

Lawyering Up

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*Pop quiz: You've just killed two people and there is no physical evidence or witness that can link you directly to either crime. Do you (A) shut your mouth or (B) visit the homicide unit and lie your ass off?*¹

EVEN AMIDST all the controversy provoked by the *Miranda* decision, there is widespread agreement on one point: *Miranda* has led to one of the most successful public education efforts in history. Polls show astonishingly high rates of awareness of the right to counsel and the right to remain silent.² It is also widely accepted that the success is largely attributable to the widespread dissemination of the *Miranda* warnings on television and in other mass media.³ New

York police recount the typical story of a suspect proclaiming: "I got the right to remain silent! You guys can't trick me. I know my rights! I watch TV!"⁴

If television is educating the American public about its *Miranda* rights, it is worth asking exactly what the American public is learning. There have been several studies examining various cop shows in order to assess the attitudes the shows convey toward cops, suspects, and the assertion of constitutional

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- ¹ David Simon, *HOMICIDE*, 213 (Houghton Mifflin 1991). We relied heavily upon an unofficial NYPD Blue web site maintained by Alan Sepinwall who is a television critic for the Star-Ledger. Episode titles and most of the quotes and descriptions of episodes were gleaned from the web site, which proved more reliable than our memories. We also cite to the web site's FAQ (Frequently Asked Questions) section, currently maintained by Jeff Knapp. The web site can be found at www.stwing.upenn.edu/~sepinwal/nypd.txt.html.
- ² Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 649 (1996) (a national poll in 1984 revealed that 93% of those surveyed knew they had a right to an attorney if arrested, and a national poll in 1991 revealed that 80% knew they had a right to remain silent if arrested).
- ³ See e.g. Leo, *id* at 671.
- ⁴ Gunther, *TV Police Dramas Are Teaching Civil Rights to a Generation of Viewers*, TV GUIDE at 7, Dec 18, 1971.

rights.⁵ As devoted fans of the cop show *NYPD Blue*, we propose to use that show to explore the messages communicated about *Miranda* and the conduct of police interrogations. *NYPD Blue* is particularly well suited to this exploration, since it tends to treat the interrogation as the dramatic focus of the show. The exploration may also shed light on an intriguing ancillary question. Specifically, if so many people know their rights, why don't more people assert them – both on tv and in real life?

THE POPULAR CULTURE FEEDBACK LOOP

The conventional wisdom about the dissemination of *Miranda* has it that tv cops, with their continual litany of *Miranda* warnings, have educated the American public about our right to counsel and our right to remain silent. Indeed television has been successful in getting out the word about *Miranda*. But this is an oversimplified picture in several respects. First, there is the question, which we will address in detail shortly, of what messages about *Miranda* are in fact being conveyed by tv cop shows. But in addition, the conventional wisdom portrays the information as flowing in only one direction: the cop shows inform the viewers of what “the law is.” Scholars of popular culture describe a more complex scenario, in which television has become (with some

help from film and other mass media) our culture's principal storyteller, educator, and shaper of the popular imagination.⁶ It not only transmits legal norms, but also has a role in creating them. Media images of law enforcement are, in the minds of many viewers, synonymous with reality.⁷ Thus the continual repetition of certain stock characters, certain story lines, certain messages, has the ability to shape our expectations about the ways in which real cops, real suspects and real citizens act – and ought to act – in the real world.⁸

What is the world portrayed on the cop shows? Popular studies professors have occasionally undertaken the onerous task of watching hours of television in order to assess the portrayal of law enforcement. They have consistently found that, apart from a brief period in the late 1960s and early 1970s in which police (along with other government officials) were often portrayed as corrupt or inept, police work tends to be portrayed in the most heroic terms. The researchers have found that the constitutional rights of suspects are very rarely observed, and indeed, that unilateral, blatantly unconstitutional police behavior is glorified. Constitutional rights are painted as bureaucratic technicalities that hinder the police from getting the bad guy. The bad guy is usually painted as deserving whatever he gets. Miraculously, the police misconduct never seems to harm the innocent.⁹

5 See e.g. Stephen Aarons & Ethan Katsch, *How TV Cops Flout the Law*, *SATURDAY REVIEW*, March 19, 1977; George Gerbner, *Trial by Television: Are We at the Point of No Return?*, 63 *JUDICATURE* 416 (April 1980); Judith Grant, *Prime Time Crime: Television Portrayals of Law Enforcement*, 15 *J. AM. CULTURE* 57 (1995).

