

# How Crime Dramas Undermine *Miranda*

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*In the half century since the Supreme Court decided Miranda v. Arizona, custodial interrogations have become a mainstay of popular culture. Even casual viewers of police procedurals will be exposed to hundreds of depicted arrests, interrogations, and other law enforcement conduct. It has become commonplace for courts, commentators, and the general public to assert that people learn about their rights from television.*

*Yet if people do, in fact, learn about their criminal procedure rights from television, what they are learning is dangerously inaccurate. In a comprehensive content analysis of ten seasons, totaling 229 episodes, drawn from two of the most highly watched crime dramas on television, we demonstrate that these shows mislead viewers about the nature and scope of Miranda and other criminal procedure rights, almost always suggesting that these rights are less protective than they actually are. First—and contrary to widely held belief—these crime dramas rarely depict the actual administration of the Miranda warning. Second, our research reveals a laundry list of ways that crime dramas undermine Miranda: for every full reading of the Miranda warning, the shows approvingly portray sixty-five Miranda violations; invocations of Miranda are regularly rejected and treated as a sign of guilt; other criminal procedure protections are routinely violated with impunity; and defense attorneys are consistently portrayed as unethical and ineffective. In all, the crime dramas we reviewed depicted events that undermine Miranda at a rate of ten times per episode.*

*If Miranda and associated rights were robustly respected by police and uniformly protected by courts, it might not matter so much how well the general public understood those rights. But remedies for Miranda violations are increasingly out of reach: in 2022, for example, the Supreme Court held in Vega v. Tekoh that a police officer's failure to read the Miranda warning prior to a custodial interrogation does not alone give rise to a federal civil damages remedy. This means that people who have been taken into custody will often be their own first and last line of defense, and if they do not understand Miranda and related criminal procedure rights, they will not be able to protect their own interests. We therefore propose an array of measures to combat the undermining of Miranda. These include revisions to doctrine, legislative reform of policing practices, responsible measures for the entertainment industry, and steps for other stakeholders.*

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#### INTRODUCTION

From the time *Miranda v. Arizona*<sup>1</sup> was decided, it has figured prominently in popular culture. Television, movies, books, and other media have depicted countless administrations of the *Miranda* warning and ensuing custodial interrogations. The Supreme Court has acknowledged *Miranda*’s unique role, observing in *Dickerson v.*

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

*United States* that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”<sup>2</sup>

Yet the precise way in which popular culture influences public understandings of *Miranda*, more than fifty years after the decision, is less clear. While many courts and legal scholars have pronounced the *Miranda* warning an established part of our culture,<sup>3</sup> empirical evidence indicates that public understanding of the full implications of *Miranda* is significantly lacking.<sup>4</sup> And, more recently, some scholars have suggested that popular culture portrayals of the *Miranda* warning are on the decline.<sup>5</sup> How can we reconcile these disparate understandings of the way that *Miranda* functions in popular culture?

In this Article, we present the most comprehensive empirical examination to date of the way that *Miranda* and other criminal procedure rights are depicted in police procedurals.<sup>6</sup> Working with a team of research assistants, we coded a total of ten seasons, or 229 episodes, of the two most popular police procedurals, *Law and Order: SVU* and *NCIS*.<sup>7</sup> Episodes were coded for depiction of criminal procedure issues including arrests, reading of *Miranda* warnings, custodial interrogations, invocations of the right to silence or to counsel, waiver, excessive force, and other searches or seizures.<sup>8</sup>

Through this comprehensive coding endeavor, we uncovered significant omissions and inaccuracies in both shows. First, while both shows depict dozens of arrests and stationhouse interrogations over the course of a single season,<sup>9</sup> the *Miranda* warning was read in full just *four times* during the 229 episodes we coded, and was *never* presented to a suspect in writing.<sup>10</sup> In situations involving an arrest and custodial interrogation in which *Miranda* warnings were definitively required, the police failed to adequately warn suspects of their rights 100% of the time—about once per episode in *NCIS* and once every two episodes in *SVU*.<sup>11</sup> It is

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2. *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

3. *See, e.g.*, Ronald Steiner, Rebecca Bauer & Rohit Talwar, *The Rise and Fall of the Miranda Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219 (2011); Marc Scott Hennes, *Manipulating Miranda: United States v. Frazier and the Case-in-Chief Use of Post Arrest, Pre-Miranda Silence*, 92 CORNELL L. REV. 1013, 1036 (2007); Matthew B. Kugler & Lior Jacob Strahilevitz, *Assessing the Empirical Upside of Personalized Criminal Procedure*, 86 U. CHI. L. REV. 489, 516 (2019).

4. *See infra* Section I.A.

5. *See, e.g.*, Steiner et al., *supra* note 3, at 231–32.

6. Throughout this Article, we will use the phrase “police procedural” to refer to popular television crime dramas. The Cambridge Dictionary uses the phrase more broadly: “[A] type of novel or drama about how the police investigate and solve a crime, or a novel, film, or television show of this type.” *Police Procedural*, dictionary.cambridge.org, <https://dictionary.cambridge.org/us/dictionary/english/police-procedural> [<https://perma.cc/H4E9-3ZAB>] (last visited Oct. 25, 2023).

7. As explained in more detail in Section II.B, we selected these two shows because they are the longest-running iterations of the two longest running and most successful police procedurals on U.S. television. *See infra* Section II.B.

8. *See infra* Part II.

9. *See infra* Table 1 – General Results, Section II.B.1.

10. *See infra* Table 1 – General Results, Section II.B.1.

11. *See infra* Table 3 – *Miranda* Violations, Section II.C.1.a.

striking that a viewer of the two most popular police procedurals might literally watch television for days without ever hearing the required *Miranda* warning prior to an interrogation.

But television portrayals of criminal procedure rights are not merely errors of omission. Suspects' unequivocal invocations of their rights to silence or to counsel were only honored about half the time.<sup>12</sup> Moreover, both shows depicted dozens of violations of other criminal procedure rights, including excessive force and unreasonable searches, that collectively contributed to an atmosphere of coercion that made self-incrimination more likely.<sup>13</sup> All told, the two shows we surveyed depicted a total of 361 constitutional violations—an average of 2.58 violations per episode of *NCIS* and 1.8 violations per episode of *SVU*—and no officer who violated the Constitution received any disciplinary action more serious than a brief reprimand from a supervisor.<sup>14</sup>

A person who gained their entire understanding of criminal procedure from these popular shows would have a significant misunderstanding of the way that these doctrines operate—one uniformly biased against their own interests. First, such a person might not even know that the *Miranda* warning existed. Second, even if they knew the *Miranda* warning existed, they likely would not know how to invoke the rights it protects. Third, if they did know how to invoke their rights, they would have no confidence that their rights would be scrupulously honored.<sup>15</sup> Fourth, they would misunderstand the scope of related constitutional protections, such as police use of force and ability to search. And finally, even if our hypothetical viewer were somehow able to glean a perfect understanding of their constitutional rights, they would still believe that the police were able to violate those rights with no meaningful repercussions.

Most people have some sense that television does not always impart accurate legal principles. Indeed, some might argue that this inaccuracy is good: in the real world, suspects do not always know the law and police do not always follow it, so why shouldn't television accurately reflect this reality? We submit, however, that police procedurals cause harm by uncritically portraying misleading and incorrect ideas relating to *Miranda* and related criminal procedure rights. When popular shows disseminate serious misinformation about *Miranda*, suspects in the real world are more likely to be mistaken or confused about their rights and less likely to properly assert them.<sup>16</sup> Consequently, we argue that courts, legislatures, the entertainment

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12. See *infra* Table 5 – Attempted Invocations Scrupulously Honored, Section II.C.1.b.

13. See *infra* Table 6 – Constitutional Violations, Section II.C.2.

14. See *generally infra* Section III.C.2.

15. See *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (“We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his ‘right to cut off questioning’ was ‘scrupulously honored.’”).

16. See, e.g., Richard Rogers, Jill E. Rogstad, Nathan D. Gillard, Hayley L. Blackwood, Eric Y. Drogen & Daniel W. Shuman, “*Everyone Knows Their Miranda Rights*”: *Implicit Assumptions and Countervailing Evidence*, 16 PSYCHOL. PUB. POL’Y & L. 300, 305–06 (2010).

industry, and other stakeholders should take measures to counteract the ways in which popular culture undermines *Miranda*.

The Article proceeds as follows. Part I provides background, offering an overview of the doctrine governing custodial interrogations. It then examines how *Miranda* has played out on the ground, surveying empirical research from the time of the decision to the present, including the limited research that has specifically examined portrayals of *Miranda* on television.

Part II presents our original and comprehensive survey of ten recent seasons of the two most popular police procedurals: *Law and Order: SVU* and *NCIS*. We catalog the massive inaccuracies in the way that *Miranda* and other doctrines related to custodial interrogation are portrayed on popular crime dramas as compared to the actual scope and operation of those doctrines under current law. This Part discusses these inaccuracies and their implications for the general public's understanding of their constitutional rights. This Part also considers the way narrative tropes employed by these shows normalize suspects waiving *Miranda* rights and reinforce the public's misunderstandings about how to protect themselves during interrogations.

Finally, Part III offers prescriptions. In light of the significant inaccuracies and omissions in portrayals of *Miranda* in these police procedurals, and the misunderstandings most people have about when and how *Miranda* protects their rights, we offer a range of interventions to counteract the disinformation spread by popular culture.

## I. BACKGROUND

This Part describes the backdrop against which police procedurals play out. Section I.A summarizes the doctrinal landscape. It includes the lead-up to *Miranda v. Arizona*, as well as criminal procedure rights related to custody, interrogation, administration of *Miranda* warnings, invocations, and waivers. Section I.B summarizes the existing empirical evidence regarding the understanding of *Miranda* by the general public.

### A. Doctrinal Foundations

Under the Due Process Clauses of the Fifth and Fourteenth Amendments, statements obtained during coercive custodial interrogations are inadmissible in both federal and state courts.<sup>17</sup> Statements obtained in violation of the Sixth Amendment right to counsel are also inadmissible.<sup>18</sup> But until the 1966 decision in *Miranda v. Arizona*, the Supreme Court's approach to protecting these rights could be described as inconsistent at best.

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

18. *Massiah v. U.S.*, 377 U.S. 201 (1964).

The Supreme Court made several false starts in establishing a doctrine to provide specific guidance about the standards governing police interrogations. The trajectory began with *Brown v. Mississippi*, in which three Black men were tried for murder.<sup>19</sup> A group of White men, including the sheriff's deputy, elicited the defendants' confessions by whipping them and telling them that the physical abuse would continue until they confessed.<sup>20</sup> While the Court concluded that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners," and held that admitting the confessions obtained through physical brutality would violate due process, it did not articulate more specific standards for police.<sup>21</sup>

*Brown* was followed by several cases in which the Court expressed concerns about a wide range of coercive police practices during custodial interrogations. These practices included interrogating a suspect "in relays" for over thirty-eight hours without allowing the suspect to rest;<sup>22</sup> holding a suspect for five days, during which he was interrogated for several hours each night, without allowing him to go before a magistrate and without providing "friendly or professional aid and without advice as to his constitutional rights";<sup>23</sup> holding and interrogating a defendant with a third or fourth grade education for sixteen days without advising him of his rights or allowing him to speak to anyone else;<sup>24</sup> and holding a nineteen-year-old suspect for over forty hours, during which he was provided with almost no food and was told by the chief of police that the chief would protect him from the mob of thirty-to-forty people outside only if he confessed.<sup>25</sup> There was also a racial dimension to these cases: all of the defendants described in the previous paragraphs were Black.<sup>26</sup>

These cases highlight two primary, albeit overlapping, categories of concern by the pre-*Miranda* Court. First, the Court was concerned that coercion would lead to confessions.<sup>27</sup> Second, the Court was concerned about a range of abuses within the custodial interrogation setting that it felt were inconsistent with notions of due process.<sup>28</sup> These two categories of concern gave rise to inconsistent approaches by the Court in analyzing how much pressure is too much in a custodial interrogation setting. Some cases focused on the amount of coercive pressure to which the

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19. *Brown*, 297 U.S. at 281–82.

20. *Id.* at 284.

21. *Id.* at 286.

22. *Ashcraft v. Tennessee*, 322 U.S. 143, 149–50 (1944).

23. *Watts v. Indiana*, 338 U.S. 49, 53 (1949).

24. *Davis v. North Carolina*, 384 U.S. 737, 742–52 (1966). There was also evidence in the record that Davis was fed only two "thin" sandwiches per day and that he lost fifteen pounds during the period of confinement; the Court described this diet as "extremely limited" and claimed it "may well have had a significant effect on . . . his ability to resist." *Id.* at 746.

25. *Payne v. Arkansas*, 356 U.S. 560, 567–68 (1958).

26. *Ashcraft*, 322 U.S. at 144; *Watts v. State*, 82 N.E.2d 846, 848 (Ind. 1948); *Davis*, 384 U.S. at 742; *Payne*, 356 U.S. at 561.

27. *North Carolina v. Butler* 441 U.S. 369, 374 (1979).

28. M.K.B. Darmer, *Beyond Bin Laden and Lindb: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 329 (2003).

suspect was subjected but found that it was difficult to define the limits of acceptable pressure.<sup>29</sup> Other cases tried to analyze the conduct of the police but found it difficult to develop a principled approach to analyzing police conduct without also looking at the effect on the defendant.<sup>30</sup> This analysis collapsed back into the approach of trying to define where pressure crossed the line and became unconstitutional coercion.<sup>31</sup>

Thus, *Miranda* arose out of the Court's recognition that the doctrines it had developed were insufficient to address the wide range of serious police transgressions it had identified. The Court noted that the "modern practice of in-custody interrogation is psychologically rather than physically oriented . . . . Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms."<sup>32</sup> Relying on police manuals and texts, however, the court expressed significant concern about the tactics that were used.<sup>33</sup>

The *Miranda* Court ultimately articulated the now-familiar four-part test. First, "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent."<sup>34</sup> Second, the "warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court."<sup>35</sup> Third, the individual must be apprised of the "right to have counsel present at the

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29. *Payne*, 356 U.S. at 562 ("The question for our decision then is whether the confession was coerced. That question can be answered only by reviewing the circumstances under which the confession was made."); *Haley v. State of Ohio*, 332 U.S. 596, 606 (1948) ("Unhappily we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in securing a confession reach the coercive intensity that calls for the exclusion of a statement so secured."); *U.S. v. Mitchell*, 322 U.S. 65, 68 (1944) ("Therefore, in cases coming from the state courts in matters of this sort, we are concerned solely with determining whether a confession is the result of torture, physical or psychological, and not the offspring of reasoned choice. How difficult and often elusive an inquiry this implies, our decisions make manifest.").

30. *See, e.g.*, *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) (Overturning conviction based on conduct that is "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear.").

31. *Haynes v. State of Wash.*, 373 U.S. 503, 515 (1963) ("The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused."); *Jackson v. Denno*, 378 U.S. 368, 389 (1964) ("As reflected in the cases in this Court, police conduct requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will."); *Rogers v. Richmond*, 365 U.S. 534, 540–41 (1961) ("[C]onfessions following the admission into evidence of confessions which are involuntary . . . cannot stand. This is so not because such confessions are unlikely to be true but because methods used to extract them offend an underlying principle in the enforcement of our criminal law."); *see also Spano v. New York*, 360 U.S. 315, 320–21 (1959).

32. *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

33. The Court noted, for example, that "[t]he manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt." *Id.* at 455. As we will show in Part II, the tactics of concern to the *Miranda* court continue to be used in popular police procedurals today. *See infra* Part II.

34. *Miranda*, 384 U.S. at 467–68.

35. *Id.* at 469.

interrogation.”<sup>36</sup> Finally, the suspect must be told that if they “wish the assistance of counsel before any interrogation occurs,” then “if he is indigent a lawyer will be appointed to represent him.”<sup>37</sup> The Court emphasized that “opportunity to exercise these rights must be afforded to [the suspect] throughout the interrogation.”<sup>38</sup>

The trigger for the *Miranda* warning is a custodial interrogation, and the Court has carefully defined both custody and interrogation. Custody occurs when a suspect is “subjected to restraints comparable to those associated with a formal arrest.”<sup>39</sup> The Court has declined to draw bright line rules when it comes to custody—for example, a traffic stop is not inherently a custodial situation, and therefore, questions asked during a traffic stop are not automatically a custodial interrogation.<sup>40</sup> Most recently, the Court has made clear that, in analyzing whether a suspect is in custody for purposes of *Miranda*, courts must take into account whether the suspect is a juvenile.<sup>41</sup> The Court has held that interrogation consists of “express questioning or its functional equivalent.”<sup>42</sup> Thus, “the term ‘interrogation’ under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”<sup>43</sup>

When a suspect is custodially interrogated, the Court has made clear that the *Miranda* warnings preceding the interrogation need not be administered with absolute fidelity to the wording articulated in *Miranda* itself.<sup>44</sup> For example, in *Duckworth v. Eagan*, the defendant was given a written form titled Voluntary Appearance; Advice of Rights. The form stated:

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. *You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions

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36. *Id.*

37. *Id.* at 472–73.

