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Miranda 2.0

Tonja Jacobi[*]

Fifty years after Miranda v. Arizona, *significant numbers of innocent suspects are falsely confessing to crimes while subject to police custodial interrogation. Critics on the left and right have proposed reforms to* Miranda, *but few such proposals are appropriately targeted to the problem of false confessions. Using rigorous psychological evidence of the causes of false confessions, this Article analyzes the range of proposals and develops a realistic set of reforms — Miranda 2.0 — which is directed specifically at this foundational challenge to the justice system. Miranda 2.0 is long overdue; it should require: warning suspects how long they can be interrogated for; delivering the warnings via a non-police intermediary, preferably a pre-approved audio-visual recording; recording all interrogations; varying the strength of the warnings according to characteristics that make suspects differently susceptible; and reforming and simplifying the rules of waiver. This Article establishes why each of these proposals most effectively combats the problem of false confessions and how each can be realistically implemented, without overly burdening police efficiency and efficacy.*

[*] Copyright © 2016 Tonja Jacobi. Professor of Law, Northwestern University School of Law. t-jacobi@law.northwestern.edu. Many thanks to Matthew Gordon for his excellent research assistance, to Matthew Sag for his invaluable help, to Steven Drizin and Song Richardson for salient suggestions, and to the audience at Northwestern Pritzker's faculty scholarship day, August 2014, for helpful feedback.

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INTRODUCTION

In 1966, *Miranda v. Arizona* announced a new era of constitutional arrest procedures designed to safeguard individual rights and restrain police coercion,[1] but *Miranda*'s 50th anniversary coincides with an alarming number of DNA exonerations, overturning convictions that often involve false confessions.[2] *Miranda* is an unusual decision: it goes against the Court's general reluctance to prescribe police procedure (in contrast to imposing negative restrictions as limits on police conduct), because such restrictions on policing are considered burdensome.[3] In *Miranda*, the Court considered those costs worth bearing to prevent the coercion inherent in custodial interrogation. Warning suspects of their rights was, as the Supreme Court asserted, a reliable mechanism of overcoming that coercion.[4] Yet now even those who once embraced *Miranda* have come to recognize its limited effectiveness, high costs, and possible displacement of more effective mechanisms of protection.[5] The scourge of false confessions

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1 Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

2 *See infra* Part I.A.

3 *See, e.g.*, Fernandez v. California, 134 S. Ct. 1126, 1137 (2014) (recognizing the burden that the warrant procedure imposes on the officers who wish to search); Oliver v. United States, 466 U.S. 170, 181 (1984) (rejecting a case-by-case approach as inadequately providing "a workable accommodation between the needs of law enforcement" and privacy interests); Steagald v. United States, 451 U.S. 204, 222 (1981) (considering the impediment to law-enforcement investigations in determining whether the warrant requirement applies); Tonja Jacobi & Jonah Kind, *Criminal Innovation and the Warrant Requirement: Reconsidering the Rights-Police Efficiency Trade-off*, 56 WM. & MARY L. REV. 759, 784 (2015) (describing the "Police Efficiency Assumption" common in the case law and its effect of discouraging investigations being categorized as searches).

4 *Miranda*, 384 U.S. at 461 ("An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak."). For a critique of this claim, see Dickerson v. United States, 530 U.S. 428, 448 (2000) (Scalia, J., dissenting) ("*Miranda* was objectionable for innumerable reasons, not least the fact that cases spanning more than 70 years had rejected its core premise that, absent the warnings and an effective waiver . . . a statement obtained pursuant to custodial interrogation was necessarily the product of compulsion.").

5 *See, e.g.*, Steven B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 566-67 (2007) (stating that *Miranda* "serves mainly to distract lawyers, scholars and judges from considering the real problem of interrogation, which is how to convict the guilty while protecting the innocent"); Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 310 (2003) (arguing that *Miranda* had an "immunizing effect" on deceptive interrogation methods); Charles D.

undermines the judicial system's claim to fairness and requires a complete rethinking of the *Miranda* enterprise. The question, then, is what form should Miranda 2.0 take?

For those who wish to assess how to reform or replace *Miranda*, the problem is not lack of options. *Miranda* has been criticized from all directions — with a commensurate variety of reform proposals — both for being too expansive of defendants' rights at the expense of police operations,[6] and as too weak in its substantive protection for suspects.[7] The post-*Miranda* jurisprudence has also been critiqued for weakening the protection provided to suspects,[8] and for disengaging *Miranda* from its intellectual moorings, by crafting exceptions, loopholes, and ambiguities, which undermine *Miranda*'s central benefit — its simplicity.[9] Thus *Miranda* could be jettisoned entirely or its extensive secondary jurisprudence could be reconsidered.[10]

There is an ideological divide inherent in these reform options. As such, assessing potential *Miranda* reforms requires: first, recognizing

Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1521, 1524 (2008) ("I have reluctantly come to agree with a number of *Miranda*'s long-standing critics," and concluding that "as a protective device, *Miranda* is largely dead.").

[6] *See, e.g.*, Ronald J. Allen, *The Gravitational Pull of* Miranda*'s Blackhole: The Curious Case of* J.D.B. v. North Carolina, 46 TEX. TECH L. REV. 143, 147 & n.17 (2013) (critiquing "the endless stream of *Miranda* cases that make it one of the most complex areas of constitutional criminal procedure."); George Edwards et al., *Interrogation of Criminal Defendants — Some Views on* Miranda v. Arizona, 35 FORDHAM L. REV. 169, 255 (1966) (stating that *Miranda* "levied an additional tax on police practices.").

[7] *See, e.g.*, Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 WM. & MARY BILL RTS. J. 773, 775 (2009) ("*Miranda*'s promise that suspects freely determine whether and when they wish to submit to custodial interrogation is an empty one."); Aurora Maoz, Note, *Empty Promises:* Miranda *Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309 (2012) (discussing *Miranda*'s weakness in not addressing the rights of suspects not in custody).

[8] For example, see Weisselberg, *supra* note 5, at 1524 ("[L]ittle is left of *Miranda*'s vaunted safeguards and what is left is not worth retaining.").

[9] *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 285 (2011) (Alito, J., dissenting) ("[W]ith [*Miranda's*] rigidity comes increased clarity. *Miranda* provides a 'workable rule to guide police officers . . . .'" (quoting New York v. Quarles, 467 U.S. 649, 658 (1984))); Joshua I. Hammack, *Turning* Miranda *Right Side Up: Post-Waiver Invocations and the Need to Update the* Miranda *Warnings*, 87 NOTRE DAME L. REV. 421, 421 (2011) ("[T]he right to remain silent has been frequently litigated, creating a body of law that is difficult to understand, often unfair to criminal suspects seeking to invoke the right, and largely contrary to the *Miranda* Court's intention.").

[10] In the first forty years after *Miranda*, there were seventy-two Supreme Court cases addressing complexities of "*Miranda.*" *See* James. L. Buchwalter, Annotation, *Construction and Application of Constitutional Rule of* Miranda *— Supreme Court Cases*, 17 A.L.R. Fed. 2d 465, tbl. of cases (2007).

that neither side is likely to get its full wish list of reforms — an overtly pro-defendant or pro-prosecution Miranda 2.0 is unlikely to attract enough support to make any change feasible; and second, assessing the entire enterprise of *Miranda* reform in light of the most obvious failing of the criminal justice system in relation to interrogations and confessions — false confessions.[11]

In 1966, the *Miranda* Court recognized that ritualized strong-arming by police was waning,[12] but the Court was concerned that this practice had been replaced with the psychological coercion of isolation.[13] That concern led the Court to conclude that all custodial interrogation is inherently coercive, and to exclude confessions obtained without adequate warning while the suspect was subject to custodial interrogation.[14] Two things have changed since then. First, the *Miranda* Court gave little credence to the importance and value of confessions,[15] whereas the Roberts Court is much less dismissive of the value, to police and society-at-large, of the truth-telling function and closure value provided by confessions.[16] Consequently, any *Miranda* reform is likely to give more weight to investigative efficiency. Second, in light of numerous highly publicized criminal exonerations, the most pressing problem for the current judiciary in relation to criminal investigations is not mitigating the coercive

[11] Arguably, the greatest problem in the criminal justice system more generally may arise in the prosecution phase, rather than in any aspect of the investigative process. For instance, the plea bargain process, which brings to bear the inherent coercion of the prosecutorial system, may lead to greater injustice. But false confessions comprise the biggest problem in the investigatory stage of criminal procedure.

[12] Miranda v. Arizona, 384 U.S. 436, 446-47 (1966) (describing its own examples of physical coercion as "undoubtedly the exception now").

[13] *Id.* at 448 ("[T]he modern practice of in-custody interrogation is psychologically rather than physically oriented.").

[14] *Id.* at 467 ("In order to combat these pressures . . . the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.").

[15] The only recognition that the majority gave of the value of confessions was to acknowledge that "[c]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Id.* at 478. As Justice Harlan critiqued in dissent: "[T]he thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all." *Id.* at 505 (Harlan, J., dissenting).

[16] *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 426 (1986) ("Admissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." (citing United States v. Washington, 431 U.S. 181, 186 (1977))). For more detail, see *infra* Part I.A.

atmosphere of the police station in interrogations generally,[17] but mitigating police-induced *false* confessions in particular.

Fortunately, the two steps necessary when weighing options to reform *Miranda* — fitting within the political-legal reality of likely Supreme Court response, and most effectively addressing the central concern of preventing false confessions — largely point in the same direction. The best way to realistically prevent false confessions is not to limit all interrogations, but rather to target the circumstances most likely to lead to false confessions. Thus this Article proposes that each element of the *Miranda* jurisprudence should be assessed in terms of whether it promotes guilt-differentiation.[18] By assessing proposed reforms in terms of differentiating their effect in eliciting confessions from innocent versus guilty suspects, we can craft an entire schema directed specifically at preventing false confessions.

For instance, psychological research has shown that mentally disabled individuals and younger individuals are more likely to comply with requests for a confession in order "to obtain the presumed short-term reward (e.g., release to go home)."[19] Many states have attempted to combat this problem by requiring a parent or interested adult's presence when the less able suspect is interrogated.[20] However, "[s]tudies have shown . . . that the presence of parents at *Miranda* waiver events typically does not result in any advice at all or, when it does, provides *added* pressure for the youth to waive rights and make a statement."[21] Furthermore, these effects occur regardless

[17] *See, e.g.*, Flint Taylor, *Jon Burge, Torturer of Over 100 Black Men, Is Out of Prison After Less than Four Years,* IN THESE TIMES (Oct. 2, 2014), http://inthesetimes.com/article/17213/jon_burge_torture_chicago_has_not_paid_for_his_crimes (describing the torturing of over one hundred African-American men in Chicago from 1972 to 1991).

[18] On this approach more generally, see Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585 (2011).

[19] Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 9 (2010); *see* Thomas Grisso & Melissa Ring, *Parents' Attitudes Toward Juveniles' Rights in Interrogation*, 6 CRIM. JUST. & BEHAV. 211, 214 (1979) (describing one study that found 90% compliance with request for information by juveniles).

[20] *See* Grisso & Ring, *supra* note 19, at 212-13.

[21] Kassin et al., *supra* note 19, at 9 (emphasis added); *accord* THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 156 (2d ed. 2003) (describing how few parents explain *Miranda* warnings to their children and most "encourage their children to cooperate with police officers in interrogation circumstances"); Grisso & Ring, *supra* note 19, at 213-14 (discussing how 60% of parents in one study encouraged waiver, while only 14% of parents discouraged waiver).

of whether the confession is true or false.[22] Thus, a focus on avoiding false confessions would advocate against such a policy choice. By differentiating between procedures most likely to encourage or discourage false confessions, through analyzing the available psychological evidence, the entire *Miranda* jurisprudence can be reassessed.

This approach runs counter to the intuition of the original *Miranda* Court, which was unwilling to consider the relevance of innocence versus guilt.[23] *Miranda* focuses on form over substance, assuming that warnings should be provided to everyone, even the hardened recidivist, with no consideration of actual coercion and individual experience.[24] But this insistence of form over substance means that once *Miranda* has been complied with, there is no option to lift the veil to examine its effectiveness.[25] Once the form has been satisfied, the Court looks no further — thus *Miranda*'s effect varies in function, instead of form.

The 50th anniversary of *Miranda*'s landmark ruling presents an opportunity to consider how to craft more sensible doctrine, appropriate to the greatest contemporary challenge faced by the criminal justice system: avoiding false confessions. With this criterion in hand, this Article catalogs and assesses the main branches of reform of *Miranda* that have been considered over the last fifty years. Part I lays the foundation by describing: the problem — the reasons for the need for change; the potential costs — how the need for change must be balanced against the needs of policing; and the appropriate authority — when it is appropriate for courts, legislatures or administrators to initiate reform. Part II presents the first major category of proposed reforms: rules attempting to promote a more genuine understanding of suspects' rights. This includes changing the content of the warnings to make them more informative and standardizing the procedure of giving the warnings. This category of change works within the basic framework of *Miranda*, rather than aiming at its replacement. Part III analyzes the second major category:

[22] *See* Kassin et al., *supra* note 19, at 9.

[23] *See* Miranda v. Arizona, 384 U.S. 436, 468-69 (1966).

[24] *See id.*; *infra* Parts I.B, IV.A.

[25] The Court's attempts to address the substance of coercion have been ad hoc, without a clear-sighted analysis of crafting doctrine within a structured framework of preventing false confessions. *See* OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, REPORT NO. 1 TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 97 (Feb. 12, 1986) ("The current Court has repudiated the premises on which *Miranda* was based, but has drawn back from recognizing the full implications of its decisions.").

rules designed to better deter police coercion. These include establishing a per se rule of exclusion, requiring that an attorney be present at all interrogations, and requiring greater transparency in police procedures. This category of change attempts to better achieve *Miranda*'s underlying goal, but many such proposals are quite unrealistic, imposing considerable costs on policing. Part IV provides the final major category: rules that change the substance of *Miranda* to better reflect its overarching aims. These include making *Miranda* variable, prohibiting police deception, and reconsidering the jurisprudence of waiver. This category is the most challenging to the foundation of *Miranda* and its progeny, questioning the very logic underlying *Miranda*.

Throughout this Article, the merits and realism of these proposals are considered, drawing on the established psychological evidence of what encourages and discourages false confessions, and how best to shape doctrine so as to prevent this scourge. Using the findings of the psychological literature, and applying this one clear criteria, this Article recommends that Miranda 2.0 should consist of: warning suspects how long they can be interrogated for; delivering the warnings via a non-police intermediary, preferably a pre-approved audio-visual recording; recording all interrogations; varying the strength of warnings according to characteristics that make suspects differently susceptible; and reforming and simplifying the rules of waiver. The advantages and disadvantages of numerous other proposals are also considered, including: other additional warnings; a per se rule of exclusion; mandated provision of counsel at the stationhouse; and prohibiting police deception. Each of these is shown to be problematic, either doctrinally or pragmatically, both in terms of police efficiency and potentially misleading innocent suspects.

Numerous analyses of the specific flaws of *Miranda* exist. However, the problem of false confessions is polycentric — it has multiple causes, and each reform proposal has myriad costs and benefits, which can vary according to the institution imposing the reform. Consequently, in contrast to prior work, this Article provides a thorough re-conception of the intellectual space of *Miranda*. It synthesizes the important elements of what has come before, but also provides a new focus, reconsidering the entire jurisprudence in light of rigorous psychological evidence of how suspects actually respond to police interrogation.

I. THE NEED FOR REVAMPING *MIRANDA*

The Fifth Amendment is meant to protect people from having to choose between the "cruel trilemma of accusation, perjury, or contempt."[26] The *Miranda* rule attempts to do that by strengthening the will of the suspect through the provision of warnings of those dangers.[27] The high number of false confessions suggests that *Miranda* is inadequate to this task, but the question is whether this problem arises because *Miranda* goes too far, or not far enough.

A. *The Problem — the Need for Change*

Traditionally, confessions were seen as the best evidence in criminal trials,[28] and have been shown to be the most persuasive on decision-makers.[29] But modern DNA evidence has exonerated alarming numbers of people we now know to be innocent that nonetheless confessed.[30] Of wrongful convictions cases tracked by the Innocence Project, approximately 28% involved false confessions or self-incriminating statements.[31] Two-hundred and twenty-nine of the 1,839 exoneration cases collected on the National Registry of Exonerations list false confessions as a contributing factor,[32] more than informants, though less than mistaken identifications.[33] As Rob Warden, Executive Director of the Center on Wrongful Convictions,

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[26] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).

[27] Namely that prior to questioning, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

[28] Pennsylvania v. Dillon, 4 U.S. (4 Dall.) 116, 118 (Pa. 1792) ("If such declarations are *voluntarily* made, all the world will agree, that they furnish the strongest evidence, of imputed guilt."); *see* John Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 14 (1978) ("[C]onfession is the queen of proof.").

[29] RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 248 (2009) ("Confessions are the most incriminating and persuasive evidence of guilt . . . because most people assume that a confession — especially a detailed one — is, by its very nature, true.").

[30] The first DNA exonerations occurred in 1989; exonerations have taken place in thirty-seven states, with the average length of time served being fourteen years. *DNA Exonerations in the United States,* INNOCENCE PROJECT, http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited July 12, 2016).

[31] *Id.*

[32] *The National Registry of Exonerations*, U. MICH. L. SCH., http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited July 12, 2016).

[33] *See* Laura H. Nirider et al., *Combating Contamination in Confession Cases*, 79 U. CHI. L. REV. 837, 839 n.4 (2012).

noted: "While confessions by torture receive widespread publicity, . . . they are the exception. 'Most people are shocked at the number of confessions that are psychologically coerced'" by police.[34] One study estimated that of the then 340 exonerations between 1989 and 2003, "[a]s a group, they had spent more than 3400 years in prison for crimes for which they should never have been convicted."[35]

These numbers, however, "are just the tip of the iceberg."[36] Editor and cofounder of the Registry, Prof. Samuel Gross, describes the greater problem: "the exonerations listed in the registry represent just a fraction of the real number because most go unreported and do not garner media attention."[37] It is impossible to know how many wrongful convictions stem from false confessions because we do not know either the denominator or the numerator in the universe of actual cases. The vast majority of exonerations resulting from DNA evidence — more than 72%, according to one study — reverse convictions for sexual assault of some kind,[38] as this is one area where DNA is usually available.[39] Those wrongfully convicted of other crimes have little prospect of being exonerated by DNA, yet there is no reason to think that false confessions are confined to DNA cases. Thus, the true number of wrongful convictions based on false confessions is likely much higher than the current rate of exoneration suggests.

The central problem with *Miranda* is that it was not crafted specifically to prevent false confessions, but rather to regulate interrogations more generally. If anything, *Miranda* probably favors the guilty and handicaps the innocent. Psychological studies suggest that innocent individuals are actually more vulnerable to police interrogation techniques, regardless of having been warned of their *Miranda* rights, because "innocent suspects simply trust the criminal justice system."[40] 81% of innocent individuals in one study waived

[34] Kevin Davis, *The Age of Innocents: Prisoner Exonerations Are at an All-Time High. But for Many, No Crime Was Ever Committed*, A.B.A. J., Sept. 2014, at 60 (quoting Warden).

[35] Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005). Of those exonerated using DNA evidence, the process of their exoneration took approximately fifteen years on average. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 11 (2011).

[36] Nirider et al., *supra* note 33, at 843.

[37] Davis, *supra* note 34, at 57.

[38] Gross et al., *supra* note 35, at 529.

[39] Even in such cases, oftentimes DNA evidence is lost or degraded. Nirider et al., *supra* note 33, at 843.

[40] *See, e.g.*, Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their*

their *Miranda* rights, while only 36% of guilty individuals did so.[41] Prof. Richard Leo describes the problem:

> Some people think that the *Miranda* rights are this great protection in the criminal justice system. But the *Miranda* rights really don't protect innocent people, because when innocent people are interrogated, their instinct is to cooperate with the police. 'I didn't do the crime; I have nothing to hide; why would I ask for an attorney or not cooperate with the police?' And so what we see is almost everybody waives their *Miranda* rights, agrees to participate in the interrogation, especially innocent people. All the innocent people who have been exonerated by DNA who confessed falsely, they all waived their *Miranda* rights."[42]

Scholars have identified three different kinds of false confessions: (1) "voluntary" false confessions; (2) "compliant" false confessions; and (3) "internalized" or "persuaded" false confessions.[43] Voluntary false confessions arise without pushing or prodding from police, sometimes out of a "pathological need for attention or self-punishment, feelings of guilt or delusions, the perception of tangible gain, or the desire to protect someone else."[44] Compliant false confessions occur when "the suspect acquiesces in order to escape from a stressful situation, avoid punishment, or gain a promise or implied reward."[45] Internalized false confessions involve "innocent but vulnerable suspects, exposed to highly suggestive interrogation tactics, [who] not only confess but come to believe they committed the crime

Miranda *Rights: The Power of Innocence*, 28 LAW & HUM. BEHAV. 211 (2004) (conducting an experiment in which participants were assigned to either an innocent or guilty condition, and most subjects of the innocent category waived their rights). For a critical exploration of this claim, see *infra* Part IV.C.

[41] Kassin & Norwick, *supra* note 40, at 215; *see also* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions — and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 498 (1998) [hereinafter *Protecting the Innocent*] ("The innocent[s] are at risk not only when police extract untruthful confessions — the false confession problem — but also when police fail to obtain truthful confessions from criminals — the lost confession problem."). This argument is discussed in more detail *infra* Part IV.C.

[42] *Interview: Richard Leo*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/the-confessions/interviews/richard-leo.html#5 (last visited Aug. 27, 2016).

[43] Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 249, 249 (2008).

[44] *Id.*

[45] *Id.*

in question."[46] *Miranda* not only does not differentiate between these different kinds of false confessions, but it does not differentiate between confessions that are likely to be true or false. Indeed, the *Miranda* Court was explicitly unconcerned with differentiating between confessions of the guilty and the innocent; rather, it was concerned more generally with whether a suspect's will was overborne, regardless of the suspect's actual guilt.[47] For instance, *Miranda* treated the well-worn good cop/bad cop technique as equivalent to the far more problematic practice of 'reverse lineups,' where false or coached witnesses identify the suspect for the purposes of mounting pressure on the suspect, rather than providing actual identification.[48] But persuasion and trickery are quite different in terms of their propensity to elicit false confessions.