6 Richard K. Sherwin, *Picturing Justice: Images of Law and Lawyers in the Visual Media*, 30 *U.S.F. L. REV.* 891, 892 (1996).

7 See e.g. J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 *MICH. L. REV.* 1966, 1981 (1992); L.J. Shrum, *Effects of Television Portrayals of Crime and Violence on Viewers' Perceptions of Reality: A Psychological Perspective*, 22 *LEGAL STUDIES FORUM* 257 (1998).

8 At least one article explicitly suggests that the transformation of popular images of police has in turn influenced the Supreme Court to ratify more and more outrageous police conduct. Aarons & Katsch, *supra* note 5 at 12.

9 Aarons and Katsch, *supra* note 5; Gerbner, *supra* note 5; Shrum, *supra* note 7 at 259-60.

Our aim is less ambitious than a full canvass of the television landscape. We want to look at the portrayal of *Miranda* in interrogations on *NYPD Blue*. In preparation for this task, we have diligently watched every episode of *NYPD Blue* ever televised, but for the purposes of this article, we will draw from just a few episodes which we deem to be representative. The issue of which episodes are representative is not a difficult one, since the portrayal of the *Miranda* rights is remarkably consistent from show to show.¹⁰

YOUR LAST CHANCE TO LET US HELP YOU

Let us turn to the question of how *Miranda* rights are portrayed on *NYPD Blue*. There are incidents in which the detectives blatantly disregard suspects' constitutional rights, for example by ignoring an unambiguous request for counsel, or even by using physical force. But the usual scenario is more subtle. It turns on the detectives' efforts, almost always successful, to convince the suspect that it is in his best interests to confess. Bobby Simone,¹¹ Andy Sipowicz or some of their detective colleagues will explain that of course the suspect has the right to refuse to talk to them, or even to demand a lawyer. But if the suspect doesn't talk to them (and if he calls a lawyer, they stress, his lawyer won't *allow him* to talk) then

the detectives will be forced to believe the sordid and inculpatory version of events told them by the other suspect, or by the abundant physical evidence, and he will never be allowed to tell his story his way. They are ready to believe that the suspect acted in self defense, or was filled with remorse, or tried to back out, but first it's up to the suspect to help himself out by telling them about it. Unless the suspect helps them to help himself, their hands are tied. And if they don't help, he is at the mercy of the prosecutor and the court, who will not have his best interests at heart.

The detectives' conduct is motivated by a view of criminal justice that we think is misguided, but portions of which may be widely shared among law enforcement professionals and the public. This view is that the Constitution (at least as interpreted by the Supreme Court) has become an impediment to justice, and that unconstitutional and even inhumane techniques are justified when used to get vicious criminals off the streets. This view, which we call *NYPD Blue* justice, was explained in an early episode. After deceiving a murder suspect into confessing to a robbery which implicated him in the murder, Detective John Kelly took off his watch, gave another detective his gun, pulled down the shades and locked the door, clearly preparing to beat a murder confession out of the suspect. After the suspect confessed, a detective in

10 We do not claim that the portrayals of interrogations on *NYPD Blue* are necessarily representative of those on other cop shows. Our sense (unsupported by any methodologically sound research) is that most cop shows tend to focus less on the interrogation room, and more on the street. However, devotees of *Law and Order* or *Homicide* may wish to undertake their own research projects.

11 Currently, Jimmy Smits plays the role of Bobby Simone, replacing David Caruso (as John Kelly) in the tough yet sensitive dreamboat role. At press time, it appeared that Simone was suffering from a serious, perhaps fatal disease. Replacing Smits/Simone this season will be Rick Schroder. *Schroder Replaces Smits on "NYPD Blue"*, *NEW YORK TIMES* at 2 (June 28, 1998). Television critic and *NYPD Blue* fan Alan Sepinwall is optimistic that Schroder will be a good replacement for Smits. See Alan Sepinwall, *Cops Go Through Shift Changes*, *THE STAR-LEDGER*, 1998 WL 3425630 (June 24, 1998) ("Rick Schroder could be the best thing to happen to *NYPD Blue* in a long time."). But see Caryn James, *So Where's the Button to Fix the Brightness?*, *NEW YORK TIMES* at B8 (October 27, 1998) ("Rick Schroder is such an unlikely choice to join the gritty series that he will have an uphill battle proving himself when he arrives ...").