38. *Id.* at 479.

39. *Berkemer v. McCartney*, 468 U.S. 420, 441 (1984).

40. *Berkemer*, 468 U.S. at 433; *see also* *Minnesota v. Murphy*, 465 U.S. 420 (1984) (holding that a confession elicited from a defendant during a meeting with his probation officer was noncustodial and therefore admissible regardless of the lack of *Miranda* warning).

41. *J.D.B. v. North Carolina*, 564 U.S. 261, 265 (2011).

42. *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980).

43. *Id.* at 301.

44. *California v. Prysock*, 453 U.S. 355, 359 (1981) (“This Court has never indicated that the ‘rigidity’ of *Miranda* extends to the precise formulation of the warnings given a criminal defendant.”).

at any time. You also have the right to stop answering at any time until you've talked to a lawyer.<sup>45</sup>

The Court held that this form—in conjunction with a subsequent oral warning that hewed more closely to the text of *Miranda*—was constitutionally sufficient.<sup>46</sup> It observed, “We have never insisted that *Miranda* warnings be given in the exact form described in that decision.”<sup>47</sup> The *Miranda* warnings are therefore “not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.”<sup>48</sup> Thus, “[r]eviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably ‘convey[ed] to [a suspect] his rights as required by *Miranda*.’”<sup>49</sup>

Once the *Miranda* warnings have been administered, the suspect must “unambiguously” assert his right to silence or his right to counsel in order to invoke those rights.<sup>50</sup> That is, “[H]e must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.”<sup>51</sup> In practice, the Court has developed a narrow reading of what counts as an “unambiguous” invocation—for example, in *Davis v. United States*, the Court held that a suspect who stated ninety minutes into an interview, “Maybe I should talk to a lawyer,” had not invoked his right to an attorney with sufficient clarity.<sup>52</sup> More recently, in *Berghuis v. Thompkins* the Court extended the *Davis* principle of unequivocal clarity to hold that a suspect who sat in near-silence for two hours and forty-five minutes had not clearly articulated his right to silence.<sup>53</sup> However, if the suspect does invoke his right to silence with sufficient clarity, he must be given a meaningful break from questioning;<sup>54</sup> and if he

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45. *Duckworth v. Eagan*, 492 U.S. 195, 198 (1989) (emphasis in original).

46. *Id.* at 203–04.

47. *Id.* at 202.

48. *Michigan v. Tucker*, 417 U.S. 443, 444 (1974); *see also Oregon v. Elstad*, 470 U.S. 298 (1985) (holding that an error in administering *Miranda* did not automatically require exclusion of a signed confession); *Vega v. Tekoh*, 597 U.S. \_\_\_\_ (2022) (slip op. at 16) (holding that “a violation of *Miranda* is not itself a violation of the Fifth Amendment” and that therefore a violation of *Miranda* does not confer a right to sue under 42 U.S.C. § 1983).

49. *Duckworth*, 492 U.S. at 203 (quoting *Prysock*, 453 U.S. at 361).

50. *Davis v. United States*, 512 U.S. 452, 459 (1994).

51. *Davis*, 512 U.S. at 459. While *Davis* enunciates a parallel standard of clarity for invoking the right to silence and the right of counsel, the consequences of invoking the respective rights are different. *Compare Michigan v. Mosley*, 423 U.S. 96, 106–07 (1975) (holding that the right to silence is not eternal and that under certain conditions a suspect who has invoked the right to silence may be re-interrogated), *with Arizona v. Edwards*, 451 U.S. 477, 484 (1981) (holding that once a suspect invokes his right to counsel, “the interrogation must cease until an attorney is present”); *see also Steven P. Grossman, Separate But Equal: Miranda’s Rights to Silence and Counsel*, 96 MARQ. L. REV. 151, 155–62 (2012) (summarizing case law distinguishing between the right to silence and the right of counsel for purposes of whether the person invoking the right can be reinterrogated while in custody).

52. *Davis*, 512 U.S. at 459.

53. *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010).

54. *Compare Mosley*, 423 U.S. at 103 (finding that a confession was properly admitted against a defendant who confessed after invoking his right to silence as “police here immediately ceased the

invokes his right to counsel, questioning cannot resume until his attorney is present.<sup>55</sup>

The Court has further developed the doctrine of waiver. In general, after warnings are given, “the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.”<sup>56</sup> A knowing and intelligent waiver is something less than an actual understanding.<sup>57</sup> Although *Miranda* itself said that “a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained,”<sup>58</sup> and further that “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,”<sup>59</sup> subsequent decisions retreated from this standard. For example, an express waiver is not required; rather, an “implicit waiver” of the “right to remain silent” is sufficient to admit a suspect’s subsequent statement into evidence.<sup>60</sup> Thus, “a waiver of *Miranda* rights may be implied through ‘the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver.’”<sup>61</sup> The Court concluded that “the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.”<sup>62</sup>

Finally, we emphasize an important point about remedies. Failure to administer the *Miranda* warning prior to a custodial interrogation is not, in itself, a constitutional violation.<sup>63</sup> Rather, statements resulting from an unwarned custodial interrogation are inadmissible against the defendant at a criminal trial.<sup>64</sup> That is, the constitutional violation occurs when the statement is admitted at trial—not when the unwarned custodial interrogation takes place.

For the balance of this Article, we will periodically use the shorthand “*Miranda* violation” to refer to a custodial interrogation that is conducted outside the

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interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation”), with *Edwards*, 451 U.S. 477, and *Westover v. U.S.*, 342 F.2d 684 (9th Cir. 1965).

55. *Davis*, 512 U.S. at 462.

56. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

57. *Moran v. Burbine*, 472 U.S. 412, 421 (1986) (holding that a waiver made “voluntarily, knowingly and intelligently” is one that was the “product of free and deliberate choice rather than intimidation, coercion, or deception” and was made with “a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it”).

58. *Miranda*, 384 U.S. at 475.

59. *Id.*

60. *North Carolina v. Butler*, 441 U.S. 369, 376 (1979).

61. *Berghuis v. Thompkins*, 560 U.S. at 384 (citing *Butler*, 441 U.S. at 373).

62. *Id.* at 385.

63. *See, e.g., Vega v. Tekoh*, 597 U.S. \_\_\_\_ (2022) (slip op. at 5, 13).

64. *Id.*

parameters established by *Miranda* and its progeny, such that any statement obtained during the interrogation would be inadmissible at trial to prove the defendant's guilt. Of course, many statements obtained in ways that run counter to the Court's rules for custodial interrogation never result in constitutional violations because they are never admitted at trial because most criminal cases never go to trial.<sup>65</sup> But the rules governing custodial interrogation are no less important, because even to be charged with an offense is an enormous burden to a defendant, let alone to plead guilty and serve a sentence. Moreover, portrayals of unwarned custodial interrogations that do not procure incriminating statements convey that warnings are in no way required and thereby contribute to the public's misunderstanding of *Miranda* and how to effectively exercise their related rights.

### B. Empirical Study of *Miranda*

A number of researchers have attempted to determine the effect of *Miranda* in the real world. Richard Leo helpfully groups these efforts into "first-generation studies" (roughly 1966–1973) and "second-generation studies" (roughly 1996–2001).<sup>66</sup> The first-generation studies examined police response to the decision,<sup>67</sup> and "the consensus that emerged . . . was that the *Miranda* rules have had only a marginal effect on the ability of the police to successfully elicit confessions and on the ability of prosecutors to win convictions."<sup>68</sup>

After a post-1973 lull in empirical research regarding *Miranda*, the studies Leo terms "second-generation" emerged around 1996 and continued at least through 2001 (the date of the publication of Leo's summary).<sup>69</sup> Leo divides the second-generation studies into two types: "[T]hose that seek to assess the quantitative impact of *Miranda* on confession, clearance, and conviction rates" and "those that qualitatively seek to assess *Miranda*'s real world impact" on the way that police officers do their jobs.<sup>70</sup> While areas of significant disagreement exist regarding *Miranda*'s effects,<sup>71</sup> Leo notes several areas of virtual consensus among second-generation empirical researchers. These findings include (1) police generally issue and document *Miranda* warnings; (2) "police have developed strategies that are

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65. For example, in 2018, 90% of federal criminal defendants pled guilty, while 2% went to trial and 8% had their cases dismissed. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial and Most Who Do Are Found Guilty*, PEW RESEARCH (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [https://perma.cc/7HTX-3K5L].

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

67. *Id.* at 1002–04.

68. *Id.* at 1004–05.

69. *Id.* at 1005.

70. *Id.* at 1006–07.

71. *Id.* at 1006–07. Leo flags the "most well-known debate" between Paul Cassell, who contends that *Miranda* is responsible for a reduction in both the confession and conviction rate, and Stephen Schulhofer, who argues that *Miranda*'s damage to law enforcement interests is virtually zero. *See id.* at 1005–09 & nn.29–50 (collecting sources).

intended to induce *Miranda* waivers”; (3) “police appear to elicit waivers from suspects in roughly 80% of their interrogations”; and (4) some jurisdictions systematically train police to custodially interrogate suspects without *Miranda* warnings.<sup>72</sup>

Since 2001, scholars have continued many of the same empirical debates about the effect of *Miranda* on the likelihood of confessions and a panoply of law enforcement interests.<sup>73</sup> More recently, however, research has questioned whether empirical evidence about the effect of *Miranda* on the rate of confessions is even relevant to determining its social value. For example, Meghan J. Ryan has asked why we care whether *Miranda* is helpful or unhelpful to the police, suggesting that the warning fosters other important social values regardless of whether it is a hindrance to the police.<sup>74</sup>

The literature focusing specifically on the general public’s understanding of *Miranda* is less extensive.<sup>75</sup> As a complement to the first-generation studies, national polling indicated that the information *Miranda* was designed to impart had made its way into the public consciousness: 93% of those surveyed in 1984 knew they had a right to an attorney if arrested,<sup>76</sup> and another survey conducted in 1991 found that 80% of respondents knew they had a right to remain silent if arrested.<sup>77</sup> Indeed, some evidence indicates that awareness of *Miranda* has spread internationally.<sup>78</sup>

More recent research has found, however, that even if they can recite the words of the warning, many people remain confused about the practical significance of *Miranda*. Richard Rogers and several co-authors administered a survey with true-

72. *Id.* at 1009–10.

73. Compare, e.g., Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda’s Harmful Effect on Law Enforcement*, 97 B.U. L. REV. 685 (2017) (surveying empirical evidence on the effects of *Miranda* to conclude that *Miranda* harms law enforcement interests), with Albert W. Alschuler, *Miranda’s Fourfold Failure*, 97 B.U. L. REV. 849, 880–90 (2017) (reviewing and analyzing work of Cassell and Schulhofer to conclude that *Miranda* did not protect suspects’ interests).

74. Megan J. Ryan, *Is Miranda Good News or Bad News for the Police? The Usefulness of Empirical Evidence*, TEX. TECH L. REV. 93 (2017) (questioning the utility of empirical evidence in establishing *Miranda*’s social value).

75. See, e.g., Kathryn Young & Christin L. Munsch, *Fact and Fiction in Criminal Procedure*, 66 S.C. L. REV. 445, 449–450 (2014) (noting that “[e]mpirical studies of criminal procedure remain relatively rare” and documenting the “handful” of studies examining knowledge of constitutional rights in the criminal procedure context”).

76. Jeffrey Toobin, *Viva Miranda*, NEW REPUBLIC, Feb. 1987, at 11–12.

77. SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE*, 1950–1990, at 51 (1993).

78. See Frederick Schauer, *The Miranda Warning*, 88 WASH. L. REV. 155, 155 (2013) (citing an example of officers on Russian television giving *Miranda* warnings and reports of suspects demanding their *Miranda* rights in countries outside of the United States); see also STEFAN TRECHSEL, *HUMAN RIGHTS IN CRIMINAL PROCEEDINGS* 352 (2005) (“‘*Miranda*’ has become a household word throughout the world [for lawyers and] those who watch American detective movies.”). Indeed, *Miranda* has even made its way into the South African constitution. CONST. OF THE REPUBLIC OF SOUTH AFRICA 1996, § 35(1) (“Everyone who is arrested for allegedly committing an offence has the right (a) to remain silent; (b) to be informed promptly (i) of the right to remain silent; and (ii) of the consequences of not remaining silent.”).

or-false questions about *Miranda* warnings to 119 undergraduate students and 149 pretrial detainees in Texas and Oklahoma (Rogers study).<sup>79</sup> The Rogers study revealed a number of crucial misconceptions. For example, 36.4% of the undergraduates and 30.9% of the detainees wrongly believed that their silence could be used against them at trial.<sup>80</sup> So even if many people can recite their rights,<sup>81</sup> critical misunderstandings of the meaning of those rights remain.<sup>82</sup> More recently, Kathryn Young and Christin Munsch surveyed undergraduates at a highly ranked private research university and a relatively low-ranked community college on their knowledge of criminal procedure rights.<sup>83</sup> Young and Munsch used a true/false survey instrument, including but not limited to Fifth Amendment rights.<sup>84</sup> While they found no significant difference in the knowledge of the two cohorts of students, they also found that students were not well-informed about their rights: both groups fared worse than they would via random guessing.<sup>85</sup>

Even if someone understands their rights, they may be unwilling to assert those rights in practice. We can deduce from the research discussed above that at least 60% of people waive their rights during custodial interrogation even though they understood their rights prior to being interrogated.<sup>86</sup> David Kessler found that most people who were approached on a sidewalk in Boston reported they would not feel free to leave if a police officer approached them on a sidewalk or a bus and said, “I have a few questions to ask you.”<sup>87</sup> Although Kessler was specifically attempting to study the seizure standard, the question of whether someone feels free to leave also has implications for whether a suspect is in custody.<sup>88</sup> Similarly, Alisa Smith and colleagues conducted a study in which campus security guards stopped people and asked them to identify themselves and state their reasons for being on campus.<sup>89</sup> All eighty-three people who were stopped complied with the requests, and in a brief post-stop interview, most subjects described the encounter

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79. Rogers et al., *supra* note 16. The study sought to compare those currently facing criminal charges with college students, with the latter representing “the upper-bound of *Miranda* knowledge—an educated segment of the public far removed from the stresses of arrest, detention, and pre-interrogation.” *Id.* at 311.

80. *Id.* at 307.

81. *Id.* at 301.

82. See also Young & Munsch, *supra* note 75, at 450–51 (collecting studies).

83. *Id.*

84. *Id.* at 458–65.

85. *Id.* at 462–63.

86. Researchers agree that police elicit waivers in about 80% of their interrogations. Leo, *supra* note 66, at 1009–10. Other researchers have found that 93% of those surveyed knew they had a right to an attorney if arrested, Toobin *supra* note 76, at 11–12, and 80% of respondents knew they had a right to remain silent if arrested, WALKER *supra* note 77, at 51.

87. David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 87 (2009) (study explicitly designed to measure the Fourth Amendment's seizure standard).

88. Kessler, *supra* note 87, at 65.

89. Alisa M. Smith, Erik Dolgoff & Dana Stewart Speer, *Testing Judicial Assumptions of the “Consensual” Encounter: An Experimental Study*, 14 FLA. COASTAL L. REV. 285, 291 (2013).

as consensual yet *also* said they did not feel free to leave.<sup>90</sup> And in an interesting, although not entirely unpredictable, result, Young and Munsch found that community college students were significantly less likely to say they would assert their right to remain silent when questioned when innocent of wrongdoing.<sup>91</sup>

Finally, and most relevant to this Article, a few studies have specifically linked the way that *Miranda* is portrayed on television to the way that the public understands *Miranda*. Courts have recognized that *Miranda* is entrenched in popular culture,<sup>92</sup> as have legal scholars.<sup>93</sup> The widely shared view is that most people get their knowledge of *Miranda* from these popular representations.<sup>94</sup> Anecdotally, some defendants have indicated that they know their rights from television.<sup>95</sup> One researcher observed that “[o]fficers regularly refer to suspects’ familiarity with *Miranda* from television and movies.”<sup>96</sup>

Yet it is unclear whether the understanding the public has gained from popular culture is accurate. Commentators have expressed skepticism that suspects’ understanding is actually accurate.<sup>97</sup> Some have observed that television portrays

90. *Id.* For a discussion of this study’s strengths and limitations, see Young & Munsch, *supra* note 75, at 453–54.