Miranda was highly unusual in that it laid out such a detailed solution to the problem of the inherent coercion of custodial interrogation. But whereas it went to great lengths to empirically establish the problem it was concerned with, it provided no empirical evidence whatsoever of the likely efficacy of its solution — the list of warnings and the circumstances and manner in which they must be delivered.[49] The *Miranda* Court made two key empirical assumptions about the nature of coercion and the effect of warnings. As Prof. Charles Weisselberg observes, the Court assumed that "the element of 'custody' would distinguish interrogations that contain compelling pressures from those that do not," and it assumed that "if read a standard set of warnings, suspects would comprehend their rights and be capable of making a reasoned choice whether to speak or remain silent."[50] Many have argued that, in terms of overcoming the coercive

[46] *Id.*

[47] Although acknowledging the argument that "admonishment of the right to remain silent without more 'will benefit only the recidivist and the professional,'" *see* Miranda v. Arizona, 384 U.S. 436, 470 (1966) (quoting Brief for National District Attorneys Association as Amicus Curiae at 14, *Miranda*, 384 U.S. 436 (Nos. 759-761, 584)). The majority applied its requirements to all suspects, regardless of their experience with the law, saying: "No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead." *Id.* at 471-72.

[48] *Id.* at 452-53. The majority opinion simply lists these two, and other, techniques without differentiating between their relative harms. *See id.* at 449-56.

[49] *Id.* at 501 (Clark, J., dissenting) (describing the "almost total lack of empirical knowledge on the practical operation of requirements truly comparable to those announced by the majority").

[50] Weisselberg, *supra* note 5, at 1527-28.

pressures of custodial interrogation, the remedy the Court fashioned to counteract those pressures is "almost totally ineffective."[51]

One of the main reasons that the *Miranda* Court may have overestimated the effect of warnings was that it falsely equated informing individuals of their rights with an actual understanding of the full weight of those rights. The question of true knowledge is explored further, *infra* Part II.A. The other reason that *Miranda* has been ineffective in preventing false confessions is that the Court failed to anticipate the effect of its solution on the other parties to the interaction: the police. The Court assumed that "officers would give warnings and obtain waivers before employing the tactics described in the interrogation manuals . . . [and that] officers would not begin questioning unless suspects clearly and affirmatively waived their rights, and questioning would cease if suspects who initially waived their rights later indicated that they wished to invoke them."[52] However, instead of preventing coercion, experts have argued that the process has become simply differently coercive:

> In order to minimize the potential silencing effect of the warning requirement, police now routinely employ manipulative interrogation methods specifically designed to keep a suspect talking . . . . While the new methods may produce confessions in a more humane manner than the crude techniques used in the past, they share an unfortunate characteristic with the older and harsher forms of coercion — under the right circumstances, the new techniques can elicit a false confession from an innocent suspect.[53]

Ironically, the final party the Warren Court failed to anticipate a response from was the courts. Prof. Steven Duke has argued that not only is *Miranda* virtually useless, but it "replaced a vibrant and developing voluntariness inquiry that took into account the vulnerabilities of the particular suspect as well as the inducement and conditions of the interrogation."[54] Thus, according to Duke, and others,[55] "[a]s far as the Supreme Court is concerned, [the] protection

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[51] *See, e.g.*, Duke, *supra* note 5, at 564.

[52] Weisselberg, *supra* note 5, at 1527-28.

[53] Matthew Iverson, *Where the Right to Silence Went Wrong*, 86 MASS. L. REV. 105, 105-06 (2002).

[54] Duke, *supra* note 5, at 564.

[55] OFFICE OF LEGAL POLICY, *supra* note 25, at i ("Beyond their costs to the truth-finding process, the *Miranda* rules can also validly be criticized as inept and ineffective means of promoting fair treatment of suspects. Their imposition by judicial fiat has

of the innocent has vanished from the law of confessions."[56] On this view, not only has *Miranda* allowed the police to disregard actual voluntariness, it has enabled the courts to be equally unconcerned with actual innocence.

Miranda rested heavily on an analysis of how police interrogation manuals trained officers to extract information from subjects while keeping them ignorant of their rights, using the psychological advantages of isolation and ignorance.[57] *Miranda* aimed to short-circuit that psychological effect.[58] However, Parts II, III, and IV of this Article show that the solution it mandated is at odds with extensive evidence showing how people actually respond to coercion and warnings. Thus although *Miranda* aimed to relieve suspects of coercion, it actually did little to reduce the likelihood of false confessions.

B. Limitations — the Need to Avoid Burdening Police Investigations

Any realistic Miranda 2.0 reform agenda must mitigate false confessions without unduly burdening police investigations to have a chance of being accepted by the Court. It is unclear whether *Miranda* significantly burdens police investigations, but it is clear that the Court is unlikely to tolerate any significant increases in restrictions on police.

In its immediate aftermath, *Miranda* was expected by many to constitute a significant constraint on police and prosecutors.[59] Most law enforcement officers viewed *Miranda* as a major barrier against crime solution.[60] In 1967, four major figures in the criminal justice system all stated in one interview that *Miranda* had adversely impacted the investigative and prosecutorial process. The Superintendent of

effectively precluded the development of superior alternative procedures.").

[56] Duke, *supra* note 5, at 564.

[57] Miranda v. Arizona, 384 U.S. 436, 448-54 (1966) (describing various practices used and endorsed in numerous police manuals).

[58] *Id.* at 456 ("In the cases before us today, given this background [of practices described in the manuals], we concern ourselves primarily with this interrogation atmosphere and the evils it can bring.").

[59] *See, e.g.*, Courtney Arthur, *Questioning by the Police Since* Miranda, 4 WILLAMETTE L. REV. 105, 147 (1966–1967) ("There can be no question but that *Miranda* will reduce police effectiveness in securing convictions at least to some degree.").

[60] Otis H. Stephens, Jr., *Police Interrogation and the Supreme Court: An Inquiry into the Limits of Judicial Policy-Making*, 17 J. PUB. L. 241, 254 (1968) (describing *Miranda* as "one more in a long line of unjustified judicial restrictions on effective police work.").

Chicago Police claimed that it "severely limits the use of questioning."[61] The Executive Director of the International Association of Police Chiefs concurred, describing *Miranda* as having "denied a vital tool of law enforcement — interrogation of suspects."[62] Even the President of the American College of Trial Lawyers, while disputing that *Miranda* and other similar rulings had "crippled" police effectiveness, was quoted as saying "I do believe that with respect to certain crimes, difficult obstacles have been placed in the way of police officers investigating crime."[63] Some went so far as to describe these restrictions "as a basic threat to the police officer's occupational raison d'être."[64]

Some scholarship supported these claims. One study described how data on rates of confessions following *Miranda* were "lower than confession rates in the years before, implying that *Miranda* has in fact impeded law enforcement."[65] Similarly, crime clearance rates diminished after *Miranda*, leading one study's authors to conclude that "*Miranda* has seriously impeded police effectiveness in ways that could be avoided through reasonable changes in the *Miranda* rules."[66] However, hard research on this topic is sparse,[67] and strewn with measurement difficulties, as Prof. John Donahue's detailed study of the impact of *Miranda* on police clearance rates before and after 1966 showed.[68] Donahue found no significant effect of *Miranda* on

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[61] *Are We Crippling Our Cops?*, DES MOINES REG., Jan 29, 1967, at 84 (quoting Orlando Wilson).

[62] *Id.* (quoting Quinn Tamm).

[63] *Id.* (quoting Frank G. Raichle).

[64] Neal A. Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW & CONTEMP. PROBS. 467, 470-71 (1971). *See also* Edwards et al., *supra* note 6, at 186 (arguing that *Miranda* "will have a real effect on law enforcement. In some cases it will make identification and conviction more difficult.").

[65] Paul G. Cassell & Richard Fowles, *Handcuffing the Cops?: A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1066 (1998). However, the authors did qualify this assessment, admitting "[o]nly a national, long-term assessment of *Miranda*'s effects will respond to concerns and shed light on the impact of *Miranda* on police effectiveness." *Id.*; *see also* Paul Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299, 303 (1996) ("Following *Miranda*, some number of criminals escaped prosecution because police were unable to obtain confessions under the restrictive warning-and-waiver regime.").

[66] Cassell & Fowles, *supra* note 65, at 1147.

[67] *Id.* at 1060 (describing the body of empirical assessment of *Miranda*'s effects as an "empirical desert").

[68] John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1166-67 (1998).

clearance rates; however, he acknowledged that "[i]f *Miranda* significantly stops the flow of damaging statements by criminals to the police, it could well reduce the rate of successful prosecutions of crime even if it has no impact on measured clearance rates."[69] Ultimately, Donahue concluded that a statistical measure of *Miranda*'s effects is all but impossible, particularly given all of the other major changes to the criminal justice system occurring at the same time.[70]

A similar problem arises when attempting to assess *Miranda*'s effects on police behavior. Although many, even some *Miranda* critics, argue that as a result of *Miranda* "police practices in interrogation of criminal suspects have markedly improved,"[71] others question this. For instance, Prof. Christopher Slobogin argued that while *Miranda* is credited with decreasing physical abuse in interrogations, this result springs from closer public scrutiny, more professionalism in the police force, the rise in lawsuits against police for physical abuse during interrogations, and only to a lesser degree, *Miranda*'s prohibition of physical force in interrogations.[72]

Nowadays, the police are used to *Miranda* and no longer consider it a major hurdle to their investigative techniques. An in-depth ABA study, based on interviews with law enforcement and prosecutors, found that *Miranda* and other like constitutional restrictions "do not significantly handicap police and prosecutors in their efforts to arrest, prosecute, and obtain convictions of criminal defendants for most serious crimes."[73] The study found that participants were more concerned with the lack of resources in the public system than any constraint posed by *Miranda*. Yet that does not mean that police and prosecutors would not strenuously object to any increased requirements being placed on them by Miranda 2.0. *Miranda* is no longer objectionable to many in the law enforcement community because of its minimalist and rote nature, and because it has become entrenched and standardized.[74] Any change to make *Miranda* more

[69] *Id.* at 1156.

[70] *Id.* at 1172.

[71] Edwards et al., *supra* note 6, at 186.

[72] Slobogin, *supra* note 5, at 311.

[73] A.B.A. Special Comm. on Criminal Justice in a Free Soc'y, *Criminal Justice in Crisis*, SCHAFFER LIBR. DRUG POL'Y (Nov. 1988), http://druglibrary.org/special/king/cjic.htm (describing the agreement in the law enforcement community that *Miranda* is not a major cause of failure to convict, which instead arises primarily out lack of resources).

[74] The Supreme Court recognized this when it refused to overrule *Miranda* in *Dickerson v. United States*, 530 U.S. 428, 443 (2000), stating that "*Miranda* has become embedded in routine police practice to the point where the warnings have become

substantial is likely to be extremely controversial among the law enforcement community and its advocates.

Now the push for change to *Miranda* largely comes not from the prosecution-focused right, but from the defendant-focused left, for insufficient prevention of coercion and false confessions.[75] This occurs in large part because *Miranda* embraces form over substance: once the police have given *Miranda* warnings, courts do not look to whether there was really an exercise of free will, unless actual coercion was used. Ironically, this has allowed the police to use the very interrogation methods that the *Miranda* Court critiqued. Professors Drizin and Leo describe the standard techniques used by police: "Police interrogation involves the use of numerous psychological techniques, primary among them isolation, accusation, attacks on the suspect's alibi, cutting off of denials, confrontation with true or false incriminating evidence, the use of 'themes' . . . and inducements."[76] The *Miranda* Court railed against these techniques,[77] yet permitted them as long as warnings are first given.[78] Thus, on its own terms, *Miranda* offers little substantial protection to suspects.

Yet major expansion of *Miranda* would have to overcome skepticism from the Supreme Court. As detailed below, in the post-*Miranda* era, the Court has placed significant restraints on the substantive effect of the warnings, by crafting numerous exceptions, mechanisms of avoidance, and limits on *Miranda*'s reach, while providing very few expansions of *Miranda*'s protection. Although it has expanded some constitutional criminal procedure protections in recent years, those developments have largely been focused in two areas quite distinct from interrogations: trial protections, particularly expanding the right of suspects in the confrontation of witnesses,[79] and protections against

part of our national culture."

[75] *See, e.g.*, Benjamin D. Cunningham, Comment, *A Deep Breath Before the Plunge: Undoing* Miranda*'s Failure Before It's Too Late*, 55 MERCER L. REV. 1375, 1408 (2004) (explaining that *Miranda* provides "the illusion of protecting individual liberty").

[76] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 911-12 (2004); *see also* Saul M. Kassin, *On the Psychology of Confessions:* Does *Innocence* Put *Innocents* at Risk, 60 AM. PSYCHOLOGIST 215, 219 (2005) [hereinafter *On the Psychology of Confessions*] (describing extended interrogation techniques as a guilt-presumptive process).

[77] Miranda v. Arizona, 384 U.S. 436, 457 (1966).

[78] *Id.* at 478-79.

[79] *See* Giles v. California, 554 U.S. 353, 364 (2008) (Scalia, J., plurality opinion) ("[J]udges may [not] strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged."); Crawford v. Washington, 541 U.S. 36, 42 (2004) (describing the right of confrontation as a "bedrock procedural guarantee" that requires reform of the

searches and seizures that impact upon the home.[80] In contrast, most of the post-*Miranda* jurisprudence has involved the Court cutting back on the protections owed to suspects,[81] including by: creating a public emergency exception;[82] allowing fruits of *Miranda* violations to be used;[83] allowing a statement elicited in violation of *Miranda* to be used to impeach a defendant's credibility,[84] and in many jurisdictions, to be used against a defendant in sentencing hearings;[85] narrowing the definition of custodial interrogation;[86] allowing the continuation of questioning after an ambiguous request for a lawyer;[87] and allowing implicit waiver of *Miranda* rights.[88] Advocating for protection against false confessions simply by promoting more stringent rules on police is unlikely to be a successful path for reform.

pre-existing rule of reliability).

[80] *See* Florida v. Jardines, 133 S. Ct. 1409, 1414 (2012) (describing the home as special from other places, specifically protected by the Fourth Amendment); Kyllo v. United States, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."). The two other main expansions of protection in relation to search are both limited in nature: first, the Court held that installing a GPS tracking device constitutes a search, United States v. Jones, 132 S. Ct. 945, 949 (2012), but this development may ultimately winnow search protections, by returning the analysis to a focus on trespass, rather than reasonable expectation of privacy; second, it ruled that examining the digital contents of a cell phone cannot be undertaken without a warrant, Riley v. California, 134 S. Ct. 2473, 2493 (2014), but this protection was explicitly limited, as cell phones are sui generis.

[81] Two notable exceptions are discussed further *infra* Part IV: first, restrictions being placed on the use of two-stage interrogations, Missouri v. Seibert, 542 U.S. 600, 609 (2004), and second, of a child's age being deemed relevant to custody analysis. J.D.B. v. North Carolina, 564 U.S. 261, 270 (2011).

[82] New York v. Quarles, 467 U.S. 649, 655-56 (1984).

[83] United States v. Patane, 542 U.S. 630, 639 (2004); Oregon v. Elstad, 470 U.S. 298, 307 (1985).

[84] Kansas v. Ventris, 556 U.S. 586, 594 (2009) (refusing to make exclusion automatic to such evidence).

[85] *E.g.*, United States v. Nichols, 438 F.3d 437, 442 (4th Cir. 2006).

[86] Yarbrough v. Alvarado, 541 U.S. 652, 662-63, 667 (2004) (rejecting a subjective test based on the views of the person being questioned, including consideration of young age and low experience, and focusing instead on the expected response of the "reasonable person in the position of the individual being questioned"); Oregon v. Mathiason, 429 U.S. 492, 494 (1977) (limiting custodial arrest to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way").

[87] Davis v. United States, 512 U.S. 452, 459 (1994) (requiring that invocation must be unambiguous).

[88] North Carolina v. Butler, 441 U.S. 369, 373 (1979) (finding that express written or oral waiver is "not inevitably either necessary or sufficient to establish waiver").

This is not simply a product of knee-jerk conservatism. There are good reasons to value confessions: they are typically highly probative, valuable evidence.[89] They offer benefits to society beyond the evidentiary: saving administrative resources of a trial, promoting public safety through successfully solving crime more expeditiously and aiding prosecutions, and providing victim closure.[90] Some jurists seek to encourage reliable confessions, and so would likely resist any expansion of *Miranda* that would further disrupt the process of obtaining them — absent the problem of false confessions.[91]

Reform may nevertheless be possible. Despite the current Court's general conservatism in constitutional criminal procedure cases,[92] it has shown a willingness to expand arrestee rights in response to specific problems. For instance, upon determining that cell phones are unlike any other physical item, because they can hold a person's entire digital correspondence, telephone log, GPS information, private notes etc., the Court carved out an exception to the authority of police to automatically search any object on the person during an arrest.[93] Another example concerns searches incident to arrest. In 1981, the Court held that the immediate surroundings of an arrestee's car were liable to search on the theory that these were "generally, even if not inevitably" within the control of an arrestee.[94] However, in 2009, in

[89] Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 469 (1997) (finding that confessions are "uniquely potent").

[90] For this reason, a classic and effective interrogation technique is to appeal to the suspect to confess for the sake of the victim and others. *See generally* FRED E. INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS (5th ed., 2013). In contrast, "[g]uilty defendants' refusals to admit guilt impede their repentance, education, and reform, as well as victims' healing process." Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363 (2003).

[91] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 449-50 (2000) ("[W]hat is most remarkable about the *Miranda* decision . . . is its palpable hostility toward the act of confession per se, rather than toward what the Constitution abhors, compelled confession.").

[92] The Rehnquist and Roberts Courts have tended to embrace police priorities beyond the Miranda context, from ruling that the exclusionary rule has to pay its own way, *see* Herring v. United States, 555 U.S. 135, 147-48 (2009), to permitting pretextual traffic stops, *see* Whren v. United States, 517 U.S. 806, 813 (1996), to unanimously permitting the use of deadly force against a fleeing motorist stopped for a minor traffic violation, *see* Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 (2014).

[93] *See* Riley v. California, 134 S. Ct. 2473, 2484-85 (2014) (finding that whereas categorical exemption from the warrant requirement is appropriate in the context of physical objects, a warrant is required to search digital content on cell phones).

[94] New York v. Belton, 453 U.S. 454, 460 (1981).

light of evidence that police routinely handcuff arrestees and put them in the back of the squad car before a search, the Court reversed its prior presumption.[95] Thus, when circumstances change significantly, the Court may reconsider restricting police practices. False confessions may constitute such a significant change.

This Article shows how reforms of *Miranda* can specifically target the problem of false confessions and provide greater protection without necessarily adding to the overall cost of police investigations. *Miranda* reform need not involve only expanding suspect protection, but could permit the police more leeway in circumstances associated with reliable confessions. Current restrictions on police procedure could be lightened where they are less effective in preventing false confessions, for example, where the suspect is clearly aware of his[96] rights.

C. Change by Whom — Legislatures, Courts, and Administrators

Contemplating any reform of *Miranda* raises the question: "change by whom?" Although there is some scope for legislative reform,[97] the Supreme Court's treatment of prior legislative reform attempts renders legislative options limited without concurrent judicial reform. In 1966, the Court stated that the *Miranda* warning was merely one possible remedy for the constitutional violations that it identified and that some other "fully as effective" means of assuring the arrestee of their rights to silence might suffice.[98] Additionally, later cases suggested that *Miranda* was not a constitutional requirement but a "procedural safeguard."[99] All of this indicated that *Miranda* could be

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[95] *See* Arizona v. Gant, 556 U.S. 332, 341-44 (2009).

[96] Throughout, this Article uses the male pronoun when referring to suspects, both because men are arrested significantly more often, and because this area of law has been structured around a male understanding of rights. *See* Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 CARDOZO L. REV. 2161, 2163 (2016). I use the female pronoun to refer to the police officer.

[97] Numerous suggestions have been made for legislative amendment. For instance: "A legislature might, for example, require warnings in very simple language and instruct police to give them prior to any suspect interviews or interrogations." Weisselberg, *supra* note 5, at 1597.

[98] Miranda v. Arizona, 384 U.S. 436, 490 (1966); *see also id.* at 467 ("We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.").

[99] Michigan v. Tucker, 417 U.S. 433, 444 (1974) (describing the right to counsel established in *Miranda* as a "series of recommended 'procedural safeguards'. . . [that] were not themselves rights protected by the Constitution"). This language was regularly quoted in subsequent cases. *See, e.g.*, Davis v. United States, 512 U.S. 452,

displaced by some legislative substitute.[100] Congress accepted that challenge by enacting a legislative substitute that required courts to consider:

> (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, [and] (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel.[101]

This returned the Fifth Amendment test to a focus on voluntariness, whereby *Miranda*-like warnings were significant factors, but were deemed to not be requirements. However, when the statute was challenged in *Dickerson v. United States*, the Supreme Court struck it down.[102]

Importantly, the *Dickerson* Court did not hold that the *Miranda* warning itself was constitutionally mandated.[103] Rather, the Court insisted that both voluntariness and *Miranda* analysis are required to assess post-arrest statements, and section 3501 only mandated voluntariness.[104] Since there was no legislative requirement of warnings, the Court considered that the congressional enactment did not constitute an adequate substitute for *Miranda*'s specific requirements, but rather the legislation was intended to overrule *Miranda*.[105] This framed the issue as one of congressional authority to overrule a constitutional determination by the Court,[106] and thus set the congressional solution up for failure.

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457 (1994).

[100] This position was strongly argued by the dissent in *Dickerson v. United States*, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting) ("[I]t is simply no longer possible for the Court to conclude, even if it wanted to, that a violation of *Miranda*'s rules is a violation of the Constitution.").

[101] 18 U.S.C. § 3501 (2012).

[102] *Dickerson*, 530 U.S. at 432 ("We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves."). On the limited use of this statute prior to its overruling, see generally Paul Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda (Indep. Inst., Working Paper No. 11, Dec. 1999), http://www.independent.org/pdf/working_papers/11_statute.pdf.

[103] *Dickerson*, 530 U.S. at 442.

[104] *Id.* (concluding that, even when augmented by the additional remedies that have developed since *Miranda*, section 3501 does not provide "an adequate substitute for the warnings required by *Miranda*").

[105] *See id.* at 436.

[106] *Id.* at 437 ("Because of the obvious conflict between our decision in *Miranda* and § 3501, we must address whether Congress has constitutional authority to thus

Both prior to[107] and subsequent to[108] *Dickerson*, the Court has displayed a willingness to tolerate legislative tinkering with *Miranda*, by varying the Miranda warnings, rather than substituting them altogether. This has included not only augmentation but, to some extent, minimization of *Miranda*'s requirements.[109] However, the Court made clear in *Dickerson* that any wholesale substitute for *Miranda* would have to impose some sort of equivalent in terms of protection of arrestees. As such, legislatures may be able to augment *Miranda* in minor ways, but major reforms would require a change of attitude by the Supreme Court. Consequently, reforms aimed at improving suspect comprehension could be enacted by legislatures, but reforms to deter police coercion and reforms altering the substance of *Miranda* would mostly require action by the Court.

In contrast, significant unilateral judicial reform is possible. The Supreme Court could calibrate the requirements of suspect protection more comprehensively with other goals, including police efficiency. Numerous commentators[110] and even official governmental reports[111] have urged the Court to abrogate *Miranda* and replace it with a different scheme. As the majority acknowledged in *Dickerson*, stare decisis is significantly less binding in constitutional cases than otherwise.[112] Consequently, the Court could take judicial notice of the ever-growing number of DNA exonerations as a "special justification" for changing the constitutional rule[113] and, as a response to this new set of facts, could promulgate a different form of protection to guard against involuntary and false self-incrimination.

