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OK, All Together Now: 'You Have the Right to . . .'

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NEW HAVEN, CONN. — I have a confession to make: I've been Mirandized more times than I can remember. Well, sort of. I've never actually been arrested or hauled down to a police station. But like virtually everyone else in America, I've been treated to the Miranda warning countless times on television. Its words are now burned into my brain as indelibly as the lyrics of "Hey, Jude" or "The Star-Spangled Banner."

Last week, the U.S. Supreme Court agreed to hear a case, Dickerson vs. United States, that could result in the formal overruling of Miranda. Civil libertarians quickly began sounding alarm bells, while some of Miranda's fiercest critics started popping champaign corks. More than three decades after it was decided, Miranda still gets people excited.

But all the noise last week misses the point. For better or worse, Miranda has been woven into the fabric of daily life: into the standard operating procedures of police departments around the country; into the expectations of most judges and prosecutors (to say nothing of defense lawyers); and, most important, into the cultural literacy and mind-set of virtually every American, rich or poor, black or white. Overruling Miranda cannot take us back to the world that preexisted Miranda, even if we wanted to go there. We have all been Mirandized too many times--if only on television.

Before the Supreme Court decided Miranda vs. Arizona in 1966, well-settled law held that a police-station confession was admissible against a criminal defendant only if he had given the statement "voluntarily." No single factor marked the line between inadmissible coerced statements and admissible voluntary ones. Instead, judges considered each case on its own and pondered all the details: the length of the interrogation; the background, age and intelligence of the suspect; the harshness of the conditions of police-station confinement (was the suspect offered coffee and sandwiches?); and so on.

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Miranda dramatically changed this legal landscape. By a 5-4

vote, the Warren court held that unless cops allowed defense lawyers into police-station interrogations, and unless cops further warned suspects of their rights to keep silent and have lawyers present, then the confessions would be categorically inadmissible.

But Miranda contained a key ambiguity: Was the new warning required by the Constitution, or was it merely one clean way to guard against coerced confessions? If the latter, then perhaps Congress could repeal Miranda in favor of some other regime designed to guard against coerced confessions. In 1968, Congress passed a law that purported to abolish Miranda. But instead of providing for an elaborate alternative regime to prevent police-station abuse, Congress purported merely to reinstate the pre-Miranda system of case-by-case determinations of voluntariness.

The 1968 statute was a slap in the court's face--demolishing the justices' activist edifice without erecting any substitute--and for many years most prosecutors hesitated to invoke the statute in court. But in Dickerson, a recent bank-robbery case arising out of a federal prosecution in Virginia, the 4th Circuit Court of Appeals looked at the dormant 1968 statute and ruled that Congress had indeed lawfully repealed Miranda. Last Monday, the Supreme Court agreed to review that decision later this term.

Ironically, one of the best arguments for repealing Miranda is that the case has exceeded the wildest expectations of its supporters. Even if the 1968 Congress failed to offer any alternative to Miranda's mousetrap, our society over the last three decades has serendipitously devised a better way of protecting police-station suspects than Miranda envisioned. It's called television.

Consider two possible enforcement regimes and ask yourself which gives Americans better notice of their police-station rights and thus guards against coerced confessions. In the first regime, if you are ever arrested and taken downtown, the cops Mirandize you. But at that precise moment, you are typically disoriented, and the warning doesn't fully register because its words are unfamiliar. The warning is part of the law, but not the culture. In the second regime, the cops often neglect to Mirandize you--perhaps they never Mirandize you. But every week of your life you have been taught the Miranda warning on your couch, and so, if you are ever arrested, you know your Miranda rights down cold. You might still decide to answer the cops' questions, if you are cocky enough to think you can talk your way out, but your decision to sing would be fully voluntary. (However, most defense lawyers, on TV crime shows and in real life, would say that talking is usually a mistake: The smart move is to keep silent.)

Isn't the second regime obviously more protective than the first? If so, even if the Supreme Court were to overturn Miranda tomorrow, how much would it matter?

To say that Miranda is here to stay, in our heads if not our lawbooks, is not to say that Miranda has been a great thing for America. Under Miranda and later cases, a suspect is, in effect, told that if he remains silent, this silence can never be used against him. What incentive does he have to cooperate with the police? When cops are barred from getting information from suspects in a timely fashion, some criminals will likely escape conviction. Even worse, some innocent suspects will wrongly become targets, defendants and even convicts: When the police are restricted in their ability to get information from

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suspect B. This is a danger that should worry even civil libertarians, yet few of Miranda's partisans have even seen the

problem.

Most of these partisans have also urged that the police should be barred from using not only confessions obtained without proper warnings, but also any reliable physical evidence and other “fruits” of Miranda violations. These arguments threaten to turn our Constitution upside down: The best argument against coerced confessions is rooted in the protection of innocence. We do not want police forcing “confessions” from those who are not guilty. But where a confession leads to reliable physical evidence or other valuable fruit--a bloody knife, a fingerprint, a witness--the matter is far different.

Though the current court could not wholly undo Miranda, even if it tried, the justices in Dickerson could perhaps modify Miranda around the edges. Here is one possible compromise, with something for both liberals and conservatives: First, the court could emphasize that although Miranda did not require it, videotaping of police interrogations should be encouraged. Police failure to videotape should be a strong factor suggesting that a confession may have been coerced. This new emphasis on videotaping might reassure civil libertarians, who worry that if Miranda goes, it will be open season on suspects.

Second, the court might modify the precise mix of the suspect’s incentives to cooperate. Currently, a suspect is free to clam up and pays virtually no legal price for doing so. Friends of law enforcement have long criticized this feature of Miranda.

A different warning might go something like this: “You have the right to remain silent. But if you now choose to stay silent, any alibi or other defense that you later try to offer to a court may be viewed with greater suspicion. Anything you say can be used against you in court, but your silence in the face of police

interrogation can also be used against you. If you are innocent, you might be better off cooperating now."

This new warning, closer to modern British practice, may be a little tricky for suspects to understand, at least at first. But after a while, its meaning should become clear: It wouldn't take more than a few new episodes of our favorite TV crime show for us all to learn Miranda's latest stanza.

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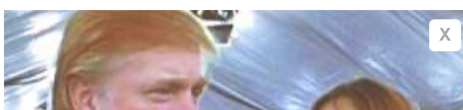

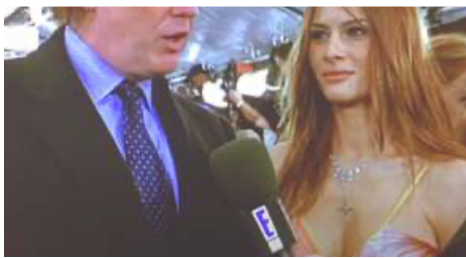

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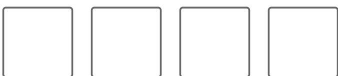

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