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MOVING BEYOND *MIRANDA*: CONCESSIONS FOR CONFESSIONS

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ABSTRACT—The law governing police interrogation provides perverse incentives. For criminal suspects, the law rewards obstruction and concealment. For police officers, it honors deceit and psychological aggression. For the courts and the rest of us, it encourages blindness and rationalization. This Article contends that the law could help foster better behaviors. The law could incentivize criminals to confess without police trickery and oppression. It could motivate police officers involved in obtaining suspect statements to avoid chicanery and duress. And, it could summon courts and the rest of us to speak more truthfully about whether suspect admissions are the product of informed, intelligent, and voluntary decisions. States could promote these outcomes by providing valuable sentencing concessions to those who confess.

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INTRODUCTION

The law of police interrogation and confessions serves some terrible ends. It goes far to protect noncooperation and cover-up by the most knowledgeable, cunning, and steely criminals, while providing only minimal safeguards for those who are uneducated, unintelligent, or easily coerced.[1] It permits police officers to use trickery, harassment, and the inducement of despair to extract statements from vulnerable persons, prohibiting only the most abusive and offensive interrogation tactics.[2] It

[1] *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996) (empirical study finding that "a suspect with a felony record in my sample was almost four times as likely to invoke his *Miranda* rights as a suspect with no prior record"); William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 977 (2001) (noting that "[t]he most vulnerable suspects, which includes those with the *least* experience dealing with the system, are helped, if at all, only indirectly").

[2] *See generally* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 119–64 (2008) (making the case that "police interrogators resort to manipulation, deception, and fraud to secure admissions . . . because they view themselves as agents of the prosecution and thus the suspect's adversary"); *see also* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 199 (1991) ("With rare exception, a confession is compelled, provoked and manipulated from a suspect by a detective who has been trained in a genuinely deceitful art."); Steven A. Drizin & Richard A. Leo, *The Problem of*

invites courts and the rest of us to declare the irrational or inveigled decisions of arrestees to talk to police as "knowing," "intelligent," and "voluntary,"[3] torturing the meaning of these words that signify the admissibility of suspect statements.[4] The law in this area facilitates bad behavior all around.

These problems arise from the conflicting efforts by the Supreme Court to both honor and minimize constitutional restrictions on police interrogation. The central limit is the Fifth Amendment provision that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[5] The Supreme Court has long said that this prohibition governs police interrogation that occurs after an arrest but before the initiation of adversarial judicial proceedings.[6] On this view,[7] the Court held in *Miranda v. Arizona*[8] that arrestees must receive a warning about their Fifth Amendment rights to silence and to counsel[9] (the latter created by *Miranda*) and must waive those rights for the government to introduce at trial their statements resulting from police interrogation.[10] An arrestee's claim of either of these Fifth Amendment rights after the provision of *Miranda* warnings requires the police to cease interrogation.[11] Likewise, an assertion of either of the rights in the face of *Miranda* warnings provides no basis for an inference of guilt at trial.[12] These rules aim to honor the Fifth

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False Confessions in the Post-DNA World, 82 N.C. L. REV. 891, 919 (2004) (asserting that "[t]he genius or mind trick of modern interrogation is that it makes the irrational (admitting to a crime that will likely lead to punishment) appear rational.").

[3] Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring the government to demonstrate that the defendant waived his privilege against self-incrimination and his right to retained or appointed counsel "voluntarily, knowingly and intelligently").

[4] *See* Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 700 (1988) ("Any expectation that truly voluntary confessions are available on a systemic basis depends either on unsupportable factual assumptions or on an interpretation of voluntariness that reduces that word to signifying no more than the absence of third degree methods.").

[5] U.S. CONST. amend. V.

[6] *See, e.g.*, Bram v. United States, 168 U.S. 532, 542 (1897). For the view that the Court correctly decided *Bram*, see Lawrence Rosenthal, *Against Orthodoxy:* Miranda *is Not Prophylactic and the Constitution is Not Perfect*, 10 CHAP. L. REV. 579, 588–90 (2007).