91. Young & Munsch, *supra* note 75, at 462–63; see *infra* Section II.B.1., Table 1 – General Results (answer to Question 2).

92. United States v. Harris, 515 F.3d 1307, 1311 (D.C. Cir. 2008) (“As every television viewer knows, an officer ordinarily may not interrogate a suspect who is in custody without informing her of her *Miranda* rights.”); United States v. DeNoyer, 811 F.2d 436, 439 n.4 (8th Cir. 1987) (noting that the term “*Miranda* warnings” “is commonly used, both in court and in television shows, to describe the ritual prescribed in *Miranda v. Arizona*”); United States v. McCrary, 643 F.2d 323, 330 n.11 (5th Cir. 1981) (suggesting that “[m]ost ten year old children who are permitted to stay up late enough to watch police shows on television can probably recite [the *Miranda* warnings] as well as any police officer”); United States v. Chapdelaine, 616 F. Supp. 522, 530 (D.R.I. 1985) (“[W]ith the popularity of police shows on television, there are few persons who are not familiar with the [*Miranda* warnings].”).

93. Leo, *supra* note 66, at 1012 (“There has been a widespread diffusion of the *Miranda* litany in American culture not only through television programs, but also through movies, detective fiction, and the popular press. It is therefore unlikely that many criminal suspects today hear the *Miranda* rights for the first time prior to police questioning; in fact, suspects are likely to have heard *Miranda* so many times on television that the *Miranda* warnings may have a familiar, numbing ring.”).

94. See Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 449 (suggesting that most Americans’ understandings of *Miranda* are derived from “police television programs, movies, or books”); Leo, *supra* note 66, at 1000 (“The *Miranda* warnings themselves have become so well-known through the media of television that most people recognize them immediately.”); Schauer, *supra* note 78, at 155 (“Largely as a consequence of American television and movies, *Miranda v. Arizona* may well be the most famous appellate case in the world.”).

95. United States v. Lacy, No. 2:09-CR-45 TS, 2010 WL 1451344, at \*2 (D. Utah, Apr. 8, 2010) (defendant testified “that he was very aware of his *Miranda* rights because of television”); see also Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 781 (2006) (“As anyone who watches television crime dramas knows, a suspect subjected to custodial interrogation must first be advised that she has a right to remain silent, that anything she says may be used against her in court, that she has a right to an attorney during questioning, and that if she cannot afford an attorney one will be appointed for her.”).

96. Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL’Y 395, 426 (2013).

97. See, e.g., Rorie A. Norton, *Matters of Public Safety and the Current Quarrel Over the Scope of the Quarles Exception to Miranda*, 78 FORDHAM L. REV. 1931, 1946 (2010) (“Therefore, though the

the *Miranda* warning as a formality.<sup>98</sup> One describes the *Miranda* warning as “a convenient plot-forwarding technique” that provides a “dramatic signal to the audience that the suspect in question is being arrested and booked, and that the detectives who found him are only one interrogation away from solving the crime.”<sup>99</sup> This superficial treatment communicates a false understanding that would have negative consequences for anyone who absorbs it. Consider the law of invocation: the literal words of *Miranda* tell suspects that they have the right to remain silent, but *Davis* and *Berghuis* require suspects to speak in order to invoke their rights.<sup>100</sup>

Commentators agree that *Miranda* is often portrayed inaccurately on television.<sup>101</sup> Some research has attempted a more systematic examination of *Miranda*'s portrayal on television. In a qualitative analysis of *Miranda*'s trajectory from the 1940s through the 2000s, Russell Dean Covey has compared film and television depictions alongside the Supreme Court's case law relating to custodial interrogations during the same time period.<sup>102</sup> Covey concludes that popular and legal notions of interrogation have followed roughly the same trajectory, culminating in *Dickerson*'s conclusion that *Miranda* must be constitutionally required because it is embedded in cultural understandings.<sup>103</sup>

More recently, Ronald Steiner, Rebecca Bauer, and Rohit Talwar published results of a study of the prevalence of *Miranda* warnings in television shows (Steiner study). The Steiner study examined one season each of six “iconic cop shows” that aired between 1967 and 2007: *Dragnet* (1967–1970), *Adam-12* (1968–1975), *Hill Street Blues* (1981–1987), *Miami Vice* (1984–1989), *NYPD Blue* (1993–2005), *Law & Order* (1990–2007), and *CSI* (2000–2007).<sup>104</sup> For each episode from the selected

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public is generally familiar with the fact that they are supposed to receive *Miranda* warnings upon arrest, they likely also believe them to be a largely trivial speed bump in the interrogation process.”)

98. See, e.g., George C. Thomas III, *The End of the Road for Miranda v. Arizona*, 37 AM. CRIM. L. REV. 1, 12 (“[T]he typical TV viewer has heard *Miranda* warnings given hundreds of times, with no discernible effect on the ‘good guys’ getting the confession from the guilty suspects.”).

99. Mandy DeFilippo, *You Have the Right to Better Safeguards: Looking Beyond Miranda in the New Millennium*, 34 J. MARSHALL L. REV. 637, 637–38 (2001).

100. Albert W. Alschuler, *Miranda's Fourfold Failure*, 97 B.U. L. REV. 849, 872 (“The Supreme Court has concluded that, although warnings of rights may depart from the formula set forth in *Miranda* and although waivers of rights can be implied, invocations of rights must be unambiguous.”).

101. See, e.g., DeFilippo, *supra* note 99, at 666–67 (“*Miranda* rights are not portrayed accurately on television. In popular police dramas, suspects’ *Miranda* rights are often violated by police, who use a range of prohibited tactics, including physical violence, to obtain confessions from suspects. If this is the source by which suspects are educated about their *Miranda* rights, it is not necessarily clear that they understand the substance of those rights when police read them at the outset of a custodial interrogation. In fact, it is likely that suspects who learn about *Miranda* on television misunderstand the substantive meaning of the warnings.”).

102. Russell Dean Covey, *Miranda and the Media: Tracing the Cultural Evolution of a Constitutional Revolution*, 10 CHAP. L. REV. 761, 762 (2007).

103. *Id.* at 786–88.

104. Steiner et al., *supra* note 3, at 228.

shows and seasons, the researchers viewed and coded the shows for whether an arrest took place and whether a *Miranda* warning, or portion thereof, was issued.<sup>105</sup>

The Steiner study found that the number of full and partial *Miranda* warnings depicted on television has declined over time.<sup>106</sup> *Miranda* warnings were common on *Dragnet*: examination of the 1967 season revealed twenty-three arrests and twenty-five references to *Miranda*.<sup>107</sup> Similarly, the 1968-69 season of *Adam-12* included forty arrests and sixteen references to *Miranda*.<sup>108</sup> The Steiner study then identified a shift in the frequency of *Miranda* warnings, beginning in the 1980s and continuing into the early 2000s. This change is epitomized by the first season of *CSI*, which included fifty-two arrests across twenty-three episodes, yet depicted only three references to *Miranda* and one actual *Miranda* warning.<sup>109</sup> That is, 94% of arrests on the show did not reference *Miranda*. As the Steiner study observed: “[T]he most popular police drama in the time of the *Dickerson* decision almost completely disregarded the *Miranda* warning.”<sup>110</sup> While most other shows demonstrated the same trend as *CSI*, the Steiner study identified *Law & Order* as an exception to the trend, with thirty-nine arrests and twenty references to *Miranda* (eight full, four substantial, eight partial).<sup>111</sup>

The Steiner study hypothesized that a decline in representations of *Miranda* will likely have the most effect on younger generations rather than on generations that came of age during a time when *Miranda* was depicted on television more frequently.<sup>112</sup> Therefore, the researchers also investigated whether shows available via iTunes, which they deemed more likely to be viewed by younger viewers, portrayed *Miranda* more frequently.<sup>113</sup> But examination of the shows *Bones* and *The Shield*—both popular on iTunes—revealed similar downplaying of *Miranda*.<sup>114</sup> And like the trend seen in fictional dramas, the Steiner study found that the reality show *Cops* “consistently cut around *Miranda* warnings.”<sup>115</sup>

From this evidence, the Steiner study concluded that “the prevalence of *Miranda* in television is fading, with only one top police procedural consistently including *Miranda* warnings and emphasizing their importance.”<sup>116</sup> The Steiner study suggested that if the trend continued, a younger generation of Americans may be less familiar with the *Miranda* warnings than older generations. Such unfamiliarity

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105. *Id.* at 228.

106. *Id.* at 231–36.

107. *Id.* at 229.

108. *Id.*

109. *Id.* at 232.

110. *Id.*

111. *Id.* at 231.

112. *Id.* at 233.

113. *Id.* at 234–36.

114. Season one of *Bones* had thirty-two arrests and only three references to *Miranda* while season one of *The Shield* had sixty-three arrests in thirteen episodes and only two references to *Miranda*. *Id.* at 234–35.

115. *Id.* at 235–36.

116. *Id.* at 236.

would call into question *Dickerson's* comments about the pervasive and inescapable cultural presence of *Miranda*.

The Steiner study only analyzed whether a *Miranda* warning was issued in the context of an arrest. Therefore, they did not attempt to further contextualize the warnings—or lack thereof—or to inspect the shows for compliance with the large body of jurisprudence surrounding *Miranda*. For example, they did not consider whether shows depicted a custodial interrogation *without* showing an arrest, how the shows depicted invocation or waiver, or what the shows teach about the right to counsel.

One point of consensus is that *Miranda* would benefit from enhanced empirical study. In work calling for enhanced empiricism in constitutional law, Lee Epstein and colleagues have flagged *Miranda* as an area particularly ripe for study.<sup>117</sup> Building on the prior work we have described, the next Part offers a partial response to this challenge.

## II. WHAT TELEVISION TEACHES ABOUT *MIRANDA*

As Susan Bandes and Jack Beerman have observed, “If television is educating the American public about its *Miranda* rights, it is worth asking exactly what the American public is learning.”<sup>118</sup> This Part presents the results of an original empirical study designed to determine what police procedurals convey about *Miranda* and related doctrine.

### A. Research Design and Implementation

Police procedurals are ubiquitous on American television. All three of the longest running primetime live-action series in U.S. television history—*Law & Order: SVU*, *Law & Order*, and *NCIS*—are police procedurals.<sup>119</sup> As of this writing, all three are currently airing, and their longevity is matched by their popularity.<sup>120</sup> *NCIS*, for example, has been the number one drama on broadcast television for

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117. See generally Lee Epstein, Barry Friedman & Geoffrey R. Stone, *Testing the Constitution*, 90 N.Y.U. L. REV. 1001, 1009–10 (2015) (noting the empirical turn in legal scholarship, to which constitutional law scholarship is something of an exception).

118. Susan Bandes & Jack Beerman, *Lawyering Up*, 2 GREEN BAG 2d 5, 5–6 (1998).

119. *NCIS* was recently renewed for its twentieth season, tying *Gunsmoke* as the third longest running prime time live-action series on American television. Nellie Andreeva and Denise Petski, ‘*NCIS*,’ ‘*NCIS: Los Angeles*’ & ‘*NCIS: Hawaii*’ Renewed By CBS For Next Season, DEADLINE (March 31, 2022, 12:00 PM), <https://deadline.com/2022/03/ncis-ncis-los-angeles-ncis-hawaii-renewed-cbs-1234991901/> [https://perma.cc/KTK3-9L4B].

120. *SVU* has aired from 1999 to the present, with 517 episodes. *Law & Order: Special Victims Unit*, IMDB, <https://www.imdb.com/title/tt0203259/> [https://perma.cc/H3BA-J9MD] (last visited Oct. 25, 2023). *Law & Order* has aired from 1990 to 2010 and from 2022 to the present, with 467 episodes. *Law & Order*, IMDB, <https://www.imdb.com/title/tt0098844/> [https://perma.cc/7M9D-7DVG] (last visited Oct. 25, 2023). *NCIS* has aired from 2003 to the present, with 436 episodes. *NCIS*, IMDB, <https://www.imdb.com/title/tt0364845/> [https://perma.cc/3RPK-ZG5D] (last visited Oct. 25, 2023).

thirteen of the fourteen seasons from 2009–10 to 2022–23.<sup>121</sup> The police procedural format has proven so popular in the twenty-first century that successful shows spawn sprawling franchises. There have been eight *Law & Order* series and five flavors of *NCIS*; combined, these two franchises have produced 113 seasons and 2,397 episodes full of investigations, arrests, and interrogations.<sup>122</sup> At their peak, these shows were viewed by twenty million people every week, with total episode views in the tens of billions.<sup>123</sup>

Even casual viewers of police procedurals will be exposed to hundreds of depicted arrests, interrogations, and other interactions with law enforcement officers. These same members of the public are likely to have only limited interactions with real-life law enforcement. For most Americans, interactions with law enforcement are limited to the occasional traffic stop. Since criminal procedure rights are not regularly taught in high schools or even college, these police procedurals are the main—for some people, perhaps the only—source of beliefs about *Miranda* and interrogations for the vast majority of the public.<sup>124</sup> The influence of these shows on public perceptions is bolstered by their air of accuracy. Since the days of *Dragnet*, technical jargon such as the *Miranda* warnings has

121. See Katie Compton, *CBS Finishes 2022-23 TV Season As Most-Watched Broadcast Network – Update*, DEADLINE (May 25, 2023, 9:15 AM), <https://deadline.com/2023/05/cbs-ratings-2022-23-tv-season-most-watched-broadcast-network-ncis-fbi-young-sheldon-ghosts-1235361839/> [<https://perma.cc/8RPA-VH5U>] (“*NCIS* remains at No. 1 among broadcast dramas for the fifth consecutive season (and 13 out of the last 14 seasons).”).

122. In addition to *Law & Order* and *SVU*, *id.*, the franchise includes *Law & Order: Criminal Intent*, IMDB, <https://www.imdb.com/title/tt0275140/> [<https://perma.cc/BS5Z-SCKA>] (last visited Oct. 25, 2023) (10 seasons and 195 episodes); *Law & Order: Trial by Jury*, IMDB, <https://www.imdb.com/title/tt0406429/> [<https://perma.cc/675Q-EUXM>] (last viewed Aug. 10, 2022) (one season and 14 episodes); *Law & Order: LA*, IMDB, <https://www.imdb.com/title/tt1657081/> [<https://perma.cc/S5DX-W6GG>] (last visited Oct. 25, 2023) (one season and 22 episodes); *Law & Order: True Crime*, IMDB, <https://www.imdb.com/title/tt6110318/> [<https://perma.cc/9STG-YLDD>] (last visited Oct. 25, 2023) (one season and 8 episodes); *Law & Order: Organized Crime*, IMDB, <https://www.imdb.com/title/tt12677870/> [<https://perma.cc/P46G-Y9A7>] (last visited Oct. 25, 2023) (two seasons and 30 episodes); and *Law & Order: Hate Crimes*, IMDB, <https://www.imdb.com/title/tt9134326/> [<https://perma.cc/MN4M-XFSB>] (last viewed Aug. 10, 2022) (in development). In addition to *NCIS*, the franchise includes *JAG*, IMDB, <https://www.imdb.com/title/tt0112022/> [<https://perma.cc/4YMK-E3HJ>] (last visited Oct. 25, 2023) (10 seasons and 227 episodes); *NCIS: Los Angeles*, IMDB, <https://www.imdb.com/title/tt1378167/> [<https://perma.cc/RP9H-ZMF7>] (last visited Oct. 25, 2023) (14 seasons and 303 episodes); *NCIS: New Orleans*, IMDB, <https://www.imdb.com/title/tt3560084/> [<https://perma.cc/YKE2-R78X>] (last visited Oct. 25, 2023) (7 seasons and 155 episodes); and *NCIS: Hawai'i*, IMDB, <https://www.imdb.com/title/tt14218674/> [<https://perma.cc/Z628-XZ7V>] (last visited Oct. 25, 2023) (two seasons and 23 episodes).

123. See Nick Venable, *An Insane Number of Minutes Was Spent Watching Law and Order: SVU This Year*, CINEMABLEND (December 29, 2015), <https://www.cinemablend.com/television/An-Insane-Number-Minutes-Was-Spent-Watching-Law-Order-SVU-Year-108117.html> [<https://perma.cc/F5WF-M329>].

124. See *supra* Section I.B.

provided a veneer of authenticity to the show's depictions of police practices and procedures.<sup>125</sup>

We chose *NCIS* and *Law & Order: SVU* (*SVU*) as the subject of our content analysis because they are the longest running versions of the two longest running and most successful police procedural franchises on U.S. television.<sup>126</sup> To garner a robust and representative sample we chose six seasons of *NCIS* and four seasons of *SVU* for a total of ten seasons and a combined 229 episodes, and enlisted three student research assistants to aid in coding the episodes.