The final possible instigators of reform are police departments themselves. As described in Parts III and IV, some police agencies are

supersede *Miranda*.").

[107] Duckworth v. Eagan, 492 U.S. 195, 202-03 (1989).

[108] Florida v. Powell, 559 U.S. 62 (2010).

[109] As explored *infra* Part II.B.

[110] *E.g.*, William T. Pizzi & Morris B. Hoffman, *Taking* Miranda*'s Pulse*, 58 VAND. L. REV. 813, 849 (2005) ("Someday, the Court will probably reach a consensus about the meaning of the words in the Self-Incrimination Clause, and that consensus will drive either a return to original notions of testimonial compulsion (and an overruling of *Miranda*) or a complete cutting of the textual bonds (and an overruling of most or all of *Miranda*'s exceptions). Until then, we can expect more false miracle cures and more premature obituaries.").

[111] *See* OFFICE OF LEGAL POLICY, *supra* note 25, at 96 (advocating that the Department of Justice "seek to persuade the Supreme Court to abrogate or overrule the decision in *Miranda v. Arizona*").

[112] *See* Dickerson v. United States, 530 U.S. 428, 443 (2000).

[113] *Id.* (discussing circumstances in which stare decisis can be set aside).

already voluntarily adopting promising Miranda 2.0 reforms, such as requiring audiovisual recordings of all interrogations. These changes suggest that it is possible to craft reforms that both protect suspects and promote police investigative needs.

II. RULES ATTEMPTING TO PROMOTE GENUINE UNDERSTANDING OF RIGHTS

In explaining why suspects need to be warned of their right to silence, the *Miranda* majority reasoned that "[t]his warning is needed in order to make [the suspect] aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege."[114] However, a common critique of the *Miranda* warning is that it inadequately describes the full range of options available to suspects, how to avail oneself of those options, and the consequences of waiving those rights. For instance, *Miranda* does not require that suspects be warned of how long they can expect to be interrogated for, and under what circumstances, or of the consequences of *not* speaking. This raises the question of whether the *Miranda* warning should be made more comprehensive, to ensure suspects' genuine understanding of their rights. Alternatively, rather than simply adding to the warning, another possibility would be altering the circumstances surrounding the giving of the warning — for instance, requiring that the warning be given by someone other than the detective interrogating the suspect.

A. A More Informative Warning

Many scholars have argued that *Miranda* warnings inadequately protect suspects by failing to inform them of their full bundle of rights.[115] This claim has been bolstered by psychology studies, which show that the public's understanding of *Miranda* rights is low. One study of the Dallas County jury pool had participants provide individual free recall of the *Miranda* warning and complete a twenty-five question true-false *Miranda* quiz. It found that 23.9% of respondents did not understand the first component of *Miranda*, the

[114] Miranda v. Arizona, 384 U.S. 463, 469 (1966).

[115] *See, e.g.*, Geoffrey S. Corn, *The Missing* Miranda *Warning: Why What You Don't Know Really Can Hurt You*, 2011 UTAH L. REV. 761, 779 ("[T]he warnings themselves are inherently defective" as the Court underestimated the effect of "fear that silence will produce an inference of guilt.").

guarantee of the right to silence.[116] Further, 34.4% thought their statements were protected if they were "off the record."[117] 61.3% of participants could not provide the language needed to request an attorney, and over two thirds of participants thought *Miranda* applied with equal force in noncustodial situations.[118] In addition, "[r]ampant misperceptions were readily apparent regarding permissible police practices."[119] But the problem with reforms aimed at improving the comprehension of the *Miranda* warning is that the complexity of more and more elaborations would weigh down the *Miranda* warning, making it so laden with careful lawyerly advice as to undermine the goal of clarifying the law to those who are ignorant of it.

1. Clarifying the Implications of Exercising the Right to Silence

Miranda famously requires informing a suspect that he has a right to silence and that anything he does say can be used against him in court. But the *Miranda* Court said nothing of the flipside: that not only does the defendant have the right to silence, but that an assertion of that right by remaining silent cannot be used against him. This means that even though a suspect may realize as a result of the warning that he cannot be compelled to talk, he may erroneously believe that the decision not to talk is much more treacherous than it in fact is. Suspects feel pressured to talk so as to appear less suspicious because silence may be perceived as an admission of guilt.[120] Critics have suggested that:

> a statement explaining when silence can and cannot be used against a suspect at trial . . . would more accurately reflect modern Supreme Court holdings, thus furthering the *Miranda* Court's goal of fully apprising the suspect of his right to

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[116] *See* Richard Rogers et al., *General Knowledge and Misknowledge of* Miranda *Rights: Are Effective* Miranda *Advisements Still Necessary?*, 19 PSYCHOL. PUB. POL'Y & L. 432, 437 (2013).

[117] *Id.*

[118] *Id.*

[119] *Id.*; *see also* Richard Rogers et al., *"Everyone Knows Their* Miranda *Rights": Implicit Assumptions and Countervailing Evidence*, 16 PSYCHOL. PUB. POL'Y & L. 300, 315 (2010) (finding "widespread misassumptions and misinformation about *Miranda* rights and waivers").

[120] *See* Corn, *supra* note 115, at 763 ("Without being informed of the constitutional prohibition against such inferential guilt, [suspects are] left to choose between asserting on the right to silence and 'looking guilty,' or attempting to explain to the accuser why the accusation is erroneous."). See *infra* Part IV.C for evidence from psychology studies to this effect.

> remain silent and ensuring his ability to use it throughout the interrogation process, without negatively affecting interrogators' ability to do their jobs.[121]

The difficulty with this is that the substance of the claim at the heart of the proposal is arguably in flux. In 2013, in *Salinas v. Texas*, the Supreme Court allowed for inferences to be drawn from silence under certain conditions.[122] In Salinas's case, prior to arrest, and thus prior to any *Miranda* warning being given, the suspect answered some questions but remained silent when asked a particularly probing question: whether shotgun casings found at the scene of the murder would match a shotgun he had access to.[123] The Court held that since Salinas was not under arrest and thus not compelled to speak, his silence on the incriminating question could be used as evidence against him.[124] Salinas could not rely on the privilege against self-incrimination without invoking it, even though he had not yet been informed of its existence.[125] Subsequently, in *People v. Tom*, the California Supreme Court extended that analysis[126] to permit the court "to admit evidence that defendant, following his arrest but before receipt of *Miranda* warnings, expressed no concern about the well-being of the other people involved in the collision" that he had just caused.[127]

Consequently, a warning that includes reference to the non-admissibility of any exercise of the right to silence could in fact be quite misleading for a suspect. Even if the Supreme Court reviews and

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[121] Hammack, *supra* note 9, at 451; *see also* Corn, *supra* note 115, at 790 ("The exact phrasing of such a warning is not critically important, so long as the warning can effectively rebut the instinctual assumption that invocation will produce the inference of guilt detrimental consequence."); Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 783-84 (2006) ("[T]he right to silence, should be buttressed by a new 'right to silence' warning that provides something to the effect of: 'If you choose to remain silent, your silence will not be used against you as evidence to suggest that you committed a crime simply because you refused to speak.'").

[122] 133 S. Ct. 2174, 2179-82 (2013) (holding that because Petitioner was voluntarily cooperating with the police, *Miranda* did not apply, and so the government must have been put on notice of the witness's intent to rely on the privilege).

[123] *See id.* at 2177.

[124] *See id.* at 2182.

[125] *See id.* at 2184 ("Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it.").

[126] 59 Cal. 4th 1210, 1215 (2014) (describing the issue as one of first impression, but finding the plurality opinion in Salinas "instructive").

[127] *Id.* at 1214.

reverses *Tom*, there are other complications relating to the right to silence. For instance, the Supreme Court has exempted "demeanor" evidence from the category of "testimonial" evidence protected under the Fifth Amendment.[128] Demeanor evidence includes not only physical evidence,[129] such as vocal characteristics, but also the appearance of nervousness,[130] which can arise whether the defendant is answering police questions or exercising his right not to. Yet the Ninth Circuit has distinguished such permissible evidence from the *lack* of reaction displayed by the suspect when interrogated; the latter is protected by the right to silence, as a non-response is the very essence of being silent.[131] An extension of the *Miranda* warning to include an accurate elaboration of the circumstances in which such important yet intricate differences apply would be challenging, to say the least.[132]

That conclusion applies even if the law remains unchanged, but this area of the law is far from static. Consequently, a more detailed *Miranda* warning would need to morph with each new jurisprudential development or refinement.[133] Given the difficulty already evidenced in police comprehension of existing constitutional criminal procedure rules,[134] an unstable *Miranda* warning could exponentially expand violations of *Miranda*. Given this, and the fact that the Court has expressly discounted any requirement to help a suspect "calibrate his self-interest in deciding whether to speak,"[135] the seemingly simple proposal of expanding the *Miranda* warning to further elucidate the details of the right to silence is actually potentially quite burdensome.

[128] Schmerber v. California, 384 U.S. 757, 761 (1966).

[129] *Id.* at 764.

[130] *See* Pennsylvania v. Muniz, 496 U.S. 582, 592 (1990).

[131] *See* United States v. Velarde-Gomez, 269 F.3d 1023, 1028 (2001).

[132] Michael D. Cicchini proposes delivering the warning in a tiered format to address this concern. *See* Michael D. Cicchini, *The New* Miranda *Warning*, 65 SMU L. REV. 911, 913 (2012).

[133] This has been suggested. *See* Godsey, *supra* note 121, at 783 (recommending that *Miranda* be reconsidered in light of changing jurisprudence).

[134] One study found that police officers performed only slightly better than chance in assessing the lawfulness of search scenarios based on major cases. *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 333 (1991). Studies have also shown that most suspects do not possess the level of education required to understand most *Miranda* warnings. *See* Cicchini, *supra* note 132, at 916-17 (summarizing the literature).

[135] Moran v. Burbine, 475 U.S. 412, 422 (1986).

2. Specifying an Associated Right for Further Police Questioning to Cease

A similar proposal to expand upon the intricacies of the right to silence warning is to elaborate on the variety of circumstances in which the right to silence contains sub-rights. In particular, the right to silence arguably encompasses the right to not be further questioned by the police after invoking the right to silence. This possibility is more complicated doctrinally than it may first appear, as that sub-right only exists in certain circumstances.

Prof. Laurent Sacharoff has argued that *Miranda*'s right to silence actually contains "two sub-rights: the right not to speak and the right to cut off police questioning."[136] According to Sacharoff, the *Miranda* Court failed to consider the complexity of its own logic: that there are three rather than two possibilities of how the suspects can respond to questioning. The suspect can remain silent, but neither waive nor invoke his rights. Then, the jurisprudence of waiver and the jurisprudence of invocation are seemingly at odds: according to the rules of waiver, the right is already held, and can be waived, but according to the rules of invocation, the right only exists once asserted by the suspect.[137] Sacharoff proposes that the two sub-rights that he identifies should be treated as one unified right, "in the sense that the two sub-rights function together. When a suspect waives, she waives both sub-rights; when she invokes, she invokes both . . . if the suspect remains silent, the police may not question."[138]

On its own, this solution seems jurisprudentially sensible, since it provides a consistent response to all three scenarios, as well as politically reasonable, since it gives a benefit to the state when the suspect waives and to the suspect when the suspect invokes. However, the residual clause in the quote above actually tips the scales quite dramatically. In seemingly attempting to resolve a narrow ambiguity created when suspects fit neither of the two categories expected by the *Miranda* Court, the proposal actually encompasses a far broader reform: expanding the right to silence by re-crafting the definition of invocation to include simply remaining silent. The Court has held that whereas waiver need not be express,[139] invocation must be

[136] Laurent Sacharoff, Miranda*'s Hidden Right*, 63 ALA. L. REV. 535, 535 (2012).

[137] *See id.* at 539.

[138] *Id.* at 560.

[139] *See* Berghuis v. Thompkins, 560 U.S. 370, 387 (2010) (waiver may be "express or implied"); North Carolina v. Butler, 441 U.S. 369, 373 (1979).

unambiguous.[140] Notably, for the right to counsel, which stems from the right to silence, the Court explicitly allowed the police to continue questioning in the face of an ambiguous invocation, where the suspect had done more than simply remain silent.[141] The Court has said that there is no reason for invocation of the right to silence to be treated differently from that of the right to counsel.[142]

This not only suggests that the Court would reject the residual term of the Sacharoff solution as to how to treat silence, it also casts doubt on whether the right to be free from continued police questioning is really considered by the Court to be a central part of the right to silence at all. The Court has previously considered whether police ceased questioning as a *factor* in the fact-intensive standard of whether police can reinitiate questioning after an invocation, as evidence that police "scrupulously honored" *Miranda*.[143] But the existence of the right to be free from continued police questioning is belied by the stricter rules that the Court has laid down in other areas, such as specifying an absolute requirement that two weeks must pass before a suspect can be questioned again after an invocation of the right to counsel.[144] Thus, it is not clear that the Court would embrace this further delineation of the right to silence.

3. Warning Suspects Regarding How Long They Can Be Interrogated

Of all the potential extensions to the *Miranda* warnings, the one most plainly linked to false confessions has received the least attention, but it is in fact the easiest to solve. The psychology literature has clearly established that uncertainty over the duration of interrogation is one of the main precursors to false confession.[145] And yet a warning as to the duration of interrogation is strangely absent from the *Miranda* formula.

Previously, the Court has permitted extensive interrogation. Famously in *Lisenba v. California*, it concluded that an interrogation that had elicited a confession after ten hours in return for a promise to receive food came close to, but did not cross, the line of fundamental

[140] *Berghuis*, 560 U.S. at 381 ("There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously.").

[141] *See* Davis v. United States, 512 U.S. 452, 462 (1994).

[142] *See Berghuis*, 560 U.S. at 381.

[143] Michigan v. Mosley, 423 U.S. 96, 104 (1975).

[144] *See* Maryland v. Shatzer, 559 U.S. 98, 110-11 (2010).

[145] *See* Kassin et al., *supra* note 19, at 16 (discussed further below).

unfairness under the due process clause.[146] However, the suspect in that case had previously been questioned for thirty-two hours with only one breakfast break.[147] In that context, a suspect ten hours into a second interrogation could reasonably expect to be continued to be held incommunicado for an essentially unlimited time. In *Miranda*, the Court clearly sought to break with such an approach: it bemoaned the interrogation of Defendant Roy Allen Stewart (whose case was consolidated with *Miranda*'s) nine times over five days.[148] Yet the Court did not specify a warning directed at such long and uncertain interrogation.

Duration and uncertainty are powerful weapons. Under standard interrogation training techniques,[149] interrogators are trained to "manipulate a suspect into thinking that it is in his or her best interest to confess" by actually changing suspects' perceptions of their own utilities.[150] Interrogators commonly use a combination technique called maximization-minimization: the former "exaggerates the strength of the evidence and the magnitude of the charges . . . [while the latter] mitigates the crime and plays down the seriousness of the offense."[151] Suspects tend to optimize among the options they face, but most people "tend to be impulsive in their orientation, preferring outcomes that are immediate rather than delayed, with delayed outcomes depreciating over time in their subjective value."[152] This impulsivity creates the possibility that individuals will falsely confess to crimes in order to escape interrogation.

Scholars have long argued for the need for greater explanation of both the content of suspects' rights and how to exercise them because, as mentioned, the *Miranda* Court incorrectly assumed that being warned translates into suspects' understanding of their rights, and that

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[146] 314 U.S. 219, 240 (1941) ("[W]e disapprove the violations of law involved in the treatment of the petitioner . . . . Their lawless practices here took them close to the line. But . . . we cannot hold that the illegal conduct in which the law enforcement officers of California indulged, by the prolonged questioning of the prisoner before arraignment, and in the absence of counsel, or their [previous] questioning . . . coerced the confessions.").

[147] *See id.* at 229-302.

[148] *See* Miranda v. Arizona, 384 U.S. 436, 497 (1966). Ernesto Miranda was interrogated for only two hours before he confessed. *See id.* at 491.

[149] See *infra* Part IV.B for further discussion.

[150] Kassin et al., *supra* note 19, at 12.

[151] Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233, 233 (1991).

[152] Kassin et al., *supra* note 19, at 15.

such an understanding would persist throughout an interrogation.[153] For instance, Prof. Benjamin Cunningham has argued that "[e]ven presuming that knowledge equals understanding, the stress of interrogation can diminish memory, hence, depriving a suspect of all the benefits of the warnings."[154] But the length of interrogation is one element that gets little attention in the literature. This occurs despite the fact that interrogation time is one of the three key risk factors for false confessions.[155] Of 125 proven false confessions examined in one study, "in cases in which interrogation time was recorded, . . . 34% lasted 6-12 hours, . . . 39% lasted 12-24 hours, and the mean was 16.3 hours."[156] The effect of lengthy interrogations is exacerbated by sleep deprivation and stress. Studies show that under such conditions, individuals are motivated to do whatever is necessary to remove themselves from the situation, and that suggestibility in response to leading questions dramatically increases over the length of an interrogation, particularly when combined with sleep deprivation.[157]

The Court could articulate a clear and simple bright line rule as to how long suspects can be interrogated for at a stretch, without significantly interrupting the interrogation process. Addressing uncertainty over interrogation time would target one of the main factors in causing false confessions.

4. Describing How Rights Can Be Invoked

Many have argued that without guiding suspects as to how they can invoke their rights, and the consequence of invocation, *Miranda* does little to protect suspects from compulsion. In particular, the rule that invocation must be clear and unambiguous, and that a statement such as "maybe I should talk to a lawyer" does not prohibit further police questioning,[158] is "not something a criminal suspect is likely to understand on his own."[159]

Prof. Joshua Hammack argues that by advising suspects of the existence of their rights but not how to use them, *Miranda* creates

[153] *See* Cunningham, *supra* note 75, at 1407-08.

[154] *Id.* at 1412.

[155] *See* Kassin et al., *supra* note 19, at 16, 28 (recommending that "police departments should consider placing internal time limits on the process" of interrogation).

[156] *Id.* at 16.

[157] *See id.* (discussing the literature at length).

[158] Davis v. United States, 512 U.S. 452, 459 (1994).

[159] Hammack, *supra* note 9, at 434.

"three related and unfair results: Suspects do not know how to invoke their rights, their attempted invocations are ignored, and they unwittingly incriminate themselves by simply remaining silent after having waived their right to do so."[160] According to Hammack, only the hardened criminal is likely to be unintimidated when invoking his rights, given this lack of information.[161] So an addition to the warnings that informs suspects how to invoke is likely to be particularly effective at encouraging invocation of rights by those most likely to be innocent.

Accordingly, some argue that the jurisprudence itself should be changed to make even ambiguous or equivocal requests be clarified prior to continued questioning of the suspect.[162] But this could be achieved much more simply. The warnings could be amended to include information such as: "'after you have waived your right to remain silent, you retain the ability to invoke it and end the interrogation at any time. However, to do so, you must state your desire in clear and unambiguous language.'"[163]

The first part of the proposed amendment is as important as the latter — not only can suspects be warned how to invoke initially, they should be informed that having initially waived their rights, they can nonetheless invoke later.[164] Otherwise, *Miranda*'s attempt to prevent coercion is likely to exacerbate the ordinary effects of lengthy interrogations on causing false confessions, by failing to prevent the reintroduction of compulsion via the suspect's own misunderstanding of the consequence of initially waiving.

5. Overall

Each of these suggestions constitutes an expansion of rights, and although financially low-cost, each does put greater demands on police. As such, the practical feasibility of all of these warning-expansions may be limited. But even if the Court was amenable to such an expansion, to ensure greater effectiveness, we would need to prioritize between the competing additional warnings because, as we have seen, even taking just one recommendation can involve adding

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160 *Id.* at 435.

161 *See id.* at 435-36.

162 *See* Strauss, *supra* note 7, at 773-75. See also *infra* Part IV.C for more detail.

163 Hammack, *supra* note 9, at 455.

164 *See, e.g.*, Corn, *supra* note 115, at 795-96; Godsey, *supra* note 121 at 784 (proposing adding a warning saying: "[i]f you choose to talk, you may change your mind and remain silent at any time, even if you have already spoken").

enormous detail into the *Miranda* warning. The complexity of the last fifty years of *Miranda* jurisprudence means that, in order not to be misleading or even inaccurate, any simple addition to the warning needs to be qualified and varied. To choose among them, we must apply our criterion of mitigating false confessions. As we have seen, long interrogations are most likely to result in false confessions. As such, adding a warning regarding the potential length of interrogation is the most likely to maximally benefit innocent suspects; information regarding how to invoke would also be valuable. In contrast, adding warnings regarding the implications of the right to silence or the right of questioning to cease are less likely to be effective at preventing false confessions.

An alternative conclusion is that concise warnings may be fundamentally limited in their potential effectiveness: *Miranda* may simply have overestimated the power of warnings of the kind that it mandated. The next section considers whether the means of giving the warnings could improve their effectiveness.

B. Standardizing the Warning Procedure

Instead of reforming the content of the *Miranda* warnings, reform could focus on how and when the warnings are delivered. In particular, a pre-recorded warning that must be given to suspects prior to formal interrogations could solve many of the problems identified.

1. Standardizing How to Deliver the Warnings

Suggestions of other possible additions and variations to the warnings have been made not only regarding the right to silence, but also to the right to counsel. The most common suggestion of how to change warnings regarding the right to an attorney is to require that an attorney be present at all times during custodial interrogation — this drastic change to the substantive rights under *Miranda* is explored in Part III. More minor variations on that theme consist of tweaking the warnings that are given, as in the previous section. For example, Daria Boxer argues that warning a suspect, not simply of a 'right to an attorney' but more specifically of a 'right to have an attorney present during the interrogation,' affords the suspect more protection because it informs them "of the full extent of their Fifth Amendment privilege, and puts them on notice that they are now facing an adversarial system."[165] This and other like proposals share many of the same

[165] Daria K. Boxer, Miranda *with Precision: Why the Current Circuit Split Should Be*

advantages and disadvantages as extending the warnings in regard to the right to silence, as discussed. But at least in regard to the right to counsel, the Court has made clear that it is likely to reject such proposals,[166] and in doing so, it has indicated its inclination to reject the more general proposal of standardizing *how* to deliver the *Miranda* warnings.

