana and the Sixth Amendment Right to Counsel*, 48 AM. CRIM. L. REV. 1335, 1369 (2011) ("In *Montejo*, the Supreme Court collapsed the Sixth Amendment right to counsel into the Fifth Amendment right to counsel . . .").

who is being interrogated, we begin to see how the Court's image of the way that an individual should react if subjected to police questioning strongly shapes the contours of the constitutional right that is fashioned.

This Article undertakes that examination and discovers that the Justices have espoused two basic characterizations of a suspect being interrogated: that of the "rugged individual" and that of the "susceptible individual." As the examination reveals, each characterization has had a period of ascendancy and the protections that are afforded a suspect largely depend on which characterization a majority of the Court invokes. This framework, however, does more than help explain the confusion surrounding the case law. By bringing these two competing visions out into the open, a direct examination from both an empirical and doctrinal viewpoint can be made of their underlying assumptions about human behavior.

The Article proceeds in five parts. Part One looks at how the Court has struggled with the meaning of 'voluntariness' in the context of interrogation and introduces the idea that the Justices' vision of who is seated in the interrogation room heavily colors that determination. Part Two looks at how the Court has at times envisioned the suspect as the "rugged individual," an individual who knows his or her rights and can stand up to the pressures of interrogation absent exceptional circumstances. Part Three explores the rise of a different characterization, that of the "susceptible individual" in the interrogation room, and how at its zenith this characterization resulted in the landmark decision of *Miranda v. Arizona*, an ascendancy that has now largely been replaced by the return of the rugged individual as the primary archetype. Part Four analyzes the Court's recent resurrection of the rugged individual perspective and how it rationalizes confessions as either the product of a "calculating rugged individual" who mistakenly believed that he could win a battle of wits with the police, or as the decision of a "penitent rugged individual" choosing to confess as a first step towards redemption. In Part Five, the Article looks at the rugged individual and susceptible individual models in light of empirical and doctrinal critiques, as well as their implications for false confessions and government-citizen relations. The empirical evidence and DNA-exoneration cases show that the rugged individual archetype is out-of-step with the realities of the interrogation room and puts minority and poorer defendants at a distinct disadvantage in exercising their rights.

I. THE ELUSIVE MEANING OF VOLUNTARINESS

The Court's voluntariness doctrine is deceptively easy to state:

Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used

against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confessions offends due process.⁸

However, as those familiar with the Court's struggle to give meaning to the doctrine are well aware, the Court's efforts to expound upon the voluntariness question offer up a ready piñata at which to take a swing. Even the Court itself has taken a swing, observing with apparent agreement that commentators have critiqued the voluntariness doctrine as "'useless' . . . '[p]erplexing' . . . and 'legal double-talk.'"⁹

The crux of the critique is that the doctrine at bottom is simply too amorphous to be effective; as one commentator pithily noted, "virtually everything is relevant and nothing is determinative."¹⁰ Professor Paul Marcus has catalogued a number of factors that courts have considered in trying to assess if an individual's will was overborne: deception (specifically, deceptions about the legal process), fabricated physical evidence, threats, promises, length of interrogation, and a defendant's age, health, and intelligence.¹¹ However, no ready algorithm exists for how those factors should be weighed or viewed, or even counted at all.¹² The result, as Judge Richard Posner candidly observed in one interrogation case, is that:

[T]he proposition that a confession, to be admissible, must be the product of free choice . . . leads nowhere. Taken seriously it would require the exclusion of virtually all fruits of custodial interrogation, since few choices to confess can be thought truly 'free' when made by a person who is incarcerated and is being questioned by armed officers without the presence of counsel or anyone else to give him moral support. The formula is not taken seriously.¹³

The first step to unraveling the puzzle of how the courts are approaching confessions, therefore, is to acknowledge that the "voluntariness" determination is not a factual determination but a judicial and societal construct. This is an observation that the Supreme Court itself has

8. *Culombe*, 367 U.S. at 602. *See also supra* note 7 (discussing the central role that the voluntariness inquiry plays throughout the Court's various constitutional doctrines concerning interrogation).

9. *Miller*, 474 U.S. at 116 n.4 (citations omitted).

10. Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745 (1987).

11. Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 614–16 (2006).

12. Courts are divided, for example, over whether police use of fabricated physical evidence during an interrogation implicates voluntariness concerns. *See id.*

13. *United States v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990).

acknowledged, describing the inquiry as an “amphibian”¹⁴ with a “hybrid quality” that, “because it subsum[es] a ‘complex of values,’ . . . militates against treating the question as one of simple historical fact.”¹⁵ Judge Posner likewise has observed that:

[W]hether a confession is voluntary is not really a fact, but a characterization. There is indeed no ‘faculty of will’ inside our heads that has two states, on and off, such that through careful reconstruction of events the observer can determine whether the switch was on when the defendant was confessing.¹⁶

Yet, despite these critiques, when confronted with the question of whether to admit a confession, courts must make their dutiful pilgrimage back to the Court’s formally stated voluntariness test with its impossible demand that the judge determine whether the “voluntariness switch” was in fact on or off.¹⁷ And unsurprisingly this amorphousness carries over to the voluntariness inquiries throughout the area of police interrogation, such as the question of whether the suspect voluntarily waived his *Miranda* rights or voluntarily surrendered his right to an attorney.¹⁸

The result is that the voluntariness determination is essentially the legal system’s version of an Escher drawing, where the figure that one sees depends upon the angle of the judge’s observation. True, some fact patterns are—let us pray—likely to be seen by all jurists as involuntary. In the infamous 1936 case *Brown v. Mississippi*,¹⁹ for example, the African-American defendants were subjected to partial hangings and brutal

14. *Culombe*, 367 U.S. at 605 (explaining that the test is “amphibian” because “[i]t purports at once to describe an internal psychic state and to characterize that state for legal purposes”).

15. *Miller*, 474 U.S. at 116 (citations omitted).

16. *Rutledge*, 900 F.2d at 1128.

17. We do know that the courts generally decide that the defendant’s “voluntariness switch” was on. Peter Nardulli’s studies found that the exclusionary rule led to the suppression of only a miniscule percentage of confessions. See Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 8 AM. B. FOUND. RES. J. 585 (1983); Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 8 AM. B. FOUND. RES. J. 611 (1983) (reviewing studies and concluding that the exclusionary rule does not have a “major impact” on the prosecution of felony arrests); see also John P. Gross, *Dangerous Criminals, the Search for the Truth and Effective Law Enforcement: How the Supreme Court Overestimates the Social Costs of the Exclusionary Rule*, 51 SANTA CLARA L. REV. 545, 547 (2011) (challenging the Supreme Court’s assumptions that the exclusionary rule imposes significant social costs).

18. See *supra* note 7 (noting how *Miranda* revolves around voluntariness inquiries).

19. 297 U.S. 278 (1936). And perhaps prayers, such as those raised in the prior sentence, are not always answered. The Mississippi Supreme Court did not find error in admitting the confessions into trial, albeit primarily on procedural grounds that objections to the confessions had not been properly raised. *Brown v. State*, 161 So. 465 (1935). But see *id.* at 472 (Griffith, J., dissenting) (“To my mind it would be as becoming a court to say that a lynching party has become legitimate and legal because the victim, while being hung by the mob, did not object in the proper form of words at precisely the proper stage of the proceedings.”).

whippings until they confessed. Adding to the outrage was how those engaged in the brutality felt absolutely no compunction over what they had done; one deputy who witnessed the brutalities proudly testified at trial that the beatings were “[n]ot too much for a negro; not as much as I would have done if it were left to me.”²⁰ The Court described the trial transcript as “read[ing] . . . like pages torn from some medieval account” and readily found that the confessions were involuntary.²¹

However, given the horrific facts, a case like *Brown* does not really advance the voluntariness inquiry in a meaningful way. Such shocking circumstances may even give a false sense of security that the voluntariness question is one that can readily yield a binary answer. The real work lies with those cases where the constellation of facts touches upon factors that the Court has identified as being relevant, like youthfulness or police tactics, and the Court must decide which way the factors play. These are the cases where we can start to see how the Justices define voluntariness based on their underlying assumptions about the suspect who is being interrogated.

Consider, for instance, the case of *Fare v. Michael C.* The defendant was a sixteen-year-old who had been arrested on suspicion of murder and in response to his *Miranda* warnings requested to have his probation officer present during the interrogation.²² After the officers denied the request, the defendant waived his *Miranda* rights and the Court needed to decide if the waiver was voluntary.²³ While Justice Blackmun for the majority acknowledged that the defendant’s juvenile status was relevant to the voluntariness inquiry, he sketched a portrait of an already hardened offender who knew his way around the criminal justice system.²⁴ The defendant, Justice Blackmun observed, was “16 ½ years old” with a record of previous offenses “stretching back over several years” and had been on probation since age 12.²⁵ The majority opinion repeatedly noted that the defendant was an “experienced older juvenile with an extensive prior record” who had “considerable experience with the police” because of multiple arrests.²⁶ In addition, he had spent time in a youth camp and “was under full-time supervision of probation authorities.”²⁷ The opinion notes in passing that he wept at one point in the interrogation, but makes nothing of it, instead

20. *Brown*, 297 U.S. at 284.

21. *Id.* at 282 (quoting *Brown v. State*, 161 So. 465, 470 (1935) (Griffith, J., dissenting)).

22. *Fare v. Michael C.*, 442 U.S. 707, 709–11 (1979).

23. *Id.* at 715.

24. *Id.* at 713 (referencing the California Court of Appeals’ description of the defendant as a “16 and a half year old minor who has been through the court system before, has been to [probation] camp, has a probation officer, [and is not] a young, naive minor with no experience with the courts.”) (quoting *In re Michael C.*, 135 Cal. Rptr. 762, 765 (Ct. App. 1977)).

25. *Id.* at 710, 726–27.

26. *Id.* at 725–26.

27. *Id.* at 726.

commending the police for taking “care to inform [him] of his rights and to ensure that he understood them. The officers did not intimidate or threaten [him] in any way.”²⁸ For the majority, Michael was no Oliver Twist inadvertently caught up in the system, but an already hardened criminal who knew the ropes of the criminal justice system.

After reading the majority’s opinion, one might wonder just who Justice Powell was talking about in his dissent. Justice Powell eschewed the majority’s repeated use of the term “juvenile” with its implicit connotations of delinquency in the criminal context. Instead, Justice Powell described Michael as a “young person” who was just “16 years old at the time” (feeling no need to add the extra one-half year that Justice Blackmun repeatedly included).²⁹ While Justice Powell acknowledged that Michael had “prior brushes with the law” (compared to the majority’s “extensive prior record”), he came across during the interrogation as “immature, emotional, and uneducated, and therefore was likely to be vulnerable to the skillful, two-on-one, repetitive style of interrogation to which he was subjected.”³⁰

Powell expressly observed that he fully believed that a minor could become a “‘street-wise,’ hardened criminal[],”³¹ but the defendant, who could be heard “crying”³² while being subjected to “protracted interrogation,”³³ was not that person. Powell strongly disputed the idea that the officers had taken “‘the greatest care’ to assure that [his] ‘admission was voluntary.’”³⁴ In short, Powell looked at the same factual sketching of the defendant, but where Blackmun saw a street-wise juvenile offender, Powell’s viewing angle saw a scared, tearful youth unable to withstand police pressures.

Michael C., however, is more than simply a vivid illustration of how Justices can view the same fact pattern so differently. The case offers an avenue that we can begin to follow as a way to understand how the Justices utilize unstated assumptions about human behavior in making their voluntariness assessments. Whether one dismisses a sixteen-year-old’s crying while being interrogated as irrelevant or sees it as a sign of a young person crumbling under pressure will depend on who we see when we look at the defendant: a hardened street tough or someone trying to act tough while knowing he needs help.

28. *Id.* at 727.

29. *Id.* at 733 (Powell, J., dissenting).

30. *Id.* (citation omitted).

31. *Id.* at 734 n.4.

32. *Id.* at 733 n.2.

33. *Id.* at 734.

34. *Id.* at 734 (quoting *In re Gault*, 387 U.S. 1, 55 (1967)).

This same basic principle is at work when we look at police questioning generally. For while some assumptions will undoubtedly turn on a case's unique facts, if we step back and look at how the Court's jurisprudence concerning police questioning has evolved over time, we see how the Justices have used various broadly ingrained assumptions about human nature in trying to answer the voluntariness question. Once we accept that the voluntariness issue is far more than a question of historical fact, we can track how the Court has used differing assumptions about how citizens behave—or should behave—when questioned by the police, as a means of getting a more accurate sense of how the voluntariness puzzle is put together. While the analysis does not offer an indisputable answer to how the Court should decide such cases, it provides a map that makes the Court's twisting path through the terrain of police interrogation far more intelligible.

II. THE RUGGED INDIVIDUAL AND POLICE INTERROGATION

A. *Introducing the Rugged Individual*

That the Court would develop two competing views of who was being questioned in the interrogation room was not immediately evident from its early voluntariness cases. Treading gingerly because of federalism concerns as it started to apply the Due Process Clause to the states, the cases providing relief tended to involve tactics so extreme, like the whippings in *Brown*,³⁵ that even an individual with the sternest constitution would have been likely to crack. Likewise, in *Chambers v. Florida*,³⁶ a 1940 case set in rural Florida, the tactics used were so coercive that even the hardest individual would have trouble convincing himself that he could have resisted.³⁷

While the *Chambers* court noted that “conflicting” claims existed over whether physical violence and threats were used,³⁸ the evidence unambiguously showed that against a backdrop of threatened mob violence, the petitioners, three Black men suspected of murdering an elderly white man, had been subjected to almost a week of continuous, intensive

35. See *supra* notes 19–21 and accompanying text.

36. 309 U.S. 227, 230–31 (1940) (describing days of intense police questioning).

37. Although one must take a very long pause after making that statement and recall that juries had found the confessions in both *Brown* and *Chambers* to be voluntary, and those findings had been upheld by the Mississippi and Florida Supreme Courts. *Id.* at 227 n.2 (describing Chambers' guilty verdict in a jury trial and the procedural steps toward the Supreme Court); *Brown v. Mississippi*, 297 U.S. 278, 279 (1936) (recounting that the jury received instructions that if they had reasonable doubt regarding the voluntariness of the confession, they should disregard the confession). The lower court cases are thus vivid reminders how important the evaluator's perspective is: one person's torture is another person's enhanced interrogation.

38. *Chambers*, 309 U.S. at 231 (“The testimony is in conflict as to whether all four petitioners were continually threatened and physically mistreated until they finally, in hopeless desperation and fear of their lives, agreed to confess on Sunday morning just after daylight.”).

interrogation without access to friends or family—let alone counsel.³⁹ Each suspect would be brought up “one by one” in shifts to a room on the fourth floor of the jail and be surrounded by “four to ten” law enforcement and community members, all of whom were white, and subjected to intensive questioning. After five days without a confession, the police decided to conduct an “all night vigil” that began at three on a Saturday afternoon and, with only short breaks interspersed for food, finally wrested “sunrise confessions” from the petitioners early Sunday morning.⁴⁰ As the unanimous Court noted, these were “circumstances calculated to break the strongest nerves and the stoutest resistance.”⁴¹

Both *Brown* and *Chambers* were thus relatively easy cases in which to find involuntariness given the extreme tactics used: one need not delve deeply into the human psyche to conclude that even the citizen with the “strongest nerves” would have submitted to the police’s will. Two cases in the years immediately following, however, introduce us to how the Court can posit the defendant as “the rugged individual”—someone with a strong constitutional and personal resolve who knows her rights and possesses the courage to exercise them unafraid of the consequences⁴²—as the benchmark for assessing whether the interrogation techniques would have coerced the confession.⁴³ Not surprisingly, if the suspect is imagined as the rugged individual, the Court is much more likely to find that the suspect’s confession was voluntary.

In *Lisenba v. California*,⁴⁴ decided only a year after *Chambers*, the defendant, a suspect in the murder of his wife, was subjected to prolonged bouts of interrogation by a rotating group of interrogators. Both parties agreed that Lisenba was deprived of sleep during the first forty-two hours of his arrest (during which he did not confess) and that eleven days later he was subjected to another marathon session of about sixteen hours. Despite requests for his lawyer, the sessions were all incommunicado. The degree of physical abuse was disputed, but at a minimum, one of the interrogators

39. *Id.* at 231–236 (describing the lengthy and intensive interrogation).

40. *Id.* at 230, 231, 235.

41. *Id.* at 238–39.

42. For an explication of the “rugged individual” as a product of American history and culture, see Scott E. Sundby, *The Rugged Individual's Guide to the Fourth Amendment: How the Court's Idealized Citizen Shapes, Influences, and Excludes the Exercise of Constitutional Rights*, 65 UCLA L. REV. 690 (2018). Professor Bennet Capers has written a fascinating essay that raises through the “good citizen” a number of parallel points to how the Court’s decisions are based on its perception of how a citizen should behave. I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653 (2018). Particularly important for this Article is his point that the Court has created a construct through the “good citizen” that has made it extremely difficult for a citizen to exercise his or her constitutional rights. *Id.*

43. Sundby, *supra* note 42 at 694–95.

44. 314 U.S. 219 (1941).

slapped Lisenba's ear hard enough to leave it red and swollen, with Lisenba claiming far more extensive abuse.

What is striking about the majority's opinion is that it is full of strong admonishments to law enforcement:

[W]e disapprove the violations of law involved in the treatment of the petitioner Officers of the law must realize that if they indulge in such practices [like prolonged interrogation and denying advice of counsel] they may, in the end, defeat, rather than further, the ends of justice. Their lawless practices here took them close to the line.⁴⁵

Yet despite the lecture, the majority saw Lisenba as the rugged individual, noting at the outset that Lisenba "while having almost no formal education, is a man of intelligence and business experience."⁴⁶ Even more so, the majority felt that off the cold record it could confidently determine that Lisenba had

exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer.⁴⁷

As it turns out, Lisenba's ability to act the rugged individual paled compared to that of the petitioner in *Lyons v. Oklahoma*.⁴⁸ Lyons was suspected of murdering a father, mother, and four-year-old child, and then burning their house down to conceal the crime.⁴⁹ The police conducted three interrogation sessions. Lyons alleged physical abuse during each questioning, and although the police denied the allegations, the Court appeared to be skeptical of the state's denial.⁵⁰ Lyons did not confess until the second interrogation, which involved "[e]leven or twelve officials" crowded around Lyons in the prosecutor's cramped office, and went on for hours through the night until he finally confessed at two thirty in the

45. *Id.* at 240.