training asked Kelly about the illegal techniques. Kelly replied that he believes in the Constitution “and I hold on to that as long as I can, but in the case of a murderer like this who’s gonna walk, I leave my gun and my jewelry outside with the Constitution.” (A Tempest in a C-Cup, Season 1, Episode 8.) The detectives, including their lieutenant, all share this view, and it means that requirements like *Miranda* may be observed in form, but rarely in substance.¹²

The unifying principle in NYPD Blue

interrogations is the need to convince suspects not to consult a lawyer. Though the *Miranda* warnings are generally given, there is a consistent and intensive effort to undercut the warnings with assurances that lawyers will only get in the way, and will prevent the detectives from helping the suspect. (Simone Says, Season 2, Episode 5.) The *Miranda* rights are portrayed as hindrances to the detectives’ efforts to assist the suspect. On NYPD Blue, the effort is almost always successful. Suspects rarely lawyer up.¹³ During the interrogation,

12 The pursuit of NYPD Blue justice is not confined to the interrogation room. The detectives also routinely violate the Fourth Amendment and other constitutional protections in order to help innocent victims and catch the bad guys. For example, in an early episode, a child was kidnapped, and the kidnapers asked for drugs with the ransom money. The detectives followed the girl’s father to the ransom drop and then followed the suspect who picked up the ransom. When the suspect pulled off the road to shoot up with the drugs, the detectives, fearing that he would overdose on the uncut drugs, threatened him at gunpoint to induce him to tell where the girl was being held. When they arrived at the house in New Jersey where the girl was apparently being held, they finessed a warrantless, exigent entry into the home by asking a local cop whether he heard the girl screaming, though there was no screaming to be heard. (From Hare to Eternity, Season 1, Episode 11.) Interestingly, their willingness to perjure themselves on this issue at trial may have been unnecessary – the mere presence of a kidnap victim in the home would likely have established exigent circumstances. See e.g. *United States v. Salava*, 978 F.2d 320 (7th Cir. 1992) (risk to public safety excuses warrant).

For another example of the show’s portrayal of the Fourth Amendment, see the pilot for the series, in which Andy Sipowicz hammered nails into the tires of a mobster’s limousine, so that he could look into the trunk when the driver opened it to get a spare. (Pilot, Season 1, Episode 1.)

13 It is reported that many viewers have criticized this aspect of the show as unrealistic. See Web Site FAQ at § 1.9. Actual statistics on the number of suspects who assert their right to counsel are hard to come by, and their interpretation is a matter of some controversy. Compare Paul Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1995), to Stephen Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950 (1987). See also Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990’s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 (1996) (citing the authors’ study showing that 16% of suspects questioned initially invoked their rights, about half of whom invoked their right to counsel. Another 4% assert a right to either silence or counsel after first executing a waiver of rights). NYPD Blue’s own consultant defends the accuracy of this aspect of the show. According to the FAQ, Bill Clark, an ex-NYPD homicide detective and show co-producer, says that suspects know their rights but that they go along with the detectives “out of naive optimism.” Further, the suspects are concerned that if they get a lawyer they will get stuck in the lock-up for at least 48 hours while the case is processed, and they are hoping that by talking they will short circuit the whole process. See Web Site FAQ at § 1.9, which is based upon an interview with Clark; email from Alan Sepinwall to Jack Beermann, July 9, 1998 (on file with authors). The FAQ also asserts that Steven Bochco’s previous hit cop show, *Hill Street Blues*, gave viewers the incorrect impression that suspects always get lawyers. In that show, Joyce Davenport, the public defender, was a major character, and each time a suspect was arrested, Davenport would immediately come to talk to him in the holding cell. In Clark’s view, NYPD Blue – in which lawyers are less accessible – is more realistic. See FAQ at § 1.9. Davenport, it should be noted, was in an intimate romantic relationship with the police captain, Frank Furillo. The legal ethics of such an arrangement are beyond the scope of this article.