In *Florida v. Powell,* prior to confessing, Powell signed a *Miranda* statement that included the words:

> You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.[167]

This raises the question of whether being informed that the right to an attorney can be exercised *at any time during* the interview can overcome the potential damage of describing the right as only being permitted to talk to a lawyer *before* the interview, when in fact the right includes having a lawyer present *during* the interview. The Court concluded that "[n]othing in the words used indicated that counsel's presence would be restricted after the questioning commenced. Instead, the warning communicated that the right to counsel carried forward to and through the interrogation."[168] The dissent complained that Florida's warning could leave an intelligent suspect with the impression that "all he was provided was a one-time right to consult with an attorney."[169] Nonetheless, the Court endorsed Florida's use of different words to those specified in *Miranda*, since they communicated "the same essential message."[170]

In *Duckworth v. Eagan*, the Court tolerated an even more potentially misleading version of the warning, which stated "we have no way of giving you a lawyer, but one will be appointed for you, if you wish, *if*

Solved in Favor of a Uniform Requirement of an Explicit Miranda *Warning of the Right to Have Counsel Present During Interrogation*, 37 SW. U. L. REV. 425, 453 (2008).

166 The majority opinion in *Florida v. Powell* somewhat mockingly deemed the notion of providing further detail in warnings "admirably informative," but "decline[d] to declare its precise formulation necessary to meet *Miranda*'s requirements." 559 U.S. 50, 64 (2010).

167 *Id.* at 54 (quoting TAMPA POLICE DEPARTMENT STANDARD OPERATING PROCEDURES § 403.3 Consent and Release Form 310, 384-85 (2011)).

168 *Id.* at 63.

169 *Id.* at 74-75 (Stevens, J., dissenting).

170 *Id.* at 64 (majority opinion).

and when you go to court."[171] Although the dissent stressed that this gave rise to a clear implication that no attorney would be provided at the stationhouse, which may cause the suspect to talk to the police "*for that reason alone*,"[172] the majority declared that the wording of *Miranda* is not "rigid" and only has to "touch[] all the bases of *Miranda*."[173]

Thus rather than being inclined to add elucidating minutiae to the requirements of *Miranda*, the Court, even when led by liberal justices, such as Justice Ginsburg, as in *Powell*, seems more inclined to give the police extensive leeway in how closely tethered the warnings given must be to the substance of *Miranda* rights. The Court does not want to punish police in the field who may innocently and "inadvertently depart from routine practice," for example, due to lack of access to a printed version of a more specific wording of the warning.[174] The next section considers some more innovative ways of standardizing the procedure by which warnings are given, which do not raise these concerns.

2. Standardizing When to Deliver the Warnings

Another problem that may interfere with suspects' full comprehension of their rights is that the stressful circumstances in which warnings are typically delivered may mitigate a suspect's full appreciation of their significance. Since *Miranda* applies as soon as custodial interrogation has commenced, it is common and sensible, from the point of view of law enforcement officers seeking to protect any subsequent confession from exclusion, to mirandize suspects at the moment of arrest.[175] Suspects, however, may be confused and

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[171] Duckworth v. Eagan, 492 U.S. 195, 198 (1989) (emphasis added) (quoting the "Voluntary Appearance; Advice of Rights" form signed by defendant); *see also* California v. Prysock, 453 U.S. 355, 359 (1981) (per curiam) ("[N]o talismanic incantation [of *Miranda* is] required to satisfy its strictures.").

[172] *Duckworth*, 492 U.S. at 218 (Marshall, J., dissenting) (emphasis original).

[173] *Id.* at 202-03. The opinion, written by Chief Justice Rehnquist, author of *Dickerson*, stressed seemingly without irony that this variation was made possible by *Miranda*'s language that the warnings were required "in the absence of a fully effective equivalent," and that the "prophylactic Miranda warnings are 'not themselves rights protected by the Constitution.'" *Id.* (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

[174] *Id.*

[175] *See* FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 18.5.6.4.1.1 (2011), http://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29 (describing when a person is required to be mirandized, including when in custody).

overwhelmed in the moments when they are handcuffed and taken to a police station for questioning; this may be when they are least capable of understanding all of the options available to them, particularly first-time offenders. There is far less written on this topic than on the failure of the existing warnings to fully reflect the intricacies of the jurisprudence, yet the question of when and by what process warnings are given holds much more potential for realistic reform.

Seemingly the simplest response to this concern is to require that suspects be re-instructed of their *Miranda* rights at some other stage. One option is to merely require that suspects be re-instructed prior to any formal interrogation beginning, as the FBI requires.[176] More stringent still, police could be required to regularly reinstruct suspects throughout any lengthy interrogation.[177] Mandating re-instruction has a number of advantages. Not only would it promote the goal of suspect comprehension, by reemphasizing the rights at a less overwhelming moment than during arrest, it would also aid the goal of law enforcement, because when statements are made following such reiteration, they could more easily be presumed to be voluntary.[178] Nonetheless, simple reinstruction does not solve the problem identified above (Part II.B.1) — repetition may add emphasis, but it does not clarify the ambiguities inherent in the existing *Miranda* warnings.

There is no reason that *Miranda* warnings need to be given solely by the police. Part III analyzes the very common suggestion that counsel be required to be present to explain the full detail of a suspect's rights, or some other independent party, such as an ombudsman. However, that proposal has obvious and significant costs.[179] A simple and potentially highly effective variation would be to require that a standardized recorded audiovisual warning be provided to the suspect

[176] *See id.* at § 18.5.6.4.1 ("An FBI employee must advise a person who is in custody of his/her *Miranda* rights . . . before beginning an interview."). The exception is when being interviewed as a witness or victim. *See id.* at § 18.5.6.4.1.2 ("*Miranda* warnings are not required for . . . an interview of the incarcerated individual as a victim or witness in an unrelated matter that does not pertain to any pending charges against the interviewee."). This is recommended by the Reid technique, to protect evidence and establish ongoing waiver. *See* INBAU ET AL., *supra* note 90, at 311.

[177] *See* Godsey, *supra* note 121, at 784.

[178] *See, e.g.*, Hammack, *supra* note 9, at 452 ("Additional warnings would also bolster the presumption that post-warning statements are voluntarily made, because the suspect knew how to protect his rights and of the consequences of speaking versus remaining silent.").

[179] *See infra* Part III.B.

before a formal interrogation takes place. That warning could provide considerably more detail than the courts are willing to require of the police directly. This would have the advantages of re-instruction and adding clarifying detail, without the disadvantages of requiring police to provide that additional detail.

There would, of course, have to be circumstances delineated in which some types of custodial interrogation can take place prior to the recorded warning, such as when public safety requires police questioning. But that exception is already carved out of the *Miranda* requirement itself.[180] There may nevertheless be further circumstances that require impromptu interactions, so the Court would have to define a rule, such as showing the suspect the recording prior to a formal interrogation.

The advantages offered by this proposal considerably outweigh these difficulties. It would solve many of the problems raised thus far: it would avoid the borderline misleading statements created by the Court's tolerance of variation on the warnings, without requiring police to change their behavior in the field. It would also ensure that the appropriate level of detail was provided to promote a full understanding of the consequences of a suspect exercising his rights, without the danger of misleading the suspect, as described above. Furthermore, it could establish a more effective break between the start of custody and the beginning of interrogation, thus mitigating the problem of suspects not understanding their rights due to being overwhelmed by the rapid pace of the initial arrest. In addition, it solves issues not yet raised: police stations could be issued with court-approved, plain language translations into multiple languages, solving many problems of comprehension for ESL and hearing impaired individuals.

A third procedural proposal regulating when warnings are issued is to preliminarily require a "brief interchange between the police and the suspect about the purpose of rights and the roles of the participants in the interrogation."[181] The purpose of such a mandate, according to Prof. Andrew Ferguson, is to promote a "dialogue approach" that "would require suspects to confirm their understanding of the rights and the consequences of the waiver by restating the rights in their own words at the time of the

[180] *See* New York v. Quarles, 467 U.S. 649, 655-56 (1984) (providing that a public safety exception applies to the requirement that *Miranda* warnings be given prior to any custodial interrogation).

[181] Andrew Guthrie Ferguson, *The Dialogue Approach to* Miranda *Warnings and Waiver*, 49 AM. CRIM. L. REV. 1437, 1439 (2012).

interrogation."[182] The Comprehension of *Miranda* Rights (CMR) measure asks suspects, after receiving *Miranda* warnings, to tell an examiner in their own words what each warning actually means.[183] CMR tests have shown a significant and positive relationship between adults' CMR scores and prior experience with the justice system.[184] This suggests that those who are new to the criminal justice system may be significantly disadvantaged, and more vulnerable to the pressures that result in false confessions, without a dialogue about the substance of the constitutional rights.

There are, however, a number of disadvantages to Ferguson's proposal. The most obvious disadvantage is the direct costs of this interference with the flow of the interrogation process, which raises costs in terms of police resources and interferes with the truth seeking function of interrogations, as Ferguson recognizes.[185] At the same time, it is not entirely clear that the proposal will necessarily benefit suspects. Whereas the CMR is done by an independent examiner, Ferguson's proposal would require that the dialogue take place between the suspect and his soon-to-be interrogator.[186] An interrogation is not a cooperative experience; it is necessarily oppositional.[187] To the extent that Ferguson's dialogue approach suggests otherwise, it could be quite misleading to the suspect, suggesting an atmosphere of cooperation when the suspect should be on his guard. Ferguson acknowledges this danger for vulnerable suspects, saying "an experienced detective could exploit the dialogue to encourage a waiver of rights."[188] However, he immediately dismisses this criticism as inapt because under the current regime, a vulnerable suspect has to invoke his rights anyway, with or without a full understanding of that waiver.[189] This seems cavalier: flaws in the current regime do not mitigate the additional danger that such a misleading dialogue may produce. Ferguson may be inadvertently

[182] *Id.*

[183] GRISSO, *supra* note 21.

[184] *Id.* at 170. The relationship for juveniles was dependent on race: there was a positive significant association for white juveniles, and a negative relationship for black juveniles. *Id.*

[185] Ferguson, *supra* note 181, at 1479.

[186] *See id.* at 1474.

[187] This is one of the key presumptions of the Reid Technique, the dominant method of interrogation adopted by most jurisdictions in the U.S. *See infra* Part IV.B.

[188] Ferguson, *supra* note 181, at 1482.

[189] *Id.*

supplying the deceptively "good cop" side of a "good cop/bad cop" instrument.

Overall, all of the proposals in this section impose a cost on policing by disrupting the flow of interrogation to some extent. That effect is a necessary consequence of *Miranda*'s essential logic, but the more burdensome the requirement placed on police, the greater the cost, and the less feasible the proposal. Requiring re-instruction of *Miranda* warnings subsequent to the immediate confusion of arrest and prior to formal interrogation is a minimal imposition. Requiring repeated warnings throughout a lengthy interrogation has the effect (and the purpose) of repeatedly disrupting the flow of interrogations. There is little empirical evidence of the benefit of greater repetitions of *Miranda* instructions. The only proposal that addresses all of the concerns of this Part at low cost is the prerecorded, standardized *Miranda* warning proposed as a requirement prior to formal interrogation. Not only would it enable operationalizing some of the additional warnings outlined in Part II.A, it would provide a mechanism of standardization that would not trigger the Supreme Court's concern that rigid wording requirements would penalize inadvertent departures made in good faith. Most importantly, it could be crafted with an eye towards avoiding those factors most likely to lead to false confessions. This proposal works hand-in-hand with the mechanisms described in the next Part, which further aim to deter police coercion through greater transparency.

III. Rules Attempting to Better Deter Police Coercion

Miranda instituted a system of mandatory warnings, not because they were required by the Fifth Amendment,[190] but as a mechanism to prevent police coercion overcoming the will of the suspect.[191] Thus an alternative to adjusting the content or method of giving the warnings is to find better ways to deter police coercion that may induce a suspect to falsely confess.

A. *Establishing a Per Se Rule of Exclusion*

Under current jurisprudence, *Miranda* does not have fruits: both secondary testimonial evidence and physical fruits of an unmirandized

[190] Miranda v. Arizona, 384 U.S. 436, 490 (1966) ("[T]he Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation.").

[191] *See id.* at 468 ("[S]uch a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.").

confession are ordinarily admissible.[192] This occurs because *Miranda* is considered to "sweep[] more broadly" than what is actually required by the Fifth Amendment — it is prophylactic, and the Court considers that expanding that prophylaxis to bar secondary evidence would be overly restrictive of police and prosecutors.[193] Some have argued that the Court erred in that conclusion, and fruits of *Miranda* should be excluded,[194] and the failure to do so leads to willful violations of Miranda.[195]

The exclusionary rule under the Fourth Amendment is a helpful comparison in determining the appropriateness of expanding the *Miranda* exclusion to fruits of an improper interrogation. In search-and-seizure jurisprudence, exclusion is justified to increase observance of constitutional rights, by deterring police violations.[196] Excluding evidence derived from an unmirandized admission in addition to the admission itself would seemingly have similar incentive effects on police practices. Implicit in the rationale for exclusion is also the notion that using tainted evidence would harm judicial integrity.[197] Arguably, the Court has recognized the inherent

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192 United States v. Patane, 542 U.S. 630, 640 (2004) ("[S]tatements taken without *Miranda* warnings (though not actually compelled) can be used to impeach a defendant's testimony at trial . . . ."); Oregon v. Elstad, 470 U.S. 298, 307 (1985) (noting that the *Miranda* rule "does not require that [violators'] statements and their fruits be discarded as inherently tainted").

193 *Elstad*, 470 U.S. at 306.

194 *See, e.g.*, Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 939 (1995) ("[T]he . . . exclusionary rule for confessions . . . is also intended to deter improper police conduct."); David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 811 (1992) (arguing otherwise "the police will be rewarded for their misconduct and thus have a significant incentive to ignore the Miranda warnings"). For the opposite view, see Michael A. Cantrell, *Constitutional Penumbras and Prophylactic Rights: The Right to Counsel and the "Fruit of the Poisonous Tree,"* 40 AM. J. CRIM. L. 111, 136 (2013).

195 Elwood Earl Sanders, Jr., *Breaching the Citadel: Willful Violations of Miranda after* Missouri v. Seibert, 10 APPALACHIAN J.L. 91, 107 (2011) (showing that "both state and federal courts have indicated that space-time considerations are crucial to following Seibert" and arguing that "lapse of time should be irrelevant to the issue of intent"); Weisselberg, *supra* note 5, at 1558-59 (reviewing police training materials in California and finding that they "tend to encourage or facilitate the 'mild' type of 'softening up'" of a two-stage interrogation technique enabled by *Elstadt*).

196 *See* Mapp v. Ohio, 367 U.S. 643, 659 (1961).

197 Initially, this was considered a separate justification for Fourth Amendment exclusion, *see id.*, but subsequently, the Court has declared that deterrence is the only consideration in assessing the application of the exclusionary rule, and judicial integrity is subsumed within the deterrence rationale, United States v. Leon, 468 U.S. 897, 921 n.22 (1984).

taint of using secondary evidence from unmirandized statements in its two-stage interrogation jurisprudence. *Missouri v. Seibert*[198] made that question hinge on whether, from the suspect's standpoint, *Miranda* warnings could still function effectively, giving the suspect a real choice between talking and remaining silent under the circumstances of having made a prior incriminating statement.

Yet there are many reasons to hesitate before excluding the fruits of an unmirandized confession. There is an extensive literature on the costs of exclusion in the Fourth Amendment context[199]: proponents of an expansion of exclusion need to answer critics who have stressed these costs. These include decreased police efficiency — including both lost arrests[200] and increased crime rates[201] — as well as prosecutorial inefficiency — including both lost convictions[202] and encouraging frivolous motions.[203]

However, the exclusionary rule might be less problematic as applied to *Miranda* fruits than to search and seizure violations or their fruits, for at least two reasons. First, *Miranda* violations raise greater

198 542 U.S. 600, 611-12 (2004) ("The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires.").

199 A concise summary of many of the arguments in this area of law is provided by David A. Harris, *How Accountability-Based Policing Can Reinforce — or Replace — the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 155-64 (2009).

200 A study of lost arrests in California from 1976 through 1979 by the National Institute of Justice found that 6% of arrestee releases by the police were due to search and seizure problems. NAT'L INST. OF JUSTICE, CRIMINAL JUSTICE RESEARCH REPORT: THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA 9 (1982). In narcotics cases, where the exclusionary rule has its greatest impact, approximately 30% of felony drug arrests were rejected due to search and seizure problems. *See id.* at 13.

201 Atkins and Rubin found that crime rates significantly increased in jurisdictions where *Mapp* took effect, by 3.9% for larceny, 4.4% for auto theft, 6.3% for burglary, 7.7% for robbery, and 18% for assault. Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157, 166 (2003).

202 Canon found that 0% of prosecutors reported having never dropped charges because of evidence being illegally seized, 30% reported having rarely dropped charges, 49% reported having occasionally dropped charges, 16% reported having somewhat frequently dropped charges, and 5% reported having very frequently dropped charges. *See* Bradley C. Canon, *Is the Exclusionary Rule in Failing Health?: Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 724 (1973).

203 *See* L. Timothy H. Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule,* 83 IOWA L. REV. 669, 711 n.26 (1998) (describing prosecutors being weighed down by multiple suppression motions that defendants use as "bargaining chips").

problems of police misconduct tainting the reliability of evidence. With search and seizure violations, exclusion applies where inculpatory evidence is unconstitutionally discovered, so exclusion only directly helps those most likely to be actually guilty.[204] Whereas in the Fifth Amendment context, the confession of a suspect who was subject to a *Miranda* violation (or actual coercion) itself becomes suspicious — coerced statements are wrong not just because of the fact of coercion, but because they are more likely to be false.

Second, unlike the Fourth Amendment context, *Miranda* fruits are less likely to create perverse incentives for police to commit more violations. Because exclusion only applies in cases where prosecutions are actually pursued, the exclusionary rule does little to prevent searches and seizures done for non-prosecutorial purposes, such as harassment of minorities.[205] Following *Mapp*'s imposition of the exclusionary rule in all states, there was evidence that exclusion actually increased police violations, as police shifted to a focus on confiscation of drugs and weapons, rather than evidence gathering.[206] In contrast, there is no reason why police harassment would increase as a result of applying exclusion to the fruits of *Miranda*.

As such, the criterion of preventing false confessions suggests that applying fruits to *Miranda* could be beneficial. However, here the political reality of likely Supreme Court jurisprudence and the drive toward eliminating false confessions cut in opposite directions. The Supreme Court has given no indication of any dissatisfaction with *Miranda* lacking fruits,[207] and has shown an increasing distaste for

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[204] *See* Jacobi, *supra* note 18, at 636.

[205] As the Warren Court itself noted: "The wholesale harassment by certain elements of the police community, of which certain minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial." Terry v. Ohio, 392 U.S. 1, 14-15 (1968).

[206] Case Comment, *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 100 (1968) (describing how police focus shifted from evidence gathering to confiscation after imposition of the exclusionary rule).

[207] Having interpreted the Fifth Amendment as containing within its text its own inherent exclusion mechanism — by specifying that no person "shall be compelled," it implicitly prohibits the admission of all such evidence — the Court could naturally have concluded that the implication of exclusion as a remedy is stronger in the Fifth Amendment context than the Fourth Amendment context, which makes no mention of any remedy; instead, the Court concluded that containing its own remedy implicitly *limits* the role of exclusion to only that explicitly mentioned. United States v. Patane, 542 U.S. 630, 631 (2004) ("[T]he Clause contains its own exclusionary rule . . . . This explicit textual protection supports a strong presumption against expanding the *Miranda* rule any further.").

exclusion more generally.[208] Consequently, an expansion of fruits to *Miranda* by the Roberts Court is extremely unlikely,[209] although this could change with a new liberal justice on the Court.[210]

B. Requiring that an Attorney Be Present

The theory behind *Miranda* is that the need for counsel arises not only post-indictment, as the Sixth Amendment provides,[211] but rather that counsel is necessary at the stationhouse, to advise a suspect whose will may be overcome by the coercion of custodial interrogation. *Miranda*, however, only requires warning suspects of their right to counsel, not its actual provision, and explicitly rejected requiring attorneys at the stationhouse.[212] Nonetheless, numerous scholars have proposed that, properly understood, the logic of *Miranda* dictates that representation is required during police questioning, for a number of reasons. For instance, Prof. Matthew Iverson argues that such a change is necessary to "level[] the playing field between experienced and inexperienced suspects by giving legal advice to both groups, and it provides an effective check on police manipulation by breaking the interrogator's monopoly on information."[213] Prof. Michael Cicchini goes further, arguing this requirement should extend to any interrogation, inside or outside the police station, even if the police consider the suspect is not under arrest.[214]

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[208] *See* Herring v. United States, 555 U.S. 135, 147-48 (2009) (shifting from an automatic application of the exclusionary rule in cases of police violations to an assessment of whether "any marginal deterrence . . . 'pay[s] its way'").

[209] *See, e.g.*, Hammack, *supra* note 9, at 447-48 ("[T]he Supreme Court has maintained that the fruits of custodial interrogation (i.e., confessions) are an 'unmitigated good' . . . .").

[210] Merrick Garland, if confirmed to fill the current vacancy, is expected to be a moderate liberal: his record on the DC Circuit puts him left of center, at the midpoint between Ginsburg and Scalia. *See* Tom Clark et al., *How Liberal Is Merrick Garland?*, WASH. POST (Mar. 17, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/17/how-liberal-is-merrick-garland/.

[211] Kirby v. Illinois 406 U.S. 682, 688 (1972) ("[A] person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.").

[212] Miranda v. Arizona, 384 U.S. 436, 474 (1966) ("This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners.").

[213] Iverson, *supra* note 53, at 115; *see also* Hammack, *supra* note 9, at 447 (arguing counsel should be provided for all suspects prior to interrogations).

[214] Cicchini, *supra* note 132, at 929, 941.

Less obviously, Iverson argues that requiring defense counsel be present during interrogation would promote the efficiency of the police process because it "would not only eliminate both physical coercion and psychological manipulation, it would also remove the rationale for the right to silence, with its associated costs in missed opportunities for justice."[215] Iverson concludes that "[r]estructuring interrogation law to allow adverse inferences from a suspect's failure to answer questions, coupled with a requirement that an attorney be present during custodial interrogation, would, for the first time, give an informed and uncoerced suspect an incentive to talk to the police."[216]

Broadening the right to counsel in exchange for abolition of the right to silence would actually be a reversal of the logic of *Miranda*, under which the right to counsel is a secondary implication stemming from the right to silence.[217] Nevertheless, Iverson's argument has the advantage of challenging the orthodox assumption that all reform proposals necessarily pit police and defendant interests in diametric opposition. It also presents an interesting and more balanced proposal than simply expanding the right without any complementary attempt to ease the efficiency of the investigative process — even many proponents of simply expanding the right to counsel into a requirement for counsel being present acknowledge that it is very unlikely to garner support from the current Supreme Court.[218] There is good reason for this — making counsel available for any custodial interrogations, let alone all interrogations, would be extremely costly and beset by insurmountable practical difficulties.

First, public defenders' offices are already overwhelmed to the point that many admit that clients are often not receiving effective representation.[219] The situation became so dire that in 2008, public

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[215] Iverson, *supra* note 53, at 115.

[216] *Id.*

[217] *See Miranda*, 384 U.S. at 469 ("[T]he right to have counsel present at the interrogation is indispensable to . . . assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process.").