46. *Id.* at 229.

47. *Id.* at 241. By contrast, Justice Black, who we will see was no friend of the rugged individual view, see *infra* notes 101–14 and accompanying text, observed in his dissent that when Lisenba was asked if he knew his statement could be used against him, he simply replied, "I didn't know whether the statement would be used against me, or not. I would rather die than to have gone back to that house and went through torture like the three days I was out there. I didn't care whether the statement was taken, or not." *Id.* at 243 n.2 (Black, J., dissenting). As in the other cases from this era, the majority opinion stressed federalism concerns in being cautious in reviewing state court judgments. *Id.* at 238–39.

48. 322 U.S. 596 (1944).

49. *Id.* at 598.

50. *Id.* at 599.

morning.⁵¹ The confession came after a pan of the victims' bones were placed in his lap⁵² and he was told "[t]here's the bones of the baby you burned up."⁵³

However, apparently recognizing the egregiousness of this confession, the State did not introduce it at trial. The prosecution instead relied on a confession obtained during a third interrogation twelve hours later. As with all the interrogations, the use of force was disputed and the jury found the confession to be voluntary despite testimony from the murder victim's relatives that the lead state investigator had told them he had beat Lyons "for either six or seven hours . . . I haven't even got to go to bed."⁵⁴ Intriguingly, despite the gruesome nature of the crimes, the jury sentenced Lyons to life instead of giving him the death penalty, suggesting lingering doubts about his guilt and treatment by law enforcement.⁵⁵

Justice Reed, for a six-Justice majority, affirmed the state courts' findings that the admitted confession was voluntary.⁵⁶ Reed provided a remarkably antiseptic description of Lyons: "married;" "twenty-one or two years of age;" "from the transcript . . . no indication of subnormal intelligence" (Lyons, Reed noted, was able to sign his name to the confession); and two prior convictions, "one for chicken stealing and one for burglary."⁵⁷ With this bland, unremarkable portrayal of the defendant, Reed was willing to find that the State had produced sufficient evidence "which, if believed, would make it abundantly clear that the events at [the coerced confession] did not bring about the [later] confession."⁵⁸

Reed proceeded to detail the evidence that he thought showed the first confession had not influenced the second, including that the second confession was "a full twelve hours" after the involuntary confession, that the second confession was at a different location, and that all but one of the interrogators from the first confession were different.⁵⁹ Reed believed these factors allowed him to find that this rugged individual of normal intelligence—who could even sign his name—would have been able to put aside the brutalities of the first confession. Reed also provided a rationale

51. *Id.*

52. *Id.* at 599–600.

53. The officer's statement does not appear in the Supreme Court opinion but is reported by Gilbert King, *The Awakening of Thurgood Marshall*, THE MARSHALL PROJECT (Nov. 20, 2014, 11:56 AM), <https://www.themarshallproject.org/2014/11/20/the-awakening-of-thurgood-marshall>.

54. *Id.* The jury found that the confession was not physically coerced and the majority acquiesced to that finding. *Id.*

55. *Id.*

56. *Lyons*, 322 U.S. at 605.

57. *Id.* at 599.

58. *Id.* at 604.

59. *Id.*

for Lyons' confession that is often used⁶⁰ in explaining the rugged individual's decision to confess: Lyons, after rationally weighing the pros and cons, had determined that "it was wise to make a clean breast of his guilt."⁶¹

Even without knowing more, one might already be inclined to agree with dissenting Justice Murphy's disbelief of the majority's psychological analysis:

[I]t is inconceivable . . . that the second confession was free from the coercive atmosphere that admittedly impregnated the first one. The whole confession technique used here constituted one single, continuing transaction. To conclude that the brutality inflicted at the time of the first confession suddenly lost all of its effect in the short space of twelve hours is to close one's eyes to the realities of human nature.⁶²

The reader's incredulity will no doubt increase upon learning that, despite Reed's portrayal of Lyons as an everyday citizen, he was in fact an illiterate "black sharecropper" who the police arrested only after releasing two other individuals whose prosecution would have potentially escalated into a scandal implicating local prison officials.⁶³ Remarkably, Lyons' race was never mentioned in the Supreme Court's opinion even though it was part of the case's dynamic.⁶⁴ Indeed, Lyons' attorney at trial and on appeal was Special Counsel to the NAACP Legal Defense Fund, Thurgood Marshall—fresh off his victory in *Chambers* and confident that Lyons would win in the Supreme Court.⁶⁵

As Marshall angrily discovered,⁶⁶ however, if the Court uses the rugged individual as the measure of a suspect's resiliency during interrogation, the effect can be to posit an individual who can "easily forget the . . . torture that accompanied [Lyons'] previous refusal to confess" and allow that person to "quickly recover from the gruesome effects of having had a pan of human bones placed on his knees in order to force incriminating testimony from him."⁶⁷ That revelation may help explain why after Marshall

60. See *infra* Part IV.A.

61. *Lyons*, 322 U.S. at 604.

62. *Id.* at 606 (Murphy, J., dissenting).

63. King, *supra* note 53.

64. As will be seen, the rugged individual archetype has a disproportionate impact on minority defendants. See *infra* notes 216–217 and accompanying text. See also Sundby, *supra* note 42 at 723–27 (discussing how the rugged individual perspective negatively impacts minority citizens trying to claim Fourth Amendment protections).

65. King, *supra* note 53.

66. *Id.* ("The decision, which Marshall openly criticized in a rare display of anger, amplified for him the harrowing and tenuous position of placing a client's fate in the hands of the Supreme Court.")

67. *Lyons*, 322 U.S. at 606 (Murphy, J., dissenting).

took his seat on the Court, he would resist so strongly the rugged individual approach and become one of the strongest advocates for an alternative vision of the citizen who is subjected to interrogation.⁶⁸

B. How the Rugged Individual Archetype Turns Voluntariness into a Special Circumstances Inquiry

What is critical to recognize at the outset is the fundamental effect that the rugged individual approach has on how the voluntariness inquiry is framed: the starting assumption is that a suspect as the rugged individual ordinarily will be able to withstand the pressures inherent to interrogation, and any confession will be presumed voluntary absent either extreme techniques or particular individual vulnerabilities. From the rugged individual perspective, therefore, *Brown* and *Chambers* can be compartmentalized as exceptions based on the suspects' particular vulnerabilities and the extreme methods used.⁶⁹ Each case took place in the Jim Crow South during a time of overt and often brutal racial discrimination in the criminal justice system, with lynching always lurking in the background as an instrument of terror.⁷⁰ The *Brown* Court noted as part of its involuntariness analysis that the suspects were "ignorant negroes"⁷¹ and the *Chambers* Court thought it critical that the "protracted questioning and cross questioning of these ignorant young colored tenant farmers [was carried out] by State officers and other white citizens."⁷²

This focus on a suspect's particular vulnerabilities was carried forward in a line of cases developed over time where the Court found confessions to be involuntary because they were produced through police exploitation of a suspect's unique situation. The Court found confessions to be involuntary, for instance, where: the suspect was a young heroin addict and a "near mental defective;"⁷³ where a sleep-deprived suspect was tricked into

68. See, e.g., *New York v. Quarles*, 467 U.S. 649, 682 (1984) (Marshall, J., dissenting) (opposing the creation of a "public safety" exception to *Miranda*, a decision he described as "the culmination of a century-long inquiry into how this Court should deal with confessions made during custodial interrogations"). Professors Green and Richman are no doubt correct that even though Marshall in his opinions addressing *Miranda* issues did not directly cast *Miranda* as a civil liberties decision addressing race and poverty disparities, that factor was always inescapably present. Bruce A. Green & Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure*, 26 ARIZ. ST. L.J. 369, 388 n.75 (1994).

69. See *infra* notes 79–83 and accompanying text.

70. *Chambers* was represented in the Supreme Court by Thurgood Marshall, Jr., as Special Counsel for the NAACP Legal Defense Fund. King, *supra* note 53 ("[Marshall] had, in fact, already argued and won *Chambers v. Florida* before the Supreme Court, which ruled unanimously that coerced confessions by police are inadmissible at trial.").

71. *Brown v. Mississippi*, 297 U.S. 278, 281 (1936).

72. *Chambers v. Florida*, 309 U.S. 227, 238 (1940).

73. *Townsend v. Sain*, 372 U.S. 293, 303 (1963).

thinking he was talking to a doctor for a medical condition, when in fact he was being subjected to the “arts of a highly skilled psychiatrist” trained in hypnosis to obtain a “trance-like” confession after extensive questioning;⁷⁴ where a suspect was actively psychotic and incompetent at the time of the confession;⁷⁵ where a Black defendant in a Deep South case full of racial animus was subjected to prolonged interrogation, including threats to arrest his mother on unrelated charges if he did not confess;⁷⁶ and where a mother was told that “state financial aid for her infant children would be cut off, and her children taken from her, if she did not ‘cooperate.’”⁷⁷

All of these cases are in one sense unremarkable and commonsensical. No one is going to be surprised that the police manipulating an individual’s unique vulnerability is a factor that a court will focus on in finding a confession involuntary. However, these cases also have an unstated analytical side-effect that is far more controversial and deserving of being pulled out of the shadows: they can be seen as entrenching the presumption that the average citizen⁷⁸ is made of sufficiently hardy material that, absent such special circumstances, the police could turn the screw fairly far before the citizen would succumb to the pressures of police interrogation.

From this perspective, these voluntariness cases are reminiscent of the Court’s discarded “special circumstances” test for deciding if an accused had a constitutional right to an appointed attorney.⁷⁹ Prior to *Gideon v. Wainwright*,⁸⁰ the Court presumed that the average citizen was quite capable of defending himself in a criminal proceeding and, therefore, no automatic

74. *Leyra v. Denno*, 347 U.S. 556, 561 (1954). After his first trial, the state supreme court reversed his conviction upon finding the confession to the psychiatrist involuntary. He was tried and convicted again, however, based on a series of subsequent confessions he had given to the police in the immediate aftermath following the confession to the psychiatrist. It was these confessions the U.S. Supreme Court ruled also involuntary because they “[a]ll were simply parts of one continuous process.” *Id.*

75. *Blackburn v. Alabama*, 361 U.S. 199 (1960).

76. *Harris v. South Carolina*, 338 U.S. 68 (1949).

77. *Lynnum v. Illinois*, 372 U.S. 528, 534 (1963).

78. And if the defendant is educated, such as a law student, the presumption will be all the stronger. In *Crooker v. California*, 357 U.S. 433 (1958), the Court found that that the defendant’s claim of involuntariness:

is negated . . . by petitioner’s age, intelligence, and education. While in law school he had studied criminal law; indeed, when asked to take the lie detector test, he informed the operator that the results of such a test would not be admissible at trial absent a stipulation by the parties. Supplementing that background is the police statement to petitioner well before his confession that he did not have to answer questions. Moreover, the manner of his refusals to answer indicates full awareness of the right to be silent. On this record we are unable to say that petitioner’s confession was anything other than voluntary.

Id. at 438.

79. *See Betts v. Brady*, 316 U.S. 455, 462 (1942) (“That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.”).

80. 372 U.S. 335 (1963).

constitutional right existed to have an attorney appointed if he could not afford one.⁸¹ A Due Process violation occurred only if a special circumstance existed like intellectual disability that would have precluded the accused from being able to live up to the Court's myth that the average citizen was a worthy match for a professional prosecutor. Led by Justice Black, the Court eventually acknowledged that the "science of the law" was beyond the ken of non-lawyers and in *Gideon* abandoned the special circumstances test by finding that fundamental fairness required that defendants were entitled to an appointed attorney if they were indigent.⁸²

Like the special circumstances test, the voluntariness cases—if cast as primarily focusing on the suspect's "special vulnerabilities"—can also be used to severely limit findings of involuntariness to only those extreme situations where even the most constitutionally courageous individual would have been unable to stand up to the police. And as *Lyons* shows, if the suspect must show how he was uniquely vulnerable, the voluntariness analysis can be readily skewed by either ignoring or downplaying such vulnerabilities, as the majority did by never noting that Lyons was an uneducated Black sharecropper in Oklahoma in the 1940s.⁸³

This restrictive view of voluntariness, however, like the special circumstances test for appointment of counsel, was also eventually challenged as not reflective of reality. And fittingly, it was Justice Black who, just as he had in *Gideon*,⁸⁴ was a prime mover in arguing that the rugged individual was not a realistic portrayal of the average citizen who found herself in the interrogation room.⁸⁵ This very different understanding of human nature set the stage for *Miranda* and introduced into the Court's interrogation jurisprudence a very different perspective, that of the susceptible individual, through which to view police interrogation practices.

81. *Id.* at 342 (declaring that the right to counsel is a fundamental right and must be applied to the states).

82. *See Betts*, 316 U.S. at 472 (“[T]he accused was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue.”).

83. *See supra* notes 54–65 and accompanying text.

84. *See Sundby*, *supra* note 42, at 739–45 (describing Justice Black's role in showing that the special circumstances test for the appointment of counsel was an unrealistic standard).

85. *See infra* notes 101–14 and accompanying text.

III. THE “EASILY SEDUCED” MIND AND THE SUSCEPTIBLE INDIVIDUAL

“The human mind, under the pressure of calamity, is easily seduced . . .”⁸⁶

A. *The Rugged Individual Finds an Alterego*

As seen in the prior section, one way to understand the Court’s voluntariness cases is as establishing a baseline assumption that a citizen confronted with police interrogation will act like the rugged individual with the “ability to resist and to admit, deny, or refuse to answer,” even though standard interrogation practices are “admit[tedly] . . . ‘inherently coercive.’”⁸⁷ From the rugged individual viewpoint, therefore, the cases where the Court found a confession to be involuntary are understood as situations where the defendant because of a particular attribute (e.g., psychosis or intellectual disability) could not rise to the role of the rugged individual, or because the tactics used were so excessive (such as week-long interrogations or physical violence) that even the rugged individual could not have withstood them. From this perspective, a court looking at an “ordinary” interrogation starts with the presumption that the suspect was quite capable of asserting his or her rights and withstanding police pressures, and will only find the involuntariness switch had been switched to “on” if something extraordinary occurred (and as *Lyons* demonstrates, the emphasis under this approach puts the “extra” in extraordinary).

There is another way to understand the cases, however, and it is a mode of understanding that ultimately begat *Miranda*. This view is one that can be detected as early as the 1897 case of *Bram v. United States*,⁸⁸ which in turn traces back to early English common law. Because it was a federal prosecution, the *Bram* Court was operating directly under the Fifth Amendment command that no person “shall be compelled in any criminal

86. *Bram v. United States*, 168 U.S. 532, 547 (1897) (quoting HENRY HAWKINS, HAWKINS’ PLEAS OF THE CROWN (6th ed. 1787)).

87. *Ashcraft v. Tennessee*, 322 U.S. 143, 170 (1944) (Jackson, J., dissenting); *see also infra* notes 148–156 and accompanying text (further discussing Jackson as a prominent advocate of the rugged individual view of police interrogation); *see also* *Lisenba v. California*, 314 U.S. 219, 239–40 (1941) (finding confession voluntary despite harsh interrogation tactics and characterizing prior cases finding involuntariness as going to situations where the confessions “were secured by protracted and repeated questioning of ignorant and untutored persons in whose minds the power of officers was greatly magnified; who sensed the adverse sentiment of the community and the danger of mob violence; who had been held incommunicado, without the advice of friends or of counsel; some of whom had been taken by officers at night from the prison into dark and lonely places for questioning”).

88. 168 U.S. 532 (1897).

case to be a witness against himself,”⁸⁹ but the focus remained on the question of whether Bram’s confession was “free and voluntary.”⁹⁰

The case’s facts are literally those of a murder-on-the-high-seas mystery. Bram was a seaman suspected in the murder of his captain, the captain’s wife, and the second mate during a voyage. Bram, who took over command as the next-in-charge, had at first succeeded in casting suspicion on another sailor, Brown, who was detained onboard.⁹¹ But by the time the ship reached port in Halifax, Nova Scotia, Brown had managed to turn the tables and Bram was the one in custody.⁹² After being stripped down for a search of his clothes, Bram was interrogated by a Halifax detective and, although denying guilt, made statements that were introduced as part of the prosecution’s case.⁹³

In finding that Bram’s confession was involuntary, three aspects of the *Bram* opinion are particularly important. First, the citizen who the Court sees the Fifth Amendment as protecting is most certainly not the rugged individual. Quoting liberally from a variety of English and American treatises to demonstrate the privilege’s origins and purposes, the Court paints a picture of the average individual as highly susceptible to police pressures:

The human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, . . . which is obtained from a defendant, either by the flattery of hope, or by the impression of fear, *however slightly the emotions may be implanted* . . . is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of

89. U.S. CONST. amend. V. The Court would not incorporate the Fifth Amendment privilege against the states until *Malloy v. Hogan*, 378 U.S. 1 (1964). The Court’s willingness to take a far more expansive view of voluntariness in *Bram* compared to cases like *Chambers* and *Lyons* is at least partly attributable to the Court’s federalism concerns when reviewing state cases. *See, e.g., supra* note 47 and accompanying text.

90. *Bram*, 168 U.S. at 557–58 (“[T]he general rule that the confession must be free and voluntary . . . is settled . . .”).

91. *Id.* at 536.

92. *Id.* at 537.