Episodes were coded whenever one of three situations occurred: (1) stationhouse interrogation, (2) arrest, or (3) other interaction between police and civilians that implicated rights related to custodial interrogation.<sup>127</sup>

When a coder identified any of the three categories of events, the coder then recorded granular details about the scene, including whether *Miranda* warnings were given; whether the person was in custody or interrogated; whether a lawyer was present; whether a suspect confessed; whether a suspect invoked their right to silence or an attorney; how police reacted to a suspect invoking their rights; how a suspect arrived at the stationhouse; whether an officer lied about the evidence they had; and a narrative description of the scene. The coding rubric is reproduced in full below.

**Figure 1—Coding Rubric**

1	Which of the following occurred: stationhouse interrogation, arrest, or other interaction of interest? <sup>128</sup>
2	Was the person in custody, or placed in custody? <sup>129</sup>
3	Did the interrogation take place in an interrogation room?
4	Was the person interrogated?

125. Steiner et al., *supra* note 3, at 225 (“The crime story was a staple of popular culture on the radio and in film, but *Dragnet* was a perennial hit in large part because Webb’s penchant for accuracy produced a new kind of cop show.”)

126. See *supra* notes 119–123.

127. The “other interaction” catch-all category covered events, in addition to arrests or stationhouse interrogations, that could contribute to a viewer’s beliefs about what they can and should do when interacting with law enforcement officers—especially relating to *Miranda* rights. These included, *inter alia*, questioning a person of interest outside the stationhouse; detention or custody of a suspect in the absence of formal arrest; requests by police that a person accompany them to the station; comments or other indications by police that invoking *Miranda* rights is an indication of guilt; derogatory depictions of defense attorneys; and instances of police and prosecutors violating constitutional rights and other laws without consequences. We considered coding these various situations separately, but ultimately concluded that the catch-all category was more useful given that these situations often overlapped.

128. These interactions were coded as Stationhouse interrogation=1; Arrest=2; Other interaction of interest=3. We also recorded the season, episode, and time within the episode at which each interaction occurred.

129. Responses to the yes/no questions were coded: Yes=1; No=2; Unclear =3; N/A=0.

5	How did the suspect end up at the stationhouse? <sup>130</sup>
6	Was the person suspected of any criminal wrongdoing?
7	Was <i>Miranda</i> warning given verbally on-screen during this scene?
8	Was <i>Miranda</i> warning given in writing on-screen during this scene?
9	Did the scene continue after the depiction of the <i>Miranda</i> warning?
10	Did the scene continue after the arrest?
11	Was the interrogation already in progress when the scene began?
12	Was a lawyer present during the interrogation?
13	If lawyer was present, was it because suspect requested lawyer onscreen?
14	Did suspect indicate wanting lawyer or wanting to remain silent before talking?
15	Did suspect talk during the interrogation (regardless of whether incriminating)?
16	Did the suspect make incriminating statements or confess during the interrogation?
17	Did police tell suspect they had evidence of their guilt/knew what had happened?
18	Did the police present suspect with physical evidence of their guilt?
19	Did the suspect invoke after being presented with evidence of guilt?
20	Did suspect unequivocally invoke right to silence during interrogation?
21	Did suspect unequivocally invoke right to a lawyer during interrogation?
22	Did suspect equivocally indicate refusal to talk during interrogation?
23	Did suspect indicate equivocally they wanted a lawyer during interrogation?
24	If the suspect invoked, was this scrupulously honored?
25	Was asking for a lawyer treated as a sign of guilt?
26	Was remaining silent treated as a sign of guilt?
27	Did police indicate to suspect that innocent people don't invoke their rights?
28	Did police refer among themselves to invoking rights as obstacle to investigation?
29	Did police break any rules during investigation or interrogation?
30	Did police lie about a material fact to the suspect during interrogation?
30	Did police encourage the suspect to talk or cooperate by offering a reward?
32	Did police threaten bad consequences if a person didn't cooperate?
33	Was a defense lawyer depicted as acting adverse to client's interests?
34	Was there a negative portrayal of a defense attorney?
35	Were police and/or their families treated better?
36	Was there any other item of note, not captured by the earlier questions?
37	Narrative Description: Please briefly describe what happened in the scene and especially elaborate on anything that isn't completely captured by the coding above.

Since many of the coding categories required fine judgement on the part of the coder, we took extra care to ensure the coding was done accurately and uniformly. Both authors and the three research assistants coded the first episode together, and another three episodes were coded by all three research assistants with feedback and corrections provided by one of the authors.<sup>131</sup> Once all the episodes were coded, the results were reviewed for errors, omissions, and internal

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130. Responses to this question were coded: Arrested=1; Asked to come in=2; Came in on own initiative=3; Other=4; Not depicted=5; "Bring him in" or equivalent=6; N/A=0.

131. Professor Farrell oversaw and audited the collection and analysis of data.

inconsistencies (for example, the quantitative data entered for a scene not matching the scene's narrative description).

### B. Material Depicted Onscreen

The data reveal that onscreen depictions of custodial interrogations undermine *Miranda* in a host of ways. First, although viewers are presented with many arrests and custodial interrogations, *Miranda* warnings are rarely shown. Second, several narrative tropes employed by the shows mislead viewers about their constitutional rights or discourage viewers from exercising them. Finally, the shows present numerous examples of police conduct that constitute *Miranda* violations, or violations of other constitutional rights, with no indication that the conduct is in any way problematic.

#### 1. Arrests and Interrogations—but not Miranda

As the Table 1 below shows, both programs average several significant events per episode, with *SVU* depicting slightly more than *NCIS*. Roughly speaking, an *NCIS* viewer will see, on average, about two stationhouse interrogations and one arrest each episode. An *SVU* viewer, on the other hand, will see slightly more than three stationhouse interrogations and between one and two arrests per episode.<sup>132</sup> A regular viewer of either show, therefore, will soon be exposed to a large volume of police interactions that implicate the right against self-incrimination. A season of *NCIS* includes, on average, over fifty stationhouse interrogations and about half as many arrests; a season of *SVU* includes, on average, over seventy stationhouse interrogations and about half as many arrests. Considering each show has been running for about twenty years (not including syndication), this amounts to an enormous number of *Miranda*-related law enforcement interactions being absorbed by the American viewing public—literally thousands of arrests and interrogations,<sup>133</sup> each of which convey information about what a person can and should do if they find themselves in a similar, real-life situation.

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132. Interestingly, the ratio of stationhouse interrogations to arrests is very similar in the two shows at a smidge over two to one in both cases. This may be a testament to the formulaic nature of police procedurals, which in turn tentatively suggests that the results garnered from this study may also apply to other police procedurals.

133. For the seasons we studied, the number of arrests and interrogations remained steady from year to year on both *NCIS* and *SVU*. Assuming the rates we observed are representative of each show's entire run, the shows have so far depicted approximately 4,000 arrests and stationhouse interrogations.

Table 1 – General Results

	NCIS			SVU		
	Total	Per season	Per episode	Total	Per season	Per episode
Stationhouse interrogations	315	52.5	2.25	287	71.25	3.21
Arrests	144	24	1.03	139	34.75	1.56
Other interactions	305	50.83	2.26	345	86.25	3.87
Full verbal warnings	2	0.33	0.014	2	0.50	0.02
Partial verbal warnings	1	0.17	0.007	9	2.25	0.10
Written warnings	0	0	0	0	0	0
Total <i>Miranda</i> references	3	0.5	0.02	11	2.75	0.12

With such a volume of arrests and interrogations, one would be forgiven for thinking there would be a similarly large number of scenes in which law enforcement officers gave suspects *Miranda* warnings. Indeed, we admit that prior to reading the relevant literature and conducting this study, both authors expected to find *Miranda* warnings saturating these programs.<sup>134</sup> The data, however, did not bear out our expectations. Far from it. As Table 1 shows, *Miranda* warnings are essentially absent from both these programs. Across all ten seasons, *Miranda* warnings were given verbally, in full, on-screen only four times—twice in *NCIS* and twice in *SVU*. *Miranda* warnings were never given in writing. That’s an average of one verbal warning every two and a half seasons (or fifty-seven episodes). Even a regular, longtime viewer might never hear the *Miranda* warnings, and a dedicated superfan of both shows would be surprised to learn that written *Miranda* warnings even exist.

Combining these data, *NCIS* and *SVU* depicted a total of 603 stationhouse interrogations and 283 arrests—886 incidents in total—but showed police giving full *Miranda* warnings only four times. That amounts to approximately once in every 222 incidents.<sup>135</sup> For all practical purposes, *Miranda* warnings are simply nonexistent on these shows. They are not among the police procedures depicted in these police procedurals.

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134. Our misperception is not surprising given that it was shared by a majority of the Supreme Court (as of *Dickerson*), other federal judges, and a great number of legal scholars. See *supra* note 2, 79–85.

135. Specifically, the shows depicted full *Miranda* warnings once per 221.5 stationhouse interrogations and arrests.

These results confirm and extend the empirical research described in Section I.B. above. The Steiner study, conducted in 2011, found that the prevalence of *Miranda* warnings on police procedurals had declined over time. The 1967 season of *Dragnet* depicted *Miranda* warnings in 93% of arrests.<sup>136</sup> The Steiner study contrasted this with much lower percentages in later shows. Usefully for our purposes, one of the shows the study compared to *Dragnet* was the 2003 series of *Law & Order: SVU*.<sup>137</sup> This allows us to do an apples-to-apples comparison of how the frequency of *Miranda* warnings has changed in the interim. During that season, *SVU* depicted the warnings partly or in full in 44% of arrests and a total of twenty-seven times.<sup>138</sup> This is a substantial decrease from the 93% depiction rate in *Dragnet* decades earlier, but the decline has accelerated since. From 2016 to 2019, *SVU* averaged only 2.75 partial or full warnings, which amounted to 3.9% of arrests shown.<sup>139</sup> In 2003, *Miranda* warnings were still referred to on average at least once per episode.<sup>140</sup> A viewer who watched a single episode would likely see *Miranda* depicted. More recently, this would require a third or more of a season. If *Miranda* had moved from “featured player to bit part”<sup>141</sup> between the 1960s and the early 2000s, it has since become a background extra whose scenes end up on the cutting room floor.

The Steiner study concluded that while “[a]t this point in time, there is no reason to think the majority of mature adults are unaware of *Miranda*,”<sup>142</sup> it is only a matter of time before *Miranda* becomes an obscure, “obsolete”<sup>143</sup> judicial decision unfamiliar to the general public.<sup>144</sup> Whether members of the public can recite *Miranda* from memory is not, however, the most important point. Our study shows that rather than merely failing to educate the public on what the *Miranda* warnings say, *Miranda*-less police procedurals *actively mislead* the public about the scope and practical importance of their rights. They create false beliefs and myths that make it more likely that members of the public will make decisions that negate their constitutional rights and act contrary to their self-interest.

To begin with, excising *Miranda* from the screen—while still depicting arrests, interrogations, and other investigative practices—conveys the message that *Miranda* doesn’t matter. *Miranda* warnings and the rights to which they refer are irrelevant to the plot and how a suspect is treated. *Miranda* rights are as important to the

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136. Steiner et al., *supra* note 3, at 229.

137. For a detailed analysis of the Steiner study, including a list of the other programs in the study, see *supra* Section I.B.

138. These portrayals consisted of seven full warnings and twenty partial warnings. Steiner et al., *supra* note 3, at 233. The Steiner study also includes the 1991 season of *SVU*’s franchise stablemate *Law & Order*. The study found eight full warnings and twelve partial warnings depicted in thirty-nine arrests, a rate of 51%. *Id.* at 231.

139. See *supra* Table 1 – General Results, Section II.B.1.

140. *Id.*

141. Steiner et al., *supra* note 3, at 228.

142. *Id.* at 236.

143. *Id.*

144. *Id.*

development of events as Detective Benson brushing her teeth or Special Agent Gibbs looking for a parking spot near the crime scene. Suspects do not engage with or respond to the warnings; nothing turns on them.

But it is not just the absence of *Miranda* warnings that conveys this message. The myth that *Miranda* has no practical effect or real-world importance is reinforced by many other features of these police procedurals, including the narrative tropes regularly employed and the depiction of custodial interrogations.

## 2. Narrative Tropes

Police procedurals are comfortable viewing in part because they follow a formula with which the audience is familiar. The formula includes regularly employing narrative tropes to depict interactions between police and suspects as the investigation unfolds. The repetition of these tropes, however, undermines the effectiveness of *Miranda* warnings.

### a. The “You’re Under Arrest.”

Arrests are of course a staple of any police procedural, and an excuse for some dramatic action. They often involve guns being drawn, car or foot chases, and suspects being tackled to the ground.<sup>145</sup> The arrest is usually consummated by an officer placing the suspect in handcuffs. In about half of the arrests shown in *NCIS* and *SVU*,<sup>146</sup> the arresting officer engages in a witty repartee with the suspect.<sup>147</sup> The scene usually ends once the suspect is arrested, often cutting away as they are placed in a patrol car. This often leads to a commercial break, and we next see the suspect in the interrogation room, with questioning already underway.

### b. The “Bring Them in.”

Another common trope involves the investigators finding some evidence implicating a person in the crime or making them a potential witness or other person of interest. A superior officer instructs other officers to “Bring them in!” (or words to that effect). Once again, the scene ends with the person of interest next seen being questioned in the interrogation room.<sup>148</sup>

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145. This is especially common on *NCIS*. See, e.g., *NCIS: Going Mobile* (CBS television broadcasting Oct. 8, 2019) (Special Agent Torres pursues a suspect on foot, tackles him, and places him in handcuffs).

146. See *supra* Section II.C.1.a.

147. See, e.g., *NCIS: No Vacancy* (CBS television broadcasting Nov. 12, 2019) (depicting Special Agent Gibbs leading an arrested suspect to his patrol car while nonchalantly asking the suspect questions about his involvement in promoting prostitution). As discussed below, these are custodial interrogations and therefore *Miranda* requires the suspect be informed of their rights. If the suspect is not read their rights prior to the clever—and reasonably likely to elicit a response—banter, the officer has not complied with *Miranda*.

148. See, e.g., *NCIS: Twofer* (CBS television broadcasting Oct. 3, 2017). In this episode, *NCIS* agents discover evidence incriminating a suspect. Special Agent Bishop says, “Let’s get him in here,”

This trope is important for *Miranda* purposes because it does not show *how* the person arrived at the stationhouse. We do not know whether they were arrested, came in voluntarily, or were pressured to come in, so we can rarely be certain that the person is in custody.<sup>149</sup> But it is worth noting that the officers always succeed in bringing the person in. That is, there is no instance in the shows we analyzed of the officers returning to their supervisor empty-handed and explaining that the person declined to accompany them. As we discuss in further detail below, this conveys to viewers that if an officer “asks” you to “come down to the station,” you can’t refuse.

*c. The “We Need to Talk.”*

The myth that you have no choice but to accompany an officer to the station is delivered more overtly through another trope. In this narrative, the audience does see officers approach a suspect or person of interest. They arrive at the person’s home or place of work and say they “need” or “would like” (it varies, often during the same scene) them to answer questions or come down to the station. In our study, the individual complies without hesitation 94% of the time. They simply answer questions or go accompany the officers to the stationhouse whether they are currently suspects or not.

Over the ten seasons analyzed, the targeted person gave some degree of resistance only thirteen times. The forms of resistance included asking if they could talk later; asking not to be questioned in front of their family or work colleagues; and directly refusing. These expressions of non-consent were almost never successful. They were met with explicit refusal, the threat of a “perp walk,” or the threat of prison time. Non-consent was only successful in the face of this pressure in two out of the thirteen attempts, or 15% of the time. In other words, members of the public who were approached outside the stationhouse complied with officers, either immediately or eventually, 99.1% of the time.

This dynamic was repeated hundreds of times,<sup>150</sup> drilling in the false belief that you must comply with an officer’s request, whether it be to answer questions on the spot or at the station and whether you want to or not. Requests to meet at another time or place will be met with denials and threats of adverse consequences. This is the case regardless of whether the officer says they “need” or “would like” to ask the person questions and is relevant not only for its likely effect on real-life decision-making by members of the public confronted by police but also because it calls into question the Supreme Court’s conceptions of voluntariness, seizure, and custody.

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as she and other agents rush for the door. The scene immediately cuts to the suspect being interrogated in the *NCIS* interrogation room.

149. See *infra* Section II.B.3. We were conservative when choosing whether to code an interrogation as “in custody.” Whenever there was the slightest possibility that, for example, a suspect came to the stationhouse voluntarily, we coded the interrogation as “unclear” as to custody.