the detectives imply¹⁴ that they can assist in a number of important ways. They suggest that only they can ensure that the prosecutor, judge or jury will hear the suspect's version of the story. They create the impression that if the suspect cooperates he will either walk out of the station a free man or at least be charged with a lesser crime, be acquitted at trial, or receive a lighter sentence. Sometimes they imply that they will obtain help – such as psychiatric or financial assistance – for the suspect or his family. For example, detectives induced a suspect to confess to child molestation by suggesting that maybe the suspect's punishment would consist entirely of treatment for his "problem." As sometimes occurs when such tactics succeed against obvious "bad guys," the falsity of the implied promise was soon revealed. In the molester's case, after the confession, the detective accompanied his arrest of the suspect with the comment: "I hope they put you away, you sick son of a bitch." (Simone Says, Season 2, Episode 5.) The climax of the NYPD Blue interrogation often con-

sists of a suspect making wildly optimistic statements about his chances while a detective silently hands him pen and paper, perhaps nodding at the suspect and saying, merely: "write it down."

The detectives understand that if the guy they like¹⁵ lawyers up, they won't get a confession. The relentless pursuit of the confession is driven by the detectives' assessment that they are unlikely to obtain a conviction without one.¹⁶ In one episode, after Andy Sipowicz threatens to beat up a suspect in the sexual assault and killing of a young girl unless he confesses, another detective (not one of the regulars) criticizes Sipowicz because the technique might have jeopardized the case by scaring the suspect into lawyering up. (Girl Talk, Season 3, Episode 16.) It is not that coerced confessions are wrong, it is that coercion, improperly employed, may result in a fate worse than death, the appearance of a lawyer.

Sometimes the detectives seem troubled by their deceptions, but the desire to keep the

14 Generally, they do not make explicit promises they cannot keep, such as promises of sentence leniency. In this regard their conduct is within the range of the allowable, since courts will uphold most lying, short of explicit promises of leniency or the forging of official-looking documents. See Welsh White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996).

15 An interesting euphemism for "suspect" or "target."

16 In this regard, their assessment may correctly describe the expectations of many real life jurors. See *infra* note 29. Former NYPD Detective Bill Clark, in a book co-authored with NYPD Blue creator David Milch, offers two reasons for the importance of a confession. The first is that a confession is the surest way to a conviction. "You get a conviction off direct statements from witnesses and the perpetrator. The best case in the world, if it's based on circumstantial and forensic evidence, a big-money lawyer turns that around in court. No lawyer can change what's already in a statement." David Milch & Bill Clark, *TRUE BLUE: THE REAL STORIES BEHIND NYPD BLUE, 194-95* (Expanded paperback edition 1997) (quoting Bill Clark). The second reason Clark offers is to protect witnesses from having to testify because defendants may use violence either to prevent witnesses from testifying or to punish witnesses after they testify. "How our judicial system is set up, believe me, you go into a trial without a statement from the perpetrator, the odds are as good the witnesses in that case'll wind up getting hurt as the perpetrators'll get convicted. ... I'm gonna get a statement from him. I'm gonna protect those people. Then after I've got his statement, let the guilty prick have all the rights he wants." *Id.* at 201.

When a threatened beating led a suspect to lawyer up, Andy tried to console himself that the lack of a confession didn't really hurt the case, since the detectives had a murder weapon and two eye-witnesses. But the fact that the suspect had lawyered up was clearly presented as a problem. (Moby Greg, Season 4, Episode 1).

lawyers away is stronger than any misgivings they might have. In a heartbreaking episode, a shopkeeper is killed in a robbery, and his son offers a reward for information leading to the arrest of the killer. In this case, a drug-addicted woman seeking the reward lets the detectives know that she thinks her two sons, who live with their grandmother, committed the crime. She clearly wants them to confess so she can get the reward to buy drugs. While the boys try to keep up a tough front, just below the surface they are frightened children. During the interrogation, an officer comes into the room and tells Detective Simone that the boys' grandmother is downstairs and says she will lawyer them up unless she speaks to a detective. The grandmother asks Simone whether she should get the boys a lawyer, assuring him that she can afford to pay for one. Simone tells her that the best thing for them is to let them talk about it, and that they don't need a lawyer. When she asks him whether she can trust him, he warmly reassures her that she can, that he has her grandchildren's best interests at heart. He almost appears troubled by his deception. But ultimately, NYPD Blue justice prevails and the boys confess without talking to a lawyer. (It Takes a Village, Season 5, Episode 5.)