[7] The Court also had said that the privilege applies against the states through the Due Process Clause of the Fourteenth Amendment. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964).

[8] 384 U.S. at 436.

[9] *See id.* at 444 ("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.").

[10] *See id.* at 475.

[11] *See id.* at 474.

[12] *See id.* at 468 n.37.

Amendment by protecting those arrestees who stand on the Constitution and remain silent.

At the same time, from the day it announced *Miranda*, the Court began minimizing the significance of the decision in excluding suspect statements and controlling police interrogation.[13] For example, the *Miranda* Court itself mandated only a confusing and misleading warning that was of no help to suspects in understanding the consequences of their choices.[14] Soon, the Court also said that the government can introduce a criminal defendant's statement obtained in violation of *Miranda* to impeach his testimony at trial.[15] Likewise, the Justices ruled that even when the police violate *Miranda*, at trial the government can still use a witness discovered as a fruit of the defendant's statements.[16] The Court also held that police and courts can ignore *Miranda* when justified by considerations of public safety.[17] These rulings, and others, render *Miranda* doctrine insignificant in all but arbitrarily narrow circumstances.[18]

The Court's conflicted approach to police interrogation results in part from the Fifth Amendment privilege's effect as applied during the formal adjudication process. In the courtroom, the criminal defendant has an absolute right not to testify, and the prosecutor and judge must avoid suggesting that the jury draw an inference of guilt from his silence.[19] These doctrines, unavailable in many civilized countries,[20] lead to tension over how the privilege should apply to police interrogation. On the one hand, the existence of these highly protective rules during the adjudicative process seems to call for their extension back at least to the point of detention, lest the police be able to render them largely meaningless by testifying before

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[13] For the view that *Miranda* "is best characterized as a retreat from the promise of liberal individualism brilliantly camouflaged under the cover of bold advance," see Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 744 (1992).

[14] *See infra* text accompanying notes 184–190.

[15] *See* Oregon v. Hass, 420 U.S. 714, 722 (1975) (failure to cease questioning after assertion of rights); Harris v. New York, 401 U.S. 222, 224–26 (1971) (failure to provide warnings).

[16] *See* Michigan v. Tucker, 417 U.S. 433, 452 (1974) (permitting testimony from a witness discovered from an unwarned statement).

[17] *See* New York v. Quarles, 467 U.S. 649, 651 (1984).

[18] *See* Richard A. Leo & K. Alexa Koenig, *The Gatehouses and Mansions: Fifty Years Later*, 6 ANN. REV. OF L. & SOC. SCI. 323, 335–36 (2010) (noting that *Miranda* protects only in the rare case where the suspect invokes one or the other rights and police honor the decision).

[19] *See, e.g.*, Griffin v. California, 380 U.S. 609, 613 (1965); *see also* Mitchell v. United States, 526 U.S. 314, 328–29 (1999) (holding that a trial court may not draw adverse inference about facts of crime that bear on sentencing based on defendant's failure to testify at sentencing hearing).

[20] *See* Jeffrey Bellin, *Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants' Trial Silence*, 71 OHIO ST. L.J. 229, 248 n.73 (2010) (noting that the adverse inference is permitted, for example, in England, France, Israel, and Singapore).

the jury about a suspect's compelled statements or refusal to cooperate.[21] On the other hand, the thorough protection the privilege affords the accused during the adjudicative process puts great pressure on the police to try to extract incriminating statements from the accused before courthouse proceedings begin and on judges to allow those statements as evidence against the accused.[22] After all, the suspect's statements to the authorities often are critical to the prosecution proving guilt and, as things currently stand, the suspect will not make statements to the authorities, absent a plea deal, once he arrives at court, secures a lawyer, and has the benefit of the privilege.[23]