150. Two hundred and twenty-four times, to be exact, or 1.6 times per episode.

*d. The “Show and Tell.”*

The narrative archetypes described above usually lead to the most well-known and recognizable scene in police procedurals: the stationhouse interrogation. When a suspect ends up at the stationhouse, it’s almost always via one of the plot devices above.<sup>151</sup> The scene opens in the interrogation room with the suspect facing one or two officers across a desk. The room is small with no windows, but a one-way mirror occupies one wall. Other officers are watching from the other side of the glass. No defense lawyer is present,<sup>152</sup> and the interrogation is already in progress. The suspect is responding to the officers’ questions, which are often aggressive and accusatory. The officers say they know the suspect is guilty and show them evidence of their guilt—photos, bank account statements, telephone logs, and so on (the “show” of “show and tell”). The suspect responds, usually with incriminating statements or outright confessions (the “tell” of “show and tell”).

A consistent feature of this interrogation-scene formula is that the suspect participates in the interrogation from the outset. There is no indication that the suspect has the capacity to shut down the interrogation before it begins. *Miranda* ensures the right to not answer questions, but in our study 94% of suspects made no attempt to stop the interrogation before responding to questions. Moreover, just like in the “We need to talk” scenes, on the few occasions that a suspect indicated they did not want to answer questions, the interrogation continued regardless. Our study revealed that 81% of these attempts were unsuccessful. Consequently, the suspect ended up being interrogated in 99% of the stationhouse scenes. In other words, suspects were depicted effectively shutting down an interrogation from the outset—which is their right under *Miranda*—in only 1% of stationhouse interrogations. Many other scenes depicted suspects who were angry or upset about being questioned but nonetheless did not try to invoke their *Miranda* rights, which suggests to viewers that even if you do not want to answer police questions, you do not have any practical choice.

*3. Custodial Interrogations*

In Section II.2.a above, we briefly discussed the prevalence of *Miranda* by reference to the percentage of arrests during which *Miranda* rights were depicted. We used arrests as the denominator to allow us to compare our results to those of earlier studies. But this is not the best way to judge the frequency at which *Miranda*

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151. In the episodes studied, 95.5% of stationhouse interrogations resulted from one of these three interactions. The remaining 4.5% of interrogations came about from a person coming to the station of their own initiative. Moreover, 82% of stationhouse interrogations take place in the interrogation room. The other 18% take place in a conference room, office, or in the detectives’ “bull pen.” These interrogations follow the same formula as those in an interrogation room, with the exception that it is more common for the person to clearly not be in custody.

152. Our study revealed that on *NCLIS*, agents interrogated suspects without a lawyer 97% of the time. On *SVU*, officers interrogated suspects without a lawyer 74% of the time. Across the two shows, suspects were interrogated without a lawyer present in 82% of stationhouse interrogations.

warnings are given. *Miranda* does not require warnings to be given at the moment of arrest. Although this is a myth commonly believed by the public, the idea that arrest triggers *Miranda* warnings is both over and underinclusive.<sup>153</sup> *Miranda* warnings are required, rather, when a suspect is subjected to “custodial interrogation.”<sup>154</sup> As discussed in Part I, custody occurs when a person’s freedom of movement is curtailed to a degree associated with formal arrest.<sup>155</sup> An interrogation takes place whenever law enforcement officers use words or conduct that are reasonably likely to elicit a response.<sup>156</sup> Stationhouse interrogations are a rough proxy for custodial interrogation, but the two are not coextensive. Many custodial interrogations occur away from the stationhouse, such as when a suspect is questioned immediately upon arrest. And a person interrogated at the stationhouse—even in an intimidating interrogation room—is not necessarily in custody. For example, they could have come to the station voluntarily, or been told they are allowed to leave.

A more illuminating measure of the frequency of *Miranda* warnings is to count how often warnings are depicted prior to, or at the beginning of, custodial interrogations. However, identifying when suspects are in custody is often challenging, if not impossible. Police procedurals regularly do not depict the full context of the interrogation. For example, when a “show and tell” scene opens in an interrogation room, the viewer is often not privy to how the suspect came to be there. The previous scene may have shown a supervising officer “bring them in,” but we cannot always be certain that they were brought in against their will or accompanied the officers voluntarily. Officers sometimes later indicate that the person was arrested, but these clarifying comments are rare, leaving the viewer—or scholar—unable to definitively determine whether the interrogation was custodial.

We dealt with this difficulty by distinguishing between interrogations where (1) custody was certain and (2) custody was likely but not certain. We were conservative in coding for custody. That is, whenever there was any doubt about custody, we coded the interrogation as likely but not certain. These scenarios could also be referred to as *apparent* custody since they displayed many of the hallmarks of custody, including the interrogations took place in interrogation rooms, the suspects were immediately accused of serious crimes, the suspects were presented

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153. See, e.g., D. Christopher Dearborn, “*You Have the Right to an Attorney but Not Right Now:*” *Combating Miranda’s Failure by Advancing the Point of Attachment under Article XII of the Massachusetts Declaration of Rights*, 44 SUFFOLK U. L. REV. 359, 359 (2011) (“Over forty years’ worth of popular culture has led most Americans to believe that they have a ‘right to an attorney’ upon arrest.”). Depicting *Miranda* warnings at the point of arrest, disassociated from a later interrogation (usually with a commercial break in between) conveys that *Miranda* warnings relate to arrests and not interrogations. They are presented as part of the verbal formalities, with no on-screen opportunity for the suspect to *respond* to them. They are not depicted as relevant to the suspect’s decisions, words, and actions when later questioned.

154. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

155. *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984).

156. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

with evidence of those serious crimes, and the interrogators displayed aggressive and adversarial demeanors. A typical viewer with no training in the legal definition of custody would get the impression that these suspects are not free to leave. This impression is reinforced by the belief—conveyed by these same police procedurals<sup>157</sup>—that you cannot refuse a police officer’s “request” to accompany them to the station. We therefore included these scenes in our results, coded separately, because their depictions influence what the public perceives as normal, permissible police conduct and impermissible suspect conduct in custodial interrogations.

**Table 2 – Custodial Interrogations**

	NCIS			SVU		
	Total	Per season	Per episode	Total	Per season	Per episode
Certain custody	271	45.16	1.93	191	47.75	2.15
Likely custody	136	22.67	0.97	142	35.5	1.6
Total	407	67.83	2.91	333	83.25	3.74
Partial <i>Miranda</i> warnings	1	0	0	0	0	0
Full <i>Miranda</i> warnings	0	0	0	0	0	0

Table 2 includes several important findings. First, in both *NCIS* and *SVU*, certain custodial interrogations are more common than arrests. Studies that measure the frequency of *Miranda* warnings per arrest therefore overstate *Miranda*’s prevalence. Second, *Miranda* warnings are significantly *less* commonly depicted in the context of custodial interrogations than in the context of arrests to the point of being essentially non-existent. *Miranda* warnings were never fully depicted on-screen in scenes with either certain or likely custodial interrogation. Partial *Miranda* warnings were given on-screen just once<sup>158</sup> in all these scenes. Those scenes depicted 462 interrogations that were unambiguously custodial. In other words, warnings were shown on-screen, even partly, in only 0.2% of the situations where they were required by *Miranda*. Adding the likely custodial interrogations, *Miranda*

157. *See supra* Section I.B.2.

158. In this scene, the suspect is in the interrogation room and Director Vance begins reciting the *Miranda* warnings. The suspect interrupts several times, telling Director Vance to “Stop!” He stops reciting *Miranda*. The suspect promptly confesses to multiple serious crimes. *See NCIS: . . . and Executioner* (CBS television broadcast May 7, 2019).

warnings were mentioned on-screen once in the 740 scenes where warnings were likely required, a rate of 0.14%. Put differently, *Miranda* warnings were not depicted 99.8% of the times they were certainly required and 99.86% of the time when they were likely, and apparently, required. A viewer with no previous knowledge of *Miranda* could not help but come away believing *Miranda* warnings are not required prior to custodial interrogation.

### C. Constitutional Violations

The above data do not, however, demonstrate that police procedurals depict *violations* of *Miranda* in 99.8% of their custodial interrogations. The shows usually either cut away from a suspect immediately after they have been arrested or don't show them being brought into custody in the first place. When the interrogation scene opens with questioning already underway, viewers are presumably meant to infer that the suspect was given *Miranda* warnings off-screen in the interim. In these cases, then, we cannot definitively conclude that police failed to warn the suspects.

The technique of cutting around scenes in which *Miranda* warnings may have been required precludes us from concluding *Miranda* rights were violated, but it nonetheless undermines viewers' understanding of how to exercise their *Miranda* rights in two ways. First, only viewers who already know that *Miranda* warnings are required prior to custodial interrogation would presume the warnings were given off-screen—and those whose beliefs about *Miranda* come from television would have no reason to know that. Second, even for viewers who know that warnings should be given before custodial interrogation, cutting around *Miranda* conveys the message that *Miranda* warnings are functionally irrelevant. Nothing is lost by not depicting *Miranda* warnings because nothing turns on them. They do not represent a moment when the storyline could go one way or the other. Not once on either *NCIS* or *SVU* did a suspect invoke upon being warned of their *Miranda* rights. This conveys the message that a *Miranda* warning is not something you *react* to but merely an inert series of words spoken to—or at—a suspect. These scenes suggest that *Miranda* warnings are mere verbal wallpaper rather than an opportunity to *decide* whether to answer questions in the absence of an attorney.

#### 1. Miranda Violations

While *NCIS* and *SVU* use the cut-around technique regularly, there are nonetheless numerous examples where we can definitively conclude that officers did not comply with *Miranda*. These fell into two categories. The first category consists of scenes during which the camera did not cut away between the arrest and the interrogation, so there was no opportunity to give the warnings off-screen. The second category consists of scenes in which an interrogated suspect unequivocally invokes their *Miranda* rights, but the invocation is not scrupulously honored by their interrogator.

*a. Failure to Warn*

We described in Section II.B.2 how “You’re under arrest” scenes in *NCIS* and *SVU* often included a back-and-forth between the arresting officer and the arrestee. In many of these exchanges, the officers either asked direct questions or made comments that were reasonably likely to elicit a response. In other words, the arresting officer interrogated the suspect they had just placed in custody.

The *NCIS* and *SVU* episodes we studied also included scenes where suspects were interrogated without being formally arrested but had been seized to a degree associated with formal arrest. That is, the suspects were in custody when they were interrogated.

None of these suspects were read their *Miranda* rights on camera. Moreover, the camera did not cut away during any of these scenes, so there was no possibility for *Miranda* warnings to be given off-screen. Since we know the suspect was not warned—on-screen or off-screen—we can definitively say that each of these scenes depicted a *Miranda* violation.

Table 3 shows the data for these *Miranda* violations. On average, *NCIS* presented unwarned custodial interrogations twenty-three times per season (just over once per episode). *SVU* depicted unwarned custodial interrogations eleven times per seasons (about once every two episodes). It bears emphasizing that *Miranda* warnings were not given in *any* these scenes. That is, of the arrest scenes that definitively required *Miranda* warnings, the shows violated *Miranda* 100% of the time. We noted above that *Miranda* warnings were at least partially depicted contemporaneous with arrest thirteen times, but none of those arrests were accompanied by interrogation. That is, every time *Miranda* warnings were given upon arrest, they weren’t necessary—and every time they were necessary, they weren’t given.

**Table 3 – *Miranda* Violations**

	NCIS			SVU		
	Total	Per season	Per episode	Total	Per season	Per episode
Failure to warn	139	23.17	0.99	42	10.5	0.47
Failure to honor invocation	45	7.5	0.32	35	8.75	0.39
<i>Total Miranda violations</i>	<i>184</i>	<i>30.67</i>	<i>1.31</i>	<i>77</i>	<i>19.25</i>	<i>0.87</i>

*b. Failure to Scrupulously Honor*

We explained in Section II.B.2 that only a small minority of suspects made any indication that they wanted to remain silent or wanted a lawyer. The reactions of law enforcement in these small number of cases is nonetheless illuminating. If a suspect validly invokes their rights, law enforcement must “scrupulously honor” the invocation by ceasing the interrogation, at least temporarily.<sup>159</sup> The frequency with which law enforcement violated *Miranda* by failing to honor an invocation is also presented in Table 3. Together with failures to warn, the total number of *Miranda* violations depicted averaged about thirty per season on *NCIS* and nineteen per season on *SVU*. In other words, *Miranda* violations were depicted as a routine part of law enforcement investigations—in stark contrast to the giving of *Miranda* warnings. Comparing these findings to those in Table 1 shows that *violations* of *Miranda* were depicted nineteen times as often as the *Miranda* warning was partly depicted and sixty-five times as often as the *Miranda* warning was fully depicted.<sup>160</sup> None of the *Miranda* violations were pointed out as such on the shows.

Suspects’ references to silence or legal counsel ranged from timid and uncertain to express, unequivocal demands. Only some of these satisfy the requirement that to be valid, waivers must be express and unequivocal.<sup>161</sup> A breakdown of valid waivers to invalid attempted or purported waivers is provided in Table 4.

**Table 4 – Number of Attempted/Apparent Invocations**

	NCIS		SVU	
	Valid	Invalid	Valid	Invalid
Right to silence	60	88	50	18
Right to attorney	28	70	29	41
<i>Total</i>	<i>88</i>	<i>158</i>	<i>79</i>	<i>59</i>

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159. *Michigan v. Mosley*, 423 U.S. 96, 104–05 (1975) (“We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether is ‘right to cut off questioning’ was ‘scrupulously honored.’” The interrogator must “immediately cease[] the interrogation” and may not re-initiate questioning until a sufficient time has passed that the renewed interrogation does not “undercut [the suspect’s] previous decision not to answer.”); *see also* *Maryland v. Shatzer*, 559 U.S. 98, 109–110 (2010) (finding that when a suspect unequivocally invokes his right to have an attorney present during interrogation, a break in custody of fourteen days before renewed questioning is a “sufficient duration to dissipate its coercive effects”).

160. *Miranda* was referred to either in part or in full 1.4 times per season across both shows. The rate of full *Miranda* depictions was 0.4 times per season. *See supra* Table 1 – General Results, Section II.B.1. The rate of *Miranda* violations across both shows was 26.1 times per season.

161. *See infra* Section I.B. The data in Table 3 include only express and unequivocal invocations—that is, only invocations that satisfy the test for legally valid invocations.

As Table 4 shows, there was a hodgepodge of valid and invalid references to both the right to silence and the right to legal counsel across *NCIS* and *SVU*. While there is no obvious pattern to the raw numbers, the way law enforcement reacted to these varied references provides insight into the message these scenes convey to viewers. Table 5 presents this data.

**Table 5 – Attempted Invocations Scrupulously Honored (%)**

	NCIS		SVU	
	Valid	Invalid	Valid	Invalid
Right to silence	12	11	52	31
Right to attorney	55	12	52	34
<i>Total</i>	<i>23</i>	<i>12</i>	<i>52</i>	<i>34</i>

These findings demonstrate two important patterns. First, valid invocations were only scrupulously honored about half the time. That is, when valid invocations of *Miranda* rights were presented on-screen, law enforcement were just as likely to ignore it, or push the suspect to continue talking, as they were to respect the suspects' rights.<sup>162</sup> With valid invocations given only half the time, viewers are unlikely to get the impression that *Miranda* rights have any practical effect. Whether *Miranda* rights provide any protection during custodial interrogations is, at best, a coin toss.

Second, invalid invocations were generally honored less often than valid invocations (which is to be expected) but were still honored in a substantial minority of cases. This is especially true of *SVU*, where equivocal waivers were scrupulously honored about a third of the time. The fact that both valid and invalid waivers are sometimes honored and sometimes ignored is likely to undermine viewers' understanding of *Miranda*. Typical members of the public do not have a sophisticated understanding (to put it mildly) of what constitutes a valid invocation of *Miranda* rights under Supreme Court precedents. Regardless of whether a suspect's invocation is valid or not, what viewers see is law enforcement officers routinely dismissing a suspect's indication that they want to exercise their *Miranda* rights.<sup>163</sup> These factors are likely to contribute to viewer confusion about *Miranda* rights even if the viewer already knows the words of the *Miranda* warnings—indeed, the confusion may be greater for someone familiar with the language of *Miranda*

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162. The one exception was valid invocations of the right to silence on *NCIS*, which were scrupulously honored only once per eight invocations. Apart from this category, the results were strikingly similar across the board.

163. Nor would these scenes *inform* viewers that their invocation must be unequivocal to have any effect since the reactions of law enforcement are mixed in either case.

warnings. Such viewers are likely to internalize the message that regardless of what words are spoken to a suspect, they provide little practical protection.