[218] *See* Cicchini, *supra* note 132, at 930; Hammack *supra* note 9, at 447-48.

[219] *See, e.g.*, Robert L. Spangenberg & Tessa J. Schwartz, *Indigent Defense Crisis Is Chronic: Balanced Allocation of Resources Is Needed to End the Constitutional Crisis*, 9 CRIM. JUST. 13 (1994) (providing various statistics illustrating the lack of funding of public defenders offices, particularly in contrast to prosecutorial and police resources); John P. Gross, *The Truth about How Public Defenders Handle Excessive Caseloads*, NAT'L ASS'N FOR PUB. DEF. (Jan. 22, 2015), http://publicdefenders.us/?q=node/673 (giving a firsthand account of how a lack of resources and excessive

defenders offices in at least seven states refused to take on new cases, saying that their "overwhelming workloads . . . undermine the constitutional right to counsel for the poor."[220] Consequently, there would have to be a massive overhaul of the system of provision of public defense before the presence of attorneys for all interrogations could seriously be contemplated. Second, requiring that no interrogation take place prior to counsel being available — however long that would take — would significantly disrupt the investigative process. Given the Court's value on police efficiency,[221] it is unlikely to restrict police officers' ability to question suspects shortly after their arrest, while the trail is hot.

It is, however, possible to imagine compromise alternatives with some of the advantages of mandating the presence of counsel before custodial interrogation, without the same disadvantages. One possibility is that, rather than counsel, some other neutral intermediary between the police and the suspect be provided — such as an interrogation ombudsman.[222] The problem with mandating the automatic provision of counsel at the stationhouse is that lawyers shut down the investigation process[223] — the first advice of any decent defense counsel is to stop talking. Yet in recognition of the enormous mismatch in power between interrogator and suspect — and thus to help ensure that any confession is truly free, voluntary, and true — *Miranda* reform could require that the warnings be provided and explained not by the police officer who has recently arrested and is about to interrogate the individual, but rather by a neutral administrator. Similar to pre-recorded warnings,[224] this would provide a mechanism of distancing the arrestee from the confusion of their recent arrest. It would be more costly — requiring as it does human

caseload caused him to fail some clients).

[220] Erik Eckholm, *Citing Workload, Public Defenders Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), http://www.nytimes.com/2008/11/09/us/09defender.html (describing how between 2005 and 2008, "the average number of felony cases handled by each lawyer in a year has climbed to close to 500, from 367, officials said, and caseloads for lawyers assigned to misdemeanor cases have risen to 2,225, from 1,380").

[221] *See* Jacobi & Kind, *supra* note 3, at 783-84.

[222] More generally, on applying administrative law to constitutional criminal procedure, in particular using administrative penalties against police officers for constitutional violations, see Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1833.

[223] Justice Harlan's dissent in *Miranda* described lawyers at the stationhouse as an "obstacle to truth-finding." Miranda v. Arizona, 384 U.S. 436, 514 (1966) (Harlan, J., dissenting).

[224] *See supra* Part II.

resources in the form of the ombudsman — but would also potentially be more effective, as the suspect could actually interact with the ombudsman. This would allow the suspect to ask questions that clarify the ambiguities in the *Miranda* warnings raised in Part II, thus promoting a more genuine understanding of his rights and the implications of their invocation. It would also harness the advantages, previously described, of the conversational approach, in a more realistic context.

As well as issues of cost, another potential problem with the ombudsman is the possibility of capture,[225] given that the ombudsman would be a person who is not defense counsel, and thus not in an adversarial position, but who is nonetheless interacting with the police on a daily basis. Another disadvantage is that the Supreme Court is unlikely to adopt such a proposal, given that the American tradition of rights elucidation tends strongly to be litigation-based, rather than bureaucratic.[226]

A variation on this alternative would be to permit the suspect to have some other intermediary, not provided by the government, available during interrogation — essentially to allow the suspect to "phone-a-friend." The theory behind this option is that, as *Miranda* explained, much of the coercive effect of custodial interrogation stems from isolation.[227] As discussed, police are instructed in standard police manuals to deliberately exploit this sense of isolation to elicit a confession,[228] an effect that psychological studies have shown to be a leading cause of false confessions.[229] Thus, by allowing a suspect to

[225] *See generally* Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089 (1991) (describing the theory of capture in government action). Capture occurs when bureaucratic agencies become so familiar with one side of an ongoing dispute that they come to rely on them, become beholden to them, or develop a bias towards them.

[226] This trend was recognized early in American history by Alexis de Toqueville. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 261 (1835) ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.").

[227] *Miranda*, 384 U.S. at 450 (describing how police manuals instruct officers to "highlight the isolation and unfamiliar surroundings" that a suspect faces).

[228] *See* INBAU ET AL., *supra* note 90, at 43 (the "principal psychological factor contributing to a successful interrogation is privacy — being alone with the person under interrogation.").

[229] *See* Kassin et al., *supra* note 19, at 16 ("People under stress seek desperately to affiliate with others for the psychological, physiological, and health benefits that social support provides. Hence, prolonged isolation from significant others in this situation constitutes a form of deprivation that can heighten a suspect's distress and incentive to remove himself or herself from the situation [through confessing.]" (citation

have another person present during the interrogation, much of the inherently coercive effect of custodial interrogation would be avoided, without imposing on the state the cost of earlier provision of counsel. Obviously, measures would have to be in place to disqualify known felons and gang affiliates from serving as intermediaries. Furthermore, communications with the intermediary could be monitored, since they are not subject to the right to confidentiality in communications with counsel,[230] but then the suspect would have to be informed that he should have no expectation of privacy.[231]

It may be worthwhile considering these fixes to this alternative, because not only is the solution directly targeted at avoiding the harmful effects of isolation on suspects likely to falsely confess, it may also help the investigative process. Psychology evidence shows that false confessions often arise out of a suspect's orientation toward impulsivity, which leads him to falsely confess to crimes in order to escape ongoing interrogation and isolation.[232] Those studies also show that when particularly vulnerable individuals, such as youths and the mentally retarded, are permitted to have parents or other interested adults present when deciding whether to exercise their *Miranda* rights, they are actually more likely to waive their rights and make a statement.[233] Thus, the option to converse with an intermediary may simultaneously provide greater rights protection without discouraging cooperation with the police. This reform may be feasible if the Supreme Court can be persuaded that protecting rights and promoting effective investigations are not necessarily incompatible.

The *Miranda* Court wrote that "[i]t is not just the abnormal or woefully ignorant who succumb" to the pressure of an interrogation.[234] Recent DNA exonerations support that conclusion —

omitted)).

[230] *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.").

[231] *See generally* Katz v. United States, 389 U.S. 347, 516 (1967) (Harlan, J., concurring) (determining that a search occurs and implicates the Fourth Amendment right to privacy when there is both a subjective and objective expectation of privacy under the circumstances). Ordinarily, a person would not have an expectation of privacy at a police station, but when talking to an intermediary for the sake of determining whether to exercise one's Fifth Amendment rights, arguably such an expectation would arise without explicit disavowal of that right by the state.

[232] *See* Kassin et al., *supra* note 19, at 15.

[233] *Id.* at 9. Note that the authors consider that having parents present may be advisable, but expressed concern about the added pressure this may put on youths and other vulnerable suspects to waive their rights. *Id.*

[234] Miranda v. Arizona, 384 U.S. 436, 468 (1966).

the isolation of the interrogation room can be too great a responsibility for individuals to handle by themselves. However, expanding the right to counsel to a requirement of the presence of counsel is far too costly to constitute a serious option. But creating an interrogation ombudsman or, more realistically, allowing a suspect to have another person present — someone who need not be a qualified attorney but who provides a link to the outside world — could be an effective way to both protect rights and facilitate the investigative process.

C. Recording All Interrogations

Technological advancement could be a major catalyst for reforming *Miranda*. Greater access to cheap technology could considerably improve police transparency, at little cost. In particular, requiring audiovisual recording of all interrogations would not only help establish actual coercion in some cases, it would reinforce *Miranda*'s "civilizing" effect on police behavior.[235] This in turn would lend confidence to a suspect to expect more professional police conduct, thus reducing the inherent coercion of custodial interrogation. In addition, recordings can be very advantageous to the police, helping prove both that police refrained from any coercive activity, and that they properly administered *Miranda* warnings. As this section shows, initial police opposition to recording technology is reversing, as police departments recognize the mutual value to both investigating officers and suspects of having a reliable record of their interactions. But there are other difficulties that complicate the issue.

Requiring that police interrogations be "videotaped," in twentieth-century parlance, is a particularly popular recommendation.[236] Prof.

[235] Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 668 (1996) ("*Miranda* has exercised a civilizing influence on police interrogation behavior, and in so doing has professionalized police practices.").

[236] *See, e.g.*, Cicchini *supra* note 132, at 939 (arguing that police should be required to "video record the *Miranda* reading and, if the rights are waived, the subsequent interrogation"); Godsey, *supra* note 121, at 808 ("[A] videotape of the interrogation would be the best evidence of exactly what the suspect said during the interrogation, leaving no room for creative interpretation."); Kassin et al., *supra* note 19, at 25 ("Without equivocation, our most essential recommendation is to lift the veil of secrecy from the interrogation process in favor of the principle of transparency. Specifically, all custodial interviews and interrogations of felony suspects should be videotaped in their entirety and with a camera angle that focuses equally on the suspect and interrogator."); George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEX. TECH L. REV. 1293, 1315 (2007) ("[I]n a world with recorded interrogation, the suppression judge would know what the police did.").

Lisa Lewis summarizes some of the many advantages commonly extolled:

> [T]he best way to ensure that custodial confessions include adequate *Miranda* warnings, are free from coercion, and are preceded by a knowing and intelligent waiver of rights, is for the police/suspect contact to be videotaped starting with initial contact in the police vehicle. In order to protect the suspect's due process right to a fair determination of the voluntariness of the statement before it is admitted at trial, the judge must have a complete record of the interaction between the police and suspect . . . [Also, it] will reduce or eliminate problems of biased testimony, inaccurate or incomplete memories, and influential factors such as voice inflection and body language, which cannot be transcribed . . . the increased number of wrongful convictions based on false confessions and a concern for fundamental fairness support the current trend towards videotaping suspects' confessions.[237]

Moreover, recordings provide a method of assessing whether police have been overly suggestive in their interrogation, with police themselves supplying the facts that the suspect is then encouraged to confess to. This contamination can be deliberate or inadvertent and usually stems from a police mindset that presupposes guilt.[238] As mentioned, standard police interrogation practices under the Reid technique center not on *evaluation* of the suspect's guilt, but *establishment* of that guilt,[239] which preys on the suggestibility of certain types of suspects.[240] The psychology evidence shows that where an "officer already believes that the suspect committed the crime [and is] not likely to take 'no' as an answer," there is a serious danger that some suspects will "form false memories of the crimes that they did not commit."[241] As mentioned, one of three main types of false confessions is coerced-internalized confessions, so called because

[237] Lisa Lewis, *Rethinking* Miranda*: Truth, Lies, and Videotape*, 43 GONZ. L. REV. 199, 200, 220-21 (2007–2008).

[238] A danger acknowledged by the Reid technique. INBAU ET AL., *supra* note 90, at 57 (acknowledging that a "preconceived expectancy of guilt" can influence the questions asked and interpretation of behavioral responses).

[239] *See* Kassin et al., *supra* note 19, at 6-7 (describing and critiquing the Reid technique).

[240] *See id.* at 9.

[241] Frances E. Chapman, *Coerced Internalized False Confessions and Police Interrogations: The Power of Coercion*, 37 LAW & PSYCHOL. REV. 159, 162 (2012-2013) (internal quotation marks omitted).

police apply pressure and the suspect internalizes the view of the police, changing their own beliefs about their innocence, and becoming unable to differentiate actual memories from those that are imagined.[242] If jurors get to see police suggesting details of the crime to the suspect, this provides direct evidence of potential unreliability of the confession.

In addition to these practical arguments, Prof. Christopher Slobogin argues that there are three constitutional bases for requiring the recording of interrogations.[243] First, due process requires preserving exculpatory evidence, and Slobogin argues that this should extend beyond intentional destruction, to a duty to create a record of relevant interactions.[244] Second, historically, the Fifth Amendment required in-person court interrogations, conducted by judges in open court, since organized police did not exist in colonial times. Slobogin argues that only if the court was unavailable to take a direct record of the interrogation were secondhand verbatim accounts entered into the record, and recordings would avoid that necessity.[245] Third, the Sixth Amendment right to counsel requires that post-indictment interrogations permit the presence of counsel or some substitute counsel.[246] Lower courts have interpreted recordings as being able to constitute that substitute, and according to Slobogin only recordings can reliably combat the "vagaries" of witness accounts of lineups and other post-indictment confrontations, as well as similar difficulties in interactions between opposing parties.[247]

Nevertheless, there are concerns with recording interrogations. The two problems most commonly raised relate to the trustworthiness of the police, being selective in what they record, or even doctoring recordings subsequent to the interrogation.[248] One response to this first problem specifically is that the *Miranda* warning could be expanded to include informing suspects that only recorded interrogations can be used against them, but for spontaneous confessions. As for doctored recordings, Slobogin argues this can be largely deterred by strict chain of custody rules and by giving the

242 *Id.* at 170. Discussed in further detail *infra* Part IV.

243 Slobogin, *supra* note 5, at 309.

244 *Id.* at 317-18.

245 *Id.* at 319-20.

246 *See* United States v. Wade, 388 U.S. 218, 226 (1967).

247 *See* Slobogin, *supra* note 5, at 320.

248 *See* JAY STANLEY, AM. CIVIL LIBERTIES UNION, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 2-3 (2015), https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf.

suspect a copy of the recorded interview, a practice in some jurisdictions in Australia.[249]

As well as advantaging defendants, advocates also stress that recordings can be advantageous to police in conducting interrogations, bolstering "the credibility of authentic confessions by providing an objective record of the interrogation and subsequent confession."[250] According to a National Intelligence Defense College report, benefits to the state include: "reduced defense motions to suppress statements, more guilty pleas, better evidence for use at trial, increased public confidence, and use as an interrogation-technique teaching tool for detectives."[251] Many of these benefits have translated into increasing guilty pleas,[252] and consequently many police agencies have adopted recording as standard for these reasons.[253]

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[249] Slobogin argues that interrogations not taped because of equipment failure or equipment unavailability would qualify as good faith exceptions to the required rule. Slobogin, *supra* note 5, at 315.

[250] Fernando Anzaldua, *False Confessions*, L.J. FOR SOC. JUST. (Mar. 8, 2012), http://ljsj.wordpress.com/2012/03/08/false-confessions/; *see also* Miriam S. Gohara, *A Lie for a Lie: False Confessions in the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 100, 147-48 (2005) (discussing how videotaping "protects the rights of the accused by providing an objective account of the interrogation, [and] also insulates police from frivolous claims that a confession has been coerced."); Lewis, *supra* note 237, at 220-21 (arguing that videotaping will benefit the courts, suspects, attorneys, and police).

[251] Ariel Neuman & Daniel Salinas-Serrano, *Custodial Interrogations: What We Know, What We Do, and What We Can Learn from Law Enforcement Experiences*, *in* NAT'L DEF. INTELLIGENCE COLL., EDUCING INFORMATION — INTERROGATION: SCIENCE AND ART 141, 224 (2006). Similar positive results for both police and citizen behavior are found in multiple studies of the evidentiary benefits of body-worn camera systems, in both resolving citizen complaints and reducing untruthful citizen complaints. *See infra* text accompanying note 260; MICHAEL D. WHITE, O.J.P. DIAGNOSTIC CTR., POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 21-22 (2014), https://www.ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20 Officer%20Body-Worn%20Cameras.pdf (summarizing results of three empirical studies).

[252] Slobogin, *supra* note 5, at 314. Similarly, a UK Home Office report on two Scottish studies found that "body-worn camera cases were 70 to 80 percent less likely to go to trial, compared to other court cases." WHITE, *supra* note 251, at 7.

[253] Some of the reasons agencies provided for videotaping statements included "[a]voiding defense attorney's challenges of the accuracy of audiotapes and the completeness of written confessions . . . [h]elping reduce doubts about the voluntary nature of confessions . . . [j]ogging detectives' memories when testifying . . . [and c]ountering defense criticism of 'nice guy' or 'softening up' techniques for interrogating suspects." WILLIAM A. GELLER, NAT'L INST. OF JUSTICE, VIDEOTAPING INTERROGATIONS AND CONFESSIONS 3 (1993). The main reason given for not videotaping was cost. *Id.*

Initially, pressure for police departments to make complete electronic recordings when they question suspects in custody came from defendant advocates.[254] However, that is changing.[255] Police agency support for mandatory recordings is increasingly common.[256] In a special report by Northwestern University Center on Wrongful Convictions, Thomas P. Sullivan interviewed police officers in numerous states who expressed strong support in favor of requiring recordings of interrogations.[257] Sullivan conducted an unofficial survey in which over 260 departments of various sizes in forty-one states reported consistently recording custodial interrogations of suspects in felony investigations, starting from when the *Miranda* warnings are given.[258] Many officers expressed enthusiasm for recordings,[259] pointing to advantages such as: providing irrefutable evidence that can be used in court, including to contradict claims of misbehavior;[260] saving police from having to write notes, which "can make the suspect nervous and clam up,"[261] and allowing officers to

[254] In 1998, the ABA's comprehensive review of criminal procedure recommended exploring more use of videotaping interviews. A.B.A. Special Comm. on Criminal Justice in a Free Soc'y, *Criminal Justice in Crisis* (1988), http://druglibrary.org/special/king/cjic.htm ("It would be particularly helpful to explore the potential for greater use of videotaping of interrogation sessions in their entirety."); In 2004, the National Association of Criminal Defense Lawyers recommended recording as "a simple procedure that would deter human rights violations, reduce the risk of wrongful convictions due to false confessions, and greatly enhance the truth-seeking process by resolving factual disputes concerning interrogation." Neuman & Salinas-Serrano, *supra* note 251, at 226.

[255] Thomas P. Sullivan, *The Police Experience Recording Custodial Interrogations*, CHAMPION, Dec. 2004, at 24, 27 ("Law enforcement personnel who oppose recording custodial interviews speculate about hypothetical problems they have never encountered because they haven't given recordings a try. Those who have recorded for years do not express similar misgivings. Experienced officers from all parts of the United States support recording custodial interrogations in felony investigations from the time the *Miranda* warnings are given until the suspect leaves the room.").

[256] The Reid technique manual now endorses use of recordings, as it aids investigations. INBAU ET AL., *supra* note 90, at 48.

[257] Sullivan, *supra* note 255, at 25 (providing quotes from individuals from locations and departments across the country and concluding that "[v]irtually every officer who has had experience with custodial recordings enthusiastically favors the practice").

[258] *Id.* at 27.

[259] As did some judges: Sullivan quotes an Indiana state court judge as saying "I don't know why I have to sit here and sort through credibility of what was said in these interviews when there's a perfect device available to resolve that and eliminate any discussion about it." *Id.* at 26.

[260] *Id.* at 26-27 (describing and quoting police statements).

[261] *Id.* at 26 (quoting an officer).

review the recordings to "later dissect the tapes for the words used, mannerisms of the suspect, and voice inflection . . . subtleties that may go unnoticed without the benefit of recording."[262]

Some police manuals now explicitly encourage use of audiovisual recordings of statements and confessions,[263] as do some courts[264] and legislatures.[265] Additionally, the lower cost and size of cameras has made not only in-vehicle cameras feasible, but now police body or lapel cameras are increasingly common.[266] The federal government may soon offer financial support for the dispersal of body-worn recording equipment, at all levels of law enforcement.[267] Reportedly, approximately 25% of the 17,000 law enforcement agencies in the nation have already instituted body or lapel cameras to be worn by police officers, and approximately 80% of agencies are considering that reform.[268] A survey of 785 federal, state, and local law enforcement professionals found that 85% of police officers reported

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[262] *Id.*

[263] *See, e.g.*, JOHN E. HOWELL, PINE BLUFF POLICE DEPARTMENT POLICY & PROCEDURE MANUAL, POLICY 305: INTERROGATIONS AND CONFESSIONS § IV.E.2, at 4 (2008), http://www.pbpd.org/Policies/Chapter-III/POL-0305%20_Interrogations%20&%20Confessions_.pdf ("If available investigative officers are encouraged to use this agency's video and audio taping capabilities for purposes of recording statements and confessions in an overt or covert manner consistent with state law.").

[264] Neuman & Salinas-Serrano, *supra* note 251, at 223 ("Electronic recording of interviews and interrogations, when feasible, has been required by judicial opinion in Alaska since 1985 and in Minnesota since 1994, although neither specifies videotaping." (citations omitted)). In her initial order against the NYPD for the City's controversial stop and frisk policy, Judge Shira Scheindlin included an order for body cameras as part of the (subsequently overturned) judicial order. Floyd v. City of New York, 959 F. Supp. 2d 540, 563 (S.D.N.Y. 2013).

[265] *See* Neuman & Salinas-Serrano, *supra* note 251, at 223 (including Illinois, the District of Columbia, and in the case of serious crimes, Maine).

[266] As described by New York City Police Commissioner Frank Straub, the cost of police body cameras is decreasing and making widespread use more feasible. *See Police Departments Implement Body-Worn Cameras*, DIANE REHM SHOW (Mar. 9, 2016, 11:00 AM), http://thedianerehmshow.org/shows/2016-03-09/police-departments-implement-body-worn-cameras (from 11:17:02). Note, however, that there remain other, more hidden costs of storage and review. *Id.*

[267] President Obama proposed a government package including $75 million to fund 50,000 police lapel cameras over three years, which the FBI projects would cover approximately 7% of police officers in the nation. Nedra Pickler, *Obama Proposes Body-Worn Cameras for Police*, PBS (Dec. 1, 2014), http://www.pbs.org/newshour/rundown/obama-proposes-body-worn-cameras-police/.

[268] STANLEY, *supra* note 248, at 1 (summarizing the ACLU's updated report on police body cameras). This is an increase from approximately 16% of agencies that videotaped at least some interrogations and confessions in 1993, GELLER, *supra* note 253, at 2, and one third of agencies serving populations of 50,000 or larger. *Id.*

being familiar with body camera technology.[269] The same number "believe that body-worn cameras reduce false claims of police misconduct, and reduce the likelihood of litigation against the agency," and 77% considered body cameras more effective than in-vehicle cameras.[270]

Much of the push for the broadening of the use of body cameras has been driven not simply by concerns regarding *Miranda* or even interrogation more generally, but by police violence, particularly against minorities.[271] Yet there are many factors that do impact the goals of *Miranda* reform, and explain this support from both sides of the traditional debate over interrogation methods. Four of five empirical studies reviewed by a report developed in cooperation with the Justice Department "documented substantial decreases in citizen complaints . . . as well as in use of force by police . . . and assaults on officers."[272] Even the ACLU, ordinarily opposed to expansion of surveillance, concluded that "[c]ameras have the potential to be a win-win, helping protect the public against police misconduct, and at the same time helping protect police against false accusations of abuse."[273]

Concerns remain, however. The ACLU reported that unlike in-vehicle cameras, which can automatically be activated by factors such as turning on sirens and flashing lights, police can (and do) turn body cameras on and off, raising reliability concerns.[274] At the same time, the ACLU also notes that prohibiting the police from turning the cameras off could raise privacy concerns for homeowners when police

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[269] Doug Wyllie, *Survey: Police Officers Want Body-Worn Cameras*, POLICEONE.COM (Oct. 23, 2012), http://www.policeone.com/police-products/body-cameras/articles/6017774-Survey-Police-officers-want-body-worn-cameras/.