The conflict over police interrogation, in turn, has fostered arcane rules that provide wrong-headed inducements for those sophisticated enough to understand them. The *Miranda* rulings honoring the Fifth Amendment reward resistance and recalcitrance by guileful arrestees sufficiently knowledgeable about them.[24] At the same time, the loopholes in *Miranda* and related interrogation laws invite well-trained police officers to take advantage of susceptible suspects through exploitative tactics.[25] Because *Miranda* doctrine professes to serve constitutional values but is empty of much protection for detainees, it also enables courts to purport to protect vulnerable suspects while allowing as evidence against them their statements to the police that any competent criminal defense lawyer would have advised them not to make.[26] All of this behavior—by criminal suspects, by the police, and by the courts—is unbefitting a legal system that aims to promote "dignity," "integrity," and governmental legitimacy.[27]

We should ask how the law of police interrogation could promote more honorable conduct from everyone involved. Could the law encourage those who have committed crimes to self-incriminate to the authorities? Could it help influence the police to treat detainees without deceitfulness even while eliciting and recording their admissions? Could it summon

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[21] *See* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From* Powell *to* Gideon, *from* Escobedo *to* . . . , *in* CRIMINAL JUSTICE IN OUR TIME 1, 19 (A.E. Dick Howard ed., 1965).

[22] *See id.* at 25.

[23] *See id.*

[24] *See supra* note 1 and accompanying text.

[25] *See, e.g.*, Leo & Koenig, *supra* note 18, at 329–30; Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 132–36 (1998).

[26] *See* Kamisar, *supra* note 21, at 37–38 (concluding that competent defense counsel will not advise self-incrimination over standing on the privilege absent an enforceable bargain from the government); Seidman, *supra* note 13, at 741 (noting that a suspect's interaction with a defense lawyer at the interrogation stage "is certain to create a context in which the defendant will remain silent").

[27] Miranda v. Arizona, 384 U.S. 436, 460 (1966).

courts to speak more candidly about whether the decisions of suspects to talk to the police are the kinds of choices they plausibly would make even with the assistance of counsel? Prevailing discourse about interrogation law has puzzlingly not posed these kinds of questions.

This Article contends that the central but largely overlooked problem with Fifth Amendment interrogation doctrine is its focus on the prevention or suppression of suspect statements. The Supreme Court and commentators have long been stuck in a debate that assumes that honoring Fifth Amendment protections in this context depends entirely on reducing suspect admissions and on excluding evidence of them from criminal trials. The conundrum is that success by this measure means greatly hampering law enforcement efforts or else "sorting"[28] irrationally among many suspects who all deserve protection. As things currently stand, virtually every self-incriminating statement elicited through custodial police interrogation is plausibly viewed as "compelled" under the Fifth Amendment.[29] The Supreme Court endorsed that perspective as the basis for *Miranda*.[30] Consequently, if the only remedy is prevention or suppression of those statements, any effort to prevent or suppress all of them will be unpalatable and any effort to distinguish among defendants to prevent or suppress only a few of them will seem arbitrary. In this latter scenario, such an effort may also perversely incentivize those suspects, police officers, and judges who know the sorting rules.

This Article advocates that states confront the dilemma by providing a sentencing concession to custodial suspects who self-incriminate.[31] By "concession" I mean a reduction in sentence severity.[32] The Supreme Court almost certainly will not find the Fifth Amendment to mandate this approach.[33] However, the *Miranda* doctrine underenforces the Fifth Amendment privilege,[34] and legislatures can and should provide a remedy

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[28] Stuntz, *supra* note 1, at 991 (describing *Miranda* as allowing suspects to do the "sorting").

[29] *See infra* Section I.B.

[30] *See infra* text accompanying notes 78–93.

[31] *See* Stuntz, *supra* note 1, at 995 ("Regulating police interrogation in ways that avoid distributive injustice may be possible if the law can do two things at once: maximize the number of suspects who talk to the police, while minimizing the frequency with which police use abusive interrogation tactics.").

[32] For more on the nature of the concessions I propose, see *infra* note 290 and Section IV.C.3.

[33] The approach that this Article recommends reflects a compromise that may seem more appropriately grounded in legislation than in a constitutional mandate. *See infra* text accompanying notes 297–308.