One final feature of how police respond to a suspect who invokes their right to counsel is worth noting. Police are deemed to have scrupulously honored a suspect's invocation of the right to counsel if they cease questioning immediately and do not initiate further interrogation, unless either they provide the suspect with an attorney or the suspect has spent at least two weeks not in custody.<sup>164</sup> That is, police are not required to provide a suspect with legal representation when they invoke their right to an attorney so long as they do not *question* them without an attorney for two weeks.<sup>165</sup>

In our study, suspects invoking this right rarely resulted in them having an attorney represent them. This was never depicted on *NCIS*, and it was shown only fourteen times on *SVU*, or approximately once every six episodes.<sup>166</sup> When law enforcement cease questioning a suspect but do not provide the suspect with an attorney, they comply with the applicable doctrine, so these instances were not coded as violations—but they nonetheless have a propensity to mislead viewers. If a viewer sees a suspect emphatically demand an attorney but no attorney shows up, they may wonder whether the professed “right to an attorney” really means what it says.<sup>167</sup>

## 2. Other Constitutional Violations

In addition to violations of *Miranda*, *NCIS* and *SVU* depicted law enforcement officers committing constitutional violations numerous times. The figures for these violations are set forth in Table 6. By far the most common of these violations were coercion (fifty-seven times), excessive force (forty-eight times), and unreasonable searches and seizures (sixty-six times). There were a total of 521 constitutional violations across both shows at a rate of roughly sixty times a season on *NCIS* and exactly forty times a season on *SVU*.

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164. *Sbatzer*, 559 U.S. at 109–110.

165. *Id.*

166. We discuss the depiction of lawyers on *NCIS* and *SVU* at greater length in Section II.D.2. See *supra* Section II.D.2.

167. For interrogations that take place before the suspect is brought before a judge or magistrate, the viewer may actually be correct. Under the Sixth Amendment, the right to counsel only attaches upon the commencement of judicial proceedings against the suspect. *Rothgery v. Gillespie County*, 554 U.S. 191 (2008). But viewers who are not aware of these doctrinal intricacies are likely to be confused about the scope of the right to counsel, if not skeptical of its practical efficacy.

Table 6 – Constitutional Violations

	NCIS			SVU		
	Total	Per season	Per episode	Total	Per season	Per episode
Failure to warn	139	23.17	0.99	42	10.5	0.47
Failure to honor invocation	45	7.5	0.32	35	8.75	0.39
<i>Total Miranda violations</i>	<i>184</i>	<i>30.67</i>	<i>1.31</i>	<i>77</i>	<i>19.25</i>	<i>0.87</i>
Right to counsel	0	0	0	3	0.75	0.03
Coercion	57	9.5	0.41	18	4.5	0.20
Excessive force	48	8	0.34	9	2.25	0.10
Unreasonable search or seizure	66	11	0.47	44	11	0.49
Freedom of speech	4	0.67	0.03	0	0	0
Due process	1	0.17	0.007	9	2.25	0.10
Brady violation	1	0.17	0.007	0	0	0
<i>Total violations</i>	<i>361</i>	<i>60.17</i>	<i>2.58</i>	<i>160</i>	<i>40</i>	<i>1.80</i>

These results are consistent with the findings of earlier studies, though constitutional violations were slightly more frequent in our study. For example, a study of the 2000 season of *NYPD Blue* and *Law & Order* found twenty-four and fifteen *Miranda* violations respectively.<sup>168</sup> By comparison, our study of *NCIS* and *SVU* found a season average of thirty and nineteen *Miranda* violations respectively. Similarly, a study of the 2003 season of *SVU* found a total of twenty-eight constitutional violations at a rate of 1.12 per episode.<sup>169</sup> Our study found a season average of forty constitutional violations on *SVU* at a rate of 1.80 per episode.<sup>170</sup>

168. Sarah Eschholz, Matthew Mallard & Stacey Flynn, *Images of Prime Time Justice: A Content Analysis of "NYPD Blue" and "Law & Order,"* 10(3) J. CRIM. JUST. & POPULAR CULTURE 161 (2004).

169. Sarah Britto, Tycy Hughes, Kurt Saltzman & Colin Stroh, *Does Special Mean Young, White and Female? Deconstructing the Meaning of "Special" in "Law & Order: Special Victims Unit,"* 14 J. CRIM. JUST. & POPULAR CULTURE 39 (2007).

170. Britto et al. recorded "civil rights violations," which they described as "no *Miranda* warnings, physical abuse, forced confession, entry without a warrant, no probable cause to arrest, or promises of leniency." *Id.* at 44. Their list of violations does not include failures to scrupulously honor

That is, our study found about half as many violations per episode of *SVU* than the earlier study of the same program. We also found a season average of 60.17 constitutional violations, at a rate of 2.58 per episode, for *NCIS*.

Some of these constitutional violations, such as coercion in violation of the Fifth Amendment, are closely connected to *Miranda*. The purpose of *Miranda* is, after all, to mitigate the inherently coercive atmosphere of custodial interrogation.<sup>171</sup> Other constitutional violations, such as warrantless searches in violation of the Fourth Amendment, are less legally and conceptually proximate to *Miranda*. Even so, their depiction on police procedurals contributes to undermining the public's capacity to effectively exercise their *Miranda* rights. Regardless of the specific right involved, none of the law enforcement officers were seriously reprimanded for their conduct. Even the most egregious constitutional violations were rarely even commented on.<sup>172</sup> The same is true of officers committing serious crimes in the course of their duty. If misconduct was mentioned at all, the most severe consequences faced by the responsible officer was a brief chastisement from their superior. This conveys to viewers that law enforcement agents are above the law, and that there are no enforcement mechanisms to deter them from violating suspects' constitutional rights. Consequently, even a viewer with some knowledge of what the *Miranda* rights say would have little confidence that they could rely on these rights for protection from law enforcement misconduct.

Our finding that law enforcement officers are rarely punished for constitutional violations reflects the results of earlier studies. The study of *SVU*'s 2003 season found that none of the twenty-eight constitutional violations were punished<sup>173</sup> and “were rarely questioned or frowned upon, [and] instead they are treated as a normal part of policing.”<sup>174</sup> Rather,

civil rights violations were shown as part of doing business with heinous criminals. The importance of civil rights to the United States justice system are [*sic*] almost never mentioned on “*SVU*,” instead violations of these rights are normalized and the implicit message is that suspects and offenders have too many rights.<sup>175</sup>

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valid waiver of *Miranda* rights. If we remove failures to scrupulously honor from our total constitutional violations, our *SVU* rate per episode drop to 1.41. The difference between our findings and Britto et al.'s findings drops from 53% to 26%.

171. See generally the discussion of the *Miranda* decision in *supra* Section I.A.

172. See, e.g., *NCIS: In the Win* (CBS television broadcast Jan. 7, 2020) (Special Agents Gibbs and Torres punch one suspect in the throat. They then throw another suspect against the wall, begin choking him, and threaten to kill him unless he cooperates. The agents' actions are portrayed as justified by the fact that they're searching for a missing child.). See also *NCIS: What Child is This?* (CBS television broadcast Dec. 11, 2018). In this episode, Special Agents Gibbs, Bishop, and Torres illegally force their way into a suspect's apartment; a shootout ensues and the suspect is killed. None of the agents' actions are criticized.

173. Britto et al., *supra* note 169, at 50.

174. *Id.*

175. *Id.*

### D. Consequences of Waiving or Invoking Miranda

In the authors' experience, when members of the public are asked why 80% of suspects waive their *Miranda* rights,<sup>176</sup> they suggest three main explanations. First, that the suspects don't think they're allowed to refuse to answer questions; second, that invoking their rights makes them look guilty, or at least suspicious; and third, that there is no point asking for a lawyer because having a defense attorney doesn't help.<sup>177</sup>

The preceding findings indicate that police procedurals convey, and consequently reinforce, the notion that suspects aren't *really* allowed to refuse to cooperate—regardless of what the *Miranda* warnings *say*. Our study found that police procedurals also convey and reinforce the second and third proposed explanations.<sup>178</sup>

#### 1. Inferences of Guilt

*NCIS* and *SVU* regularly depict situations in which law enforcement officers treat invoking *Miranda* rights as a sign of guilt and an impediment to achieving justice. Inversely, they also regularly depict law enforcement officers stating that innocent suspects have no reason to invoke. These inferences come in different forms. For example, when a suspect invokes his *Miranda* rights, law enforcement officers may treat invocation as the equivalent of a confession. This narrative technique is particularly common on *NCIS*: the suspect denies involvement in the crime, agents then show the suspect damning evidence, and then the suspect resignedly says, "I want my lawyer." The agents exchange satisfied glances, and the episode comes to a satisfactory conclusion.<sup>179</sup>

Law enforcement officers may also tell a suspect, so as to entice a waiver, that only guilty people invoke, or that innocent people have no reason to invoke.<sup>180</sup> In

176. See discussion of empirical data in Section I.B *supra*; Leo, *supra* note 66, at 1009 ("[P]olice appear to elicit waivers from suspects in roughly 80% of their interrogations.").

177. The authors have discussed this question with thousands of law students in criminal procedure classes and hundreds of middle school and high school students through juvenile education programs. See LYRIC: LEARN YOUR RIGHTS IN THE COMMUNITY, <https://lyriccommunity.org> [<https://perma.cc/L55V-7GFS>] (last visited Oct. 25, 2023) (Colorado-based nonprofit that teaches juveniles how to safely and effectively exercise their rights when confronted by police).

178. High school students also regularly state their belief that "public defenders aren't real lawyers." Our study found nothing on either *NCIS* or *SVU* that would convey that belief. There was only one reference to public defenders and that reference did not portray public defenders in a negative light. See *SVU: Intent* (NBC television broadcasting Nov. 29, 2021) (showing a public defender representing a suspect in high-profile interrogation is gazumped by a famous private defense attorney seeking publicity).

179. See, e.g., *NCIS: One Step Forward* (CBS television broadcasting May 8, 2018). In this episode, Special Agents Bishop and Torres interrogate a suspect, showing him incriminating evidence. The suspect immediately says, "I want a lawyer." Behind the one-way mirror, Agent Sloane performs a celebratory dance and says she will give the Secretary of the Navy the "good news" that the perpetrator has confessed.

180. See, e.g., *SVU: Gone Baby Gone* (NBC television broadcast Jan. 3, 2018). In this episode, Detective Rollins questions the daughter of a suspect about his whereabouts. The daughter says,

addition, when speaking amongst themselves with no suspect present, law enforcement officers may refer pejoratively to “lawyering up” as an obstacle to putting a dangerous criminal behind bars.<sup>181</sup>

These associations of invocation with guilt—and waiver with innocence—are not isolated incidents. Table 7 shows the rate at which invocations were conveyed as indicating guilt. Almost half of all *Miranda* invocations (44%) on *NCIS* and *SVU* combined were depicted as indicating guilt. The total number of times the two shows associated invocation with guilt and waiver with innocence was 235, at an average of thirty-four times per season, or 1.5 times per episode.

**Table 7 – *Miranda* Invocations Treated as a Sign of Guilt (%)**

	NCIS	SVU
Right to silence	63	24
Right to lawyer	58	32
<i>Combined</i>	<i>61</i>	<i>28</i>

## 2. Depiction of Defense Attorneys

Our study found that defense attorneys are portrayed negatively on *NCIS* and *SVU*. On *SVU*, for example, there were 137 scenes in which defense attorneys were depicted in a negative light, an average of thirty-four times per season or 1.44 times per episode. These negative portrayals included giving law enforcement incriminating information in violation of lawyer-client privilege;<sup>182</sup> acting in the interests of someone other than their client;<sup>183</sup> dropping their client once they realize he’s guilty, because he doesn’t deserve a defense;<sup>184</sup> incompetence and not caring

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“Maybe I should call . . . a lawyer.” Detective Rollins responds, “There’s no need, if you really believe your father didn’t do anything.”

181. See, e.g., *SVU: Redemption in Her Corner* (NBC television broadcast Feb. 6, 2020). In this episode, Inspector Benson chews out Detective Rollins for suggesting to a juvenile suspect that she say nothing until her father can get her a lawyer.

182. See, e.g., *SVU: Gone Baby Gone* (NBC television broadcast Jan. 3, 2018) (showing a defense attorney violating confidentiality to help find missing child).

183. *SVU: Broken Rhymes* (NBC television broadcast Nov. 9, 2016) (showing a defense attorney preventing a suspect from taking a great deal to protect the owner of a powerful record label).

184. *SVU: Garland’s Baptism by Fire* (NBC television broadcast Apr. 2, 2020) (showing a defense attorney dumping a client upon realizing the client is guilty and says doesn’t deserve a defense).

about their client's interests;<sup>185</sup> bribing a judge;<sup>186</sup> and sex trafficking, bribery, and possession of child pornography.<sup>187</sup>

*NCIS* had far fewer negative depictions of defense attorneys, primarily because *NCIS* depicted far fewer defense attorneys. But what *NCIS* lacked in quantity, they made up for in consistency. Over six seasons, only eight defense attorneys were portrayed on-screen. All eight were depicted negatively, including (like on *SVU*) violating lawyer-client privilege<sup>188</sup> and committing serious crimes. In fact, four defense attorneys—fully half of the defense attorneys portrayed on *NCIS*—turned out to have committed one of the crimes the team was investigating. The four defense attorneys committed murder and kidnapping,<sup>189</sup> murder and manufacturing meth,<sup>190</sup> kidnapping an infant,<sup>191</sup> and selling a baby.<sup>192</sup>

Such onscreen antics are unlikely to give viewers a positive opinion of defense attorneys. Viewers are unlikely to perceive defense attorneys—who are routinely displayed as some combination of incompetent, corrupt, and criminal—as valuable allies and advocates should they happen to be confronted by law enforcement. This is especially so when police and prosecutors are portrayed, by contrast, as honorable protagonists working diligently on behalf of society. Sure, they break the rules—but only when that's necessary to achieve justice.

Even if a viewer nonetheless perceived defense attorneys as beneficial, the message conveyed by *NCIS* and *SVU* is that you get a defense attorney not by requesting one but by hoping one will simply show up. We discussed in Section II.C.1.a above that requests for attorneys were regularly rebuffed. And strangely, of the lawyers who were nonetheless depicted representing their clients during an interrogation, the suspect was shown requesting the lawyer only 17% of the time. In other words, 83% of defense attorneys arrived at the stationhouse as if by magic, through no act of agency on the part of the suspect.<sup>193</sup> Lawyers are shown swooping

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185. *SVU: At Midnight in Manhattan* (NBC television broadcast Oct. 24, 2019) (showing a defense attorney proposing a deal without talking to her client and without knowing any of the facts so that she can go home for the rest of the weekend).

186. *SVU: Must be Held Accountable* (NBC television broadcast Jan. 9, 2020) (showing a defense attorney bribing a judge).

187. *SVU: Must be Held Accountable* (NBC television broadcast Jan. 9, 2020) (showing a defense attorney guilty of sex trafficking, bribery, possession of child pornography).

188. *NCIS: Keep Your Friends Close* (NBC television broadcast Feb. 6, 2018) (showing a defense attorney telling Agent Sloane to “keep digging” for evidence that her client committed murder).

189. *NCIS: Shell Game* (NBC television broadcast Oct. 25, 2016) (showing a defense attorney found to be murderer and kidnapper).

190. *NCIS: Sight Unseen* (NBC television broadcast Apr. 17, 2018) (showing a defense lawyer, who was originally depicted as fool, turning out to be a murderer and methamphetamine manufacturer).

191. *NCIS: Family Ties* (NBC television broadcast Jan. 23, 2018) (showing a lawyer kidnapped an infant).

192. *NCIS: What Child is This?* (NBC television broadcast Dec. 11, 2018) (showing a defense attorney illegally selling a baby for adoption).

193. On *NCIS*, defense attorneys arrived at the interrogation without being requested by the suspect seven out of nine times; on *SVU*, they arrived without request 84 out of 100 times. This comes to a rate of 17% across the two shows.

into the stationhouse because, for example, a family member contacted them; the lawyer is the suspect's family member; or they heard about the case on the news. Whether a suspect had a lawyer was represented not as a function of whether they requested one, but merely as a matter of luck.

### 3. *Trusting the Police*

The message that individuals should trust law enforcement—rather than a slimy defense attorney—is reinforced by two other features of what *NCIS* and *SVU* depict. Or rather, what they don't depict. The shows almost never depict interrogators lying to a suspect about the evidence they have against them. And they almost never depict an innocent suspect confessing to a crime they did not commit.

#### a. *Lying by Interrogators*

Police officers lying to suspects during interrogations is both permissible and prevalent. First, the Supreme Court has consistently held that law enforcement are allowed to lie to suspects.<sup>194</sup> Second, law enforcement officers have been taught for decades that lying to a suspect during an interrogation—about, for instance, having irrefutable evidence of their guilt—is a powerful technique for inducing confessions.<sup>195</sup> It is striking, then, that this technique was almost never shown on-screen in the police procedurals we studied. *SVU* detectives lied to a suspect four times in total—that is, once per season—and *NCIS* agents lied only three times—that is, once every two seasons.