93. *Id.* at 561–62 (describing the circumstances under which Bram was questioned). The Court made short work of the government’s argument that the admission of the statement was not prejudicial because it did not admit guilt: “Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner’s statement precludes the State from saying that it was not used to his prejudice.” *Id.* at 542 (quoting *State v. Rorie*, 74 N.C. 148 (1876)). The *Miranda* Court would later make clear that its ruling applied even to statements that were arguably exculpatory. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (ruling applies to “statements, whether exculpatory or inculpatory”).

his own conviction.⁹⁴

Second, the Court noted that part of the difficulty with the obtaining of confessions is that it is almost impossible to truly tell whether a confession is voluntary. Consequently, the statement must be suppressed if any threat or promise “however slight”⁹⁵ was employed:

A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.⁹⁶

Finally, the Court was cognizant of the special danger of coercion associated with a police officer’s interrogation, noting that the English doctrine underlying the privilege might even be read as saying that “the mere fact of the interrogation of a prisoner by a police office would per se render the confession inadmissible, because of the inducement resulting from the very nature of the authority exercised by the police officer.”⁹⁷ At a minimum, the Court concluded,

[t]he attempt on the part of a police officer to obtain a confession by interrogating has been often reprovved by the English courts as unfair to the prisoner, and as approaching dangerously near to a violation of the rule protecting an accused from being compelled to testify against himself.⁹⁸

In *Bram*, then, one can begin to see a dramatically different vision of the citizen claiming constitutional protection when subjected to police questioning. Unlike the rugged individual, this citizen cannot necessarily stand up to the police when confronted in an interrogation atmosphere. This person, whom we will call the “susceptible individual,” is someone who when faced with the inherent authority of the police in an interrogation atmosphere is likely to be vulnerable to either threats or promises of hope—even if innocent. And echoing Judge Posner’s earlier reflections that it is psychologically impossible to know when a person’s involuntariness switch

94. *Bram*, 168 U.S. at 547 (quoting HAWKINS’ PLEAS OF THE CROWN (6th ed. 1787)) (emphasis added) (citation omitted); *see also id.* (judges may refuse to record a confession that “proceed[s] from fear, menace, or duress, or from weakness or ignorance.”) (quoting HAWKINS’ PLEAS OF THE CROWN (6th ed. 1787)).

95. *Id.* at 543.

96. *Id.* (quoting 3 H. SMITH & A. KEEP, RUSSELL ON CRIMES AND MISDEMEANORS 478 (6th ed. 1896)).

97. *Id.* at 556 (citing 3 H. SMITH & A. KEEP, RUSSELL ON CRIMES AND MISDEMEANORS 510 (6th ed. 1896)).

98. *Id.* at 557.

magically turns to “on,”⁹⁹ the susceptible-individual perspective acknowledges that “[t]he law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner” and so effectively presumes that if inducements were made, the statement was involuntary.¹⁰⁰

Two competing visions of the suspect who is sitting in the interrogation room thus begin to emerge. As we will see, much of the Court’s jurisprudence reflects a tug-of-war between these visions and which archetype—the rugged individual or the susceptible individual—is at any point ascendant. The susceptible individual archetype reached its zenith in *Miranda*, but it was Justice Black who was the most articulate and passionate advocate of the susceptible individual perspective in setting the foundation for *Miranda*. His opinions on voluntariness focused on portraying the vulnerability of everyday individuals who are subjected to police interrogation techniques.

Justice Black’s use of the susceptible individual is evident in *Ashcraft v. Tennessee*,¹⁰¹ a case decided the same term as *Lyons*. *Ashcraft* involved a defendant who had allegedly confessed¹⁰² to killing his wife. The case is particularly notable because, as Justice Jackson observed in his dissent, “[t]his is not the case of an ignorant and unrepresented defendant who has been the victim of prejudice. Ashcraft was a white man of good reputation, good position, and substantial property.”¹⁰³

The interrogation Ashcraft underwent—a thirty-six-hour interrogation during which he was given only a single five-minute respite—is alarming from a psychological perspective, but it did not involve the brutality, the racially charged lynch mob atmosphere, or the week-long tag-team interrogations of the other cases that the Court reviewed during this time period. In other words, if some Justices were looking for an opportunity to express concerns over the general effects of intensive interrogation on “ordinary” suspects, *Ashcraft* provided such a forum.¹⁰⁴

Justice Black, who had written *Chambers* a few years earlier and dissented in *Lyons*,¹⁰⁵ sympathetically sketched E.E. Ashworth as a salt-of-the-earth individual doing his best in a system where the odds were all stacked in the government’s favor: “[B]orn on an Arkansas farm[,]”

99. See *supra* note 16 and accompanying text.

100. *Bram*, 168 U.S. at 543 (quoting 3 H. SMITH & A. KEEP, *RUSSELL ON CRIMES AND MISDEMEANORS* 478 (6th ed. 1896)).

101. 322 U.S. 143 (1944).

102. Ashcraft actually denied that he had ever confessed and refused to sign a purported transcript of his statement. *Id.* at 151–52.

103. *Id.* at 173 (Jackson, J., dissenting).

104. See *supra* notes 69–83 and accompanying text.

105. See *supra* notes 48–65 and accompanying text.

Ashcraft had pulled himself up by the bootstraps, leaving at the age of eleven to become a farmhand, and eventually becoming a “skilled dragline and steam shovel operator.”¹⁰⁶ “[H]e had acquired for himself ‘an excellent reputation’” and through the dint of hard work had accumulated a home and some modest bank accounts from which he supported himself and his wife in a “home life [that] was pleasant and happy.”¹⁰⁷ Yet, as Black relates, despite the police’s “fail[ure] to unearth one single tangible clue pointing to his guilt[,]” Ashcraft was taken into custody, placed in a room “equipped with all sorts of crime and detective devices,” interrogated for thirty-six hours beneath a high-powered lamp, “during which period he was held incommunicado, without sleep or rest, [as] relays of officers, experienced investigators, and highly trained lawyers questioned him without respite.”¹⁰⁸

And while Ashcraft and the police described different versions of his treatment, that was beside the point for Black, because, as he darkly noted, “[s]uch disputes . . . are an inescapable consequence of secret inquisitorial practices.”¹⁰⁹ And in an effective rhetorical move, Black made Ashcraft the representative of not just accused murderers, but of individuals everywhere who the government is trying to break down, arguing that such “secret inquisitions” are always “weighted against an accused, particularly where, as here, he is charged with a brutal crime, or where, as in many other cases, his supposed offense bears relation to an unpopular economic, political, or religious cause.”¹¹⁰ Most strikingly, Black bluntly declared techniques like Ashcraft’s prolonged interrogation to be “so *inherently* coercive that [their] very existence is irreconcilable with the possession of mental freedom.”¹¹¹

Justice Robert Jackson, perhaps the most articulate advocate of the rugged individual viewpoint, was quick to sense that Justice Black was trying to shift the voluntariness framework. He observed that:

[T]he Court always has considered the confessor’s strength or weakness, whether he was educated or illiterate, intelligent or moronic, well or ill, Negro or white. But the Court refuses in this case

106. *Ashcraft*, 322 U.S. at 148.

107. *Id.* (quoting the Tennessee Supreme Court).

108. *Id.* at 149, 153.

109. *Id.* at 152.

110. *Id.* at 152–53.

111. *Id.* at 154 (emphasis added). The State on remand retried Ashcraft using testimony about what Ashcraft had said during the interrogation instead of the defendant’s own written confession; in other words, the jury heard everything to which Ashcraft had allegedly confessed although the Supreme Court had suppressed the confession. In an opinion again written by Justice Black, the Court reversed once more finding that all the reasons “apply with equal force” for reversal. *Ashcraft v. Tennessee*, 327 U.S. 274, 279 (1946). Cf. G. Wayne Dowdy, *1941 Raleigh Murder Case Had National Impact*, THE BEST TIMES, (Dec. 20, 2019), <https://www.thebesttimes.com/local/raleigh-murder-case-had-national-impact/article89451086-942b-11e8-9dc1-1b84a879f030.html> [<https://perma.cc/356J-HYYY>] (noting that Ashcraft ended up being tried a total of four times before being released from custody).

to be guided by this test. . . . Instead of finding as a fact that Ashcraft's freedom of will was impaired, it substitutes the doctrine that the situation was "inherently coercive."¹¹²

The effect, the dissent correctly divined, was to create an "irrebuttable presumption that [prolonged] custody and examination are 'inherently coercive'" so that "the constitutional admissibility of a confession is no longer to be measured by the mental state of the individual confessor but by general doctrine dependent on the clock."¹¹³ In prescient fashion, Jackson foresaw where this might lead:

No one can regard the [voluntariness test] dependent on the state of the individual's will as an easy one to apply. It leads to controversy, speculation, and variations in application. To eliminate these evils by eliminating all confessions made after interrogation while in custody is a drastic alternative, *but it is the logical consequence of today's ruling . . .*¹¹⁴

The cases over the two decades following *Ashcraft* and culminating in *Miranda* failed to clearly resolve the tension between the rugged and susceptible individual templates. The cases were capable of being understood either as situations where the suspect could not fulfill the rugged individual's role because of unique circumstances, or as ones which acknowledged that the human condition made anyone vulnerable to the inherent coercion of interrogation.¹¹⁵ This changed, however, with *Spano v. New York*,¹¹⁶ a 1959 case that, especially with hindsight, marked a major turning point toward a majority of the Court adopting the susceptible individual perspective.

The police were searching for Vincent Spano who had been indicted for murder based on a retaliatory shooting, and Spano eventually called a friend, Bruno, who was training to be a police officer.¹¹⁷ Bruno convinced Spano to obtain a lawyer and turn himself in.¹¹⁸ As Spano turned himself over to police custody, his lawyer cautioned him to not answer any questions.¹¹⁹ Spano was subjected to the now familiar relay-fashion interrogation by multiple interrogators in the middle of the night, but the prolonged session lasted eight hours, compared to the thirty-six hours in

112. *Ashcraft*, 322 U.S. at 162 (Jackson, J., dissenting).

113. *Id.* at 158, 162.

114. *Id.* at 163 (emphasis added).

115. See cases discussed *supra* notes 69–85.

116. 360 U.S. 315 (1959).

117. *Id.* at 317.

118. *Id.*

119. *Id.*

Ashcraft, let alone the week-long ordeal in *Chambers*. And while the Court noted that Spano was foreign-born, he had largely grown up in the United States and was twenty-five years of age.¹²⁰ He had dropped out of high school in his freshman year and some evidence existed of emotional and mental instability, but he was employed and had not been in trouble with the law before.¹²¹

The police behavior was not exemplary, but it was not flagrantly egregious when compared to prior cases. In addition to the eight-hour interrogation session, the police ignored Spano's repeated refusal to answer questions and his requests to talk to his attorney, even telling him they could not find his lawyer's number in the phone directory (a fact the Court wryly called a "mystery" given that the lawyer's name was readily found in the directory).¹²² There were, however, no allegations of physical abuse or threats. In short, it is hard to imagine under the earlier cases that Spano would have been seen as incapable of living up to the rugged individual ideal.

Yet the Court found Spano's confession to be involuntary. Chief Justice Warren was particularly troubled by the interrogators' use of his friend, Bruno, the officer-in-training.¹²³ Bruno was instructed by his superiors to go in and lie to Spano by telling him that Bruno was in trouble for having helped Spano and that for the sake of Bruno's "pregnant wife and three children" he needed to confess.¹²⁴ It took four different attempts, but eventually the ploy worked, a tactic that Chief Justice Warren stressed in finding involuntariness:

And Bruno played th[e] part of a worried father, harried by his superiors, in not one, but four different acts, the final one lasting an hour. Petitioner was apparently unaware of John Gay's famous couplet:

"An open foe may prove a curse,
But a pretended friend is worse,"

and he yielded to his false friend's entreaties.

We conclude that petitioner's will was overborne by official pressure, fatigue and *sympathy falsely aroused* after considering all the facts¹²⁵

120. *Id.* at 321.

121. *Id.* at 322.

122. *Id.* at 317–18, 318 n.1.

123. *Id.* at 323 (describing how Spano "yielded to his false friend's entreaties").

124. *Id.* at 319.

125. *Id.* at 323 (emphasis added) (citation omitted).

The Court's reliance on "sympathy falsely aroused" as a critical factor in finding the defendant's will to have been broken is a far cry from a case like *Lyons* where the Court posited the suspect would have been able to shake off the effects of having a pan of the victim's charred bones thrust onto his lap.¹²⁶ Indeed, the *Spano* Court acknowledged that the Court's approach had evolved over how it approached the question of whether one's will was broken:

The facts of no case recently in this Court have quite approached the brutal beatings in *Brown* . . . or the 36 consecutive hours of questioning present in *Ashcraft* But as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made.¹²⁷

Unsurprisingly, as the Court increasingly adopted the susceptible individual perspective, it also became more open to the idea that procedural barriers needed to be erected to protect the citizen who was being interrogated. In *Spano*, four Justices expressly would have held that, at least after charges have been filed, a constitutional right to a lawyer during interrogation existed:

What followed the petitioner's surrender in this case was not arraignment in a court of law, but an all-night inquisition Throughout the night the petitioner repeatedly asked to be allowed to send for his lawyer, and his requests were repeatedly denied. He finally was induced to make a confession. That confession was used to secure a verdict sending him to the electric chair.

Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station.¹²⁸

126. *Id.*

127. *Id.* at 321 (citations omitted).

128. *Id.* at 327 (Stewart, J., concurring); *see also id.* at 325 (Douglas, J., concurring) ("This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel.").

Spano thus helped set the stage for *Miranda*'s debut with a Court that not only was increasingly considering procedural protections that would help pierce the secrecy of the "midnight inquisition,"¹²⁹ but that also was increasingly casting the citizen being interrogated not as the rugged individual, but as a psychologically vulnerable person susceptible to the interrogator's practices.

B. Miranda v. Arizona: The Susceptible Individual Archetype Triumphant

As can now be seen, while *Miranda* was revolutionary in turning to the Fifth Amendment privilege as the source for the now-famous *Miranda* warnings,¹³⁰ the essence of its holding—the full embracing of the susceptible individual perspective—can be readily traced back through *Spano*, *Ashcraft* and all the way to *Bram*.¹³¹ But to close the circle on the argument for preemptive measures to protect the citizen, Chief Justice Warren still needed to make the case that every citizen needed upfront protections.

Warren did so by examining what we can call the "science of interrogation"¹³² as a way of demonstrating why the privilege against self-incrimination needed to be far more difficult to waive, even for the hardest rugged individual. For six pages, Warren famously detailed the techniques found in interrogation training manuals to demonstrate how these "menacing police interrogation procedures" relying on psychology rather than the "third degree" enabled "the police . . . [to] persuade, trick, or cajole

129. The concern over greater procedural protections went beyond the right to counsel and had been building up momentum even prior to *Spano*. Justice Douglas, for example, in his concurrence in *Watts v. Indiana*, wrote:

It would be naive to think that this protective custody was less than the inquisition. The man was held until he broke. Then and only then was he arraigned and given the protection which the law provides all accused. Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. They can then operate at their leisure. The accused is wholly at their mercy. He is without the aid of counsel or friends; and he is denied the protection of the magistrate. We should unequivocally condemn the procedure and stand ready to outlaw . . . any confession obtained during the period of the unlawful detention. The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country.

Watts v. Indiana, 338 U.S. 49, 57 (1949) (Douglas, J., concurring) (citations omitted).

130. In *Miranda*, the Court noted that it granted certiorari to provide further guidance after its decision two years earlier in *Escobedo v. Illinois*. *Miranda v. Arizona*, 384 U.S. 436, 440–42 (1966). *Escobedo* was a half-step toward protecting the individual's constitutionally-guaranteed rights during police interrogations, albeit only through the Sixth Amendment. See *Escobedo v. Illinois*, 378 U.S. 478 (1964)

131. See *supra* Part III.A.

132. Warren's rhetorical strategy is reminiscent of Justice Black's approach in arguing for the right to counsel by invoking the idea that there existed a "science of law" that "[e]ven the intelligent and educated layman" would not understand, and therefore would "lack[] both the skill and knowledge adequately to prepare his defence." *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

[the suspect] out of exercising his constitutional rights.”¹³³ And critically to Warren’s mission of making the opinion’s protections attach to all suspects undergoing a custodial interrogation, even for those whom the Court earlier would have cast as the rugged individual, the majority opinion stressed that “[i]t is not just the subnormal or woefully ignorant who succumb to an interrogator’s imprecations.”¹³⁴ Consequently, the majority required *Miranda* warnings to be given “whatever the background of the person interrogated” lest the privilege become a mere “form of words.”¹³⁵

While Warren did not go as far as those who argued that a suspect must first meet with an attorney before being allowed to waive his privilege,¹³⁶ the opinion did attempt to structure the process so that the default position was that the privilege was in effect unless the state could affirmatively prove waiver:

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . .

. . . [A] valid waiver will not be presumed simply from the silence of the accused after warnings are given

. . . [T]he fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. . . . Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.¹³⁷

Given the inherent pressures that the majority saw as bearing on the individual to speak, the opinion also attempted to make it as easy as possible for the individual to invoke the privilege:

If the individual indicates in any manner, at any time prior to or

133. *Miranda*, 384 U.S. at 449–55, 457.

134. *Id.* at 468.

135. *Id.* at 444, 469. Interestingly, an argument that the pressures can be so great as to lead the rugged individual to confess despite his innocence—a danger that DNA exonerations have shown occur far more often than commonly assumed—received relatively cursory treatment in a footnote, no doubt because in 1966 the phenomenon of false confessions was thought quite rare. *Id.* at 455 n.24 (observing that “[i]nterrogation procedures may even give rise to a false confession” and giving a brief description of one such case and noting “two other instances” where a false confession had occurred). See *infra* notes 253–270 and accompanying text (detailing how DNA testing has shown false confessions to be a far more serious problem than previously assumed by the courts).

136. See Louis Michael Seidman, Brown and *Miranda*, 80 CAL. L. REV. 673, 739–740 (1992).

137. *Miranda*, 384 U.S. at 475–76.

during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after . . . cannot be other than the product of compulsion, subtle or otherwise.¹³⁸

And anticipating that the science of interrogation might adapt to the *Miranda* warnings and simply make them part of the interrogation process, Warren even tried to initiate a preemptive strike by declaring that “[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.”¹³⁹

As we now know,¹⁴⁰ Chief Justice Warren was prescient in his concerns that police would adapt to and incorporate the *Miranda* warnings into their interrogation techniques so that the Court’s efforts to immunize the in-custody suspect from pressures would be diluted. Indeed, by the time *Miranda*’s constitutional basis was reconsidered in *Dickerson v. United States*¹⁴¹ thirty-four years later, law enforcement had largely learned to adapt to *Miranda*¹⁴² despite their initial hue and cry when the case was first decided,¹⁴³ and to even embrace it for the certainty the holding provided.¹⁴⁴ Just how diluted *Miranda*’s impact had become can perhaps be seen in the fact that despite his long history as a harsh *Miranda* critic,¹⁴⁵ it was Chief Justice Rehnquist who wrote the *Dickerson* opinion that allowed *Miranda*

138. *Id.* at 473–74.

139. *Id.* at 476.

140. *See infra* Part IV.

141. 530 U.S. 428 (2000).