[34] *See infra* Section II.A.

to honor the constitutional right in those circumstances.[35] In particular, states could pass legislation that would require that a custodial suspect whose statement to the police or its fruits would be admitted against him at trial receive a sentence after conviction, whether on a guilty plea or at trial, that is proportionally reduced from what it would otherwise have been. The effect would be to reward those who self-incriminate to the police to their detriment.[36] Suspects would still face conviction and, in serious cases, a substantial sentence when their statements to the police tend to demonstrate their guilt. At the same time, the proposal would help encourage suspects to voluntarily cooperate with law enforcement, the police to avoid deceiving suspects to get them to talk, and the courts to speak with greater candor about suspects' decisions to self-incriminate.

This Article proceeds in four stages to demonstrate why legislatures should use sentencing concessions to balance the desire to secure suspect statements to the police with the need to respect the Fifth Amendment. Part I briefly reprises and assesses the view of the *Miranda* Court that custodial interrogation contains inherent pressures that create a great risk of "compelled" self-incrimination. This Article urges this view as persuasive if the understanding of the Fifth Amendment privilege is to protect *free and rational choice* by the suspect in custody on whether to become a witness,[37] which is how I contend the Court understands the Fifth Amendment to apply in the formal adjudication of a criminal case.

With this view of the privilege in mind, Part II summarizes the conventional, anticonfessional perspective on *Miranda*'s failure. The unifying theme of prevailing critiques is that the *Miranda* safeguards have not prevented or suppressed enough self-incriminating statements. These critiques favor alternative safeguards that would prevent and suppress more of them. The proposals include tinkering with the *Miranda* rules to make them more favorable to the defense, electronic recording of police interrogation sessions, requiring defense counsel's presence prior to and during any police questioning, judicial interrogation instead of police interrogation, and a return to a fortified due process test of "voluntariness" alone.

Part III of this Article proposes an entirely different perspective on *Miranda*'s failure, one that is pro-confessional. This critique claims that the

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[35] For more on the notion that the Supreme Court will sometimes not fully enforce the Constitution due to features of the judicial process but that these institutional inhibitions on the Court do not reflect the substantive boundaries of the Constitution, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214–15 (1978).

[36] *See infra* text accompanying notes 314–340.

[37] *See infra* notes 124–134 and accompanying text.

Miranda doctrine failed not because it did not adequately prevent and suppress but because it focused on prevention and suppression in the first place. If virtually all admissions by custodial suspects to the police, absent concessions, are compelled, no rules about prevention or suppression can satisfy us. We will either turn our backs on too much helpful evidence of guilt to meet our desire for effective law enforcement or else use arbitrary rules about which admissions the government can use, and those rules may incentivize perverse behavior. To demonstrate, this Part explains why the rules that the *Miranda* doctrine imposed—both originally and as modified by the Burger, Rehnquist, and Roberts Courts—have achieved unsatisfying results. They have not only failed to honor the view of the Fifth Amendment privilege presented by the *Miranda* Court, but have incentivized bad behavior by suspects, police, and courts. This Part also explains why the alternative doctrines that commentators have commonly proposed would also achieve undesirable outcomes. Because these alternative proposals also depend on suppression, they cannot avoid a heavy tradeoff between honoring the Fifth Amendment and succeeding in prosecuting crime.

Part IV of this Article explains the proposal for a better compromise—legislation authorizing sentencing concessions to supplement the *Miranda* doctrine. These concessions might provide less of a benefit to some suspects than prevention or suppression of their admissions, but they would apply to a greater breadth of suspects. The concessions would help compensate custodial suspects who self-incriminate to the police. The concessions could also dissuade police officers from interviewing a suspect, but only when the government does not need the suspect's self-incriminating statement. This Part also focuses on the formal notice that police officers could provide to suspects regarding the sentencing concessions. Along with the concessions themselves, the notice would encourage suspects to talk, reduce the need for the police to employ deceitful or threatening interrogation tactics, and enable courts to speak more honestly about the fairness of the interrogation process. If properly presented as an addition to the *Miranda* warnings, this notice could survive constitutional challenge.