These findings mean that *SVU* depicted serious constitutional violations by police forty times as often—and *NCIS* 120 times as often—as they showed police lying to suspects during interrogations.<sup>196</sup> Viewers who get their information about permissible police practices from television would likely be led to believe that police simply do not lie to suspects—and perhaps are not allowed to lie. That is, being told false information about the evidence against them is not something about which they need to be on their guard or from which they might need a lawyer's protection.

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194. See, e.g., *Jacobsen v. United States*, 503 U.S. 540, 548 (1992) (affirming that the government is permitted to use deceptive practices so long as they don't entrap innocents into committing crimes); see also Miller W. Shealy, Jr., *The Hunting of Man: Lies, Damn Lies, and Police Interrogations*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 21, 26–27 (2014) (discussing Supreme Court decisions that make “absolutely clear that law enforcement personnel may engage in fraud and even lie in the pursuit of legitimate enforcement objectives”).

195. For the last sixty years, the leading interrogation manual used for training law enforcement officers is FRED INBAU, JOHN REID, JOSEPH BUCKLEY, & BRIAN JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* (5th ed. 2013). See Alan Hirsch, *Going to the Source: The “New” Reid Method and False Confessions*, 11 OHIO ST. J. CRIM. L. 803, 803–4 (2014) (describing how this text has remained the leading interrogation manual since 1962 despite criticism from courts and scholars). Fabricating claims of irrefutable evidence is an important step in the so-called Reid Technique. See *id.* at 805 (“The interrogation itself typically begins with an accusation of the suspect, buttressed by the suggestion that the interrogators have irrefutable evidence, sometimes fabricated.”).

196. See *supra* Table 6 – Constitutional Violations, Section I.C.2.

*b. False Confessions by Innocent Suspects*

Commentators have consistently criticized the practice of police lying during interrogations for increasing the likelihood that suspects will confess to crimes they did not commit.<sup>197</sup> While “[t]he frequency with which false confessions occur during interrogations . . . is unknown,”<sup>198</sup> leading experts agree that the documented examples “undoubtedly represent only the tip of the iceberg.”<sup>199</sup> These documented examples are growing, as is recognition that false confessions are a serious problem within the criminal legal system.<sup>200</sup> Yet the number of false confessions depicted on *NCIS* and *SVU* was vanishingly small. During the ten seasons we studied the shows contained only two references to false confessions, only one of which showed the interrogation and confession onscreen.<sup>201</sup>

The shows therefore likely contribute to the widely believed myth that innocent people do not confess. A viewer would not be aware that confessing to a crime they did not commit is a very real danger for those who waive their *Miranda* rights.

*E. Summary of Findings*

Police procedurals routinely undermine *Miranda*. The shows we analyzed depict law enforcement officers violating *Miranda* and other constitutional protections without suffering negative consequences for doing so. Officers regularly reject suspects’ attempt to avoid answering questions and treat invocations of rights as proof of guilt. They additionally portray defense attorneys as untrustworthy and incompetent.

Both *NCIS* and *SVU* depicted instances undermining *Miranda* an average of ten times per episode—or about once every four minutes of airtime. Table 8 details the number of specific, identifiable on-screen instances that would mislead a

197. See, e.g., Gisli Gudjonsson, *The Psychology of False Confessions: A Review of the Current Evidence*, in *POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS* 36 (G. Daniel Lassiter & Christian A. Meissner eds., 2012) (“[E]xperimental studies have shown that false confessions can be readily elicited by false accusations, psychological manipulation, and interrogative pressure.”).

198. G. Daniel Lassiter, Christian A. Meissner, Lezlee J. Ware, Jessica L. Marcon & Kim D. Lassiter, *Introduction: Police Interrogations and False Confessions—An Overview*, in *POLICE INTERROGATIONS AND FALSE CONFESSIONS*, *supra* note 197, at 4.

199. Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 *J. AM. ACAD. PSYCHIATRY L.* 332, 332 (2009).

200. For example, the Innocence Project reports that 62% of DNA exonerees who were wrongfully convicted of murder gave a false confession. See *DNA Exonerations in the United States (1989–2020)*, INNOCENCE PROJECT, <https://innocenceproject.org/dna-exonerations-in-the-united-states/#:~:text=102%20DNA%20exonerations%20involved%20false,as%20of%20July%2024%2C%202018%5D> [<https://perma.cc/L6ZY-3E97>] (last visited Oct. 25, 2023).

201. One reference involved a confession that had occurred decades earlier. *SVU: Murdered at a Bad Address* (NBC television broadcast Oct. 31, 2019). The other depicted a suspect agreeing to plead guilty to a crime, against the ineffectual protestations of his attorney, because he felt morally guilty for his actions. *SVU: Intent* (NBC television broadcast Dec. 6, 2017).

reasonable viewer about the real-world operation of *Miranda* and other protections relating to law enforcement interrogations.

**Table 8 – Depictions that Undermine *Miranda***

	NCIS			SVU		
	Total	Per season	Per episode	Total	Per season	Per episode
<i>Miranda</i> violations	90	30	1.32	77	19.25	0.87
Other constitutional violations	89	29.66	1.31	83	20.75	0.93
Other custodial interrogation without warning depicted	317	67.83	2.91	333	83.25	3.74
Equivocal requests rebuffed	111	37	1.63	79	19.75	0.88
Invocation associated with guilt	95	31.66	1.40	140	35	1.57
Negative portrayals of defense attorneys	8	2.66	0.12	137	34.25	1.53
<i>Total</i>	<i>710</i>	<i>236.6</i>	<i>10.44</i>	<i>849</i>	<i>212.25</i>	<i>9.54</i>

In contrast, these police procedurals rarely portray *Miranda* in a helpful or positive light. Not only do they avoid depicting law enforcement officers warning suspects of their *Miranda* rights, but they also rarely portray the positive consequences of invoking *Miranda* and other constitutional protections. Suspects successfully stop an interrogation about once every four episodes, violations of *Miranda* are never identified, and the shows never depict statements being excluded from evidence at trial because of a *Miranda* violation.<sup>202</sup> Importantly, the shows include no endorsements of *Miranda* or its value in protecting the interests of individuals suspected of criminal activity. Rather, the shows normalize a narrative of complete compliance with police requests (or demands, as they are portrayed on-screen) from which deviation by a suspect puts them in greater—not lesser—legal jeopardy.

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202. The shows only depict one instance of evidence being excluded at trial. In that *NCIS* episode, evidence was not excluded because the protagonists violated *Miranda* or the privilege against self-incrimination. Rather, the evidence was suppressed as fruit of the poisonous tree due to state law enforcement's noncompliance with state regulations for maintaining a DNA database. This technicality is depicted as a travesty of justice—so much so that the presiding judge turns vigilante and has the defendant assassinated. *NCIS: Judge, Jury...* (CBS television broadcast Apr. 30, 2019).

To civilians, the combined message of these portrayals is that *Miranda* is not a valuable or effective shield against law enforcement interrogation. To put it another way, all of these features are apt to make it less likely that a viewer facing custodial interrogation will invoke their *Miranda* rights—even if they strongly desire not to be interrogated. Thus, police procedurals directly undermine a purpose of providing *Miranda* warnings: to inform suspects that remaining silent (at least in the absence of a lawyer) is a viable, constitutionally protected option for them.

The famed Yale law professor and bar exam pedagogue Charles Whitebread once said:

When I teach the material about police interrogation and confessions, I focus on the *Miranda* warnings because there is so much emphasis on *Miranda*-based questions on both the Multistate and the essay parts of the bar exam. In introducing the *Miranda* warnings, I say, “I am reluctant to insult your intelligence by telling you what the *Miranda* warnings are. If you really don’t know the *Miranda* warnings, you separate yourself from every person who watches television in America. If you don’t know the *Miranda* warnings, you should study a little less tonight and watch a cop show on T.V. and you will learn them.”<sup>203</sup>

Our study shows that Professor Whitebread’s advice is misplaced. A student studying the bar exam would have to watch, on average, more than fifty episodes of a “cop show” to hear the full *Miranda* warnings just once. And during that time the student will be exposed to hundreds of scenes that will actively mislead them as to how to answer hypothetical questions on both the Multistate and essay parts of the bar exam. Far more importantly, these same shows will similarly fail to educate viewers who are faced with real-life interrogations, and actively mislead them into believing that their interests are better served by waiving their rights and complying fully with their interrogators.

### III. FIXING TELEVISION’S *MIRANDA* MISUNDERSTANDING

The research presented in Part II reveals a sobering disconnect between the doctrine of *Miranda* and the way *Miranda* is presented to everyday civilians via television. These misrepresentations map directly onto the mistaken beliefs revealed by the research presented in Section I.A.2.<sup>204</sup> Although establishing the precise causal mechanism underlying these mistaken beliefs is a challenging endeavor well beyond the scope of this project, an inference that the shows we have studied contribute to the misunderstanding is more than reasonable. For many people, police procedurals are the main—and perhaps even only—source of knowledge about police practices related to *Miranda* and other criminal procedure rights. Even if shows such as *NCIS* and *SVU* are not the initial source of mistaken beliefs, they

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203. Charles H. Whitebread, *Making the Bar Review Fun*, 9 GREEN BAG 2d 263, 266–67 (2006).

204. See *supra* Section I.A.2.

actively reinforce such beliefs through direct portrayals and narrative tropes.<sup>205</sup> Courts themselves have acknowledged this link.<sup>206</sup>

This Part considers how to address the gap between the legal scope of the rights protected by *Miranda* and its progeny, and the misconceptions perpetuated by the most popular police procedurals. We consider several institutions capable of intervention—courts (Section III.A), legislatures (Section III.B), entertainment industry stakeholders (Section III.C), and scholars (Section III.D)—and propose several measures each institution could undertake.

### A. Courts

Courts should interpret the Fifth Amendment in a manner that takes account of the way *Miranda* is depicted in popular culture. Prior research indicates that most people’s understanding of the constitutional rights protected by *Miranda* is deeply flawed, and courts themselves have acknowledged that television plays a part in instilling these beliefs.<sup>207</sup> The data we have presented in this Article reinforces the connection. Courts should therefore take these television-led misconceptions into consideration in evaluating Fifth Amendment principles of custody and invocation.

First, courts should adopt a definition of custody that explicitly incorporates available empirical information about when people feel free to end an encounter with the police.<sup>208</sup> In the United States, in the twenty-first century, many reasonable people have absorbed their understanding of whether they are free to leave from police procedurals such as *SVU* and *NCIS*.<sup>209</sup> These notions may depart from courts’ understanding of custody as a degree of “restraints comparable to those associated with a formal arrest.”<sup>210</sup> Thus, even when a court would hold that a suspect arrived at the station voluntarily, they may not feel free to decline the request to come to the station or that they are free to leave once there.<sup>211</sup> Rather, they may

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205. It is no answer to say that other television shows depict rights more accurately. While this may be true, *NCIS* and *SVU* are far more widely viewed than any other show, *see supra* notes 119–123, and even if they were not, an average viewer has no way of knowing whether *SVU* or (say) *The Wire* offers a more accurate representation of Fifth Amendment doctrine.

206. *See* Young & Munsch, *supra* note 75.

207. *See, e.g.*, *United States v. Harris*, 515 F.3d 1307, 1311 (D.C. Cir. 2008) (“As every television viewer knows, an officer ordinarily may not interrogate a suspect who is in custody without informing her of her *Miranda* rights.”); *United States v. DeNoyer*, 811 F.2d 436, 439 n.4 (8th Cir. 1987) (noting that term “*Miranda* warnings” “is commonly used, both in court and in television shows, to describe the ritual prescribed in *Miranda v. Arizona*”); *United States v. McCrary*, 643 F.2d 323, 330 n.11 (5th Cir. 1981) (suggesting that “[m]ost ten year old children who are permitted to stay up late enough to watch police shows on television can probably recite [the *Miranda* warnings] as well as any police officer”); *United States v. Chapdelaine*, 616 F. Supp. 522, 530 (D. R.I. 1985) (“[W]ith the popularity of police shows on television, there are few persons who are not familiar with the [*Miranda* warnings].”).

208. *See supra* Section I.B.

209. *See infra* Section II.A.

210. *Berkemer v. McCartney*, 468 U.S. 420, 441 (1984).

211. *See, e.g., supra* Section II.B.2. (discussing the “Bring them in” and “We need to talk” tropes used by police procedurals).

feel that the request is really a politely-worded command, that the request would be followed by a demand if not obeyed, or that a refusal would be held against them at some future time.<sup>212</sup>

One way for courts to address the disparity between what *Miranda* says and what popular culture teaches is to explicitly assume that a suspect harbors the misunderstandings that are communicated by police procedurals and—as documented empirically—shared by most people.<sup>213</sup> *J.D.B. v. North Carolina*, in which a majority of the Supreme Court held that age must be taken into consideration as part of the totality of the circumstances in determining whether a suspect is in custody, supplies precedent for taking common misunderstandings into account.<sup>214</sup> Just as not every underage suspect shares a heightened risk of coercion, not every person harbors misconceptions about *Miranda*—but because most do, courts should look carefully for evidence of such misconceptions as well as whether police took adequate steps to mitigate them.<sup>215</sup>

Courts should also modify the current rule that “[i]f the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.”<sup>216</sup> Police procedurals rarely show an unequivocal invocation, and even when one is depicted, *SVU* and *NCIS* teach that *Miranda* invocations are only honored about half the time.<sup>217</sup> These factors may lead to uncertainty and hesitation in invocations or discourage invocations altogether; moreover, as we have documented, good things rarely come of invocations even when they are honored.<sup>218</sup> Moreover, *ambiguous* attempts at invoking *Miranda* rights are honored on these shows almost as frequently as unambiguous invocations.<sup>219</sup> This likely leads viewers to believe that there is no legal difference between ambiguous and unambiguous invocations. *Miranda* does not explicitly say what a suspect needs to do to invoke their rights, and popular culture often enhances,

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212. See, e.g., *supra* Section II.B.2 (finding that individuals who initially resisted an officer’s request to accompany them to the station were pressured to comply in every instance depicted and succumbed to the pressure on all but two occasions over the ten seasons analyzed).

213. See *supra* Section I.A.2.

214. See *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

215. *Id.* at 277 (“This is not to say that a child’s age will be a determinative, or even a significant, factor in every case. It is, however, a reality courts cannot simply ignore.” (citations omitted)). Incorporating the beliefs of ordinary members of the public into the court’s conception of custody would also align the doctrine relating to *Miranda* with Fourth Amendment jurisprudence. See Christopher Robertson, Bernard Chao, Ian Farrell & Catherine Durso, *Why Courts Fail to Protect Privacy: Race, Age, Bias, and Technology*, 106 CALIF. L. REV. 263 (2018) (“[T]he Supreme Court has repeatedly—and explicitly—asserted that ‘reasonableness’ in [the context of expectations of privacy] is determined by the beliefs of the typical innocent member of society.”).

216. *Davis v. United States*, 512 U.S. 452, 462 (1994).

217. See *supra* Table 5 – Attempted Invocations Scrupulously Honored, Section II.C.1.b.

218. For example, invoking the right to counsel on these shows hardly ever results in legal representation. See *supra* Section II.C.1.b.

219. See *supra* Table 5 – Attempted Invocations Scrupulously Honored, Section II.C.1.b.

rather than dispels, the confusion.<sup>220</sup> In the real world, instances of suspects invoking their rights hesitantly and ambiguously are legion, demonstrating that most people are not sure whether they should invoke their rights and do not know what they need to do to if they want to invoke.<sup>221</sup>

These concerns militate against the rule that suspects must invoke either the right to silence or the right to counsel clearly, unequivocally, and unambiguously.<sup>222</sup> Instead, courts should require police officers to cease interrogation and clarify a suspect's desires whenever the suspect offers an *equivocal* invocation of their rights such as "I'm not sure I want to talk" or "maybe I should talk to a lawyer."<sup>223</sup> The current doctrine contains what is essentially a default rule in favor of the police: when there is doubt about whether a suspect is invoking *Miranda*, police can continue their interrogation in precisely the same manner as when the suspect has unequivocally waived their rights. The content of police procedurals supports the inverse default rule: when there is doubt about whether a suspect is invoking *Miranda*, police cannot continue their interrogation unless and until the suspect unambiguously waives their rights. At the margins, perhaps there would be some debate about whether a suspect has equivocally invoked their rights or not invoked them at all, but given the confusion sown by popular culture, many reasonable people enter an interrogation unsure what they need to do to invoke their rights.<sup>224</sup>

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220. See *supra* Section II.C.1.b ("Suspects' references to silence or legal counsel ranged from timid and uncertain to express, unequivocal demands.").