142. *See id.* at 443. (“We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”). Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 455–60 (1987); Kit Kinports, *supra* note 4; Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 433–37 (1999). Of course, one person’s adaption may be another person’s circumvention, see Kamisar, *supra* note 6, at 186 (contending that “‘circumventing,’ ‘evading,’ or ‘disregarding’” are “more accurate” terms than “[a]dapting’ or ‘adjusting’”).

143. *Miranda*, 384 U.S. at 516–24 (Harlan, J., dissenting) (describing the ways in which the majority’s holding would frustrate law enforcement, reduce confessions, and obtain little offsetting benefit).

144. CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* (1991) (observing that law enforcement officials “learned to live with *Miranda*, and even to love it, to the extent that it provided them with a safe harbor”).

145. *See, e.g.*, *New York v. Quarles*, 467 U.S. 649 (1984) (carving out a public safety exception for *Miranda* warning); *Colorado v. Connelly*, 479 U.S. 157 (1986) (raising the threshold for voluntary confessions by requiring a showing of coercive police conduct and lowering the burden of proof on the state to show waiver by a preponderance of the evidence); *see also* Victor Li, *Think You Have the Right? The 50-Year Story of the Miranda Warning Has the Twists and Turns of A Cop Show*, 102 ABA J. 34 (Aug. 2016) (detailing Justice Rehnquist’s criticisms of *Miranda* before his opinion reaffirming the decision in *Dickerson*); Yale Kamisar, *Miranda’s Reprieve: How Rehnquist Spared the Landmark Confession Case, but Weakened Its Impact*, 92 A.B.A. J. 48 (June 2006).

to survive its near-death constitutional moment.¹⁴⁶ While Rehnquist's defense of *Miranda* is extremely tepid, exuding all the enthusiasm of a twelve-year-old going to etiquette class on a sunny Saturday afternoon, he was able to live with the decision because the rugged individual in the decades after *Miranda* had regained a dominant position within the Court's interrogation decisions.

IV. THE RUGGED INDIVIDUAL'S RESURRECTION: RATIONALIZING CONFESSIONS THROUGH THE CALCULATING AND PENITENT SUSPECTS

Even during the run up to *Miranda* there were, as we have seen,¹⁴⁷ Justices who had argued that the rugged individual was sufficiently hardy that if he wanted constitutional protections, he needed to claim them. Recall that Justice Jackson in his *Ashcraft* dissent had strongly objected to Black's suggestion that prolonged questioning would have broken the will of any person subjected to the thirty-six-hour interrogation.¹⁴⁸ Jackson believed that "some men would withstand for days pressures that would destroy the will of another in hours[,]"¹⁴⁹ and that the facts indicated to Jackson that Ashcraft's "strength of character" would have enabled him to resist the interrogators if he had wanted.¹⁵⁰ From Jackson's perspective, if Ashcraft failed to resist the interrogation techniques, he had no one to blame but himself: "He did not throw himself at any time on his rights, refuse to answer, and demand counsel, even according to his own testimony."¹⁵¹

To Jackson's credit, he candidly acknowledged that in a pure sense, "[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional."¹⁵² Rather, Jackson explained, "[v]oluntary confessions' in criminal law are the product of calculations of a different order, and usually proceed from a belief that further denial is useless and perhaps prejudicial."¹⁵³ The question, therefore, for Jackson was not whether the interrogation that occurred in *Ashcraft* was "'inherently coercive.' Of course it is. And so is

146. See *Dickerson*, 530 U.S. at 428.

147. See *supra* notes 112–114 and accompanying text.

148. See *Ashcraft v. Tennessee*, 322 U.S. 143, 161 (1944) (Jackson, J., dissenting).

149. *Id.* at 162.

150. *Id.* at 171. In a footnote, Jackson also painted a far less flattering picture of Ashcraft:

The officers had been baffled as to any motive for Ashcraft to murder his wife (who was his third, two former ones having been separated from him by divorce). He disclosed in his confession to them that her sickness had resulted in a degree of irritability which had made them incompatible and resulted in his sexual frustration.

Id. at 166 n.1.

151. *Id.* at 169.

152. *Id.* at 161.

153. *Id.*

[even] custody and examination for one hour. . . . Of course such acts put pressure upon the prisoner to answer questions, to answer them truthfully, and to confess if guilty.”¹⁵⁴ But so long as the interrogation did not “pass[] the individual’s ability to resist and to admit, deny, or refuse to answer[,]” the confession was voluntary despite the inherent pressure and coerciveness.¹⁵⁵ In short, Jackson concluded with intriguing religious overtones, “[a] confession is wholly and incontestably voluntary only if a guilty person *gives himself up to the law*.”¹⁵⁶

Those arguing that the rugged individual has the resilience to resist ordinary interrogation pressures, however, still must answer a critical question: Why would the rugged individual ever “give himself up to the law” where the consequence is criminal liability? Or, in other words, is not the fact that someone confesses to a criminal act itself evidence of *Miranda*’s claim of overbearing coercion? Those Justices who have argued that *Miranda* underestimates the rugged individual have relied on two answers to explain why the rugged individual might “voluntarily” confess: a mistaken reliance on his ability to outsmart the police and a desire to take a step towards redemption.

A. Giving One’s Self Up to the Law: The Calculating Rugged Individual and the Battle of Wits

For Justice Jackson, when a rugged individual like Ashcraft confessed, the explanation lay in the likelihood that he had calculated that he could win a “battle of wits” with the police, only to discover that he was mistaken:

The strategy of the officers evidently was to keep him talking, to give him plenty of rope and see if he would not hang himself. He does not claim to have made objection to this. Instead he relied on his wits. The time came when it dawned on him that his own story brought him under suspicion, and that he could not meet it. Must the officers stop at this point because he was coming to appreciate the uselessness of deception? . . . He had run out of expedients and inventions; he knew he had lost the battle of wits. After all honesty seemed to be the

154. *Id.* In far-sighted fashion, Jackson foresaw that *Ashcraft* was likely to beget a ruling like *Miranda*: “But does the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is ‘inherently coercive’? The Court does not quite say so, but it is moving far and fast in that direction.” *Id.*

155. *Id.* at 170.

156. *Id.* at 161 (emphasis added). Jackson did observe that, “[t]he term ‘voluntary’ confession does not mean voluntary in the sense of a confession to a priest merely to rid one’s soul of a sense of guilt.” *Id.*

best, even if the last, policy. He confessed in detail.¹⁵⁷

In Jackson's view, then, Ashcraft had elected to make the choice often made by characters in literature and film, like a Moriarty or a Raskolnikov, to enter into a "battle of wits." But a suspect who chooses to play a cat-and-mouse game with the police does so at his own peril, and if he ends up on the losing end to a would-be Sherlock Holmes or Porfiry Petrovich, well, then, he should bear the consequences of his decision.

This Jacksonian perspective on voluntariness—that the rugged individual should generally be viewed as capable of making the "calculation" of whether to engage with the police—has since been voiced a number of times by other Justices and has gradually reshaped *Miranda*. Indeed, in *Miranda* itself, part of the four dissenters' objection was that, "it has never been suggested, until today, that such questioning was coercive and *accused persons so lacking in hardihood* that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will."¹⁵⁸ And, Justice Harlan complained, *Miranda* essentially eliminated the "battle of wits" all together:

[T]he thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward 'voluntariness' in a utopian sense, . . . voluntariness with a vengeance.¹⁵⁹

I think it must be frankly recognized . . . that police questioning . . . may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they may be, can in themselves exert a tug on the suspect to confess . . .¹⁶⁰

[I]nterrogation is no doubt often inconvenient and unpleasant for the suspect . . . [but] peaceful interrogation is not one of the dark moments of the law.¹⁶¹

Hence, Harlan had no trouble finding that a "seasoned criminal [who] was practically given the Court's full complement of warnings and did not heed them" should bear full responsibility for confessing.¹⁶²

157. *Id.* at 169.

158. *Miranda v. Arizona*, 384 U.S. 436, 535 (1966) (White, J., dissenting) (emphasis added).

159. *Id.* at 505 (Harlan, J., dissenting).

160. *Id.* at 515.

161. *Id.* at 517.

162. *Id.* at 518 n.15 (describing the *Westover* case, one of the cases that was consolidated). Harlan likewise dismissed Ernesto Miranda's confession as the product of "brief, daytime questioning" with "no perceptible unfairness, and certainly little risk of injustice." *Id.* at 519.

While the battle of the wits view of police interrogation did not carry the day in *Ashcraft* or *Miranda*, over time it has emerged as an important paradigm. Indeed, the paradigm is a useful way to conceptualize the Court's change in approach and tenor to *Miranda* issues. The *Miranda* opinion viewed any person, even the rugged individual, as not only unlikely to win the battle of wits, but as unlikely to be aware of just how strongly the odds are stacked in favor of the interrogators. And because *Miranda* viewed the decision to engage in the contest as a decision that even the rugged individual could easily feel pressured to make or get tricked into making, the decision sounds a strong tone of protecting the person against himself.¹⁶³ Not only must an individual be warned that he is being asked to enter a contest in which he does not have to participate (“You have the right . . .”) and which may be very unwise (“anything you say . . .”), but because the opinion uses a prism of strong skepticism in scrutinizing a citizen's decision to match wits, it places the “heavy burden” on the interrogators themselves to prove that the individual entered the contest with eyes wide open and that he understood that he could terminate the contest at any point by “indicat[ing] [that desire] in any manner.”¹⁶⁴

Over time, though, the Court began to expressly move back towards a far more laissez-faire approach that considers the rugged individual as presumptively capable of deciding for himself whether to play the odds.¹⁶⁵ The Court's later waiver cases, for instance, essentially approach the four *Miranda* warnings as a basic explanation of the ground rules if one wants to enter the battle of wits, and beyond that, the individual is free to make his calculations—or miscalculations—as he chooses. The police, therefore, need not provide any information beyond the four warnings even where the information may have changed his mind about waiving his rights. As the majority reasoned in holding that a defendant need not be told that he would be questioned about a different crime than the one for which he was arrested:

We have held that a valid waiver does not require that an individual be informed of all information “useful” . . . that “might . . . affec[t] his decision to confess.” . . . [T]he additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary

163. The Court thus adopted an approach of providing a strong warning rather than prohibiting the behavior altogether; this approach is similar to how the government approaches other risky behavior. See, e.g., *Day Trading: Your Dollars at Risk*, SEC (Apr. 20, 2005), <https://www.sec.gov/investor/pubs/daytips.htm> [<https://perma.cc/X568-US33>].

164. *Miranda*, 384 U.S. at 473, 475.

165. See generally DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* (2016).

and knowing nature.¹⁶⁶

Once the rugged individual has received the warnings, therefore, he is now like any blackjack player, day trader, or bungee jumper who can assess the risks and make his own personal decision. Under this *caveat emptor* model, the decision to enter the “game” may be unwise because the odds strongly favor the “house,” but he cannot later complain since he knew the game when he sat down and put his chips on the table.

Perhaps the most significant aspect of the reemergence of the hardy rugged individual is that the Court increasingly has placed the onus on the individual to assert his Fifth Amendment rights when dealing with the police.¹⁶⁷ This movement can be starkly seen in the Court’s requirement in *Davis v. United States*¹⁶⁸ that an individual has to “unambiguously” invoke the right to counsel, even though the majority “recognize[d] that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present.”¹⁶⁹

It was in *Berghuis v. Thompkins*,¹⁷⁰ however, that the Court most expressly welcomed the hardy rugged individual back home in the police interrogation context. Through almost three hours of interrogation, Chester Thompkins had remained silent other than declining a peppermint and complaining that the chair he was “sitting in was hard,” when out of the blue one of the officers asked, “Do you believe in God?”¹⁷¹ This question triggered a brief exchange during which the officer asked, “Do you pray to God to forgive you for shooting that boy down?”¹⁷² Thompkins answered “Yes.”¹⁷³ Yet, despite *Miranda*’s admonishments that silence could not be construed as waiver and that the interrogators bore “a heavy burden” to

166. *Colorado v. Spring*, 479 U.S. 564, 576–77 (1987) (quoting *Moran v. Burbine*, 475 U.S. 412, 422 (1986)). The Court has likewise held that a defendant need not be informed that an attorney had been hired on his behalf and was trying to reach him, *Moran*, 475 U.S. at 422; that a prior statement obtained unconstitutionally might not be able to be used against him, *Oregon v. Elstad*, 470 U.S. 298, 314–318 (1985); and that an incriminating statement can be used even if not written, *Connecticut v. Barrett*, 479 U.S. 523, 527–30 (1987).

167. The Court has also placed the onus on the citizen to assert her Fifth Amendment rights in contexts outside of *Miranda*. In *Salinas v. Texas*, 570 U.S. 178 (2013), the Court in a 5-4 decision held that to avail herself of the right to silence in a non-custodial “interview” (a situation to which *Miranda* would not apply), an individual must affirmatively assert the privilege and cannot simply remain silent. *Id.* at 186–90 (allowing prosecutor to argue defendant’s silence in response to a question during the “interview” as evidence of guilt).

168. 512 U.S. 452, 459 (1994).

169. *Id.* at 460.

170. 560 U.S. 370 (2010).

171. *Id.* at 376.

172. *Id.*

173. *Id.*

prove waiver,¹⁷⁴ Justice Kennedy found a valid waiver since he saw in *Thompkins* a calculating rugged individual fully in control.¹⁷⁵

In a remarkable recasting of how interrogation works, Kennedy portrayed interrogation not as the *Miranda* Court had—as an event to be highly wary of because of the danger of finding one’s self unwittingly outmatched by sophisticated interrogation techniques—but as an opportunity for the accused to make a better decision, an almost empowering experience:

Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that *Miranda* rights can be invoked any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps towards relief or solace for the victims; and the beginning of the suspect’s own return to the law and the social order it seeks to protect.¹⁷⁶

The five-Justice majority thus saw interrogation as an information-gathering session providing the individual “the opportunity to reassess his or her immediate and long-term interests.”¹⁷⁷ Consequently, and with reasoning strongly echoing Justice Jackson’s dissenting view of *E.E. Ashcraft*, the Court concluded that if *Thompkins* had ended up making an incriminating statement that he now regretted, he had no one to blame but himself:

Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his “right to cut off questioning.” . . . [H]e did neither, so he did not invoke his right to

174. See *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (declaring state has “heavy burden”); but see *Thompkins* 560 U.S. at 383–84, 396–97 (discussing how the “heavy burden” language has been interpreted since *Miranda*).

175. Kennedy acknowledged that “some language in *Miranda* could be read to indicate that” *Thompkins*’ behavior could not be seen as a waiver. *Thompkins*, 560 U.S. at 383. But he saw “[t]he course of decisions since *Miranda*” as having diluted *Miranda*’s strong language about waiver. *Id.*

176. *Id.* at 388.

177. *Id.*

remain silent.¹⁷⁸

Indeed, after *Thompkins* the only situation where the original susceptible individual paradigm remains dominant is when the suspect has unequivocally requested a lawyer. The Court has treated this situation as one where the suspect has declared that he does not feel able to deal with the police on his own, and thus must be left alone unless he changes his mind.¹⁷⁹ Even this situation, however, has been critiqued as underestimating the rugged individual, with Justice Scalia suggesting that these holdings serve as de facto affirmative action for the “dull-witted” and constitutionally challenged:

[These] holdings are explicable, in my view, only as an effort to protect suspects against what is regarded as their own folly. The sharp-witted criminal would know better than to confess; why should the dull-witted suffer for his lack of mental endowment? Providing him an attorney at every stage where he might be induced or persuaded (though not coerced) to incriminate himself will even the odds. Apart from the fact that this protective enterprise is beyond our authority under the . . . Constitution, it is unwise. The procedural protections of the Constitution protect the guilty as well as the innocent, but it is not their objective to set the guilty free. That some clever criminals may employ those protections to their advantage is poor reason to allow criminals who have not done so to escape justice.

Thus even if I were to concede that an honest confession is a foolish mistake, I would welcome rather than reject it; a rule that foolish mistakes do not count would leave most offenders not only unconvicted but undetected.¹⁸⁰

And while the Court has not gone as far as Justice Scalia would have liked in curtailing protections even after a citizen has requested a lawyer, Scalia was able to carry a majority in *Maryland v. Shatzer*¹⁸¹ for the view that the susceptible individual who has requested a lawyer regains his

178. *Id.* at 382. See generally George M. Dery III, *Do You Believe in Miranda? The Supreme Court Reveals its Doubt in Berghuis v. Thompkins by Paradoxically Ruling that Suspects Can Only Invoke Their Right to Remain Silent by Speaking*, 21 GEO. MASON U. CIV. RTS. L.J. 407 (2011).

179. *Edwards v. Arizona*, 451 U.S. 477, 484–87 (1981). If one were inclined towards maritime metaphors, one can understand the Court’s distinction between whether a suspect invokes his right to silence or to an attorney this way: It has treated a suspect’s invocation of the right to remain silent as a declaration that he is the captain of his own ship and capable of making further decisions, while asking for a lawyer is sending out an S.O.S. and expressing the sentiment that he is not capable of dealing with the police by himself.

180. *Minnick v. Mississippi*, 498 U.S. 146, 166–67 (1990) (Scalia, J., dissenting).

181. 559 U.S. 98 (2010).

rugged individual status two weeks after exiting the custodial interrogation setting.¹⁸² Without the slightest pretense of an empirical basis, the *Shatzer* majority speculated that after a fortnight a suspect will have been able to “shake off any residual coercive effects of his prior custody,”¹⁸³ “regain the degree of control they had over their lives prior to the interrogation,”¹⁸⁴ so that any “change of heart is less likely attributable to [police] ‘badgering’ than . . . to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest.”¹⁸⁵

B. Giving One’s Self Up to the Law: The Interrogation Room As Confessional

Part of what we have seen in the half-century since *Miranda*, then, is the Court moving rather dramatically away from a view of presuming that all individuals, even rugged ones, are likely to be overwhelmed by the interrogation context, to the position that once a citizen has received the *Miranda* warnings, he or she should be treated as fully capable of deciding whether to enter a battle of wits with the police. The battle-of-wits rationale, however, tells only part of the story when it comes to the rugged individual in a post-*Miranda* world. It turns out that the rugged individual not only is a capable, rational actor despite the pressures of the interrogation room, he also has a conscience that often leads him to want to purge his “guilty secrets.”¹⁸⁶

Justice White, for instance, argued in his *Miranda* dissent that a confession may be good for the confessor as well as for society, making it a win-win for everyone:

And what about the accused who has confessed or would confess in response to simple, noncoercive questioning and whose guilt could not otherwise be proved? Is it so clear that release is the best thing for him in every case? Has it so unquestionably been resolved that in each and every case it would be better for him not to confess and to return to his environment with no attempt whatsoever to help him? I think not. It may well be that in many cases it will be no less than a callous disregard for his own welfare as well as for the interests of

182. *Id.* at 111.