The detectives do whatever they can to keep lawyers away from the suspect they like, even if the lawyer is in the building and wants

to talk to the suspect. In one episode, the father of a murder victim refuses to believe that someone he trusted killed his daughter. He brings a lawyer to the station house, but two of the detectives keep the father and his lawyer in the lobby while another detective conducts the interrogation upstairs.¹⁷ The interrogation produces plenty of incriminating information and ends with the pen and paper ritual after the suspect is confronted with physical evidence that is inconsistent with his attempt to place most of the blame on his accomplices. (Burnin' Love, Season 3, Episode 11.) The lawyer does not get to the potential client in time.

Further, the detectives know how important it is for a defendant to have a lawyer. When Internal Affairs was investigating two of the detectives, the detectives refused to talk to the investigators before consulting a lawyer. (Is Paris Burning?, Season 4, Episode 21.) When detectives have sympathy for someone who may have committed a crime, they advise the person not to talk to them, or any other police, without a lawyer. For example, in the first season, Detective John Kelly moonlights as a security guard for a rich couple. The husband is a wife-beater, and Kelly is clearly partial toward, and protective of, the wife. In fact he quits his security guard position so he will be able to help the wife if the husband beats her again. After the wife shoots and kills

17 The Supreme Court has held that this tactic is constitutional. Only the suspect himself has a right to request a lawyer. *Moran v. Burbine*, 475 U.S. 412 (1986). However, it appears to violate New York law. See e.g. *People v. Pinzon*, 44 N.Y.2d 458, 377 N.E.2d 721 (1968) (suspect's family may retain lawyer for suspect, and subsequent waiver of counsel is invalid unless made in lawyer's presence). Though this case was decided well before *Moran*, it was recently cited with approval and distinguished in *People v. Lennon*, 662 N.Y.S.2d 821, 243 A.D.2d 495 (1997), in which the court found an interrogation did not violate the suspect's rights when the suspect's father retained a lawyer for the suspect, but the suspect stated clearly that if she needed a lawyer it would not be him. See also Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 671, 739 & n.155 (1997) (citing *Pinzon* for the proposition that the New York constitution provides greater protection than does *Moran*); James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 238, 264 & n.97 (1996) (citing *Pinzon* for the proposition that under the New York constitution, police have the burden of ensuring that counsel can communicate with a detainee).

the husband, she tells Kelly a self-defense story that Kelly knows won't stand up. His advice: don't talk to anyone until you talk to your lawyer. (True Confessions, Season 1, Episode 4.)¹⁸

LIFE ON THE STREETS

Is the NYPD Blue version of *Miranda* an accurate reflection of what goes on in actual interrogation rooms? If *Miranda* has served a symbolic function in educating people about their rights, and if television has greatly assisted in that function, is television currently educating them accurately? Or perhaps this is only part of the question. It may also be that if television has lowered viewer expectations about police regard for *Miranda* rights, those very lowered expectations aid police in their quest to portray *Miranda* as a temporary and technical impediment to the inevitable confession.¹⁹

Do the NYPD Blue tactics correspond to actual police tactics? Legal scholars writing about the impact of *Miranda* agree that the most important task of the interrogator seeking a confession is to convince the suspect that confessing is in his self interest.²⁰ Obviously,

this message directly contradicts the message of the *Miranda* warnings themselves. *Miranda* communicates, in several ways, that the police are acting as the suspect's adversaries, that they will use his words against him, and that he should seriously consider availing himself of the services of a trained legal professional. The hurdle for police is to disguise or convert this message into a very different one: we are here to help you, and if you don't talk to us, you are in big trouble.

David Simon, a journalist who covered the Baltimore Police Department for a year and wrote about the experience in a book called *Homicide*, writes the following:

[C]atharsis in the interrogation room occurs for only a few rare suspects. ... [T]he majority of those who acknowledge their complicity in a killing must be baited by detectives with something more tempting than penitence. They must be made to believe that their crime is not really murder, that their excuse is both accepted and unique, that they will, with the help of the detective, be judged less evil than they truly are. ... The fraud that claims it is somehow in a suspect's interest to talk with police will forever be the catalyst in any criminal interrogation. It is a fiction propped up against the greater weight of logic itself, sustained for hours on end through nothing