[270] *Id.*

[271] *See, e.g.*, Rory Carroll, *California Police Use of Body Cameras Cuts Violence and Complaints*, GUARDIAN (Nov. 4, 2013), http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto (summarizing a few inflammatory racialized catalytic incidents, and describing a randomized study of police body cameras which found that "after cameras were introduced in February 2012, public complaints against officers plunged 88% compared with the previous 12 months" and that "[o]fficers' use of force fell by 60%").

[272] WHITE, *supra* note 251, at 6. There is also evidence that frivolous citizen complaints are reduced when officers are wearing body cameras, so the statistics could be a product of changed police behavior or changed citizen behavior. *Id.*

[273] STANLEY, *supra* note 248, at 2.

[274] *Id.* at 4 (reporting that "compliance rates with body camera policies are as low as 30%"). However, there may be some future possibility of using certain types of movement, particularly aggressive or threatening moves, to activate the camera. *See id.* Interestingly, the likelihood of videotape usage decreased "as the severity of the felony decrease[d]." GELLER, *supra* note 253, at 3.

enter homes, and for victims of sexual assault or domestic violence, for whom privacy is particularly important.[275] Furthermore, there is the danger of misuse of the recordings against police officers, by departments listening in on non-investigative conversations between officers, to harass whistleblowers or union activists; privacy concerns with covert use of cameras; and concerns over unnecessarily lengthy retention of data, or distribution to the public.[276]

In addition, psychological studies once again reveal concerns that have been largely overlooked in the legal literature.[277] Substantial empirical evidence shows that mock jurors' evaluations of videotape confessions vary significantly with changes in camera perspective. Jurors who watch confessions that are seen from the point of view of the interrogator — which most police recordings are — are not only more likely to consider confessions to be voluntary, but also they are more likely to conclude that suspects are guilty.[278] This effect has subsequently been established not only for mock jurors, but also in response to actual police interrogations, and has been shown to be difficult to mitigate. One study summarized the breadth of the problem:

> [I]ndividual differences in the motivation to think effortfully and in the capacity to reason specifically about complex causal relationships do not moderate the camera perspective bias, nor is it reduced by situationally increasing observers' sense of accountability for their judgments. The bias has also been shown to occur across various types of crime, in the context of realistic trial simulations, with samples of college students and community members from disparate backgrounds, and with authentic video-taped confessions recorded by police that depict actual suspects and detectives. Finally, relevant expertise does not mitigate the bias as it has been shown

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[275] *See* STANLEY, *supra* note 248, at 5.

[276] *Id.* at 3. This concern is shared by police departments. *See* Peter Hermann & Aaron C. Davis, *As Police Body Cameras Catch on, a Debate Surfaces: Who Gets to Watch?*, WASH. POST (Apr. 17, 2015) http://www.washingtonpost.com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e_story.html.

[277] *But see* ADAM BENFORADO, UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE 104 (2015) (raising concerns about perspective bias for the use of body cameras).

[278] *See* G. Daniel Lassiter, *Illusory Causation in the Courtroom*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 204 (2008) (describing recent research on the illusory-causation phenomenon which "can produce serious prejudicial effects with regard to how people evaluate certain types of legal evidence").

> recently to affect the evaluations of highly experienced trial judges and police interrogators.[279]

Perspective bias is a problem for all recordings of interrogations, but it is particularly a problem for body cameras because they frame the encounter from the police officer's perspective, and this cannot realistically be altered. Perspective bias thus constitutes a caveat on the otherwise unusually broad support for the use of body cameras, as do the other concerns mentioned, regarding privacy and manipulation. Nevertheless, the advantages of recordings — whether from lapel cameras, in-vehicle cameras, or simply interrogation room cameras — are so many and so powerful that these difficulties should not and are not preventing the widespread adoption of this method of ensuring police accountability. In contrast to the other reform proposals considered in this Part, recording interrogations is not only realistic, it is already being adopted throughout the nation, even in the absence of a Supreme Court mandate. There are nonetheless some jurisprudential issues that the widespread use of interrogation cameras raises, particularly if mandated.

The significance of recordings is not only evidentiary: requiring that interrogations be recorded, especially if recordings are required to be made overtly and not covertly,[280] has the advantage of reducing the inherently coercive atmosphere of custodial interrogation. A suspect will know that there are limits to what the police can do while their interaction is being recorded, and thus will have less fear of actual coercion. Prof. Paul Cassell has suggested that mandatory videotaping could substitute for *Miranda* rules, since it would provide adequate protection against false confessions "by allowing judges and juries to see when police have led an innocent person to admit to a crime he did not commit."[281] Most advocates for recordings consider them a supplement to *Miranda* protection. But it is reasonable to ask: in an era of mandatory recordings for all interrogations, is the assumption of coercion — the cornerstone of *Miranda* — still necessary? The next Part addresses more generally the possibility of a complete overhaul of *Miranda*.

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[279] Lezlee J. Ware et al., *Camera Perspective Bias in Videotaped Confessions: Evidence That Visual Attention Is a Mediator*, 14 J. EXPERIMENTAL PSYCHOL. 192, 193 (2008). Manipulating visual attention can mitigate, although not negate, the bias. *See id.* at 198.

[280] One survey of police investigators in Alaska and Minnesota, both states that require recordings, reported an 82% confession rate when the recording device was completely hidden in contrast to a 43% confession rate when the recording device was always visible, INBAU ET AL., *supra* note 90, at 51.

[281] Cassell, *Protecting the Innocent*, *supra* note 41, at 503.

IV. Rules that Change the Substance of *Miranda* to Better Reflect Its Aims

The third category of proposed reforms challenges whether a pro forma recitation of rights really overcomes the inherent coercion of custodial interrogation. There are three main proposals as to how to better combat coercion: making *Miranda* variable, according to the vulnerability of the individual; prohibiting police deception; and abolishing or reforming waiver.

A. Making Miranda Variable

If it is demonstrably apparent that a given suspect knows his rights, then any lack of warning should have no coercive effect. Likewise, if the suspect is incapable of understanding even a procedurally sound recitation of those rights, providing a warning has no protective effect. In such cases, a better calibrated, variable frame of protection would seem appropriate. The Court could require that more detailed warnings — possibly as described in Part II — be provided to more vulnerable suspects. At the same time, the Court could excuse police from not warning less vulnerable, more experienced suspects.

Miranda rejected this reasoning, favoring instead a per se rule requiring that the warnings be given in all cases of custodial interrogation.[282] The Court justified the per se rule on the basis of three factual assertions: that giving a warning is "so simple . . . that we will not pause to inquire in individual cases" whether the suspect in fact knew his rights;[283] that assessments of a suspect's knowledge, based on information such as age, intelligence, education, and prior contact with the authorities, can only ever be speculative;[284] and that even for someone who is educated, experienced with the police, etc., warnings still serve an important role of overcoming pressures on the individual.[285] The first of these three statements constitutes an assertion of the low cost of providing *Miranda* warnings which, as discussed, is disputable.[286] The empirical claim that no one is immune from police pressure is questionable, but constitutes a 'type I error' — it errs on the side of over-inclusiveness — and thus is less dangerous in terms of creating false confessions. But the Court's third empirical

[282] Miranda v. Arizona, 384 U.S. 436, 467-68 (1966).
[283] *Id.* at 468.
[284] *Id.* at 468-69.
[285] *Id.* at 469.
[286] *See supra* Part III.A.

claim, that warnings provide effective protection for all suspects, creates a risk of 'type II error' — it fails to appreciate the danger of under-inclusiveness, and so risks providing inadequate protection.

The *Miranda* Court justified the assumption of the effectiveness of the warnings by claiming that they operated not just as information devices, but also as a kind of code to let the suspect know that the interrogator will respect the rights of the individual.[287] Ironically, however, by refusing to acknowledge differences among suspects and making *Miranda* apply identically across suspects' range of experience and intelligence, the Warren Court arguably laid the groundwork for later Courts to only require a minimalist version of *Miranda*.[288] Much of the restrictive jurisprudence that followed was essentially justified by presuming the effectiveness of the *Miranda* warning.[289] By refusing to vary the rule according to actual needs, the Warren Court created de facto variation in actual protection: differences in education, English comprehension, experience with the legal system, and general sophistication lead to different levels of understanding. Thus either the *Miranda* warning is varied, or else the *effect* of *Miranda* varies, inversely.

Those opposing *Miranda* from a more pro-prosecution side are also significantly dissatisfied with its lack of variability. Critics object that hardened criminals are treated to the same warnings — and thus to the same entitlement to exclusion of evidence if that procedure is not followed — as first time suspects, despite the vast expected difference in their prior knowledge of their rights.[290] Prof. James Spiotto's study found that 78% of all motions to suppress were made by those defendants who had a prior criminal record. Whereas defendants who had no criminal record constituted 29% of the defendant pool, they

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[287] *Miranda*, 384 U.S. at 468.

[288] *See* Duke, *supra* note 5, at 564-66 ("Stripped of its muscle by narrowing interpretations, Miranda not only provides no significant protection for suspects, guilty or innocent, it actually assists the police in their efforts to convict whomever they believe to be guilty.").

[289] For example, Justice O'Connor reasoned that two-stage questioning techniques ordinarily will not pose a serious concern because a "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice" to counteract any violation. Oregon v. Elstad, 470 U.S. 298, 314 (1985).

[290] *See, e.g.*, Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 686-87 (1968) (stating that "on balance the privilege so much more often shelters the guilty [that] . . . its occasional effect in protecting the innocent would be an altogether insufficient reason" to find it beneficial).

constituted only 12% of those making motions to suppress.[291] Defendants with criminal records were also more likely to succeed with their suppression motions.[292] These results suggest, though they do not prove,[293] that those experienced with the criminal justice system are more knowledgeable about how to exploit its rules and the constitutional rights articulated by the Supreme Court.

The *Miranda* Court itself seemed to recognize that some situations of custodial interrogation are far worse than others — and thus better justify the *Miranda* mandate. The four cases consolidated under *Miranda* were quite mild in terms of alleged police coercion, with only one of the four suspects being interrogated repeatedly over a long period of time.[294] Consequently, the Court did not stress the facts in the four cases before the Court.[295] Instead, it focused on general police practices,[296] and detailed prior cases that illustrated more problematic circumstances of interrogation:

> In *Townsend v. Sain*, the defendant was a 19-year-old heroin addict, described as a 'near mental defective'. The defendant in *Lynumn v. State of Illinois* was a woman who confessed to the arresting officer after being importuned to 'cooperate' in order to prevent her children from being taken by relief authorities. . . . [I]n *Haynes v. State of Washington*,

[291] James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 255–56 (1973). Note this does not count only *Miranda*-violation motions.

[292] *Id.* at 256.

[293] The results could reflect a selection effect in cases that proceed to the pre-trial stage — for example, dismissals and pleas may be more common for first-time offenders.

[294] Defendant Miranda was simply taken to a special interrogation room and confessed; defendant Vignera made an oral confession in the afternoon and signed an inculpatory statement that evening; defendant Westover was interrogated by local authorities "for a lengthy period, both at night and the following morning," then interrogated by the FBI for two hours before signing a confession; only defendant Stewart was interrogated repeatedly, on nine occasions over five days. *See* Miranda v. Arizona, 384 U.S. 436, 456-57 (1966).

[295] Its only two references, both rather dubious, to the facts that may have made the defendants especially vulnerable were that coercion was "forcefully apparent" because defendant Miranda was an indigent Mexican who "was a seriously disturbed individual with pronounced sexual fantasies" and defendant Stewart "was an indigent Los Angeles Negro who had dropped out of school in the sixth grade." *See id.* at 457.

[296] *See id.* at 448 (describing the psychological manipulation espoused by police manuals).

> [defendant's] persistent request during his interrogation . . . to phone his wife or attorney [were ignored.][297]

But these cases are quite different to the principle espoused in *Miranda*: in the first two cases, the defendants possessed special characteristics that made them exceptionally vulnerable, and in the third, the suspect had repeatedly attempted to assert his rights. They do not establish the Court's empirical claim that everyone is vulnerable to police coercion. The facts that the Court emphasized in those cases could instead be used to justify a rule that the police need to meaningfully inform the suspect of their rights, rather than to give a pro forma recitation. That would mean that suspects such as Townsend would require more from the police than a simple recitation of *Miranda* warnings, which he would be unlikely to genuinely comprehend, but police could be excused from interrupting the flow of an interrogation of a multiple recidivist in order to inform him of rights that he has clearly heard before. The question then becomes: who gets more and who gets less warning?

Although the *Miranda* Court insisted that all suspects be treated the same, the Roberts Court has taken the first steps towards answering that question. In *J.D.B. v. North Carolina*, the Court held that special rules apply to juvenile suspects because of their exceptional vulnerability.[298] Ordinarily, to determine whether a person is in custody, an objective evaluation is made of whether, in the circumstances, a reasonable person would feel "at liberty to terminate the encounter and leave."[299] But recently, the Supreme Court found that "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."[300] Consequently, the Court ruled that age needs to be considered in the reasonable person analysis of whether a person is in custody.[301] This premise rested on the basis of extensive psychology evidence that children are more susceptible to outside pressures than adults.[302] The Court acknowledged that, ordinarily, the in-custody analysis involves no consideration of the "actual mindset"

[297] *Id.* at 456 (citations omitted).

[298] J.D.B. v. North Carolina, 564 U.S. 261, 270-72 (2011).

[299] Thompson v. Keohane, 516 U.S. 99, 112 (1995).

[300] *J.D.B.*, 564 U.S. at 264-65.

[301] *Id.* at 272.

[302] It also considered the special circumstances and rules that apply only to juveniles, particularly that their "presence at school is compulsory" and "disobedience at school is cause for disciplinary action." *Id.* at 276.

of the suspect,[303] but concluded that a child's age would affect his perception of whether he is free to leave.[304] This is because "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."[305]

The Court was at pains, however, to make clear that it was not introducing a more generalized variability to *Miranda*, and attempted to differentiate juvenile status from other characteristics.[306] Regarding a suspect's experience with law enforcement, the Court said that factor has "no objectively discernible relationship to a person's understanding of his freedom of action" because its effect would be "contingent on the psychology of the individual suspect."[307] But this is belied by the test that the Court developed, which was that the characteristic, in this case the child's age, "was known to the officer at the time of the interview, or would have been objectively apparent to a reasonable officer."[308] The Court insisted that, in contrast, the test for juveniles requires officers neither to consider circumstances "unknowable" to them, nor to "'anticipat[e] the frailties or idiosyncrasies.'"[309] Yet this is even more true of experience with the police, which is an objectively observable fact, unlike age, which can only be approximated.

Furthermore, the Court's observation that a suspect's assessment of whether they are free to leave is affected by age applies equally to gender, mental disability, and other factors for which there is ample psychological evidence of significant difference in perception of freedom to leave, as well as other legally significant assessments, such as voluntariness of consent.[310] For instance, there is similar evidence that persons with disabilities, like juveniles, are more likely to "comply with requests for a confession — whether true or false" to obtain the benefit of ending the interrogation,[311] as are those with other "cognitive and intellectual impairments; and personality

[303] *Id.* at 271.
[304] *Id.* at 271-72.
[305] *Id.* at 273.
[306] *Id.* at 275 ("[A] child's age differs from other personal characteristics . . . .").
[307] *Id.* (quoting Yarbrough v. Alvarado, 541 U.S. 652, 668 (2004)).
[308] *Id.* at 274, 277.
[309] *Id.* at 274 (quoting Yarbrough v. Alvarado, 541 U.S. 652, 662 (2004); and citing Berkemer v. McCarty, 468 U.S. 420, 430 (1984)).
[310] *See* Cuevas & Jacobi, *supra* note 96, at 2175-76, 2183.
[311] *See* Kassin et al., *supra* note 19, at 9.

characteristics and mental illness."[312] According to the Innocence Project, all of the following serve as factors that may contribute to a detainee's false confession during police interrogation: "duress, coercion, intoxication, diminished capacity, mental impairment, ignorance of the law, [and] fear of violence," among others.[313]

Arguably, the Court has further developed a doctrine of varied application of *Miranda* through its waiver doctrines as well. As Prof. Joshua Engel describes, the Court has begun a "subtle shift towards focusing more [on] responsibility of the subjective knowledge of suspects rather than the objective actions and tactics of the police. In particular, the Court has started to implicitly consider the criminal background of suspects among the factors that determine whether a *Miranda* waiver and subsequent statement is knowing, intelligent, and voluntary."[314] Engel argues that this constitutes "a more realistic review into whether a waiver and statement were uncoerced."[315] Thus, although making the warnings variable may seem at first glance to constitute a major upheaval to *Miranda*, the Supreme Court has arguably already begun that process.

There are, however, two problems with making *Miranda* variable, one practical and one jurisprudential. The practical problem is that *Miranda* may actually be easier for the police to administer than a variable standard. The jurisprudential problem is how this variable standard would be different from actual coerciveness.

Arguably, the great value of *Miranda* is its simplicity. The Court in *J.D.B.* stressed that it is far easier for the police to administer an objective standard than a variable standard, for otherwise police are burdened "with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind."[316] Yet police departments have already begun accommodating to the new in-custody rule for juveniles, as well as anticipating other potential changes to the process as it pertains to children. For instance, in Tampa, Florida, the police

[312] *Id.* at 25.

[313] *False Confessions and Admissions*, INNOCENCE PROJECT (July 13, 2016), http://www.innocenceproject.org/causes/false-confessions-admissions/.

[314] Joshua A. Engel, *Frequent Fliers at the Court: The Supreme Court Begins to Take the Experience of Criminal Defendants into Account in* Miranda *Cases*, 7 SETON HALL CIR. REV. 303, 340 (2011).

[315] *Id.*; *see also* Randall Blowers, Miranda *Rights for Terrorists: The Obama Administration's New Policy and What It Means for the New War on Terror*, 28 CONN. J. INT'L L. 321, 338 (2013) (arguing for "individual tailorability" in the *Miranda* process for the treatment of terrorists).

[316] J.D.B. v. North Carolina 564 U.S. 261, 271 (2011).

manual specifies that "special efforts should be made, preferably on tape, to explain the rights to the juvenile in custody."[317] Similarly, in Austin, Texas, an oral statement given by a juvenile "must be recorded by an electronic recording device (tape recorder or video camera) and, before making the statement, the child [must] receive[] the *Miranda* warning by a magistrate . . . and the warning is made part of the recording."[318] That department goes further than the Supreme Court, requiring that the *Miranda* warning "must be given out of the presence of police officers or prosecutors,"[319] that police officers should "adjust their interviewing style to be sensitive to each person's age and experience,"[320] and that officers must "confer with the juvenile and parents or guardians to explain agency and juvenile justice system procedures."[321] Likewise, the Rapid City, South Dakota, police manual requires that "rights must be waived by both child and parent/guardian before questioning if the statements/admissions obtained are to be admissible in court."[322]

These accommodations are not limited to juveniles. The Austin manual also deals with other conditions, such as deafness and limited English proficiency.[323] For instance, it provides that when interrogating an arrestee, "[i]f an officer cannot inform the arrestee of the *Miranda* warnings without the use of an interpreter, then the officer must secure an interpreter before any interrogation."[324] Alternative special conditions are illustrated by the Seattle Police Department Manual, which requires that: "Officers will establish that the suspect understands in one of two ways: by asking 'Do you understand' after each of the four *Miranda* warnings, or by asking, 'Do you understand each of these rights?' after reading all of the

[317] TAMPA POLICE DEPARTMENT STANDARD OPERATING PROCEDURES § III(G)(5), at 51 (2011).

[318] AUSTIN POLICE DEPARTMENT POLICY MANUAL § 317.5, at 141 (2013), http://austintexas.gov/sites/default/files/files/Police/APD_Policy_2013-2_Effective_6-1-2013.pdf.

[319] *Id.* Except when it is deemed necessary to have an officer present for the magistrate's protection. *Id.*

[320] *Id.* at 142.

[321] *Id.* at 143.

[322] RAPID CITY POLICE DEPARTMENT RULES AND PROCEDURES, Pol'y No. 615-02, § G, at 609 (2006) (emphasis omitted).

[323] AUSTIN POLICE DEPARTMENT POLICY MANUAL, *supra* note 318, § 403.4.2, at 242-43, 403.5.6, at 248 (requiring that Miranda statements be given in a person's primary language, and a sign language or other interpreter provided when necessary).

[324] *Id.* § 609.3.3(a)–(b) at 366.

warnings,"[325] as well as an additional warning for the hearing impaired,[326] and for those with limited English.[327] These and other accommodations suggest that the practical critique of *Miranda* variability is quite surmountable.

The jurisprudential problem is that, arguably, making *Miranda* variable would collapse into an actual coercion standard, returning the doctrine essentially to voluntariness analysis, with all of the problems associated with that doctrine.[328] One response to this problem is that *Miranda* already looks a lot like voluntariness, and that the differences between the two doctrines are overstated.[329] In fact, the Supreme Court has suggested as much in *Withrow v. Williams*.[330] There the Court refused to eliminate habeas claims based on failure to properly administer *Miranda* warnings, in part on the ground that prisoners could readily transform their *Miranda* claims into a due process claim that a conviction rested on an involuntary confession. Specifically, the Court stated that "it seems reasonable to suppose that virtually all *Miranda* claims would simply be recast in this way."[331]

Nonetheless, making *Miranda* variable would require a large jurisprudential shift, because that reform would look a lot like the 1968 Omnibus Crime Act that Congress crafted in an attempt to reform *Miranda*,[332] which was overruled by the Court in *Dickerson*. As discussed, that legislation considered that whether the police read a suspect his *Miranda* rights was only one factor in the broader totality

[325] *See generally* SEATTLE POLICE DEPARTMENT MANUAL § 6.150.3 (2015), http://www.seattle.gov/police-manual/title-6---arrests-search-and-seizure/6150---advising-persons-of-right-to-counsel-and-miranda.

[326] *Id.* § 6.150.5 ("When advising a person who is hearing-impaired of *Miranda*, officers shall include the following warning: "If you are hearing-impaired, the Seattle Police Department has the obligation to offer you an interpreter without cost and will defer interviews pending the appearance of the interpreter.").

[327] *Id.* § 6.150.6 ("When advising a person who speaks limited English of *Miranda*, officers shall give *Miranda* warnings in an appropriate language to establish understanding.").