183. *Id.* at 110.

184. *Id.* at 113.

185. *Id.* at 108.

186. *Oregon v. Elstad*, 470 U.S. 298, 312 (1985).

his next victim.¹⁸⁷

It was Justice Scalia, however, who most strongly voiced the redemptive view of confessions:

More fundamentally, however, it is wrong, and subtly corrosive of our criminal justice system to regard an honest confession as a “mistake.” While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself A confession is rightly regarded by the Sentencing Guidelines as warranting a reduction of sentence because it “demonstrates a recognition and affirmative acceptance of personal responsibility . . . for criminal conduct,” which is the beginning of reform. We should, then, rejoice at an honest confession, rather than the pity the “poor fool” who has made it; and we should regret the attempted retraction of that good act, rather than seek to facilitate and encourage it. To design our laws on premises contrary to these is to abandon belief in either personal responsibility or the moral claim of just government to obedience.¹⁸⁸

The invocation of the penitent suspect is helpful to the Court in justifying its confession jurisprudence for two reasons. First, the image aids the Court in reconciling the rugged individual’s ability to resist pressure with his decision to confess. Now when explaining why the rugged individual “gives himself up to the law”¹⁸⁹ and confesses, the desire to “make a clean breast of the guilt”¹⁹⁰ helps provide a constitutionally palatable explanation. A change in heart after invoking one’s right to an attorney, for instance, can be cast not as the result of giving into interrogation pressures, but, as Chief Justice Burger argued, “[because] the human urge to confess wrongdoing is, of course, normal in all save hardened, professional criminals, as psychiatrists and analysts have demonstrated.”¹⁹¹

187. *Miranda v. Arizona*, 384 U.S. 436, 543 (1966) (White, J., dissenting). Justice White similarly noted in another part of the opinion that, “it is by no means certain that the process of confessing is injurious to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.” *Id.* at 538. Chief Justice Rehnquist also expressed the belief that “completely voluntary confessions may, in many cases, advance the cause of justice and rehabilitation.” *Michigan v. Tucker*, 417 U.S. 433, 448 n.23 (1974).

188. *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting) (citations omitted) (quoting U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 1988)).

189. *Ashcraft v. Tennessee*, 322 U.S. 143, 161 (1944) (Jackson, J., dissenting).

190. *Lyons v. Oklahoma*, 322 U.S. 596, 604 (1944).

191. *Brewer v. Williams*, 430 U.S. 387, 420 (Burger, C.J., dissenting) (citing T. Reik, *THE COMPULSION TO CONFESS* (1972)).

And in *Oregon v. Elstad*,¹⁹² the Court used the idea of the “guilty secret” as a way to downplay the effect that a prior un-*Mirandized* statement would have on a suspect in making a later confession:

There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect’s will and the uncertain consequences of disclosure of a ‘guilty secret’ freely given in response to an unwarned but noncoercive question¹⁹³

Therefore, the *Elstad* majority reasoned, because it is “difficult to tell with certainty what motivates a suspect to speak”—it may involve a “visit with a minister” or “[an] exchange of words . . . with his father”—*Miranda* warnings before the second statement “ordinarily” would be sufficient to allow the rugged individual to regain perspective and make “a rational and intelligent choice whether to waive or invoke his rights” in deciding to repeat the guilty secret.¹⁹⁴

It was in *Thompkins*, however, that the notion of a “guilty secret” gained full status with its implication that the rugged individual might voluntarily choose to get a wrongdoing off his chest. Recall that Justice Kennedy characterized the decision to waive one’s *Miranda* rights as an ongoing collection by the suspect of “additional information” to allow “a more informed decision.”¹⁹⁵ And while he included the type of “additional information” that one might first suppose, such as the hope that “[c]ooperation with the police may result in more favorable treatment,”¹⁹⁶ Kennedy also expressly included the weighing of how a confession might be the “beginning steps towards relief or solace for the victims[] and the beginning of the suspect’s own return to the law and the social order it seeks to protect.”¹⁹⁷ After *Thompkins*, the desire for repentance and atonement (what the *Elstad* dissenters sarcastically dubbed the “guilty secrets doctrine”)¹⁹⁸ appears to now fully be part of the rugged individual’s persona.¹⁹⁹

192. 470 U.S. 298 (1985).

193. *Id.* at 312.

194. *Id.* at 314 (quoting *Dunaway v. New York*, 442 U.S. 200, 220 (1979) (Stevens, J., concurring)).

195. *Berghuis v. Thompkins*, 560 U.S. 370, 388 (2010); see *supra* notes 170–174 and accompanying text.

196. *Id.*

197. *Id.*

198. *Elstad*, 470 U.S. at 372 n.25. (Brennan, J., dissenting) (the dissent described the majority’s reasoning as “marble-palace psychoanalysis”).

199. This is comparable to how the Court rationalizes why the rugged individual would want to cooperate in the Fourth Amendment context. See Sundby, *supra* note 42, at 719–20.

In addition to providing a rationale for why the rugged individual might confess, the suspect as penitent offers an additional advantage to the Justices desiring to curtail *Miranda*'s reach. In deciding cases on whether *Miranda* should have exceptions such as a public safety exception,²⁰⁰ the Court has expressly invoked a cost-benefit analysis. Typically, this involves the Court weighing perceived lost convictions as the primary "cost" of giving the *Miranda* warnings against the "benefit" of fewer involuntary confessions on the other side of the ledger.²⁰¹ The heralding of confessions as the first virtuous step towards rehabilitation, therefore, can also help tilt the calculus in favor of allowing police practices that encourage confessions: the "cost" of using *Miranda* is not only fewer convictions, but for those Justices who view confessions as a crucial step towards absolution, fewer redeemed criminals.

V. JUDGING THE STRUGGLE BETWEEN THE RUGGED AND SUSCEPTIBLE INDIVIDUAL

By tracking the evolving struggle within the Court between whether to use the rugged or susceptible individual as the measure of what happens when human nature is tested in the interrogation room, we now have a way of thinking and talking about the cases that allows a deeper analysis. From Justice Black's depiction of E.E. Ashcraft as the everyday individual likely to be overwhelmed by the pressures of incommunicado interrogation and the tricks of the interrogator's trade²⁰² (a depiction later given full constitutional voice in Chief Justice Warren's *Miranda* opinion), the Court has largely returned to viewing the suspect as the hardy person fully capable of rationally calculating for himself whether to enter a battle of wits or to go down the path of repentance.

Yet this return to the rugged individual archetype was done without overruling *Miranda* and with the specters of cases like *Bram*, *Ashcraft*, and *Spano* still very much present in the case law. As a result, two distinct views of the human psyche reside side-by-side within the Court's approach to voluntariness; a result that, unsurprisingly, leaves the law in the area with a distinctly schizophrenic cast that is unlikely to disappear anytime soon. Our next task, therefore, is to begin to diagnose the strengths and weaknesses of each viewpoint as a means of plumbing the underlying values and principles at work depending on which archetype is used.

200. See *New York v. Quarles*, 467 U.S. 649 (1984).

201. *Id.* at 657.

202. See *supra* notes 106–111 and accompanying text.

A. Critiquing the “Battle of Wits”

Part of the appeal of the “battle of wits” scenario is that it invokes an image that is comfortingly in accord with images we cherish of the American legal system. Though the end goal is confession to a crime, the scenario enshrines the suspect as a citizen fully in control of his or her fate. And by treating the citizen-suspect as master of his fate and a worthy opponent of law enforcement, the law bestows a constitutional dignity on the suspect. To read some of the Justices’ descriptions of the interrogation process, the ultimate decision to confess for many suspects is the equivalent of the chess player scanning the board after a hard fought game and tipping over one’s king in begrudging but respectful resignation.

The difficulty with this scenario is that the typical interrogation is anything but a James Moriarty calmly matching wits with a Sherlock Holmes. Rather the suspect is much more likely to be a person who finds himself in crisis mode trying to make decisions without a clear sense of what the police know or are obligated to do. The burgeoning research studying decision-making under stress has found that decisions made under conditions of high anxiety produces both biological and psychological conditions that can greatly impede one’s judgment and comprehension.²⁰³ Unsurprisingly, the effects of stress carry over to the *Miranda* context, affecting both the ability to understand the warnings and to make rational judgments.²⁰⁴ In short, the susceptible individual that Justices Black and Warren saw in everyday citizens when subjected to typical interrogation techniques, even techniques far short of “enhanced interrogation,” now has a solid empirical footing.

203. See generally ROBERT M. SAPOLSKY, BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST (2017) (using neurobiology to explain decision making under stress).

204. See, e.g., Richard Rogers et al., *Decrements in Miranda Abilities: An Investigation of Situational Effects Via a Mock-Crime Paradigm*, 35 L. & HUM. BEHAV. 392 (2011) (finding, in mock study of college students, impairment in both memory of *Miranda* warnings and subsequent reasoning when placed under stress); Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 125–128 (1996) (finding ability to induce false confessions in college students in mock setting); Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 481–486 (2005); Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 L. & HUM. BEHAV. 211, 211–221 (2004) (finding ability to induce false confessions in college students in mock setting).

Most of the studies on how stress affects *Miranda* comprehension and decision making have been done in mock settings using college students, a group that on average will be more educated and know they are participating in an experiment. The findings are all the more alarming, then, when extrapolated to the real-life setting of a police station interrogation room involving a suspect who is unlikely to be as well-educated. One study looking at pretrial detainees found the calculating criminal model to not reflect the realities of how someone in custody reacts. Because of temporal discounting, many offenders are more concerned about their immediate circumstances than the long-term consequences. See Hayley L. Blackwood et al., *Investigating Miranda Waiver Decisions: An Examination of the Rational Consequences*, 42 INT’L J. L. & PSYCHIATRY 11 (2015).

A suspect's susceptibility is amplified by the fact that the police are not bound by any rules of honesty or forthrightness so long as they do not actively mislead the individual as to his or her right to end the interrogation or have a lawyer present.²⁰⁵ The interrogator's techniques that Chief Justice Warren detailed in *Miranda* that are designed to heighten pressures on the individual who is "swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion,"²⁰⁶ continue to be taught and practiced widely.²⁰⁷ As Judge Posner has observed, "[t]he policeman is not a fiduciary of the suspect. The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties."²⁰⁸ And while a suspect is told under *Miranda* that "anything you say can be used against you," that lone warning does not in any way reveal that the police will be allowed to "pressure and cajole, conceal material facts and actively mislead,"²⁰⁹ an omission in the warnings that is especially important where a key interrogation strategy is often to lure the individual into believing that the police simply want to hear his side of the story.²¹⁰

A more accurate warning would tell a suspect, "We are here to try and obtain a confession of guilt from you. We are trained in techniques that are designed to have you make a confession and, in so doing, we may tell you things that are untrue, we may affirmatively mislead you as to what we know, we may even commit fraud."²¹¹ Such a fifth warning will never, of course, find its way onto the *Miranda* warning card. Interrogators would blanch at the prospect of forewarning a suspect that they might lie and mislead because such a warning would defang their techniques and likely lead to a greater rate of refusal to be interrogated.

205. See *Moran v. Burbine*, 475 U.S. 412, 432–433 (1986). For a thoughtful look at the use of trickery and deception that concludes that deception should be allowed in limited circumstances, see Christopher Slobogin, *The Legality of Trickery During Interrogation*, 43 INTERROGATION, CONFESSION & TRUTH: COMP. STUD. IN CRIM. PROC. 61, 61–86 (2020).

206. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966).

207. See Douglas Starr, *The Interview: Do Police Interrogation Techniques Produce False Confessions?*, THE NEW YORKER (Dec. 2, 2013), <https://www.newyorker.com/magazine/2013/12/09/the-interview-7> [<https://perma.cc/BW2V-YFJE>]; see also Tracy Hresko Pearl, *Fifty Years Later: Miranda & the Police*, 50 TEX. TECH L. REV. 63, 71 (2017) (finding that police tactics have not changed post-*Miranda*); Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1530 (2008) (describing how police interrogation techniques from the *Miranda* decision, like the Reid Technique, are still taught to officers).

208. *United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir. 1990) (Posner, J.) (noting that the police "are not allowed to magnify those fears, uncertainties, and so forth to the point where rational decisions become impossible").

209. *Id.* at 1131.

210. Starr, *supra* note 207.

211. *Cf.* *Rutledge*, 900 F.2d. at 1130–31 (noting that even if officers had promised a benefit "from spilling the beans," "it was the sort of minor fraud that the cases allow").

Nor is it realistic to propose that the law conceptualize the interrogator as the suspect's fiduciary and act in a way that accounts for the suspect's best interests; the interrogator and suspect inescapably are adversaries, and it is best that the law fully acknowledges that relationship.²¹² The point, rather, is that the Court should not be allowed to justify its voluntariness doctrine by utilizing an image of interrogations as a constitutionally edifying experience for the citizen-suspect when few citizens are psychologically equipped to confront a hostile high-pressure atmosphere unaware that the police are allowed to lie and mislead.

Moreover, the asymmetry of power will place some suspects in a far more disadvantageous position under the Fifth Amendment privilege than others. The politician or businessperson under criminal investigation almost certainly will have a lawyer either already involved by the time that questioning occurs or have ready access to a lawyer who can intervene.²¹³ Similarly, an affluent individual likely will have business or personal attorneys who can quickly find a criminal defense attorney if questioning is imminent. More fundamentally, a person who has employed attorneys before will feel in a far better position to demand their right to an attorney because lawyers will have been a familiar part of their professional and personal lives.²¹⁴

This skewing of the ability to exercise one's Fifth Amendment rights toward the wealthy and educated is exacerbated by additional factors that receive far too little attention. Particularly problematic, given the Court's insistence that the suspect must act the rugged individual and assert his rights directly and authoritatively, is that someone who feels relatively

212. The need to craft the doctrine governing interrogations with a forthright acknowledgment of the adversarial relationship is one reason why the "penitent" rationale is both flawed and dangerous. *See infra* Part IV.B.

213. *See* Hartmut Berghoff & Uwe Spiekermann, *Shady Business: On the History of White-Collar Crime*, 60 BUS. HIST. 289, 290 (2018) (noting the historically "privileged position of white-collar criminals" such as the ability to "afford the best lawyers").

214. As one judge recently objected in being forced to use a purely objective standard in determining whether a defendant would have felt he was in custody for *Miranda's* purposes:

Would it not be more consistent with the values that the Fifth Amendment has traditionally been understood to protect . . . to require the trial court to make fact-specific findings as to what a motorist in the given circumstances would reasonably have expected from his encounter with police? Shouldn't a trial court at least *consider* the need to distinguish, for purposes of assessing the reasonable feelings and expectations of the wayfarer, between the white businessman stopped in his Mercedes as he drives along [upscale] Brickell Avenue at lunchtime, and the teenager of color [like the defendant] stopped on his bicycle as he pedals through a low-income neighborhood at dusk?

State v. Santiago, No. F16-18479, 2017 WL 449266 at *4 (Fla. Cir. Ct. Jan. 24, 2017) (Hirsch, J.) (emphasis original) (order denying defendant's motion to suppress); *see also* David Rossman, *Resurrecting Miranda's Right to Counsel*, 97 B.U. L. REV. 1129, 1133 (2017) ("In my forty-five years as a criminal trial attorney, the ones who do not [waive their *Miranda* rights] are overwhelming[ly] either professional criminals or educated people with money. Neither group is likely to be as intimidated by the police as those who make up the rest.").

powerless is likely to “use less direct and assertive patterns of speech.”²¹⁵ Since many minority citizens when confronted by the police are going to be acutely aware of the power differential, the effect is to often place minorities in a distinctly disadvantaged position when trying to exercise their rights.²¹⁶ As a result, “members of racial and ethnic minority groups who fear the way the police interact with their community” are going to be far less likely to exercise their rights.²¹⁷

The unevenness of the psychological playing field is often further tilted against the citizen by how the *Miranda* warnings are stated and conveyed. First, a staggering number of variations of the *Miranda* warnings are given nationwide and they vary widely from a third-grade reading level up through post-college,²¹⁸ often using words such as “indigent” or legal-laden language like “admissible” that are not within the vocabulary of many.²¹⁹ Moreover, most individuals are not particularly competent at comprehending orally communicated information—a college undergraduate is likely to recall less than fifty percent of a typical *Miranda* warning consisting of 125 to 175 words²²⁰—and that low comprehension is without the police “speed reading” the warnings at over 200 words a

215. Janet Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 320 (1993); see generally Marcy Strauss, *Understanding Davis v. United States*, 40 LOY. L.A. L. REV. 1011 (2007). A case that garnered a fair amount of media attention involved a suspect who at one point said, “if y’all think I did it, I know that I didn’t do it, so why don’t you just give me a lawyer dog cause this is not what’s up.” See, e.g., Tom Jackman, *The Suspect Told Police “Give Me a Lawyer Dog.” The Court Says He Wasn’t Asking for a Lawyer*, WASH. POST, Nov. 2, 2017. The Louisiana Supreme Court refused to find that this was an unambiguous request for a lawyer, and, therefore, found no constitutional violation. *State v. Demesme*, 228 So. 3d 1206 (La. 2017) (mem.) (Chrifton, J., concurring). Although the media was drawn to the story because of the suspect’s use of the phrase “lawyer dog,” a deeper issue resides in the case: not only must someone affirmatively assert their rights, they must do so in the language of the police and courts. The other option, of course, was to adopt the four Justices’ position in *Davis* that the police if unsure whether a suspect is requesting a lawyer “should stop their interrogation and ask him to make his choice clear.” *Davis v. United States*, 512 U.S. 452, 467 (1994) (Souter, J., concurring in the judgment).

216. See C. Antoinette Clark, *Say It Loud: Indirect Speech and Racial Equality in the Interrogation Room*, 21 U. ARK. LITTLE ROCK L. REV. 813, 820–26 (1999) (exploring how minorities are disadvantaged by the requirement that rights must be asserted unequivocally); see also Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 12 (1999) (detailing how objective standards for issues like custody “maintain the power” of the majority and disenfranchises the minority).