18 Kelly's attitude changes, however, when the attorney gives the wife advice with which Kelly disagrees. When the attorney advises the wife not to speak to the detectives because he thinks she will ultimately be found not guilty, Kelly convinces her to confess to a scenario that will lead to a manslaughter conviction and a possible suspended sentence. This also illustrates another element of NYPD Blue justice: if someone who is not a real bad guy has committed a crime, even murder, for good reason or under the influence of a real bad guy, the detectives often assist that person in getting off lightly or completely by helping her to cast her statement in the best light, and occasionally even by encouraging her to lie. Bill Clark explains this element of NYPD Blue justice this way: "A cop who's doing his job isn't just looking to lock up bad people. People who are basically all right, whether either by their own mistake or being in the wrong place at the wrong time they're jammed up, a good cop tries to get these people through their problem." Milch & Clark, *supra* note 16 at 31 (quoting Bill Clark).

19 See Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229, 265-67 (1987) (citing studies showing that heavy television viewing is correlated with increased fear of crime, increased support of police, and decreased support of civil liberties).

20 Peter Arenella, *Miranda Stories*, 20 HARV. J.L. & PUB. POL'Y 375, 382 (1997); Young, *supra* note 14 at 427; White, *supra* note 14 at 610; Albert Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 972 (1997).

more or less than a detective's ability to control the interrogation room.²¹

Simon and others describe the methods police use to convert the *Miranda* warnings into a means of conveying rather than contradicting their message. As Simon puts it, the officer "follows the requirements of the law to the letter – or close enough so as not to jeopardize his case. Just as carefully, he ignores the law's spirit and intent."²² The officer enlists the suspect's help in dispatching the pesky paperwork (like the waiver form) that needs to be done before the officer can begin helping the suspect exonerate himself. The very act of giving the warnings can be used to encourage this fiction. The suspect may easily mistake the officer for a helpful guy with the suspect's interests at heart. After all, isn't he telling the suspect he'll get him a lawyer if he wants one, and that the suspect can stop talking whenever he wants to? The officer will help this fiction along in any way he can. The Inbau-Reid manual on police interrogation, for example, recommends that the officer inform the suspect that even if he were the officer's own brother, father, or sister, he would still advise him to speak the truth.²³ And, in an example of the feedback loop discussed above, the officer may enlist television in support of the fiction. Richard Leo quotes the following typical gambit:

In order for me to talk to you ... I need to advise you of your rights. It's a formality. I'm sure you've watched television with the cop shows, right, and you hear them say their rights and so you can probably recite them better than I can, but it's something I need to do and we can get this out of the way before we talk about what's happened.²⁴

Thus it does appear that the NYPD Blue cops' focus on convincing the suspect that it is in his best interest to talk is a pretty accurate reflection of the focus in actual interrogations. Is there any truth to the assertion that confessing can be beneficial to the suspect in the disposition of his case?

The empirical data strongly suggest that the assertion has no basis in reality. Studies show that suspects who confess are more likely to have charges filed against them, less likely to have charges dropped, and less likely to receive a plea bargain, that they receive worse deals if they do bargain, are more likely to be convicted at trial, and more likely to be convicted of serious charges.²⁵ Prosecutors and courts consider confessions among the most probative and damaging evidence available.²⁶ In short, there is no evidence that talking to the police can help, and substantial evidence that it can hurt. Any competent defense lawyer will advise his client not to talk to police. The interrogation tactic is, to be blunt, a form of lying – albeit one the courts are willing to

21 Simon, *supra* note 1 at 198, 201.

22 Simon, *id.* at 200-201.

23 White, *supra* note 14 at 610-11 (citing Fred Inbau & John Reid, *CRIMINAL INTERROGATION AND CONFESSIONS* at 60 (2d ed. 1967)).

24 Leo, *supra* note 2 at 662.

25 Margaret L. Paris, *Forum: Faults, Fallacies, and the Future of Our Criminal Justice System*, 3 VA. J. SOC. POL'Y & L. 3, 16 (1996); David Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103, 109 (1974); Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1608-09 (1967); Cassell & Hayman, *supra* note 13 at 905-14; Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 288-90 (1996); Cassell, *supra* note 13 at 441-444; and George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 939 (1996).