I. POLICE INTERROGATION AS COMPULSION

In this Part, I recount and assess the claim of the *Miranda* Court that custodial police interrogation involves inherent pressures that, absent safeguards, render almost all resulting statements "compelled" within the

meaning of the Fifth Amendment.[38] The *Miranda* Court viewed compulsion as "pressure" placed on a custodial suspect by the government that "disable[s] him from making a free and rational choice" about whether to talk or remain silent.[39] The Court also concluded that "free and rational choice" required a suspect to be apprised of his rights and of the consequences of foregoing them.[40] There must be an "assurance of real understanding."[41] Based on this view, the Court declared that unrestricted police interrogation resulting in self-incrimination virtually always violates the privilege.[42] If we accept the Court's view of compulsion, I urge that we should also accept this latter conclusion.

A. The Meaning of Compulsion During Adjudication

The *Miranda* majority's view about the meaning of compulsion at the interrogation stage corresponds to how the Court has applied the Fifth Amendment privilege in the formal adjudication phases of a criminal case. At a criminal trial, the defendant has a right to abstain from even taking the stand to assert the privilege.[43] "The right of the defendant is not only to avoid being compelled to give incriminating responses to particular inquiries, but to resist being placed in a position where the inquiries can be put to him while he is under oath."[44] This right continues at sentencing and survives even if the defendant previously waived it by pleading guilty.[45] The defendant also has the right to the assistance of counsel at trial and sentencing to help the defendant understand the consequences of testifying or remaining silent and which of these options would better serve the

[38] *See* 384 U.S. 436, 467 (1966) ("We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime 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."); *see also* Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1522 (2008) ("The Court's first premise was that the process of custodial interrogation contains inherent pressures that compel suspects to speak.").

[39] 384 U.S. at 464–65.

[40] *See id.* at 468 ("For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise.").

[41] *Id.* at 469.

[42] *See id.* at 478.

[43] Brown v. United States, 356 U.S. 148, 155–56 (1958) (declaring that a criminal defendant at his own trial "has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all").

[44] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.5(a), at 1162 (5th ed. 2009).

[45] Mitchell v. United States, 526 U.S. 314, 316 (1999).

defendant's interests.[46] These substantial protections reflect the notion that the Fifth Amendment privilege aims to ensure that a person facing criminal prosecution can make a free and rational choice.

Consistent with this perspective, the Court has concluded that the state generally may not impose any significant penalty on a criminal defendant for electing not to testify. Only a year before *Miranda*, in *Griffin v. California*,[47] the Court ruled that neither a prosecutor nor a trial judge can suggest to a jury that it may draw an adverse inference from the failure of a criminal defendant to testify, even as to facts within the defendant's knowledge.[48] According to the Court, comment on the defendant's silence would constitute "a penalty imposed . . . for exercising a constitutional privilege" because "[i]t cuts down on the privilege by making its assertion costly."[49] The Court rejected the claim that the jury would naturally draw the inference anyway.[50] It said that "[w]hat the jury may infer, given no help from the court, is one thing" while "[w]hat it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."[51]

The Court also extended the *Griffin* rule to sentencing hearings in *Mitchell v. United States*.[52] There, the trial court found at sentencing that Mitchell "had been a drug courier on a regular basis," thus putting her over the five-kilogram sales threshold that subjected her to a minimum sentence of ten years imprisonment.[53] The judge relied in part on an inference from Mitchell's failure to testify at trial or at sentencing.[54] Over a spirited dissent,[55] a five-Justice majority held the adverse inference was a violation

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[46] *See, e.g.*, Alabama v. Shelton, 535 U.S. 654, 658 (2002) (holding that the *Gideon* rule applies to any case in which incarceration is imposed, even in the form of a suspended sentence); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (establishing that the Sixth Amendment right to counsel for a felony prosecution applies to the states); *see also* Glover v. United States, 531 U.S. 198, 203 (2001) (holding that a criminal defendant is entitled to effective assistance of counsel at sentencing).