217. Rossman, *supra* note 214, at 1133; see generally Sundby, *supra* note 42, at 723–26 (discussing studies of how interactions between police and members of a minority community are especially fraught with potential conflict).

218. RICHARD ROGERS & ERIC DROGIN, *MIRANDIZED STATEMENTS: SUCCESSFULLY NAVIGATING THE LEGAL AND PSYCHOLOGICAL ISSUES* 215 (2014) (identifying more than 1,000 unique variations, varying in length by more than 500 words, with reading levels that range from grade three to post-college).

219. See generally Richard Rogers et al., *General Knowledge and Misknowledge of Miranda Rights: Are Effective Miranda Advisements Still Necessary?* 19 PSYCHOL. PUB. POL’Y & L. 432 (2013).

220. Richard Rogers & Eric Y. Drogin, *Miranda Rights and Wrongs: Matters of Justice*, 51 CT. REV. 150, 152 (2015).

minute²²¹ or reciting them in a “mechanical, bureaucratic” fashion that serves to “trivialize their potential significance and minimize their effectiveness.”²²² Nor is it an easy rebuttal that everyone already knows the *Miranda* warnings from popular-culture mediums like television and the movies; in fact, studies have shown that many do not understand the nature of the rights, especially when it comes to the critical knowledge that a lawyer will be appointed without personal expense and that the individual has the right to end the interrogation at any time.²²³

In sum, to the extent there are suspects who could live up to the Court’s ideal of the calculating rugged individual, it will almost certainly be a person of high social status and socioeconomic standing. And perhaps there is more than a touch of irony that it precisely such an individual who would almost always decline to engage the police in a battle of wits and call a lawyer instead.

B. Critiquing the Interrogation Room as Confessional

The justification for encouraging confessions as a step on the path towards repentance is of course far more difficult to empirically test. This is true both for Chief Justice Burger’s general psychological proposition that “[t]he human urge to confess wrongdoing is . . . normal in all save hardened, professional criminals”²²⁴ and for the idea that a confession to interrogators should be embraced as part of a suspect’s journey towards absolution.

Even if these propositions are believed to be true, however, their use as a justification for relaxed constitutional scrutiny of interrogation is troubling. The most fundamental objection is the incongruity and, quite frankly, oddness of trying to equate the atmosphere and effects of a confession in a religious or personal context to that of a police station. Perhaps if a confession to the police in fact triggered a different response

221. A fascinating empirical analysis of audiotaped warnings given by Canadian police to suspects found that almost two-thirds of the right to silence warnings (65%) and almost one-third (32%) of the right to a lawyer warnings exceeded 200 words per minute, the upper range for understanding speech. The average speech rate for the right to silence warning alone was a blazing 264 words per minute, while the right to legal counsel warning clocked in at 202 words per minute on average. Brent Snook, Joseph Eastwood & Sarah MacDonald, *A Descriptive Analysis of How Canadian Police Officers Administer the Right-to-Silence and Right-to-Legal Counsel Cautions*, 52 CAN. J. CRIMINOLOGY & CRIM. JUST. 545, 553-56 (2010).

222. Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1003 n.15 (2001).

223. Rogers & Drogin, *supra* note 220 at 151 (a survey of a jury pool that represented a cross-section of the community about common knowledge of *Miranda* rights found that, “[w]hile performing moderately well on the first component, right to silence, they faltered on the other three basic components, averaging only 45% correct: risks of talking, right to counsel, and free legal services. The fifth component of most *Miranda* warnings, addressing the assertion of rights at any time, or continuing rights, is almost universally missed.”).

224. *Brewer v. Williams*, 430 U.S. 387, 420 (1977) (Burger, J., dissenting).

from the criminal justice system, placing the confessor on a “repentance track” with counseling and rehabilitative opportunities, one could take such a rationale more seriously. But in many cases, even in those where a Justice invokes the rationale, the confession leads to harsh retribution and sometimes even a walk to the death chamber. At most, a confessing defendant generally earns a reduction in his sentence through “acceptance of responsibility” credit, but that reduction in reality is a payoff for saving the criminal justice system from having to conduct a trial rather than any acknowledgment of the defendant’s atonement.²²⁵ Indeed, while judges may believe that they can determine remorsefulness, there is scant empirical evidence to support their ability to divine whether a defendant is remorseful in a consistent and accurate manner.²²⁶

The repentance rationale also is potentially dangerous in the sense of offering a facile way of simultaneously absolving the police while explaining why someone would act against their own apparent self-interest. One court, for instance, used the rationale to find the defendant’s confession to be voluntary even though it came following improper police conduct: “[the defendant’s] confession and consent to search . . . were prompted not by any misconduct of the officers, but by appellant’s own guilty conscience and desire to be caught, and were thus sufficiently purged of the taint of the illegal arrest.”²²⁷ This is not only a rather remarkable feat of judicial psychoanalysis given that the record holds no indication of why the defendant ultimately confessed,²²⁸ it also vividly demonstrates how the repentant rugged-individual trope offers an easy way to finesse an otherwise extremely difficult causal determination: by hypothesizing that a confession was the product of the defendant’s “guilty conscience and desire to be caught,” the court is able to absolve the preceding police misbehavior from tainting the confession and find that the confession was voluntary.

225. See Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 18 (2010) (discussing how the sentencing guidelines incentivize defendants to waive trial and plea).

226. See generally Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14 (2015) (examining lack of empirical evidence that judges or juries can accurately determine remorse); Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133 (2015) (interviewed judges revealed a wide discrepancy in perceptions of remorse).

227. *United States v. Edmondson*, 791 F.2d 1512, 1516 (11th Cir. 1986).

228. To the court’s credit, it did not entirely accept the government’s argument that the “defendant’s submissive arrest posture may indicate a guilty mind,” noting it could have also been an “acquiescence to a show of official authority.” *Id.* at 1515 (quoting the district court’s decision). Instead, the court relies on the passage of forty-five minutes since the illegal arrest, the giving of *Miranda* warnings in the interim, and that the defendant initiated the statement by saying “Why don’t we just get this over with.” *Id.* at 1514. While these factors are relevant under the test in *Brown v. Illinois*, 422 U.S. 590 (1975), they do not by themselves show the taint from the illegal arrest had been broken, let alone that his offer to confess was resulting from a “guilty conscience.”

The repentant rugged individual, however, not only allows courts to sanitize police misbehavior in explaining subsequent confessions. By suggesting that confessions are beneficial for the suspect as well as law enforcement, it also encourages judges to view all but the most egregious police pressure not just benignly, but positively. While this rationale applies across all police interrogation, the cases involving an appeal to a suspect's religiosity highlight how police pressure can be given a positive veneer if confessions are viewed as good for the suspect.

In *Welch v. Butler*,²²⁹ for instance, Welch, who was suspected of a murder, agreed to be questioned and denied killing the victim. He ended the interrogation, however, after being told that the police had taped his conversations with his estranged wife during which he admitted the killings.²³⁰ With Welch's ending of the interrogation, Officer Easley, who had not been a part of the original interrogation, entered the room. Easley, who had listened to the tapes and had heard Welch make statements to his wife expressing a concern that God would not forgive him for the murder, then held what the court labeled a "prayer session:"

Easley, a professed born-again Christian . . . apparently was concerned that Welch misunderstood the nature of divine forgiveness. Upon entering the room, he immediately identified himself as a police officer. Easley and Welch discussed forgiveness and salvation and prayed together for about three hours. During this time, Welch made incriminating statements.²³¹

After the "prayer session," Welch agreed to make another statement, and the trial court admitted the statements made both during and after the "prayer session."²³²

That Welch first tried to claim the priest-penitent privilege as a way to exclude the "prayer session" statements gives a sense of how perplexing the inquiry becomes from a voluntariness standpoint once law enforcement uses an appeal to a suspect's religious beliefs to obtain a confession.²³³ Nor is one likely to take much comfort from the Fifth Circuit's expressly felt need to note that while "religious speculation about the 'voluntariness' of

229. 835 F.2d 92 (5th Cir. 1988).

230. At his murder trial, the court suppressed the tapes of the wife's conversations with the defendant based on husband-wife privilege. *Id.* at 93.

231. *Id.*

232. The Fifth Circuit noted that Easley when asked by other officers upon leaving the interrogation room if Welch had confessed, replied "that he had not asked Welch anything like that." *Id.* While he might not have asked any classic interrogation questions during the "prayer session," Easley did testify at trial about Welch's incriminating statements during the session.

233. The Louisiana Court of Appeals rejected the privilege claim since Easley was not a clergyman within the meaning of the statute. *State v. Welch*, 448 So.2d 705, 712 (La. Ct. App. 1984).

yielding to the will of God . . . has its place,” it did not view that question as relevant to the legal inquiry of voluntariness.²³⁴

What is relevant for our purposes, however, is that the court was able to use the idea that Welch was repenting as a way to conclude that Welch’s confessions were not the product of police pressure, because “at most, the police set up a situation . . . in the hope that his desire to be saved would lead him to confess.”²³⁵ And perhaps most striking was that by casting Welch’s real motivation for the confession as a concern about personal salvation, the court was able to absolve Officer Easley of any constitutional sins and conclude that “[w]hat coercion . . . existed was sacred, not profane.”²³⁶ Left unexplained is why, if Welch’s confessions were a “sacred” outcome, he tried to exclude his confessions—beginning with his state appeals all the way through federal habeas corpus—rather than embracing them as a first step to repentance.

The repentant rugged individual thus offers the courts an easy way to cast interrogation and confessions in a positive light. However, without any empirical basis for believing that confessions to law enforcement actually promote redemption, it is difficult to take the rationale seriously when the confession is used to punish rather than to forgive. This is not to deny that Lady Macbeth-type confessions occur or that self-awareness and acknowledgment of one’s transgressions promotes spiritual and religious growth.²³⁷ To build a constitutional doctrine on the idea that many criminal suspects undergoing interrogation are having a road-to-Damascus revelation inside an interrogation room in the back of a police station, however, should require considerably more than sheer supposition.

C. *False Confessions*

Even if, as has been argued above, neither the Court’s calculating nor the penitent rugged individual withstands empirical or logical scrutiny, the contention remains that the rugged individual is a necessary fiction to give police adequate leeway to obtain confessions. This is the core reason that Justice Jackson repeatedly raised in maintaining the rugged individual narrative in his efforts to ward off preemptive measures to significantly

234. *Welch*, 835 F.2d at 95.

235. *Id.*

236. *Id.*

237. Nor is it to deny that admitting to wrongdoing is the more virtuous action or that the refusal to confess should not be “romanticized.” Albert W. Alschuler, *Miranda’s Fourfold Failure*, 97 B.U. L. REV. 849, 865 (2017). Professor Alschuler’s thoughtful defense of the penitence view makes a strong case against the “glorification of noncooperation.” *Id.* at 868. The question this Article poses is not what would be the correct moral choice if a suspect was freely choosing to confess, but the defensibility of courts’ using penitence as a post hoc rationale with little evidence that defendants who confess are doing so because they decided to take the moral high road.

curtail interrogation. And to Jackson's credit, he acknowledged that the question of voluntariness was not a mere historical inquiry delving into the suspect's mind, but rather a question of how much pressure can be applied before it goes beyond what society will tolerate in obtaining necessary confessions.

Justice Jackson in *Watts v. Indiana*²³⁸ presented what he saw as "a real dilemma in a free society" if a suspect is not advised of his right to counsel and subjected to interrogation:

To subject one without counsel to questioning . . . is a real peril to individual freedom. [But t]o bring in a lawyer means a real peril to solution of the crime because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. . . .

If the State may arrest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guaranty of the right to assistance of counsel.

. . . .

. . . But if the ultimate quest in a criminal trial is the truth and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect's help in solving a crime merely because he was confined and questioned when uncounseled?

. . . .

. . . If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowls about unmolested. Is it a necessary price to pay for the fairness which we know as "due process of law"?²³⁹

Justice Jackson's framing of the issue as involving the specter of the public having to watch "helplessly while those suspected of murder prowls about unmolested" suggests that perhaps he did not see the situation as a "real dilemma" even though he disavowed "know[ing] the ultimate answer to these questions."²⁴⁰ Still, even if Jackson may not have had quite as open a mind as his statement of the dilemma first suggests, he does helpfully frame the issue as to when a confession should be deemed involuntary from a

238. 338 U.S. 49 (1949).

239. *Id.* at 59–62 (Jackson, J., concurring). Although Jackson concurred in the suppression of the confession in *Watts*, his concurrence is combined with dissents in the companion cases and presents a view of voluntariness at odds with the majority.

240. *Id.* at 61–62.

policy perspective: at what point does interrogation endanger constitutional values to such a degree that it becomes better to risk allowing guilty individuals to go free rather than permitting law enforcement to engage in the interrogation.

Framed this way, the voluntariness inquiry has a kinship to the due-process requirement that guilt must be proven beyond a reasonable doubt.²⁴¹ No one doubts that the burden of persuasion that must be met before a person can be convicted of a crime must be sufficiently high to act as a strong safeguard against wrongful convictions, because, as is often stated in popular parlance, “it is better to let ten guilty persons go free than convict one innocent person.”²⁴² Yet, the standard is not “beyond any doubt” because of the recognition that at some point the risk of convicting an innocent person may be so minimal that the “cost” of freeing a larger number of guilty individuals is too steep a tradeoff.²⁴³ This is not even taking into account that we may vary our calculus, at least intuitively, based on what the “guilty” person who is going free might have done.²⁴⁴

To acknowledge a similar tradeoff in the interrogation context does not, of course, begin to answer where the voluntariness fulcrum should properly be placed in weighing lost convictions against the protection of constitutional values. As we have seen, Chief Justice Warren in *Miranda* used the susceptible individual as his baseline to strike the balance strongly in favor of insulating a suspect from pressures that could trigger a confession.²⁴⁵ Unsurprisingly, the criticism that the balance was too “costly” in terms of lost convictions for the “benefit” of guarding against involuntary statements has been a staple of the *Miranda* critique.²⁴⁶ In an article that garnered considerable attention, Professor Cassell argued, for instance, that *Miranda* causes the loss of roughly 28,000 violent-crime convictions a year, including almost 900 non-negligent homicides, because of the loss of confessions from suspects who would have confessed if they

241. See *In re Winship*, 397 U.S. 358 (1970).

242. See generally, Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457 (1989).

243. *Id.* at 458–60.

244. Sir Stephen expressed reservations over whether it was always better that ten guilty individuals be set free. He argued that “[e]verything depends on what the guilty men have been doing.” JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 438 (1881).

245. See *supra* Part III.B.

246. The proposition that the warnings’ benefits were outweighed by its costs was expressly used by the Court in carving out a ‘public safety’ exception to *Miranda*. *New York v. Quarles* 467 U.S. 649 (1984). The Court, however, expressly held that an involuntary confession would still need to be suppressed. *Id.* at 655 n.5.

had not been given the warnings.²⁴⁷ And while the studies assigning such a large “cost” to *Miranda* have been strongly disputed on methodology grounds,²⁴⁸ Cassell’s proposed number of lost convictions certainly raises in high relief Jackson’s question of how the constitutional bargain should be struck.

The Jacksonian question—how do we define voluntariness in a way that balances society’s needs to convict the guilty while protecting a suspect’s rights—needs to account, however, for several critical developments since he raised it in the 1940s.²⁴⁹ The most fundamental development is recognition that false confessions are far more of a danger than commonly believed. Jackson was not insensitive to the issue, specifically noting that:

Of course, no confession that has been obtained by any form of physical violence is reliable and hence no conviction should rest upon one obtained in that manner. Such treatment . . . may . . . break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, promises, or inducements, which torture the mind but put no scar on the body.²⁵⁰

247. Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 440 (1996). Professors Cassell and Fowles later examined the effects of *Miranda* through the use of police clearance rates and continue to conclude that *Miranda* causes a statistically significant drop in the ability of police to clear both violent and property crimes. Paul Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda’s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685 (2017).

248. Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 538–47 (1996). While Cassell found that confessions declined about sixteen percent after *Miranda*, a decline which in turn led to the loss of convictions against almost four percent of all suspects who are questioned, Schulhofer challenged the data and methodology, concluding instead that confessions declined only between 6.7 and 9.1 percent, resulting in the loss of only a “vanishingly small” number of convictions of less than one percent. *See also* George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: “Embedded” in Our National Culture?*, 29 CRIME & JUST. 203, 244 (2002) (“Though he has garnered considerable attention from some of the nation’s top law reviews, as well as the media, Cassell’s quantitative claims have not been generally accepted in either the legal or the social science community.”). Cassell and Fowle’s use of clearance rates has also received substantial criticism. *See* Steven J. Schulhofer, *Bashing Miranda Is Unjustified—and Harmful*, 20 HARV. J.L. & PUB. POL’Y 347 (1997); Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of Miranda on the Police*, 32 RUTGERS L.J. 1, 4 (2000) (“Although Professors Cassell and Fowles should be commended for their efforts to raise the *Miranda* debate from the rhetorical to the empirical level, their study fails to establish the conclusions that they reach.”).

Part of the difficulty is the lack of reliable nationwide data making such empirical determinations speculative and largely turning on what variables the researchers choose to emphasize. *See* George C. Thomas III, *Is Miranda a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996); Meghan Ryan, *Is Miranda Good News or Bad News for the Police? The Usefulness of Empirical Evidence*, 50 TEX. TECH. L. REV. 81, 86–89 (2017).

249. Although Justice Jackson used the *Watts* case to raise and address the tradeoff question at length, he also raised similar concerns in his *Ashcraft* dissent, *see Ashcraft v. Tennessee*, 322 U.S. 143, 160–62, 174 (1944) (Jackson, J., dissenting).

250. *Watts v. Indiana*, 338 U.S. 49, 59–60 (1949) (Jackson, J., concurring).