26 See *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

countenance.²⁷

HOW THE MEDIUM AFFECTS THE MESSAGE

What, then, is the message of the interrogations on NYPD Blue about the rights of suspects? There are several issues of perspective that make the question difficult to answer. First, the show (as is common in cop shows) is told from the perspective of the cops, not the suspects. The viewer is in the shoes of the detectives, rooting for them to solve the crime. The viewer gets to know the detectives from week to week. She learns about their foibles, their tender hearts, their families. She watches them risk their lives hundreds of times, and acquit themselves with courage. The viewer, if she has successfully suspended enough of her disbelief to become involved in the drama, finds herself hoping with the detectives that the suspect won't – in the dread phrase – lawyer up. She is hoping that the suspect won't invoke those hyper-technical rules that allow him to hide his certain guilt.

This leads to the second issue of perspective. The viewer is in the shoes of the detectives, rather than operating from an omniscient perspective. Therefore she is exploring, alongside the detectives, a number of possible scenarios. However, there comes a certain point at which the detectives, and the viewer along with them, *know* who is guilty. At that point the stakes are raised, and a far greater amount of abuse of the suspects becomes acceptable. Thus the show often portrays the detectives riding roughshod over requests for counsel, or rolling up their sleeves in a threatening manner, or even hitting a suspect, when that suspect is “known” to

have committed a heinous and depraved act which he refuses to admit to having done. The officer's angry or even violent response is portrayed as an understandable human reaction, which connects the detective to the rest of us. Or perhaps it is meant to reinforce the view that the detective acts as our representative, united with us against the forces of criminality.

In short, the viewer is given all the information she needs to empathize with the detectives. She is often given the information she needs to feel sorrow, pity or fear for the victim. She is very selectively given the information she needs to empathize with particular suspects – the wrongly accused, the truly provoked, the battered or otherwise victimized, the very young. She is also given information – at the interrogation stage – about who deserves punishment. When the sympathetic or “good” suspect comes along, the detectives tend to help her in just the ways they promise to. When the unsympathetic suspect comes along, they do whatever they need to do to get the confession, and the viewer cheers them on. The sympathetic or innocent suspect is easily distinguished from the unsympathetic or guilty suspect. And as to the latter, the end justifies the means.

As the early studies of cop shows point out, due process and procedural fairness aren't very filmic. Getting the bad guy, helping the victim, doing justice – these are filmic denouements. And nothing is more filmic than a confession.²⁸ A confession satisfies the viewer's need to know what “really” happened, and to hear it from the suspect himself. The suspect's own confession allows the viewer not only epistemological certainty, but a window into

27 See Young, *supra* note 14 at 427; White, *supra* note 14 at 610.

28 Paul Cassell points out that NYPD Blue also helps convey the impression that police are entitled to ask questions until suspects lawyer up, rather than the correct message – that police can't question custodial suspects absent a waiver. He suggests as an explanation that it is not particularly filmic to show a suspect refusing to execute a waiver of rights. Email from Paul Cassell to Susan Bandes, September 3, 1998 (on file with authors).

the true motivations of the suspect, and even into his level of remorse.

Thus the medium is stacked in favor of the desirability of the confession.²⁹ The notion of *Miranda* rights as process rights that belong to all defendants (even the unattractive, the unsympathetic, and the likely guilty) is not readily televisable. The costs of *Miranda* to society are very effectively portrayed. The costs to the suspect of confessing are much more ambiguously treated. The attentive viewer may discern that the promises (at least those to the “clearly guilty”) are cynically made, and that the detectives seem to have little intent to keep them. The detectives, in the halls and the locker room, or in facial expressions in the interrogation room itself, often congratulate themselves on the success of their trickery.

The attentive viewer may notice that NYPD Blue doesn't include courtroom scenes. As a general matter, the action stops soon after the confession is obtained. Whether the detectives follow through on their promises of assistance is not usually a matter of television record. For such a viewer, perhaps the lesson of NYPD Blue is that the last thing a suspect should do is allow himself to be tricked, cajoled or beaten into confessing.

But this is subtext. The text, for the viewer who is willing to suspend his disbelief and depend on television to educate him about his rights, is that lawyering up is the worst thing a suspect can do. It will prevent that compassionate, handsome Jimmy Smits and that irascible yet lovable Dennis Franz from helping him before it's too late. *GB*

29 This is the feedback loop at work. Scholars talk about a Perry Mason effect which causes real life juries to expect an on-the stand confession from the perpetrator, and to be dissatisfied with anything less. Stark, *supra* note 19 at 280. However, it is also plausible to think that, even without television, confessions would afford juries a satisfying sense of closure because they correspond to more basic narrative expectations.