[328] *See* Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 967-68 (2012) (summarizing the problems with the doctrine).

[329] *See* Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195, 2201 (1996).

[330] *See* 507 U.S. 680, 693-94 (1993).

[331] *Id.* at 693 (citations omitted). However, a variable *Miranda* standard would presumably be considerably more protective than an actual coercion test: *Miranda* would still be prophylactic and require more detailed elaboration when such warning would be seen by the reasonable police officer as likely to provide additional information and meaningful protection.

[332] *See* 18 U.S.C. § 3501 (2012).

of the circumstances of an ad hoc voluntariness test.[333] Because the Court overturned that legislation, it would have to reverse itself, along with part of *Miranda*, in order to embrace a variability standard. This would be a bold step, but it is not entirely unrealistic, for three reasons.

First, the reform would not be entirely burdensome to the police, for it would, as discussed, permit police to forgo warnings in cases of experienced criminals who would be expected to know their *Miranda* rights. Second, since the Court has already begun to go down the path of varying the rules based on subjective understanding, it will run into different jurisprudential problems if it does not take that path. For instance, the Court is not even consistent in how it treats juveniles — juvenile status is relevant to the in-custody determination, but not to interrogation, yet whether a question is likely to elicit an incriminating response[334] is equally likely to hinge on the vulnerability of age.[335] Others have called for special procedures for not only juveniles, but also the mentally impaired and those who speak little English,[336] and it will be a hard distinction to maintain otherwise. Third, variability may have the most potential to address the problem of false confessions, by providing more meaningful protection for those least experienced with the criminal justice system, and most likely to confess as a result of that inexperience. As such, the problems of variability already exist, without having reaped the benefits that variability would offer.

B. Prohibiting Police Deception

In *Miranda*, the Court bemoaned the common police practice of deceiving suspects,[337] describing how it undermines the suspect's constitutional rights.[338] Yet *Miranda* did not prohibit police deception, and both before[339] and after[340] *Miranda*, the Court has explicitly

[333] *See supra* Part I.C.

[334] *See* Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (defining interrogation as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response").

[335] *See* Cuevas & Jacobi, *supra* note 96, at 2184-85.

[336] *See* Cicchini, *supra* note 132, at 940.

[337] *See* Miranda v. Arizona, 384 U.S. 436, 461 (1966) (talking about the need to "guard against intimidation or trickery").

[338] *Id.* at 455 ("The police then persuade, trick, or cajole him out of exercising his constitutional rights.").

[339] *See* Sherman v. United States, 356 U.S. 369, 372 (1958) ("Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer."); Sorrells v. United States, 287 U.S. 435, 441 (1932) ("Artifice and stratagem

allowed it, as long as it does not interfere with the suspect comprehending his *Miranda* rights.[341] The term 'police deception' is broad, including a range of activities from undercover operations to misrepresenting the seriousness of the offense; most commonly it refers to 'trickery,' including presenting the suspect with false evidence of guilt, such as misrepresenting forensic or eyewitness evidence, existence of a co-defendant's admission of guilt, or the results of a polygraph test.[342] These are standard investigatory techniques, but police deception, particularly in the form of the presentation of false evidence, is one of the three main risk factors identified by psychologists for false confessions.[343]

Two primary methods by which police interrogation methods induce false confessions can be discerned from the psychology literature. The first type arises by encouraging resignation in an innocent suspect by undermining any belief of forthcoming relief from suspicion, interrogation, and prosecution.[344] False confessions of this type are a conscious (albeit arguably involuntary) choice made by the suspect, given his options. The second type of false confession arises when a suspect internalizes a false narrative of the crime: the innocent suspect actually comes to believe he is guilty.[345] False evidence feeds these two types of false confessions, especially because of the standard model of interrogation used by police in the United States, the Reid Technique.[346]

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may be employed to catch those engaged in criminal enterprises.").

[340] *See* United States v. Russell, 411 U.S. 423, 435-36 (1973) ("[T]he mere fact of deceit [will not] defeat a prosecution, for there are circumstances when the use of deceit is the only practicable law enforcement technique available." (citation omitted)); Frazier v. Cupp, 394 U.S. 731, 739 (1969) ("The fact that the police misrepresented the statements that [co-conspirator] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible.").

[341] Moran v. Burbine, 475 U.S. 412, 423-24 (1986) ("Granting that the 'deliberate or reckless' withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."). It must also not amount to entrapment. *Sherman*, 356 U.S. at 372; *Sorrells*, 287 U.S. at 441-42.

[342] GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 8-9 (2003).

[343] Kassin et al., *supra* note 19, at 16.

[344] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 997-1000 (1997).

[345] *Id.* at 1107, as described briefly *supra* Part III.

[346] GUDJONSSON, *supra* note 342, at 7 ("Hundreds of thousands of investigators have received the training in their technique."); *see* Neuman & Salinas-Serrano, *supra* note

Reid interrogations are undertaken assuming the suspect's guilt,[347] with the interrogator developing a theme of the crime premised on the suspect's guilt, avoiding any denials or objections.[348] Reid explicitly encourages developing that theme through deception: through reference to non-existent evidence,[349] the investigator overstating her certainty of the suspect's guilt,[350] and exaggerating his involvement in other crimes.[351] Advocates of the Reid technique argue that this combination of trickery and insistence on guilt will only entice confessions from the guilty;[352] however, this assertion is based on inaccurate assumptions about the effect of these interrogation techniques of the guilty mind, as differentiable from the innocent mind. The Reid technique assumes that it is almost always possible to differentiate between guilty and innocent suspects, based on various assertions regarding how guilty suspects appear — such as avoiding eye contact and slouching[353] — as well as how they think and respond to cues, because lying is tiring and anxiety-producing.[354] These indicators of guilt will become apparent through the interrogation process, according to the Reid technique. For instance, a person other than the interrogator should tell the suspect the name of the interrogator before he or she arrives, because the formality will "heighten the apprehension of the guilty suspect by reason of the apparent exalted status of the investigator," whereas "an innocent suspect will be favorably impressed by this professional arrangement and thereby will be relieved of any apprehension over the possibility of

251, at 142 ("Almost all manuals on interrogation techniques cover the same aspects of successful interrogation as the seminal Reid Technique."). The FBI's Direct Accusation Approach closely resembles the Reid technique, except that it "relies on confronting the suspect with the evidence available to motivate a confession." *Id.* at 205.

[347] After a neutral pre-interview, in which the interrogator determines the suspect's guilt or innocence, INBAU ET AL., *supra* note 90, at 3, based on three categories of behavioral cues: verbal, such as absence of thoughts or emotions and phrases indicating a time gap, *id.* at 90, 91, para-linguistic, such as hesitations or early responses, *id.* at 117-18, and non-verbal, such as posture, hand gestures and shrugs, *id.* at 128.

[348] *Id.* at 185.

[349] *Id.* at 191.

[350] *Id.* at 193.

[351] *Id.* at 198.

[352] *See, e.g.*, *Clarifying Misinformation About the Reid Technique*, JOHN E. REID & ASSOCS., INC. 1, 4, http://www.reid.com/pdfs/20120311.pdf (last visited Aug. 31, 2016).

[353] INBAU ET AL., *supra* note 90, at 196.

[354] *Id.* at 111.

being falsely determined to be guilty."[355] Similarly, the interrogator should pause after each answer to take notes, because "truthful suspects are comfortable with the silence" whereas "deceptive suspects are uncomfortable with the silence and it is not uncommon for them to break the silence by verbally modifying the earlier response."[356] Likewise, reassuring the suspect that the investigation will reveal the truth of the crime will convince the innocent suspect of the investigator's objectivity and delay his fears of not being believed, while increasing the fear of detection of the guilty suspect.[357]

The manual acknowledges that some behavior, such as nervousness will be common to both types of suspect,[358] but it claims that differentiation can nonetheless be consistently made because secondary analysis of common characteristics will reveal guilt or innocence. For instance, both types of suspect may interrupt a question in order to give early responses, but an innocent suspect does this out of anxiety, which will wane throughout the interview, whereas guilty suspects do so in the middle or end of an interview, due to anxiety to get the lie out.[359] More generally, innocent suspects will only be nervous at the beginning of an interview and become more relaxed and composed, whereas deceptive subjects will continue to be nervous, because they are lying.[360] Young suspects can display impertinence even when innocent, but only guilty adults display impertinence, to indicate defiance and lack of fear.[361]

Many of these claims are obviously quite dubious, such as the suggestion that innocent suspects will necessarily become more rather than less anxious as the interrogation continues over time. This assumes that the suspect will conclude that the interrogation will clearly reveal the truth, rather than convince the interrogator of an innocent person's guilt, and that the mere fact of an ongoing interrogation will not lead to increased anxiety at the time. Additionally, psychologists have disputed many of Reid's behavioral claims,[362] including the foundational assumption that there is a

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[355] *Id.* at 58.

[356] *Id.* at 60.

[357] *Id.* at 79.

[358] *Id.* at 62.

[359] *Id.* at 118.

[360] *Id.* at 142.

[361] *Id.*

[362] GUDJONSSON, *supra* note 342, at 9 (describing the extensive psychological literature challenging the claims of the manual writers that false confessions are not a likely result of their interrogation techniques); *see* Kassin, *On the Psychology of*

systematic way of judging whether someone is lying from nonverbal cues, an error known as the "Othello error," after the Shakespearean character duped into belief of his wife's guilt.[363]

Not only does Reid inaccurately assume interrogators can distinguish between innocent and guilty suspects, but when it is combined with police deception — particularly the presentation of false evidence — the technique becomes highly likely to create the two false confession effects described above. The first effect, what I call the resignation effect, is the direct goal of these techniques — if the person is guilty. The explicit aim of the interrogation is to "manipulate a suspect into thinking that it is in his or her best interest to confess."[364] This notion of 'best interest' involves convincing suspects that "the benefits of confession will be relatively high (e.g. lenient sentencing, end of stressful interrogation, release from custody) and that the costs of his confession will be relatively low (e.g. he will be convicted anyway because there is enough other evidence to prove the case against him)."[365] However, if the person is innocent, this approach may nonetheless be quite persuasive in encouraging confessions.

An innocent person presented with false evidence against him is more likely to think that he has been framed or misidentified in a way that is not going to be able to be remedied, and may confess in order to make a better deal.[366] The psychology literature supports the Reid technique's presumption that people will attempt to "maximize their well-being given the constraints they face, making the best of the

Confessions, *supra* note 76, at 220-24 (2005) (describing five key findings of the psychology literature that belie the assumptions of the Reid technique); Timothy E. Moore & C. Lindsay Fitzsimmons, *Justice Imperiled: False Confessions and the Reid Technique,* 57 CRIM. L.Q. 509, 510 (2011) (describing multiple challenges to the assumptions of the Reid technique and claiming each assumption is so lacking "sound scientific support" that the overall validity of the approach is "dubious").

363 *See, e.g.*, Aldert Vrij & Samantha Mann, *Detecting Deception: The Benefit of Looking at a Combination of Behavioral, Auditory and Speech Content Related Cues in a Systematic Manner*, 13 GROUP DECISION & NEGOT. 61 (2004) (discussing the unreliability of analysis of body language for indicia of deception, but arguing that it be made more reliable through systematization).

364 Kassin et al., *supra* note 19, at 12.

365 Gohara, *supra* note 250, at 118; *see also* Kassin et al., *supra* note 19, at 12 (describing "maximization" and "minimization").

366 As Gohara points out, under the standard model of interrogation, the "suspect's actual guilt or innocence has little bearing on whether he confesses; rather, he will confess whenever the costs of confession as he perceives them are outweighed by the benefits of confession, regardless of his culpability." Gohara, *supra* note 250, at 817.

situation they are in . . . ."[367] However, that applies also when facing a false accusation, and seemingly incontrovertible inculpatory evidence. The psychology literature also shows that people tend to be impulsive, seeking methods of mitigating present costs — such as avoiding ongoing interrogation — and overly discounting future damage — such as whether they will be able to mitigate the effect of falsely confessing to a crime.[368] Thus the first effect, resignation, has clear implications for false confessions.

The second effect is the coerced-internalized confessions, discussed briefly above;[369] it is worth considering this effect in more detail here because the impact of false evidence plays so directly into this psychological phenomenon. Coerced-internalized confessions arise where "suspects come to believe they have committed the crimes of which they are accused, even if they have no actual memories of the crimes."[370] If an individual lacks a clear memory of *not* committing the crime, because he lacks a clear memory of what he was doing at the time of the offense, he can become convinced that he must have committed it.[371] The pressure of an interrogation can be internalized by suspects, to the extent that they "change their beliefs about their innocence and actively accept the interrogators' accounts of events."[372] In particular, the presentation of false incriminating evidence "can lead some to confess, internalize blame, and confabulate details not only for remote past events, but for events that have just happened."[373]

Although this phenomenon is of particular danger for suspects who are highly susceptible to influence,[374] a study by Professors Kassin and Kiechel using undergraduate students showed how easily coerced-internalized confessions can be induced in ordinary subjects.[375] Seventy-nine students were engaged in an experiment ostensibly

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[367] Kassin et al., *supra* note 19, at 15.

[368] *Id.*

[369] *See supra* Part III.

[370] Chapman, *supra* note 241, at 170.

[371] *Id.*

[372] *Id.*

[373] *Id.* at 172.

[374] *Id.* at 171 (They tend to be "suggestible, trusting of authority, and lacking self-confidence. . . . [L]ack of confidence in one's memory is key — particularly an inability to differentiate between an actual memory and something that has been suggested by interrogators.").

[375] Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 125 (1996).

testing reaction speed and spatial awareness on a computer.[376] Participants were instructed that hitting the "ALT" key on their keyboards would crash the study, and when each student's computer inevitably crashed, they were accused of causing the malfunction by pressing the "ALT" key, with a confederate "witness" claiming to have seen the student press the forbidden key.[377] 69% of the students were persuaded to sign confessions that they had caused the crashes, although none had; 28% internalized feelings of guilt over their alleged crime, and 9% confabulated further details to support the false confession, such as "I hit it with the side of my hand."[378] When the students were put under pressure by a fast-paced test, 100% falsely confessed, 65% internalized, and 35% confabulated.[379] The presentation of false evidence by the witness significantly increased all three effects.[380]

The authors considered that these findings were highly relevant to the criminal context — they noted that their results were manifested by intelligent college students who were "self-assured, and under minimal stress compared with crime suspects held in custody, often in isolation."[381] For these and other reasons, many commentators have called for a prohibition on police deception. For instance, Prof. Robert Mosteller proposes that "[n]ontrivial overt lies . . . told after the police take the suspect into custody but prior to *Miranda* warnings, should categorically be prohibited," with automatic evidentiary exclusion if deception is practiced.[382] Professors Kassin *et al.* would similarly like to see an outright ban on admission of confessions resulting from police use of false evidence, but consider that an alternative approach could have courts considering the fact of false evidence being used as evidence against voluntariness and reliability.[383]

The Supreme Court is unlikely to initiate such a reform, and with good reason. After Kassin and Kiechel's study showed such a dramatic

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376 *Id.* at 126.

377 *Id.*

378 *Id.* at 127.

379 *Id.*

380 *Id.*

381 *Id.*

382 Robert P. Mosteller, *Police Deception Before* Miranda *Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239, 1273 (2007).

383 Kassin et al., *supra* note 19, at 29; *see also* Gohara, *supra* note 250, at 794-95; Thomas *supra* note 236, at 1295-96. For another proposal for a partial ban on deceptive practices, see Kassin et al., *supra* note 19, at 30 (proposing that minimization of legal consequences be banned, but moral minimization be permitted).

impact of false evidence, subsequent studies examining different interrogation techniques were undertaken. A study by Professors Perillo and Kassin found that similar results were produced when the accuser bluffed, rather than created false evidence.[384] This secondary study also distinguished between innocent and guilty subjects, and found that innocent subjects increased in false confessions from 0% to 50% with only a bluff.[385] These authors describe the subsequent results as suggesting that "the phenomenology of innocence can lead innocents to confess even in response to relatively benign interrogation tactics."[386] Another study replicated the results for a more serious offense — cheating, rather than an accidental keystroke — and found similar results, and also established that strategies of minimization and offering a plea deal each also increased both true and false confessions.[387]

The results from the subsequent variations of the Kassin and Kiechel study illustrate two dilemmas. First, false confessions are encouraged not only by the presentation of false evidence, but by police deception more generally, as well as other standard interrogation techniques and standard prosecution bargaining tactics. Second, while the effects described above strongly suggest that false confessions arise from the combination of the accusatory interrogation technique and presentation of false evidence, that combination is also very effective at securing true confessions.[388] It would be quite radical for the Court, as a result of these studies, to mandate how the police conduct interrogations. The Court is generally reluctant to do so.[389] It has said

[384] Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, the Bluff, and False Confessions*, 35 LAW & HUM. BEHAV. 327, 335 (2011); *see also id.* at 330 ("For participants in the bluff condition, the experimenter stated that the computer they had typed on was connected to a server located in another room and that all keystrokes from experimental sessions had been recorded, making it possible to check on whether the ALT key had been hit. The experimenter went on to explain, however, that because the server was password-protected by her professor, she was not able to check it until she could locate him.").

[385] *Id.* at 334.

[386] *Id.* at 327.

[387] Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 484 (2005) (showing a tripling of false confessions when interrogators minimize the significance of the problematic conduct, a doubling of false confessions when interrogators offer a deal, and a sevenfold increase when the two techniques are combined).

[388] Cassell, *Protecting the Innocent*, *supra* note 41, at 498 ("The lost confession problem arises because restrictions on interrogations can reduce the number of confessions police obtain, which will in turn prevent police from solving crimes.").

[389] *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 427 (1986) (refusing to restrict police

that the *Miranda*'s "objective is not to mold police conduct" other than to "dissipate the compulsion inherent in custodial interrogation."[390] This reluctance rests on good reason: if the Court was to prohibit or restrict police deception, that would massively impact many forms of vital police investigation.

Imagine, for instance, that the police could not manipulate the prisoner's dilemma, where a suspect is encouraged to confess before his co-conspirator does so in another room — without deception, police could not inspire a confession with news that the confederate was wavering in his loyalty. Deception is an essential interrogation tool for playing on consciousness of guilt of guilty suspects.[391] Furthermore, deception can help differentiate between true and false confessions: one of the deceptive strategies that the Reid technique advocates is for the police to deliberately introduce trivial errors into the written confession in the hope that the suspect will correct those mistakes.[392] This provides evidence that the suspect knows what he is signing, and thus further evinces consciousness of guilt, but it also suggests the reliability of the confession, and the suspect's unwillingness to accept police contamination.[393]

The psychological studies raise important and very concerning results regarding false confessions, but simply concluding that all police deception should be prohibited ignores countervailing considerations. We simply do not know the denominator of this calculation: how many true confessions those same techniques

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deception of suspect's attorney as doing so would be "injurious to legitimate law enforcement.").

[390] *Id.* at 425.

[391] *See* Devallis Rutledge, *The Lawful Use of Deception*, POLICE PATROL (Jan. 1, 2007), http://www.policemag.com/channel/patrol/articles/2007/01/point-of-law.aspx (discussing the usefulness and constitutionality of police playing "on a suspect's consciousness of guilt by pretending to have conclusive evidence of guilt that police do not in fact have, to prompt incriminating responses from the suspect. As long as the deception is plausible in light of what is known or suspected about the crime, such deception is not likely to induce an innocent person to confess to a crime he or she did not commit."); *see also* Major Peter Kageleiry, Jr., *Psychological Police Interrogation Methods: Pseudoscience in the Interrogation Room Obscures Justice in the Courtroom*, 193 MIL. L. REV. 1, 40 (2007) ("Deception is fundamental to the psychological interrogation model. The interrogator must deceive the suspect into believing that confession is in the suspect's best interest.").

[392] *See* Douglas Starr, *Do Police Interrogation Techniques Produce False Confessions?*, NEW YORKER (Dec. 9, 2013), http://www.newyorker.com/magazine/2013/12/09/the-interview-7.

[393] INBAU ET AL., *supra* note 90, at 317.

inspire.[394] This is of course true of all reforms, but deception is often essential to investigation,[395] and the practice is not of itself unconstitutional.[396] Consequently, banning all deception is simply too radical to propose without evidence of the costs involved. Given Supreme Court attitudes to restricting police practices that are not of themselves coercive, this reform is not a serious proposal — at the judicial level. This is one area where it is not only unlikely, but inappropriate for the Court to be the arbiter of acceptable practices. Distinguishing between police deception that is likely to lead to false confessions, be it through contamination, encouraging internalization of false narratives, or resignation, is an important goal, but it is one that is appropriate for broad-based reform of police manuals and training. That kind of comprehensive review of police practices ought to involve legislative or administrative oversight, which would allow for a detailed consideration of costs, benefits, and preferred mechanisms of reform.[397]

This conclusion is reinforced by the experience of some overseas jurisdictions that have instituted limits on police deception. For instance, the Canadian Supreme Court circumscribed the use of confessions obtained using the "Mr. Big" tactic, whereby police officers infiltrate gangs and use monetary and other allurements to undertake staged criminal acts, ultimately meeting with the group's boss, Mr. Big.[398] The Court did not ban the practice; rather it required that any resulting confession must be examined for evidence that the accused "provided details, which are exclusive and not already made public," to ensure against police contamination.[399] This is realistically the kind of minimalist reform possible in a judicial forum when

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[394] *See* Gisli H. Gudjonsson, *False Confessions and Correcting Injustices*, 46 NEW ENG. L. REV. 689, 694-96 (2012) (noting that such base rates are unknown, but describing the evidence that the rate varies across different countries, based on self-reporting among youths in various surveys).

[395] *See* Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1186 ("A bar on deception during all stages of investigation would make it very difficult to solve some crimes.").

[396] *See* Frazier v. Cupp, 394 U.S. 731, 739 (1969) ("The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible.").

[397] The Connecticut government has begun such a review. *See* James Orlando, *Interrogation Techniques*, OLR RES. REP. (2014), http://www.cga.ct.gov/2014/rpt/2014-R-0071.htm.

[398] Kalyan Kumar, *Canada's "Mr. Big" Gets Judicial Reprimand: Top Cop Says All Fine*, INT'L BUS. TIMES (Aug. 27, 2014, 5:35 PM), http://www.ibtimes.com.au/canadas-mr-big-gets-judicial-reprimand-top-cop-says-all-fine-1351993.

[399] *Id.*

considering such a foundational police practice as deception. In contrast, in response to a number of false confession cases, the British government conducted a massive, detailed review of the problem and instituted a comprehensive overhaul of interrogation practices, developing an entirely new approach to interrogation.[400] Called PEACE, for Preparation and Planning, Engage and Explain, Account, Closure, Evaluate, the new approach is based on modern psychological research.[401] It requires "fair practice" by the police when dealing with suspects,[402] and emphasizes professionalism, integrity, establishing a rapport, and avoiding "impropriety."[403] Arguably, this excludes bluffing, lying and minimizing — all staples of American law enforcement interrogation.[404]

The contrast between the U.S. and the U.K. going forward will provide a way of assessing two very contrasting approaches to police interrogation.[405] Prohibiting deception may be revealed to be a highly desirable reform, but, like standardized recordings, it is a reform that will realistically be instigated only through non-judicial means.