He cited the ability to corroborate a confession, however, as a critical safety net,²⁵¹ giving as examples that the suspects in the cases before the Court had revealed information that only the criminal could have known.²⁵²

Jackson's perspective is a fair representation of what seemed a commonsense assumption seventy years ago: That innocent people would not falsely confess unless subjected to extreme measures and that 'checks' on reliability existed that would prevent a conviction based on a false confession from happening.²⁵³ Consequently, prior to DNA testing's revelation that wrongful convictions based on false confessions were in fact occurring at a far greater rate than had been imagined,²⁵⁴ the primary "benefit" of using the susceptible individual model was not one of avoiding wrongful convictions, but of having a criminal justice system not dependent on coerced statements even if the statements might be reliable. This benefit is an important one,²⁵⁵ but Jackson's prospect of suspected murderers "prowl[ing] about unmolested"²⁵⁶ was a rhetorically vivid counterweight to what can come across as a largely abstract values revolving around notions like "dignity," or "inviolability of the human personality,"²⁵⁷ or concerns about "inquisitions."²⁵⁸

With the advent of DNA testing in the late 1980s, however, the criminal justice system was abruptly awakened to the fact that certain staples of a prosecutor's case—evidence such as eyewitness identifications or jailhouse informants—were often unreliable.²⁵⁹ Judge Learned Hand had famously

251. *Id.* at 60 ("Once a confession is obtained it supplies ways of verifying its trustworthiness.").

252. Jackson gave as an example that in one of the cases the police had found the murder weapon where the defendant had said he hid it. *Id.* But see *infra* note 280 (detailing the defendant's exoneration in one of the cases that Jackson had stated had left him with "no doubt that the admissions of guilt were genuine and truthful").

253. Although this may have been the prevailing view, concerns over innocent individuals confessing even in non-extreme contexts were raised by some Justices even prior to DNA testing's revelations. In *Crooker v. California*, 357 U.S. 433, 446–47 (1958), the dissenters stressed that even an educated defendant (in this case a law student) can be innocent but "sorely in need of legal advice once he is arrested."

254. See *infra* notes 263–70 and accompanying text.

255. See *infra* notes 293–307 and accompanying text.

256. *Watts*, 338 U.S. at 62 (Jackson, J., concurring).

257. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

258. See *Ashcraft v. Tennessee*, 322 U.S. 143, 168 (1944) (Jackson, J., dissenting) (noting majority "characterized [the questioning] as a 'secret inquisition' invoking all the horrendous associations of those words" and objecting that "the use of such characterizations is no substitute for . . . detached and judicial consideration").

259. See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011) (examining the first 250 DNA exonerations that took place from 1989 through early 2010); see also, *How Eyewitness Misidentification Can Send Innocent People to Prison*, INNOCENCE PROJECT (April 15, 2020), <https://www.innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/>; *Informing Injustice: The Disturbing Use of*

and confidently written that “[o]ur [criminal] procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”²⁶⁰ DNA testing was criminal procedure’s witching hour that brought the ghosts out from the shadows and proved them to be real.

Perhaps the most counterintuitive discovery from DNA exonerations was that in over a quarter of these cases, a demonstrably innocent person had confessed to a serious crime that they in fact had not committed.²⁶¹ Nor could these confessions simply be explained away as attributable to a suspect’s youth or intellectual disability. If the false confessions had been limited to such situations, the rugged individual model perhaps could still control the voluntariness doctrine, because factors such as immaturity, lack of education, and impaired intellect are classic elements of the mantra that judges recite when deciding if a confession or waiver of rights was voluntary.²⁶²

DNA has confirmed, however, what Justices Black and Warren had hypothesized in arguing for a susceptible individual model: While it is true that juveniles and intellectually disabled suspects are particularly susceptible to falsely confessing,²⁶³ the E.E. Ashcrafts of the world are also vulnerable. In one study of 125 individuals who gave false confessions, less than one-third were under eighteen, fewer than one-quarter were intellectually disabled, and only one in ten suffered from mental illness.²⁶⁴ Even assuming that there was no overlap between the juvenile, intellectually disabled, and mentally ill individuals who falsely confessed, this would still mean at least one-third of the confessions were from the “typical” adult that the Court has so often posited as the rugged individual.

Jailhouse Informants, INNOCENCE PROJECT (Mar. 6, 2019), <https://www.innocenceproject.org/informing-injustice/>.

The number of DNA exonerations as of July 2020 stands at 367. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited July 30, 2020). When one includes non-DNA based exonerations, the National Registry of Exonerations has recorded 2556 exonerations from 1989 through 2019. *The National Registry of Exonerations Annual Report*, NATIONAL REGISTRY OF EXONERATIONS 3 (March 1, 2020).

260. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

261. *DNA Exonerations*, supra note 259; see also *Facts and Figures*, FALSE CONFESSIONS.ORG, <https://falseconfessions.org/fact-sheet/#:~:text=The%20overall%20total%20is%20258,been%20based%20upon%20false%20confession> [<https://perma.cc/7MNH-X2GA>]. See generally Craig J. Trocino, *You Can't Handle the Truth: A Primer on False Confessions*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 85 (2016).

262. See supra Part I.

263. See Gisli H. Gudjonsson, *Psychological Vulnerabilities During Police Interviews. Why Are They Important?*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 161, 167 (2010).

264. See Richard A. Leo & Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, 9, 13–21 (Daniel Lassiter & Christian Meissner, eds., 2010).

Now that we know that innocent defendants, even those who fit the Court's rugged individual archetype, do in fact make false confessions, the balance must be reassessed to reflect that innocent individuals will be convicted if the Court is not sufficiently rigorous in policing involuntary confessions. Indeed, if an individual wanted to engage in a bit of rhetorical counter-flourish to Justice Jackson, one might instead say that "without reform, the people of this country must discipline themselves . . . to stand[ing] by helplessly while individuals innocent of nothing more than succumbing to police pressures and deception will languish in prison cells or walk to the death chamber."²⁶⁵ This rephrasing of Jackson's ominous warning is not meant to dismiss or discount the need for effective crime detection, but one must be wary of letting nightmare scenarios fully control the narrative on either side of the balance.

Justice Jackson's assumption that corroboration will provide a backstop against unreliable confessions has also proven to be a less than foolproof safety net. As studies of false confession have discovered, false confessions often contain facts that could be known only to the perpetrator because the police during interrogation, sometimes deliberately, sometimes unknowingly, supply facts that the confessor then incorporates into his confession as he succumbs to police pressure.²⁶⁶ Professor Garrett found that as of 2015, an astonishing

ninety-four percent . . . of . . . false confessions by DNA exonerees were contaminated by . . . "inside" information Almost without exception [the confessions included] crime scene details which these innocent suspects . . . could not have . . . been familiar with until they learned of them from law enforcement.²⁶⁷

Not surprisingly, the prosecutors in these cases had hammered home in closing arguments to the jury that the accused's confession could not be

265. The Netflix documentaries *Making a Murderer* and *When They See Us* have likely done more to trigger a public debate over the reliability of confessions than the legion of law review articles and books written on the topic of police interrogation. *Making a Murderer* raises questions about the confession of Brendan Dassey, who was sixteen at the time and intellectually challenged. Despite initially winning habeas relief based on a finding that his confession was involuntary, the Seventh Circuit reversed the lower court and the Supreme Court has declined to hear the case. Daniel Victor, *Supreme Court Won't Hear Appeal of 'Making a Murderer' Subject Brendan Dassey*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/brendan-dassey-supreme-court.html> [<https://perma.cc/79QX-47DE>]. *When They See Us* deals with the "Central Park Five," five young Black men convicted of raping a jogger and later exonerated when the actual rapist came forward to confess and DNA confirmed he was the perpetrator. The defendants were convicted based on uncounseled confessions that later turned out to be coerced.

266. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1066–92 (2010).

267. Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 410 (2015).

false because the statement contained information that only someone who committed the crime could know.²⁶⁸

And while one may try to take comfort in the idea the false confessions in these cases were uncovered, especially since many were death penalty cases, that comfort leads to a distressing corollary: most cases involving false confessions will not be so “easy.” In many cases a false confession will likely go undiscovered because it did not contain biological evidence or did not receive the heightened post-conviction scrutiny that a capital crime is far more likely to receive. Instead, in those cases a false confession, often containing facts that could only be known to the perpetrator, will likely lead to a conviction with little chance of the false confession ever being uncovered.²⁶⁹ Therefore, the assumption that Justice Jackson argued for in calibrating his voluntariness balance—that if a confession includes “conditions which could only have been known” to the perpetrator it must be “genuine and truthful”—turns out not to be the safe commonsense assumption we once thought.²⁷⁰

The other major qualifier to Justice Jackson’s striking of the balance is one that he also could not have foreseen at the time he wrote. His primary focus for the voluntariness inquiry was on the confession’s reliability. The essential question for Jackson was at what point did physical or psychological coercion become so severe that a confession was no longer “reliable and hence no conviction should rest upon one obtained in that manner.”²⁷¹ Almost forty years later, however, the Court in *Colorado v. Connelly*²⁷² cast doubt on the availability of reliability as a constitutional safeguard.

Francis Connelly, a chronic paranoid schizophrenic who was hearing the “voice of God,” approached a police officer and without prompting

268. *Id.* at 411–15.

269. As Professor Garrett notes, the use of false confessions was especially troubling given that of the sixty-six exonerees who falsely confessed, exonerating DNA evidence existed in nineteen of the cases *at the time of the conviction*. *Id.* at 407–08. That almost thirty percent of the cases involved the use of confessions despite the presence of exonerating DNA is powerful evidence of how once a confession is obtained, the confession takes over the perception and handling of a case. *Id.* See also Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOL. 431 (2012).

270. The highlighting of the role of contamination in false confessions does not require that one cast law enforcement as a villain intent on obtaining confessions despite innocence. Detective James Trainum has provided an invaluable first-hand description of how he and his fellow detectives inadvertently contaminated a confession in a murder case that might have resulted in a wrongful conviction if not for the fortuitous existence of exonerating evidence. Saul Elbein, *Confessions Act One: Kim Possible*, THIS AM. LIFE (Oct. 11, 2013), <https://www.thisamericanlife.org/507/transcript>. See also JAMES TRAINUM, HOW THE POLICE GENERATE FALSE CONFESSIONS: AN INSIDE LOOK AT THE INTERROGATION ROOM (2016) (exploring how police interrogation techniques can lead to false confessions).

271. *Watts v. Indiana*, 338 U.S. 49, 59–60 (1949) (Jackson, J., concurring).

272. 479 U.S. 157 (1986).

confessed to a murder.²⁷³ As part of his Due Process challenge,²⁷⁴ Connelly argued that the voluntariness doctrine should bar the State's use of his confession at trial because it was inherently unreliable based on his psychosis. Chief Justice Rehnquist, however, rejected reliability as a basis for exclusion:

Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the State. We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence, and erects no standard of its own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."²⁷⁵

Connelly's reasoning thus casts doubt on reliability as a reassuring backstop when it comes to confessions.²⁷⁶ If part of Justice Jackson's justification of using the rugged individual was that we could be confident that the voluntariness doctrine will account for reliability, *Connelly* undermines that underlying premise. Suffering from an acute psychosis, Francis Connelly was in no position to fulfill the role of the rugged individual, and yet the Court allowed in a confession that, by the majority's own admission, "might be proved to be quite unreliable."²⁷⁷ As Justice Brennan observed in his dissent after noting the lack of any meaningful corroboration of Connelly's confession:

Since the Court redefines voluntary confessions to include

273. *Id.* at 160–61.

274. Before reaching the issue of the confession's admissibility if it was unreliable, the majority held that the confession did not come within the Court's voluntariness doctrine cases because Connelly's confession was impelled forward by his psychosis and not by any law enforcement actions. The majority reasoned, therefore, that because the Due Process clause requires state action to trigger its protections, even if Connelly's confession lacked voluntariness in the sense that it was a product of his psychosis and not his "free will," the confession was outside the doctrine's protections. *Id.* at 165–67. See Primus, *supra* note 5, at 31–34.

275. *Connelly*, 479 U.S. at 166–67 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)).

276. See Garrett, *supra* note 266 at 1109–12 (discussing *Connelly* and the loss of reliability review). Professor Primus appropriately cautions against reading *Connelly* as having dispensed with reliability as a factor in the involuntariness inquiry altogether, arguing that it still can play a role in a court's evaluation if "the police have done something whose effect on the suspect reduces the reliability of the confession obtained." Primus, *supra* note 5, at 34 (emphasis omitted).

277. *Connelly*, 479 U.S. at 167.

confessions by mentally ill individuals, the reliability of these confessions becomes a central concern. A concern for reliability is inherent in our criminal justice system, which relies upon accusatorial, rather than inquisitorial, practices. . . .

. . . .

Minimum standards of due process should require that the trial court find substantial indicia of reliability, on the basis of evidence extrinsic to the confession itself, before admitting the confession of a mentally ill person into evidence. . . . To hold otherwise allows the State to imprison and possibly to execute a mentally ill defendant based solely upon an inherently unreliable confession.²⁷⁸

Now that science has punctured our basic assumptions about false confessions, *Connelly*'s restrictive notion of the voluntariness doctrine's ability to exclude unreliable confessions needs to be reassessed, especially given that part of the traditional justification for the rugged individual model is that confessions are generally reliable and verifiable. Justice Jackson's rationale for adopting the rugged individual approach to voluntariness no longer has either the empirical or the doctrinal founding that once appeared to give it a far sturdier basis when he articulated it in *Watts*. And it may be that even prior to DNA testing unveiling the full scope of the problem of false confessions, Jackson himself eventually would have become more sympathetic to the idea that the innocent rugged individual could confess to a crime he did not commit and that the confession might appear reliable even though it was not; in what constitutes the judicial equivalent of a dramatic plot twist, in one of the cases where Jackson objected that a reliable confession was unjustifiably being suppressed,²⁷⁹ the defendant was later exonerated after another individual admitted to the murder and led authorities to where he had disposed of the murder weapon.²⁸⁰

278. *Id.* at 181, 183 (Brennan, J., dissenting).

279. *Harris v. South Carolina*, 338 U.S. 68 (1949) (Jackson, J., dissenting); *Watts v. Indiana*, 338 U.S. 49, 60 (1949) (Jackson, J., concurring) (including *Harris*'s case as one where "the verification [of the confession] is sufficient to leave me in no doubt that the admissions of guilt were genuine and truthful").

280. The story of L.D. *Harris*'s case is an inspiring one of lawyers who fought valiantly for their client despite hostile community sentiment. See Carl Langley, *A Tale of Two Men: By 5-4 Vote, the High Court Unplugged the Electric Chair*, AUGUSTA CHRON., July 18, 1979 (on file with author) (explaining how *Harris*'s local lawyers "lost a lot of friends" because, as the lawyers explained, "Everybody just knew *Harris* was guilty and couldn't understand our trying to prove his innocence"). *Harris* was convicted of killing a shopkeeper and sentenced to death based solely on a confession obtained after days of intensive incommunicado interrogation conducted in relay fashion by a number of local authorities inside a cubicle with "stifling heat." *Harris*, 338 U.S. at 70. *Harris*'s lawyers, however, had become convinced that the police had coached his confession to include facts that only the killer

D. Beyond False Confessions: Miranda and the Citizen-Government Relationship

As we have just seen, those Justices not enamored with the susceptible individual view of interrogation openly lament the potential loss of confessions and convictions and have used that rationale to limit the scope of constitutional protections. The choice of a rugged or susceptible individual model, however, also has doctrinal justifications that need to be analyzed. One rationale, that a legal standard that encourages confessions will aid the confessor's rehabilitation, already has been addressed.²⁸¹ A second rationale, however, has the appeal of casting the rugged individual standard as actually empowering the individual citizen by giving her more control over her exercise of rights.

This theme emerged as early as *Michigan v. Mosley*,²⁸² a case that allowed police questioning even after a person had invoked his right to silence so long as the original invocation was "scrupulously honored."²⁸³ In rejecting the dissent's position that renewed questioning should only be allowed after the suspect has met with an attorney, Justice White saw the dissent's position as a "paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case. To do so would be to 'imprison a man in his privileges,' and to disregard 'that respect for the individual which is the lifeblood of the law.'"²⁸⁴ The Court similarly used the argument to justify not telling a suspect his family had retained a lawyer ("*Miranda* . . . [gave] *the defendant* the power to exert some control over the course of the interrogation."),²⁸⁵ and to justify requiring a suspect

supposedly could have known and, believing in his innocence, pursued his appeals. *Id.* After winning in the Supreme Court, and with the prosecution having no evidence other than the suppressed confession, Harris was released. *Id.*; see also *Pen Releases Negro Freed by High Court*, THE STATE, September 24, 1949 (on file with author) ("L.D. Harris, a Negro once convicted of murder . . . has been released and is now as free as the breeze, according to penitentiary officers."). But that was not to be the end of the story. Eleven years after the murder that Harris had been convicted of, a similar brutal attack on a shopkeeper was committed in the same town and a recently released convict was arrested. That individual soon revealed that he had committed the murder that Harris had been convicted of, along with several other murders, and led the police to the crime scenes and to the site where he had buried the murder weapons; he ultimately plead to four life sentences. *Id.*; see also *Admitted Slayings Probed at Aiken: Police Search for Weapons After Man Admits Four Murders*, THE STATE, August 20, 1957 (on file with author).

281. See *supra* Part IV.B.

282. 423 U.S. 96 (1975).

283. *Id.* at 104.

284. *Id.* at 109 (White, J., concurring) (citations omitted). To Justice White's credit, if he viewed the defendant as indicating he could not deal with the police on his own by invoking his right to a lawyer, he precluded further police contact unless the defendant reinitiated the contact. See *Edwards v. Arizona*, 451 U.S. 477 (1981); *supra* note 179.

285. *Moran v. Burbine*, 475 U.S. 412, 426 (emphasis in original). The *Moran* Court also noted that *Miranda* had "[d]eclin[ed] to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation." *Id.*

to actively invoke the right to counsel in the interrogation context even after counsel has been appointed through the Sixth Amendment (“The dissent seeks to prevent a defendant altogether from waiving his Sixth Amendment rights, i.e., ‘to imprison a man in his privileges and call it a Constitution’ . . .”).²⁸⁶

An initial temptation may be to view the Court’s invocation of the rugged individual archetype, especially the idea that one is protecting an individual from being “imprison[ed]” in his own rights, as little more than a cynical rationalization to justify broader police powers and more convictions.²⁸⁷ The sentiment, however, derives from a view put forward by Justice Frankfurter that deserves to be taken seriously:

When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.²⁸⁸

Frankfurter made the argument in a case involving the question of whether an accused who wanted to represent himself could be forced to accept a lawyer against his wishes. Indeed, if the idea of a constitutional right is to enhance personal autonomy, especially in relationship to the government, Frankfurter’s characterization has an undeniable appeal: forcing a right upon a citizen can be seen as taking away her dignity and independence by depriving her of the ability to decide her own course of action. This viewpoint became a driving force for the Court’s later cases

286. *Montejo v. Louisiana*, 556 U.S. 778, 788 (2009) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942)). One of the strongest statements of the ‘imprisonment’ view was Chief Justice Burger’s dissent in *Brewer v. Williams*, 430 U.S. 387 (1977). Burger saw the majority as effectively holding that once an individual invoked his right to an attorney under the Sixth Amendment he could not then waive the invocation until he met with the attorney; that understanding triggered this response:

[C]onstitutional rights are personal, and an otherwise valid waiver should not be brushed aside by judges simply because an attorney was not present. The Court’s holding operates to “imprison a man in his privileges;” it conclusively presumes a suspect is legally incompetent to change his mind and tell the truth until an attorney is present. It denigrates an individual to a nonperson whose free will has become hostage to a lawyer so that until the lawyer consents, the suspect is deprived of any legal right or power to decide for himself that he wishes to make a disclosure. It denies that the rights to counsel and silence are personal, nondelegable, and subject to waiver only by that individual.