221. See, e.g., *U.S. v. Plugh*, 648 F.3d 118, 125 (2nd Cir. 2011) ("Plugh instead argues that he invoked his *Miranda* rights through his 'unequivocal' refusal to sign a waiver of rights form. We disagree."); *Brewer v. Yearwood*, 30 F. Appx. 713, 714 (9th Cir. 2002) ("[W]e reject Brewer's argument that his waiver was ambiguous, and that the detective should have clarified it before continuing the questioning. His statement 'I'll answer what I want' was not ambiguous."); *James v. Marshall*, 322 F.3d 103, 109 (1st Cir. 2003) (holding that a defendant's response to police questioning with "Nope" was insufficient to clearly invoke his *Miranda* rights).

222. *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (holding that suspect must invoke rights "unambiguously"); *United States v. Davis*, 512 U.S. 452, 461–62 (1994) ("If the suspect's statement is not an unambiguous or equivocal request for counsel, the officers have no obligation to stop questioning him.").

223. Cf. *Davis*, 512 U.S. at 461 ("[W]hen a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney."); *U.S. v. Rodriguez*, 518 F.3d 1072, 1074 (9th Cir. 2008) ("We reverse, and hold that the 'clear statement' rule of *Davis* applies only *after* the police have already obtained an unambiguous and unequivocal waiver of *Miranda* rights. Prior to obtaining such a waiver, however, an officer must clarify the meaning of an ambiguous or equivocal response to the *Miranda* warning before proceeding with general interrogation."); *U.S. v. Sanchez*, 866 F. Supp. 1542, 1558 (D. Kan. 1994).

224. *Miranda* itself does not include instructions as to how invoke one's rights. The evident confusion of suspects such as Van Chester Thompkins—who sat in silence for two hours and forty-five minutes but did not explicitly *say* that he wished to invoke his right to silence—counsels in favor of more explicit instruction. See *Berghuis*, 560 U.S. at 376; see also *id.* at 412 (Sotomayor, J., dissenting) ("Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak . . . suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so. Those results . . . find no basis in *Miranda*."); Harvey Gee, *In Order to be Silent, You Must First Speak: The Supreme Court Extends Davis's Clarity Requirement to the Right to Remain Silent in Berghuis v. Thompkins*, 44 J.

The concerns that originally animated *Miranda* counsel in favor of a requirement that law enforcement officers offset suspects' confusion.

### B. Legislatures

Federal, state, and municipal legislatures could move to remedy misunderstandings of *Miranda* propagated by popular culture. Some readers might question whether such misunderstandings should be a legislative priority given the myriad social problems the country faces.<sup>225</sup> To this, we submit that the inadequacy of *Miranda*, as currently implemented, is an urgent crisis. Empirical evidence demonstrates the public does not understand *Miranda*, popular crime dramas are spreading disinformation about *Miranda* that is worsening the misunderstanding on a daily basis, and there is less redress for Fifth Amendment violations than ever before due to the Court's decision in *Vega v. Tekoh*.<sup>226</sup> Since federal courts are unlikely to act quickly, legislatures at all levels of government should step in.<sup>227</sup>

Of course, not all government entities could summon the political will to strengthen individual rights surrounding custodial interrogations.<sup>228</sup> Still, for those that do have the means, there is room to improve understanding of *Miranda* both by suspects under interrogation in the moment and by the population more generally.<sup>229</sup>

Government should consider the following as mechanisms for remedying misunderstandings of *Miranda*:

- requiring law enforcement officers to provide an enhanced version of the *Miranda* warning that includes explicit information regarding,

MARSHALL L. REV. 423, 454–55 (2011) (arguing that, pre-waiver, suspects should not be required to unambiguously invoke their right to silence).

225. See, e.g., Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused*, 59 AM. CRIM. L. REV. 1597, 1598–1600 (2022); Brita Belli, *Racial Disparity in Police Shootings Unchanged over 5 Years*, YALE NEWS (Oct. 27, 2020), <https://news.yale.edu/2020/10/27/racial-disparity-police-shootings-unchanged-over-5-years> [https://perma.cc/Y2Z5-4XXM]; Chelsia Rose Marcius & Téa Lola Fadulu, *Thousands Protest in New York After Supreme Court Overturns Roe v. Wade*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/24/nyregion/abortion-protests-ny.html> [https://perma.cc/4WNY-MKP3]; Karen Attiah, Opinion, *The GOP's Attack on Voting is Shameless. The Democratic Response is Spineless*, WASH. POST (Oct. 25, 2021, 5:39 PM), <https://www.washingtonpost.com/opinions/2021/10/25/gops-attack-voting-is-shameless-democratic-response-is-spineless/> [https://perma.cc/QS5T-QC9C]; Wayne Unger, *How the Poor Data Privacy Regime Contributes to Misinformation Spread and Democratic Erosion*, 22 COLUM. SCI. & TECH. L. REV. 308, 312–15 (2021); Stuart Ford, *The Need for a Wealth Inequality Amendment*, 122 W. VA. L. REV. 1, 2–5 (2019).

226. *Vega v. Tekoh*, 597 U.S. \_\_\_\_ (2022).

227. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 859 (2004) (“Judicially created rules also lack the necessary flexibility; they cannot change quickly and cannot test various approaches. The context of legislative rule-creation offers significantly better prospects for the generation of balanced, nuanced, and effective investigative rules involving new technologies.”).

228. While partisan gridlock in Congress makes federal legislation unlikely as of the writing of this Article, political will may exist in progressive states and municipalities.

229. Kerr, *supra* note 227, at 858.

inter alia: how to invoke one's *Miranda* rights, that remaining silent cannot be used against a suspect in a criminal trial, how a lawyer will be provided in the event of indigency, the maximum length of time a suspect can be held without a lawyer or a hearing, and that officers are permitted to lie to suspects;

- requiring law enforcement officers to provide *written* notification of rights to all suspects in a language in which the suspect is fluent prior to custodial interrogation;<sup>230</sup>
- funding public service announcements, on national or local television and radio, targeted to demographics that are less likely to understand their rights;<sup>231</sup>
- funding civic education programs in schools.<sup>232</sup>

Legislatures might also consider returning to *Miranda* itself for inspiration. The general public possesses so many misunderstandings about *Miranda* that legislatures should consider adopting the original proposal that some advocates advanced in *Miranda*: providing any suspect with a lawyer immediately upon request.<sup>233</sup> Some of the original objections to the proposal remain. For example, providing an attorney to every suspect may be expensive, especially in rural communities.<sup>234</sup> Here, however, technology can help; the Covid-19 pandemic has taught us that not all attorney-client interactions need to take place in-person. With many legal systems operating over Zoom for months during the pandemic, much of the infrastructure for immediate virtual advising is already in place. Although we would never argue that a Zoom meeting with an attorney is a substitute for an in-

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230. Legislatures should also take care to specify that warnings should be written at a level that is accessible to those with a fifth-grade education, and that additional explanation should be provided for suspects who cannot read at that level. *See* Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Kimberly S. Harrison & Daniel W. Shuman, *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAVIOR 124 (2008) (finding that, in an analysis of 385 *Miranda* warnings and waivers, a “large majority” required a seventh-grade reading level to understand, while two-thirds of American criminal defendants read as a sixth-grade level or less).

231. Such informative messages could be modeled on successful public health campaigns. *See, e.g.*, Matthew C. Farrelly, Kevin C. Davis, M. Lyndon Haviland, Peter Messeri & Cheryl G. Heaton, *Evidence of a Dose—Response Relationship Between “Truth” Antismoking Ads and Youth Smoking Prevalence*, AM. J. OF PUB. HEALTH (2011) (linking campaign with significant decrease in prevalence of youth smoking).

232. In our community, an example of such an organization is LYRIC, or Learn Your Rights in the Community. *See* LYRIC, *supra* note 177 (Colorado-based nonprofit that teaches juveniles how to safely and effectively exercise their rights when confronted by police).

233. *Cf. Miranda v. Arizona*, 384 U.S. 436, 474 (1966) (“This does not mean, as some have suggested, that each police state must have a ‘station house lawyer’ present at all times to advise prisoners.”); Brief for Petitioner, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 759), 1966 WL 87732, at \*8 (“We therefore urge upon the Court . . . that there is a right to counsel during the interrogation period for any person under arrest”).

234. *See also* Brief for Petitioner, *supra* note 233 (“The right to counsel under public defender systems may well be costly, but the dollar cost of preservation of a constitutional right is no reason for ignoring that right.”).

person one, we think that for purposes of providing a suspect with immediate access to counsel prior to a custodial interrogation, technology holds considerable promise—and is certainly preferable to a suspect undergoing custodial interrogation with no access to counsel. Providing suspects with counsel prior to interrogation would be easier now than at any prior point in history, and legislatures have the ability to implement this system.

### *C. Entertainment*

The entertainment industry can also aid in improving the understanding of rights associated with custodial interrogation. Most obviously, those involved with the production and dissemination of police procedurals and custodial interrogation in film and television should commit to responsible portrayals of interrogations. This does not mean that every portrayal of a custodial interrogation needs to show the police following the law. Rather, the touchstone should be: would these portrayals materially mislead a reasonable viewer about their rights?

To avoid misleading a reasonable viewer, those involved with its production have a number of choices. They could consider writing scripts that

- include a mixture of scenes in which the police follow the law and scenes in which they do not follow the law;
- include at least some scenes in which legal violations by police are presented in a disapproving context;
- more regularly portray suspects effectively invoking their *Miranda* rights—especially suspects with whom the audience sympathizes;
- portray at least some examples of remedies being provided for constitutional violations, such as evidence being excluded at trial or offers being meaningfully disciplined;
- portray more examples of police interrogation tactics that, in the absence of a defense attorney, lead to false confessions;
- more regularly depict defense attorneys effectively and ethically protecting their clients' legal interests—and resort less often to the lazy trope of the smarmy, unethical defense attorney;
- portray law enforcement being respectful and appreciative of suspects or defense attorneys who invoke their rights;
- more regularly portray the manner in which suspects arrive at, or are brought to, the police station so that viewers have a sense of whether they have genuinely consented to being interrogated;
- portray a protagonist, or other character that viewers respect, explaining the benefits of invoking *Miranda* or pointing out the reasons that waiving *Miranda* rights is not in a suspect's best interests, including when a suspect is innocent;
- produce more programs with ethical defense attorneys as the protagonists.

Critics of the above suggestions might claim that there is no audience for shows with more pro-rights, pro-defendant, and anti-police content. We have several responses. First, being pro-rights does not entail being anti-police. Indeed, portraying constitutional rights as antithetical to law enforcement, and law and order generally, is one of the main ways that police procedurals dissuade viewers from exercising their rights.

Second, crime dramas can include informative and critical portrayals of specific police interactions with unrepresented suspects without expressing criticism of law enforcement in general. A good example of this takes place in the first episode of *Bosch: Legacy*.<sup>235</sup> The protagonist, Bosch, a former homicide detective, is called as an expert witness on interrogation techniques. Bosch walks the jury—and the television audience—through a video recording of a police interrogation, pointing out the various coercive techniques used by the interrogator and concluding that the confession thereby obtained was false. Since the protagonist retains a staunchly law enforcement outlook, the scene educates viewers on the need for defense counsel during interrogations without condemning law enforcement in toto.

Third, it is by no means obvious that police procedurals with a focus on injustice would be unsuccessful. Several recent movies and television shows have addressed false confessions and wrongful convictions. These include *When They See Us*,<sup>236</sup> *Just Mercy*,<sup>237</sup> and *Making a Murderer*,<sup>238</sup> among others. The success of these works—each of which is either a documentary or based on a true story—show that a market exists for programs that more accurately depict the importance of constitutional rights in the context of police interrogations. However, such depictions remain largely excluded from long-running police procedurals on network television.

Fourth, we are not demanding that television shows *never* portray ethically challenged defense attorneys. Such portrayals have a place in popular culture. For example, in the humble opinion of one of the authors, *Breaking Bad*<sup>239</sup> and *Better Call Saul*<sup>240</sup> are two of the greatest television shows of all time, even though the character of Saul Goodman is the platonic conception of an unscrupulous, morally bankrupt defense attorney. We are not advocating that all Sauls be banished from the television landscape. We are merely proposing that police dramas include a critical mass of honorable and principled defense attorneys to create some balance in the representation of defense lawyers.

Alternatively, if producers, distributors, and television networks are nonetheless reluctant to move away from the current content of crime dramas, they

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235. *Bosch: Legacy: The Wrong Side of Goodbye* (Amazon Freevee original release May 6, 2022).

236. *When They See Us* (Netflix original release May 31, 2019).

237. *JUST MERCY* (Warner Bros. Pictures 2019).

238. *Making a Murderer* (Netflix original release Dec. 18, 2015).

239. *Breaking Bad* (AMC television broadcast Jan. 20, 2012–Sept. 29, 2013).

240. *Better Call Saul* (AMC television broadcast Feb. 8, 2015–Aug. 15, 2022).

could consider any number of mitigation measures. One can imagine a disclaimer presented at the beginning of an episode of a police procedural: “This episode presents a fictionalized version of *Miranda* rights that doesn’t reflect Supreme Court precedent—stay tuned after the episode to learn your rights!” Such a measure would both avoid undermining *Miranda* and present an opportunity to educate the fans of a show.

We further propose that producers, distributors, and television networks that are committed to social justice generally should commit to creating accurate and non-misleading portrayals of custodial interrogations. Moreover, they should make their commitment publicly known.<sup>241</sup> This would help viewers know which shows could be counted upon to portray *Miranda* accurately and, by extension, which shows were unreliable sources. For ongoing shows, this would allow viewers to lobby their favorite shows or, if those efforts failed, to vote with their television remotes.

To carry out the aim of accuracy, shows should consult with lawyers well-versed in criminal procedure. Shortly after *Miranda* was decided, Jack Webb did this with *Dragnet*;<sup>242</sup> contemporary shows would do well to follow his example. We suggest that production companies maintain a roster of expert attorneys as consultants to preview scripts and raw footage for legal accuracy.

Finally, when it comes to entertainment, outside fact-checkers also have a role to play. Here is a terrific idea for a blog or vlog: in each post or each episode, spotlight one (or several) depictions of a custodial interrogation. Analyze each depiction, explain what’s right and what’s wrong, and then give the show a score. Keep track of the show’s scores and keep a running list of each show’s grades, from A to F. This would provide incentives for poor-performing shows to improve. It would also create a valuable resource for those in the entertainment industry, law enforcement officers, educators of all sorts, and the general public.

#### D. Academic Research

We highlight two areas that future academic research can profitably explore. First, we think that we need more information about the misconceptions the general public may harbor about *Miranda* warnings, custodial interrogations, and criminal procedure rights in general. So many criminal procedure principles are based on a belief about what a “reasonable person” would do in a particular situation.<sup>243</sup> This is fundamentally an empirical question. If, for example, most people would not believe that they could choose to terminate stationhouse questioning under a

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241. In future work, we will propose a “*Miranda* Pledge”—a public promise, to be signed by those involved in police procedurals and other portrayals of custodial interrogations, to depict the rights surrounding custodial interrogation in a manner that will not mislead viewers about the existence, nature, or scope of their rights.

242. Steiner et al., *supra* note 3, at 224.

243. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); *United States v. Drayton*, 536 U.S. 194, 202; *Miranda v. Arizona*, 384 U.S. 436, 457–58 (1966).

particular set of circumstances, that information should inform whether we—and in particular, judges—conclude that the interrogation was custodial. A greater empirical understanding of what people think, understand, and do in situations implicating their constitutional rights would result in more informed judging.

Second, we think that future research can helpfully explore the causal link between police procedurals and other popular culture representations of *Miranda* and misunderstandings of *Miranda* among the general public. We believe, based on having taught thousands of criminal procedure students, that most students come to law school with significant misunderstandings about custodial interrogations. Most can recite the warnings nearly verbatim from the original *Miranda* opinion but have almost no understanding of what they mean in practice. Moreover, many of our students explicitly say their misunderstandings result from *Law and Order* or other popular media. If individuals who are interested in the law, so much so that they have chosen to pursue it as a vocation, are confused, we can only imagine the extent of the confusion in the general population. We think that future research can profitably explore the causal link between the way custodial interrogations are portrayed on television and the way that people actually understand their rights during such interrogations in the real world.

#### CONCLUSION

The famous four-part warning first articulated in *Miranda v. Arizona* was designed to protect people's rights during custodial interrogations by informing them of those rights. Yet in the intervening half-century, a powerful source of *disinformation* has emerged: television's most popular police procedurals, which stream errors and half-truths into millions of homes every day. Without aggressive action to combat this disinformation, television will continue to undermine *Miranda's* protection.