[47] 380 U.S. 609 (1965).

[48] *See id.* at 609–13.

[49] *Id.* at 614.

[50] *Id.* at 614–15. In a subsequent decision, the Court said that a judge must, upon defense request, instruct the jury that it may not consider the defendant's silence as evidence of guilt. *See* Carter v. Kentucky, 450 U.S. 288, 305 (1981).

[51] *Griffin*, 380 U.S. at 614.

[52] 526 U.S. 314, 316–17 (1999).

[53] *See id.* at 319.

[54] At sentencing, the district judge said to the defendant: "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times . . . ." *Id.*

[55] *See id.* at 331–41 (Scalia, J., dissenting).

of the *Griffin* rule,[56] calling it "an impermissible burden on the exercise of the constitutional right against compelled self-incrimination."[57]

The no-adverse-inference rule is highly protective of criminal defendants. Many commentators have criticized it,[58] urging, for example, that it is "out of sync with the historical understanding of the Fifth Amendment"[59] or, on policy grounds, that it is too broad in protecting defendants even when the inference is entirely logical.[60] Its survival underscores the Court's view that the state may do little in the way of penalizing defendants to persuade them to testify during formal adjudication.[61]

While the state need not eliminate every inconvenience for the defendant in deciding whether to remain silent, any burdens imposed must be "supported by the legitimate ends of procedural efficacy."[62] The state, for example, can "force the defendant to make his choice as to whether to testify before he has a jury evaluation of the strength of the prosecution's

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[56] *See id.* at 330 (majority opinion).

[57] *Id.*

[58] *See, e.g.*, *id.* at 332–33 (Scalia, J., dissenting) (contending that *Griffin* lacked historical justification as an interpretation of the Fifth Amendment); Griffin v. California, 380 U.S. 609, 620 (1965) (Stewart, J., dissenting) (contending that adverse comment was not of the same nature as "that involved in the procedures which historically gave rise to the Fifth Amendment guarantee"); Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt from Silence:* Griffin v. California *After Fifteen Years*, 78 MICH. L. REV. 841, 847 (1980) (contending that "the weight" of the burden imposed by adverse comment was not sufficient to justify the *Griffin* rule); Bellin, *supra* note 20, at 234 (contending that the no-adverse-comment prohibition can be justified only if greatly narrowed); Mark Berger, *Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence*, 22 AM. J. CRIM. L. 391, 426–27 (1995) (contending that there is no evidentiary reason why the adverse inference should be disallowed); Anne Bowen Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L REV. 191, 236 (1984) (contending that *Griffin* was poorly justified given that the jury would draw the adverse inference anyway).

[59] *Mitchell*, 526 U.S. at 332 (Scalia, J., dissenting).

[60] *See, e.g.*, Bellin, *supra* note 20, at 234–37.

[61] The exceptions arise if the defendant tries to invoke the privilege selectively or to suggest, without testifying, that his testimony would support the defense. An accused who testifies may not avoid cross-examination "on matters raised by her own testimony on direct examination." Brown v. United States, 356 U.S. 148, 156 (1958). Likewise, if the defense lawyer gives an opening statement that summarizes the planned defense and states that the defendant will take the stand, the prosecution may note before the jury that its case was "unrefuted" and "uncontradicted." Lockett v. Ohio, 438 U.S. 586, 594–95 (1978). Similarly, if the defense lawyer asserts in argument that the government never permitted the defendant to give his version of events, the prosecution can respond before the jury that the defendant was permitted to take the stand to testify. *See* United States v. Robinson, 485 U.S. 25, 31 (1988). In cases like *Lockett* and *Robinson*, the government comments are deemed to function not as way of highlighting "substantive evidence of guilt" but as a "fair response" to the unfair claims by defense counsel. *See Robinson*, 485 U.S. at 32.