Id. at 419 (Burger, J., dissenting) (emphasis omitted) (citation omitted); *see id.* at 419 n. 2 (arguing majority’s “paternalistic rule” was “particularly anomalous” given that *Faretta* had recently “discovered an independent constitutional right of self-representation.”)

287. Someone of a sarcastic bent might envision a prisoner in a jail cell thinking, “Thank you Justices ever so much for freeing me from the shackles of the Bill of Rights, even though it means that I confessed when I otherwise might not have and am now wearing actual shackles; they don’t chafe nearly as much as those constitutional ones.”

288. *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 280 (1942).

enshrining an independent right of self-representation within the Sixth Amendment;²⁸⁹ as one court succinctly put it in *Braveheart* fashion, “respect for individual autonomy requires that he be allowed to go to jail under his own banner.”²⁹⁰

As with any guiding principle, however, context is everything. When Justices recite Frankfurter’s famous quote in the context of interrogation, they fail to account for a crucial sentence that immediately precedes it: “To deny an accused a choice of procedure in circumstances in which he, *though a layman, is as capable as any lawyer of making an intelligent choice*, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.”²⁹¹ In the context of self-representation, this means an extensive in-court hearing on the accused’s ability to understand the right to counsel that he is foregoing and requiring a judge to assess whether the defendant’s decision is knowing and voluntary.²⁹² The isolation of an interrogation room is obviously a far different situation, with the citizen’s ability to make “an intelligent choice” buffeted by the fear and pressure generated by trained interrogators who are allowed to make up their own script unbound by the truth.

Indeed, Justice Frankfurter’s admonishment actually argues *for* a regime comparable to *Miranda*, especially with our evolving empirical understanding of the confession process. If the vitality of constitutional rights stems in part from the citizen’s free choice to exercise the right, the Court then has an obligation to ensure that the invocation or declination is able to be done in a manner that promotes the underlying constitutional value. Otherwise, the right becomes an “empty verbalism,” not because the citizen is deprived of autonomy in deciding whether to invoke the right, but because she is placed in a situation in which she cannot realistically exercise the right. The susceptible individual model of confessions is targeted precisely at providing the needed space and information for the citizen to make the decision whether to invoke the right.

Let us try to take the analysis one step further, though, by using the idea of autonomy to engage the question of what values are being vindicated by giving full strength to the privilege against self-incrimination and the idea of voluntariness. The Justices expressing concern over limiting autonomy in exercising constitutional rights are not mistaken in worrying that how we allow rights to be exercised can affect the right itself, even if they are

289. *Faretta v. California*, 422 U.S. 806 (1975); see generally Sundby, *supra* note 42, at 697–703 (discussing approvingly Court’s invocation of the “heroic rugged individual” in promoting autonomy and dignity values).

290. *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965).

291. *Adams*, 317 U.S. at 280 (emphasis added).

292. See Myron Moskowitz, *Advising the Pro Se Defendant: The Trial Court’s Duties under Faretta*, 42 BRANDEIS L.J. 329 (2004).

mistaken in how that value plays out in the interrogation context. The difficulty, however, has been that the privilege's values frequently are expressed either by references to inquisition-like techniques²⁹³ or by appeals to "human dignity" and "free choice."²⁹⁴ Yet the type of questioning that Ernesto Miranda was subjected to—a two-hour questioning without extreme physical or psychological coercion—does not conjure up an image of the rack and screw, and "free choice" can seem flimsily amorphous when compared to an underlying crime like rape.²⁹⁵

If we flesh out the underlying constitutional values through the notion of autonomy and the citizen-government relationship, however, one can see that in fact much is at stake even in cases like Ernesto Miranda's. This is in part because acceptance of a prevalent use of police interrogation power can lead incrementally to the type of criminal investigative regime that is the nightmare of democracies. The Court in *Escobedo v. Illinois*²⁹⁶ voiced such a concern by quoting at length a powerful observation by Dean Wigmore:

[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,[] that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.²⁹⁷

293. See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143, 153–54 (1944); *Watts v. Indiana*, 338 U.S. 49, 56–57 (1949) (Douglas, J., concurring).

294. *Miranda v. Arizona*, 384 U.S. 436, 457–458 (1966) (twice raising idea that petitioners' confessions were not "truly . . . the product of free choice").

295. *Id.* at 539 (White, J., dissenting) ("Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.").

296. 378 U.S. 478 (1964).

297. *Id.* at 489 (quoting 8 WIGMORE, EVIDENCE 309 (3d ed. 1940)). The *Escobedo* Court also observed:

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence

One need only read the Court's cases from the whippings in *Brown v. Mississippi* forward through the techniques of sleep deprivation, isolation, relay-questioning by groups of police, and acts of physical and mental intimidation, to realize that without procedural constraints the desire to obtain a confession can breed a belief that the end of obtaining the confession justifies the means. Slippery slope arguments always deserve a skeptical welcome, but prior experience suggests that Dean Wigmore's historical warning should be given close attention when deciding whether to weaken procedural protections for interrogations.

One could let the argument rest at this point for an invigorated right to silence founded upon a realistic view of how ordinary individuals behave in the interrogation room. The historically proven danger that governments without such restraints slip towards increasingly coercive interrogation methods, when coupled with recent findings that false confessions occur even without extreme tactics, together form a powerful rationale for sending the rugged individual into exile. A further value is at stake, however, that is bound up in the right to silence and extends to the very fabric of our system of government. As Chief Justice Warren noted in *Miranda*, the Court has viewed the privilege as founded upon a "complex of values,"²⁹⁸ such as the "inviolability of human dignity" and the need to maintain a "fair state-individual balance."²⁹⁹ One aspect in particular, though, captures a special danger in upsetting the "state-individual balance" if the privilege is not properly protected, the right's role as a safeguard of the individual's substantive right of privacy, "a right to a private enclave where he may lead

independently secured through skillful investigation.

Id. at 488–89. Intriguingly, Wigmore was originally skeptical of the privilege's justification and even urged abolition, but then later came to view the privilege as essential because of the danger that without the privilege brutal interrogation practices would become common. See Donald A. Dripps, *Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 712 & n.56 (1988).

298. *Miranda*, 384 U.S. at 460 (citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55–57, 56 n.5 (1964)), *abrogated by* *United States v. Balsys*, 524 U.S. 666 (1998)). In an oft-quoted passage, the *Murphy* Court wrote:

[O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;" our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" our distrust of self-deprecatory statements; and our realization that the privilege . . . is often "a protection to the innocent."

Murphy, 378 U.S. at 55 (citations omitted).

299. *Miranda*, 384 U.S. at 460.

a private life.”³⁰⁰ The quote comes from an opinion by Judge Jerome Frank that more fully (and passionately) argues that the privilege’s protection of privacy is a linchpin to broader values of democracy and liberty:

The foes of the privilege . . . have mistakenly viewed it solely from a procedural angle; so considered, it seems to them an unjustifiable obstacle to the judicial ascertainment of the truth. They ignore the fact that the privilege—like the constitutional barrier to unreasonable searches, or the client’s privilege against disclosure of his confidential disclosures to his lawyer—has, *inter alia*, an important “substantive” value, as a safeguard of the individual’s “substantive” right of privacy, a right to a private enclave where he may lead a private life. That right is the hallmark of our democracy. The totalitarian regimes scornfully reject that right. They regard privacy as an offense against the state. Their goal is utter depersonalization.³⁰¹

The privilege’s crucial role in “protecting the realm of human thought and expression”³⁰² from government intrusion also explains why much is at stake from a government-citizen balance perspective if the right is diluted.

Few actions by the state against a citizen are more a statement of a government’s supremacy to a citizen’s standing than the subjection of a citizen to questioning against her will in an effort to find out her secrets. A common critique of someone who invokes her right to silence is that only a guilty person would invoke the privilege, which casts the privilege’s purpose as solely one of covering up or hiding incriminating information. In fact, the invocation of the privilege viewed from the perspective of government-citizen power is a critical means of maintaining the central premise that the government derives its power from the consent of the citizenry.³⁰³ The right to maintain one’s thoughts to herself—whether they be guilty, shameful, or simply one’s musings—is a fundamental tenet of

300. *Id.* at 460 (quoting *United States v. Grunewald*, 233 F.2d 556, 579, 581–582 (Frank, J., dissenting), *rev’d*, 353 U.S. 391 (1957)).

301. *United States v. Grunewald*, 233 F.2d 556, 581–582 (Frank, J., dissenting) (citations omitted), *rev’d*, 353 U.S. 391 (1957).

302. *Braswell v. United States*, 487 U.S. 99, 119 (1988) (Kennedy, J., dissenting); *cf. Doe v. United States*, 487 U.S. 201, 210 n.9 (1988) (although not finding that the privilege applied, stating, “We do not disagree with the dissent that “[t]he expression of the contents of an individual’s mind’ is testimonial communication for purposes of the Fifth Amendment.”); *Doe*, 487 U.S. at 211 (it is “the attempt to force him ‘to disclose the contents of his own mind,’ that implicates the Self-Incrimination Clause.”) (quoting *Curcio v. United States*, 354 U.S. 118, 128 (1957)). For an interesting use of the idea of “cognition” as a basis for defining what the privilege protects, see Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243 (2004).

303. See generally Scott E. Sundby, “Everyman’s” Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751 (1994).

individual autonomy and dignity; for the government to override that right is to take away that autonomy and dignity.

This is why while we may recoil most strongly when brutality is used to obtain a confession, an important constitutional value is still actively undermined whenever a citizen is unable to assert the right to keep her thoughts free from government prying. The long-term harm results not from the brutality, but in the police placing the citizen in a position where she loses the ability to exercise a right fundamental to preserving the citizen's autonomy vis-à-vis the state, whether the loss of ability is due to the inherent pressures of the interrogation room or the swinging of a truncheon. This danger is especially true given Justice Black's observation in *Chambers* that coercive interrogation techniques have often been targeted at the "numerically weak, the friendless, and the powerless,"³⁰⁴ making the oppression fall on those citizens least able to assert their rights.

It is the subversion of this basic value that causes many to intuitively mourn the decline of *Miranda* despite its shortcomings. The defenders of *Miranda* understand that the decision was not simply a criminal procedure right concerning a suspect and the police, but was a monumental effort to acknowledge and to help enshrine the individual's right to self-determination and autonomy against the government.³⁰⁵ Consequently, when the Court places the rugged individual in the interrogation room rather than the everyday citizen, it not only is an act of fiction that defies empirical and practical experience, it is a recasting of the government-citizen relationship.³⁰⁶ From this perspective, a police officer reading *Miranda*

304. *Chambers v. Florida*, 309 U.S. 227, 238. See also *Trocino*, *supra* note 261, at 88 ("[T]he interrogations that lead to confessions are usually administered by the powerful against the powerless.").

305. *Miranda*, 384 U.S. at 460:

[T]he privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.

(citations omitted).

306. The fundamental values at stake have also been expressed through the idea that the United States is an accusatorial rather than an inquisitorial system. As Justice Frankfurter observed:

[Obtaining an involuntary confession] violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial, as opposed to the inquisitorial, system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. Under our system, society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of

warnings to a suspect is not an isolated event taking place in an interrogation room. Rather, the interaction in the interrogation room is part of a far larger enterprise that strives to maintain a balance of government-citizen power that preserves the government by consent that the Founders intended.³⁰⁷

CONCLUSION

The extent to which we should tailor a constitutional right to the realities of human behavior is a question that arises with many constitutional rights. Can prosecutors set aside their prosecutorial perspective and objectively evaluate evidence in deciding if evidence is exculpatory and therefore needs to be disclosed to the accused?³⁰⁸ Are litigators able to abide by *Batson v. Kentucky*³⁰⁹ and put out of their mind stereotypes when exercising peremptory challenges to choose a jury?³¹⁰ Will the ordinary citizen confronted by a police officer's request to consent to a stop or search in

the accused, even under judicial safeguards, but by evidence independently secured through skillful investigation. "The law will not suffer a prisoner to be made the deluded instrument of his own conviction." . . . Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards.

Watts v. Indiana, 338 U.S. 49, 54–55 (1949) (citations omitted).

307. In this sense, every motion to suppress a confession as a *Miranda* or Due Process violation serves an important civic function by bringing into a public forum a reminder of the limits of police and government power as it relates to the citizen. See Scott E. Sundby, *Mapp v. Ohio's Unsung Hero: The Suppression Hearing as Morality Play*, 85 CHI.-KENT L. REV. 255 (2010). See also REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 11 (1963):

The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. . . . The loss to the interests of accused individuals, occasioned by these failures, are great and apparent. . . . Beyond these considerations, however, is the fact that [this situation is] detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community.

308. See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590 (2006) ("Perhaps prosecutors sometimes fail to make decisions that rationally further justice, not because they fail to value justice, but because they are, in fact, irrational. They are irrational because they are human, and all human decision makers share a common set of information-processing tendencies that depart from perfect rationality.");

Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of*

Brady v. Maryland, 33 MCGEORGE L. REV. 643 (2002) (questioning whether prosecutors invested in the decision to prosecute can assess evidence fairly).

309. 476 U.S. 79 (1986) (holding under the Equal Protection Clause that a lawyer cannot exercise a peremptory strike based on race).

310. See Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM L. 103, 107 (2012) (arguing *Batson* was based on an "unrealistically optimistic view"). The widespread criticism of *Batson's* failure to eliminate race-based peremptory challenges has led the state of Washington to adopt a rule that bars specific justifications that historically have been associated with racial bias and that allows a judge to deny a strike if an "objective observer" could see race as a factor in dismissing the juror. See WASH. CTS. GEN. R. 37.

reality feel that she can tell a police officer that she is invoking her Fourth Amendment right and refuse?³¹¹

In this sense, this Article's argument that the Court is making assumptions about human behavior in crafting its regulation of police interrogation is unremarkable. What is remarkable, however, is that unlike in almost any other constitutional context where the Court almost invariably casts the citizen as a rugged individual who can live up to a romanticized vision of civic courage,³¹² the Court has at times acknowledged that interrogation practices can in fact overbear even the hardest soul.³¹³ Indeed, in this regard *Miranda v. Arizona* may be the Court's most honest opinion, not just in its recognition of human frailty, but by incorporating that understanding into its doctrine.

We now know through DNA testing and empirical studies that the *Miranda* Court's assumptions were in fact correct. The inherent pressures of the interrogation context when combined with standard interrogation techniques not only are likely to compel individuals to talk, they can lead to false confessions. If anything, *Miranda* was overly optimistic in its belief of how an individual could be bolstered to withstand the pressures.

Since *Miranda*, however, the Court has largely retreated from this rare epiphany of realism and increasingly turned back to the rugged individual ideal. This retreat may be because of a reassessment of the tradeoff between convictions and allowing suspects to exercise their right to remain silent; it may also be a refusal to believe that individuals are not made of sufficiently stern fortitude to resist police pressures so that confessions are acts of repentance or a miscalculated battle of wits; or perhaps it is from a desire to have constitutional standards reflect the Justices' ideals of who a citizen should be, even if most of us could not live up to the standard. Or, of course, it may be some mix of these reasons.

Whatever the motivations, however, the Court should explain, especially in the face of the growing number of false confessions, why it is rejecting an approach that realistically reflects human nature. This is not simply a call to reinvigorate *Miranda*, although if the Court is serious about giving individuals autonomy and dignity in the exercise of the privilege, that is a

311. *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973). See generally Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 156 (2002) (“[T]he Court’s Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort—a mere device for attaining the desired legal consequence.”).

312. Although a number of Justices have at various points decried that the Court’s jurisprudence often does not accord with the realities of human nature, Justice Marshall was perhaps the Justice who was most focused on how a holding would fare in the ‘real world.’ See generally Green & Richman, *supra* note 68.

313. See *supra* Part III.

necessary first step. A number of proposals have been put forward to make *Miranda* more effective given the lessons of experience.³¹⁴

Miranda warnings alone, however, cannot protect the susceptible individual, especially the innocent citizen, in the interrogation room.³¹⁵ This Article's greatest hope is that the Court will listen to the many reforms that are being proposed, ranging from mandatory taping to pre-trial reliability hearings³¹⁶ and adopt a view of voluntariness that incorporates the realities of human nature when placed in an interrogation context. But if it does not, then this is a call to the Court to explain why it is refusing to do so and how that refusal can be squared with the constitutional norms underlying the privilege against self-incrimination and the Due Process Clause. Without such an explanation, the Court's rugged individual approach to police interrogation is no more than legal mythology masquerading as legal doctrine.

314. See Tonja Jacobi, *Miranda 2.0*, 50 U.C. DAVIS L. REV. 1 (2016) (suggesting reforms to *Miranda* warnings, including how they are administered, to make them more effective).

315. Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 787–90 (2013) (criticizing the “the *Miranda* diversion” as failing to have any meaningful impact and pointing out that all of the wrongful confessors had waived their rights). Of course, even if *Miranda* may not be the most effective means for addressing the false confession problem, it still serves other critical purposes in terms of regulating the government-citizen relationship. See *supra* notes 293–307 and accompanying text.

316. The American Law Institute (ALI) has recently promulgated principles regarding interrogations that provide an excellent starting point. With confessions becoming one of the most studied areas of the law, crafting procedures to guard against wrongful confessions is producing a number of promising proposals ranging from the mandatory taping of confessions. Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of Miranda Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157 (2017), to pretrial reliability assessments before a confession can be admitted, see Leo et al., *supra* note 315, at 792–809 (calling for pretrial reliability assessments).