C. Reforming the Rules of Waiver

The *Miranda* Court assumed that suspects cannot know what is in their own best interests, due to the inherently coercive environment of the stationhouse.[406] But *Miranda* does not give a suspect the right to

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[400] THE ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT, CM. 2263 (1993), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271971/2263.pdf.

[401] Starr, *supra* note 392.

[402] Police and Criminal Evidence Act 1984, c. 60, § 76 (U.K.), http://www.legislation.gov.uk/ukpga/1984/60/contents (anything that suggests that a confession may be unreliable will be considered as to whether it should be excluded); *Investigative Interviewing*, C. POLICING, at princ. 2, https://www.app.college.police.uk/app-content/investigations/investigative-interviewing/ ("Investigators must act fairly when questioning victims, witnesses or suspects.").

[403] *Investigative Interviewing*, *supra* note 402.

[404] Irina Khasin, *Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT'L L. 1029, 1031 (2009).

[405] Britain's PEACE model has faced criticism. *See* Gudjonsson, *supra* note 394, at 705 ("Unfortunately, the PEACE model technique does not appear to have evolved sufficiently since its introduction in the United Kingdom in the early 1990s, and it needs to become more innovative with regard to challenging the denials of uncooperative suspects. With this in mind, both the Norwegian and the Irish (An Garda Síochána) police have developed their own interview models, which are largely based on the structure and principles of the PEACE model but are more dynamic and flexible in terms of challenging uncooperative interviewees.").

[406] Miranda v. Arizona, 384 U.S. 436, 467 (1966) ("[I]n-custody interrogation . . .

counsel, only the right for questioning to cease without counsel being present; it allows for waiver of all *Miranda* rights, including the right to counsel, without a suspect having conferred with counsel on whether to waive.[407] This raises a paradox: how can a person who does not know his own will nevertheless know whether to waive his rights?

The *Miranda* Court failed to anticipate the strong incentives to waive the rights it was establishing. As a result many argue that *Miranda* provides little real protection from coercion, because the innocent feel that they need to talk, as asking for a lawyer would make them look guilty.[408] Twenty years ago, Prof. Richard Leo observed three California police departments and found that just under 80% of suspects waive their rights.[409] Subsequent studies confirm that the vast majority of suspects continue to waive their rights.[410] Furthermore, numerous Supreme Court decisions in the wake of *Miranda* have arguably even encouraged waiver.[411]

According to some, if waiver is common and invocation during interrogation is rare, then "*Miranda* is not working" because that is evidence that suspects cannot protect themselves from the inherent coercion of custodial interrogation.[412] However, the fact that 80% or more of suspects waive their *Miranda* rights does not of itself show that there is a problem — a 100% waiver rate may be optimal, as long as suspects understand their rights as read to them. However, some argue that waiver is particularly bad for innocent suspects.

In a study by psychology Professors Kassin and Norwick, subjects were either instructed to commit or refrain from committing a mock theft, and told they would be interrogated, and should do whatever they think would protect their interests in a possible subsequent mock

contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.").

[407] *See id.* at 479 ("After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.").

[408] Thomas, *supra* note 236, at 1294.

[409] Leo, *supra* note 235, at 658.

[410] *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 859-60 (1996) (finding only five out of 129 Utah-based suspects invoked their rights once questioning began).

[411] *See infra* Parts IV.C.1–C.3.

[412] William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 988 (2001); *see also* Cunningham, *supra* note 75, at 1406 ("[T]he miniscule number of suspects invoking their rights during questioning is troubling . . . .").

trial.[413] Kassin and Norwick found a 58% waiver rate;[414] significantly, 81% of innocent suspects waived, whereas only 36% of the guilty waived.[415] In addition, they found that the reasons given for waiver diverged considerably:

> 12 of the 13 guilty suspects who waived their rights articulated strategic self-presentation reasons for the waiver (e.g., "if I didn't, he'd figure I was guilty," "I would've looked suspicious if I chose not to talk"). Although 11 of the 29 innocent waiver suspects offered similar explanations, 21 of them also (8) or instead (13) explained that they waived their rights precisely because they were innocent — believing, apparently, in the power of this truth to prevail (e.g., "I did nothing wrong," "didn't have anything to hide").[416]

The authors concluded from these findings that "a suspect's actual innocence may place him at an increased risk of making a false confession because he will waive his legal rights, believing in the power of his innocence."[417] But once again, the fact of common waiver does not of itself establish the harm — the literature critical of easy waiver largely assumes, rather than establishes, that waiver is necessarily bad for innocent suspects. It is entirely unknown, for instance, how often talking to the police quickly clears an innocent suspect from suspicion.

Arguably, it can be inferred that waiving *Miranda* rights is "a tactical error" from the fact that those with prior felony records are four times more likely to invoke their rights than first time arrestees, and three times more likely than a suspect with only a misdemeanor record: "these two groups are defined not by their disadvantage but by their advantage — they are more knowledgeable than most suspects."[418] Many have made this argument;[419] however, the psychology evidence

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[413] Kassin & Norwick, *supra* note 40, at 213.

[414] *Id.* at 217-18 (explaining that over two thirds of innocent suspects waived even in the presence of "a hostile and closed-minded interrogator who made it clear to participants that they had nothing to gain from denial").

[415] *Id.* at 215.

[416] *Id.* at 216.

[417] Gudjonsson, *supra* note 394, at 700-01 (commenting on the Kassin and Norwick study); Kassin & Norwick, *supra* note 40, at 218 (summarizing the psychological findings and concluding that "innocence may put innocents at risk.").

[418] Stuntz, *supra* note 412, at 993 (discussing the implication of Prof. Richard Leo's findings to that effect).

[419] Cassell, *Protecting the Innocent*, *supra* note 41, at 502-03 ("Those who are innocent of crime will almost invariably waive their *Miranda* rights, gaining little from

does not support it. In a study that contrasted *Miranda* knowledge between three groups — those arrested less than two weeks prior, those arrested at least four weeks prior, and undergraduate students — it was demonstrated that misapprehensions about *Miranda* rights were widely held in all three groups.[420]

Even among prior offenders, significant misconceptions were demonstrated regarding the right to silence: approximately 30% viewed silence as inherently incriminating; over 25% believe that waiver is only effective if it is in written form; 52% believe that off the record comments cannot be used against a suspect, and over 12% believe that past deceptive statements can be retracted without repercussions.[421] Similar misconceptions apply to the right to counsel — for instance, 30.2% believe that questioning can continue until an attorney is physically present. And a large majority have misperceptions about police deception: 64.2% believe police deception regarding witness testimony is impermissible, and 55.4% believe deception is impermissible regarding nonexistent charges.[422] "In general, these defendants are likely to believe there is nothing to lose — and possibly something to gain — by relinquishing their 'right' to silence."[423] In comparison, undergraduate students have a slightly *better* understanding of some rights, including the risk of talking.[424] Yet these results were not shown to be a product of greater education or intelligence; rather, misunderstandings of *Miranda* were widespread.[425]

Thus, it seems that the claim that innocent or inexperienced individuals are particularly ignorant of *Miranda's* safeguards and purpose, and thus less protected by *Miranda*, than those more experienced with the criminal justice system, is incorrect. Although innocent subjects and first-time arrestees waive more often than experienced criminals, these differences could be a product not of more and less sophisticated understandings of the rules of *Miranda*, but of an underlying factual divergence between the two groups.

anything in the decision, while career criminals become adept at using the rule to avoid interrogation."); Thomas P. Windom, *The Writing on the Wall:* Miranda*'s "Prior Criminal Experience" Exception*, 92 VA. L. REV. 327, 358 (2006) ("In real-world practice, it logically follows that a suspect with considerable prior criminal experience knows his rights, regardless of whether police read him his *Miranda* warnings . . . .").

[420] Rogers et al., *supra* note 119, at 307-10.

[421] *Id.*

[422] *Id.*

[423] *Id.* at 307.

[424] *Id.*

[425] *Id.* at 312.

Those suspects arrested for the first time may be more likely to be innocent than repeat arrestees, and as such whether waiver is a good strategy could vary between the two groups.

Nevertheless, the studies described herein provide further evidence that, as described in Part II, *Miranda* warnings are commonly misunderstood by all types of suspects. These results and others suggest that *Miranda* is not doing its job in properly informing suspects and girding them in facing the inherently coercive atmosphere of the stationhouse. In that context, rules that make waiver easy are concerning, because generally such waiver is not being made truly knowingly. As such, it is worth considering the many reforms proposed to discourage waiver.

1. Require Express or Written Waiver

In *North Carolina v. Butler*, the Supreme Court held that there is no need for a per se rule that all waivers need to be express or in writing.[426] While express written or oral statements provide strong evidence that the defendant waived, the Court was willing to infer waiver from both "the actions and words of the person interrogated."[427] In *Butler*, agents had determined that the suspect had a reasonable education and was literate, and had elicited a statement that he understood his rights,[428] so the Court concluded that there was no doubt that the defendant had been "adequately and effectively" apprised of his rights.[429]

However, defendant Butler also stated, before making inculpatory statements, "I will talk to you but I am not signing any form,"[430] a statement that suggests he may have been inaccurately differentiating between the legal significance of a written versus an unwritten waiver. As described above, over one quarter of suspects make that mistake.[431] Arguably, allowing implied waiver is likely to considerably add to that confusion. Having been told that he has the right to remain silent, even a sophisticated suspect is unlikely to expect that he has to speak in order to invoke that right, let alone that the fact of his silence could

[426] North Carolina v. Butler, 441 U.S. 369, 373 (1979) ("The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived . . . .").

[427] *Id.*

[428] *Id.* at 371.

[429] *Id.* at 374.

[430] *Id.* at 371.

[431] *See supra* text accompanying note 421.

be used against him.[432] And as discussed, *Miranda* warnings are typically given at a time of great stress, when the arrest is occurring or immediately thereafter, which is likely to be the moment of lowest comprehension.

The fact that over one quarter of suspects misapprehend the difference between oral and written statements suggests that *Miranda* is not truly creating a remedy that informs people of their rights in any meaningful way. Arguably, then, the Court should not only overrule *Butler*'s conclusion that implied waiver is sufficient, but should go even further and require that waiver be in writing. As with a confession, ensuring that a waiver is in writing makes it more reliable. This would certainly fit with *Miranda*'s prophylactic attempt to protect the voluntariness requirements inherent in the Fifth Amendment. However, it would be at odds with the subsequent jurisprudence, in which the Court has made clear that it wants to set the default as one of cooperation with police, without overly burdening the interrogation process.[433]

Yet, at the same time, the Court held in *J.D.B.* that at least some subjective considerations are necessary to effectuate the Fifth Amendment; a systematic failure to understand *Miranda* without an express writing requirement is at least as significant as the effect of youth. Requiring that waiver be in writing, at least for a formal stationhouse interrogation (in contrast to spontaneous utterances or interrogation, or questioning under the public safety exception), would be far less intrusive than many of the other reforms considered here, and does not have the disadvantages of engorging the content of the warning itself.

2. Permit Ambiguous Invocation

A closely related reform proposal is to change the rules of invocation, rather than the rules of waiver. The Court requires that post-warning invocations be unambiguous, whether invoking the right to silence,[434] or the right to counsel.[435] Consequently, saying "maybe I should talk to a lawyer" was not a clear enough request for

[432] Salinas v. Texas, 133 S. Ct. 2174, 2182 (2013) ("A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.").

[433] *See id.* at 2181 (arguing that making silence equivalent to an invocation "would needlessly burden the Government's interests in obtaining testimony and prosecuting criminal activity").

[434] *See* Berghuis v. Thompkins, 560 U.S. 370, 381 (2010).

[435] Davis v. United States, 512 U.S. 452, 461 (1994).

consultation with counsel to require police to cease questioning.[436] Scholars have proposed various reforms to this rule. For instance, Prof. Joshua Hammack has suggested a range of options:

> First, and most disruptively, the Supreme Court could hold that all instances of post-waiver silence are affirmative invocations of the right to remain silent. This holding would fundamentally alter the current method of invocation by requiring interrogators to cease questioning in the face of what is now seen as ambiguous conduct . . . [or it] could continue to require unambiguous invocations but hold that silence is not ambiguous. In other words, the Court could count silence itself as an 'unambiguous invocation' of the right to remain silent.[437]

Hammack acknowledges that "counting silence itself as an invocation would dramatically overprotect the right to remain silent."[438] And the Court would no doubt agree: in *Davis*, it stressed that requiring police to cease questioning when it is unclear whether the suspect has actually requested a lawyer "would needlessly prevent the police from questioning a suspect."[439] This judicial concern for police efficiency makes it clear that changing the rules of invocation in either of these ways is even less likely than changing the rules of waiver.

Nevertheless, there is problematic ambiguity in the relationship between invocation and waiver that needs to be resolved. The two are close to being mirrors of one another, and yet a gray zone exists around a suspect's silence and partial responses, such as occasional nodding and giving reluctant one word answers.[440] That gray area has become increasingly doctrinally complex, since invocation is assessed objectively from the point of view of the police officer,[441] whereas

[436] *Id.* at 459 ("[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.").

[437] Hammack, *supra* note 9, at 444.

[438] *Id.* at 445.

[439] *Davis*, 512 U.S. at 460.

[440] The Court chose to err against requiring police to guess whether this response constitutes waiver, instead requiring suspects to vocalize their desire not to speak. Berghuis v. Thompkins, 560 U.S. 370, 381-82 (2010) ("If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent . . . .").

[441] *Davis*, 512 U.S. at 458-59 ("To avoid difficulties of proof and to provide

waiver is assessed under a totality of circumstances, in light of all of the defendant's background, experience, and conduct.[442] And thus waiver jurisprudence brings in all of the subjective considerations that the bright line rule of *Miranda* was said to avoid — level of education, language proficiency, age, and the like. Thus the Court's goal of not placing "irrational obstacles to legitimate police investigative activity"[443] is arguably harmed by the complexity of its waiver and invocation jurisprudence. Permitting ambiguous invocation is unlikely to be the solution to that problem; instead, more generally, the rules of waiver and invocation should be reconciled and simplified, as considered next.

3. Simplify the Rules of Waiver

There are a number of other rules that, like the relationship between invocation and counsel, seem overly complex, making the jurisprudence less easily comprehensible to a suspect and more difficult for the police to follow, and thus are ripe for reform.

One is the rules of reinitiation. Although *Miranda* talks about the right to counsel, the reality of invoking *Miranda* rights is not that an attorney is immediately provided; rather, it means that interrogation must cease, which ordinarily translates into the suspect being put into a jail cell in the interim. The police cannot resume interrogation of a suspect who has requested counsel unless the suspect reinitiates communication,[444] or unless two weeks have passed when the suspect has not been in custody.[445] Whereas for the right to silence, police can reinitiate interrogation after as little as two hours have passed, as long as *Miranda* was "scrupulously honored;"[446] although it is unclear whether interrogation can resume on the same crime, or only

guidance to officers conducting interrogations, this is an objective inquiry.").

442 Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.").

443 *Davis*, 512 U.S. at 460 (citing Michigan v. Mosley, 423 U.S. 96, 102 (1975)).

444 Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) ("[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.").

445 Maryland v. Shatzer, 559 U.S. 98, 115-17 (2010) (holding that two week period applies, however, while the suspect is in prison).

446 Michigan v. Mosley, 423 U.S. 96, 103-04 (1975).

regarding a separate crime.[447] It may be that sitting in a jail cell is just what is needed for a guilty party to confess, but the possible "mounting coercive pressures of 'prolonged police custody'"[448] could also prey on the mind of an innocent suspect, inspiring him to reinitiate questioning in order to get out of a holding cell. The rules of reinitiation, then, are both overly convoluted and likely to harm innocents.

Another area involving a complex mass of rules is the two-stage waiver jurisprudence. The Court is currently split on how to deal with two-stage interrogation. A majority initially found that a suspect's having once responded to unwarned yet non-coercive questioning did not thereby disable him from waiving his rights and confessing after he had been given the *Miranda* warnings.[449] Subsequently, a plurality distinguished between two-stage questioning that was an honest mistake versus police adopting a deliberate two-stage strategy in order to undermine the effectiveness of *Miranda*, in which case the two interrogations could be treated as one ongoing and illegal interrogation.[450] The plurality and Justice Kennedy in concurrence disagreed as to whether it was appropriate to take an objective approach from the suspect's vantage point or a subjective approach from the police officers' point of view, respectively.[451] In addition, the two camps were divided as to whether re-mirandizing the suspect prior to the second interrogation was an essential curative measure to the first illegal interrogation, or only one factor to be considered.[452]

At the very least, it seems fair to let suspects in on the complexity of the rules that apply to them. Instead of just warning a suspect that

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[447] *See* Leslie A. Lunney, *The Erosion of* Miranda*: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 779 n.222 (1999).

[448] *Shatzer*, 559 U.S. at 105 (quoting Arizona v. Roberson, 486 U.S. 675, 686 (1988)).

[449] Oregon v. Elstad, 470 U.S. 298, 313-14 (1985).

[450] *See* Missouri v. Seibert, 542 U.S. 600, 609-11 (2004).

[451] *Compare id.* at 611-12 ("The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires."), *with id.* at 622 (Kennedy, J., concurring) ("I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.").

[452] *Compare id.* at 615 (plurality opinion) (providing a list of "relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object"), *with id.* at 622 (Kennedy, J., concurring) ("If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made.").

they have a right to an attorney, they could be told "you have a right to an attorney, but you must ask for one explicitly, which you can do at any time in our conversation." But some of the jurisprudence is simply too complex for extended warnings to offer a solution, as discussed in Part II. The complexity of the two-stage interrogation jurisprudence, even putting aside the disagreement on the current Court, is illustrated when we consider how it could be dealt with through expanding the *Miranda* warnings. The suspect would have to be informed that anything said prior to the provision of *Miranda* warnings cannot be used against him, but anything said subsequently could be. But it would have to be further clarified that this rule only applies to pre-warning statements made subsequent to custodial arrest, and that the applicability of the rule may depend on the deliberateness of the police strategy, something that is likely entirely unknown and unknowable by the suspect.

Perhaps the complexity of the waiver jurisprudence stems not just from the intricacies of the fine distinctions that the Court has adopted — between ambiguous invocation and waiver through silence, between acceptable and unacceptable two-stage interrogation techniques, and when waiver is truly informed, under those circumstances. Rather, the concept of waiver itself is strange, particularly in a constitutional context: a person does not lose his First Amendment right to free speech through failure to exercise it, nor his Second Amendment right to carry a firearm through lack of practice. In fact, some rights *cannot* be waived, such as the right to be free from indentured servitude.[453] And none of these rights need to be explicitly invoked in order to be exercised. *Miranda* itself admitted the possibility of waiver, but explicitly denied that silence could constitute it.[454] The Court subsequently appeared to want to reset the balance in favor of greater police freedom in interrogation, but the result is a complicated and ad hoc jurisprudence.

The consistent willingness of innocent suspects to waive raises the possibility that waiver may greatly encourage false confessions. Requiring written waiver could be a fairly minimalist change to address this concern, and would return the jurisprudence closer to

[453] Whereas most constitutional rights are specified in the terms of rights, such as "[t]he right of the people to be secure in their persons, houses, papers, and effects," U.S. CONST. amend. IV, the prohibition on slavery and involuntary servitude specifies that neither "shall exist within the United States," U.S. CONST. amend. XIII.

[454] Miranda v. Arizona, 384 U.S. 436, 475 (1966) ("[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.").

Miranda's original conception. However, that rule would have to be subject to a spontaneity exception, as well as the usual public safety exception. Alternatively, the warnings could be slightly altered to clarify waiver or invocation. Instead of being warned that "you have the right to an attorney . . .", the warning could instead be phrased as "you have the right to an attorney — do you wish to assert that right?" Difficult line drawing could still arise — for example, if suspects still choose to remain silent in the face of those questions — but this reform would likely clarify the vast majority of statements issued in that gray area between waiver and invocation. Such questioning would provide minimal additional intrusion on the interrogation process — it would occur as part of the existing warning. And it would clean the state's hands of relying on interrogations where it is ambiguous if the suspect has attempted to exercise the constitutional rights that *Miranda* recognized.

CONCLUSION

Miranda 2.0 is long overdue. Constitutional procedures for protecting suspects from coercion need to adapt to changing conditions and our new knowledge about the causes of false confessions and the weaknesses of *Miranda*, but without excessively impeding police investigations. The reforms that are likely to be both efficient and effective largely fall into two broad categories: first, changes to police procedure — particularly by recording interrogations, adding information regarding the potential length of interrogation and how to invoke rights, and asking the suspect directly if they want to invoke or waive their rights; second, changes to the methods of implementation of the warnings — most simply and effectively through showing suspects a standardized, audiovisual explanation of *Miranda* rights before any formal interrogation begins. These reforms are inspired both by political reality and evidence of what is most likely to cause false confessions.

Many other reforms have advantages, but are unrealistic; but this Article has proposed variations that could make them more plausible. For instance, expanding the right to counsel to require the presence of an attorney at the stationhouse is not viable, but allowing a suspect to have someone from the outside world present could combat the sense of isolation that can lead to false confessions out of resignation, and can even encourage guilty suspects to come clean. Similarly, prohibiting all police deception is not only unrealistic but ill-considered, but more humble reforms such as requiring that waivers be in writing would be far less intrusive on the interrogation

procedure, yet would go a long way toward protecting suspects from unintended waivers due to widespread misunderstandings of the consequences of their actions.

Most prior proposals for *Miranda* reform consist of wish-lists that give little heed to the importance of extracting true confessions. Many existing rules and reform proposals misunderstand how individuals actually tend to react to various stimuli. And many proposals contain well intended reforms that could actually backfire, such as additional warnings that would require provision of enormous detail, bloating the process and potentially misleading suspects even further. But there are reforms that, as surprising as it may seem, overall benefit both sides of the interrogation. Most obviously, recording interrogations and other police-citizen interactions has now been embraced across the political spectrum. Providing a pre-recorded, pre-vetted explanation of *Miranda* warnings similarly would better inform suspects and relieve police of the risk of inadequately meeting their obligations to warn.

This Article has outlined a new way of thinking about *Miranda* reform, one targeted at the most pressing problem of false confessions, and has considered how to actually achieve those reforms. It has outlined judicial, legislative, administrative and even grassroots-instituted changes that could have broad-based appeal, including among police officers. Miranda 2.0 cannot entirely solve the problem of false confessions. Even defendants who know their rights and how to invoke their rights may still waive and falsely confess. But this set of reforms provides a path for bringing the well-intended but now antiquated and clunky machinery of *Miranda* into the 21st century.