[62] LAFAVE ET AL., *supra* note 44, at 1163.

case-in-chief."[63] Likewise, where unitary jury trials on guilt or innocence and sentencing are the rule, the state generally need not provide bifurcated proceedings for the defendant who wants to avoid testifying on his guilt or innocence but wants to testify on his sentencing.[64] At the same time, the Court has rejected a requirement that a defendant must testify before any other testimony for the defense is heard.[65] In those circumstances, the state's interest in limiting perjury cannot justify[66] the burden placed on the defendant's "freedom of choice."[67]

In the context of plea bargaining, the state also may not impair the defendant's freedom of choice. The state can provide inducements in the form of sentencing concessions to encourage the defendant to plead guilty, but it cannot, for example, lie about the evidence or fail to adhere to its promises.[68] The traditional view that prosecutors have discretion not to pursue the most severe charges also means that, when prosecutors have originally charged leniently, they can try to induce a guilty plea by advising the defendant that they will pursue the higher charges if he does not accept the offer.[69] Nonetheless, the higher charges must be legitimate,[70] and they must be "openly presented"[71] to the defendant "so that he knows precisely his choices."[72]

To waive the privilege and accept a plea bargain, the defendant must also receive some basic information about the consequences. He must receive an explanation of the charge to which he is pleading guilty either from the trial court or from defense counsel such that he has "notice of what he is being asked to admit."[73] Likewise, he must be apprised of the

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[63] *Id.*

[64] *See* McGautha v. California, 402 U.S. 183, 216 (1971) (noting an exception for certain capital sentencing proceedings).

[65] In Brooks v. Tennessee, 406 U.S. 605 (1972), the Court concluded that such a rule violates the Fifth Amendment privilege, noting that the defendant "may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause." *Id.* at 610–12.

[66] LAFAVE ET AL., *supra* note 44, at 1163.

[67] *Brooks*, 406 U.S. at 608.

[68] *See* Brady v. United States, 397 U.S. 742, 757 (1970) (stating that "absent misrepresentation or other impermissible conduct by state agents . . . a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise").

[69] *See* Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978).

[70] *See id.* at 364 ("It is not disputed here that Hayes was properly chargeable under the recidivist statute . . . .").

[71] *See id.* at 365.

[72] CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 26.02, at 729 (5th ed. 2008).

[73] Henderson v. Morgan, 426 U.S. 637, 647 (1976).

sentencing possibilities that result from his guilty plea.[74] In addition, he must be informed of certain, significant collateral consequences that could result, such as if the plea would subject him to automatic deportation.[75] More generally, in deciding on the best course between accepting a plea agreement and forcing the government to prove its case, the defendant is entitled to the effective assistance of counsel.[76] These rules confirm that compulsion in the adjudication stages is not simply governmental tactics so offensive as to equate with "coercion" but something less sinister—pressure by the government under circumstances that deprive a defendant of free and rational choice in deciding whether to speak or remain silent.[77]

B. The Risk of Compulsion Through Police Interrogation

The *Miranda* Court's view of compulsion was crucial to its conclusion that custodial interrogation by the police, absent safeguards, always jeopardizes the Fifth Amendment privilege.[78] The Court had not previously endorsed this notion.[79] Nearly seven decades earlier, in *Bram v. United States*,[80] the Court ruled that the Fifth Amendment privilege governs police interrogation.[81] Language in the *Bram* opinion also suggested that rather minor pressure from the police could render a suspect's statement "compelled" for Fifth Amendment purposes.[82] Nonetheless, the *Bram* Court

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[74] *See, e.g.*, Williams v. Smith 591 F.2d 169, 172 (2d Cir. 1979).

[75] *See* Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010) (finding erroneous advice given by defense counsel regarding immigration consequences of guilty plea to constitute ineffective assistance).

[76] *See* Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012).

[77] *See* Dripps, *supra* note 4, at 703–04 (describing rules on guilty pleas as demanding that the accused have "a complete understanding of the consequences and alternatives," and thereby recognizing that "[o]nly a rational person, free from pressures inconsistent with the dignity of rational persons, is responsible").

[78] *See* 384 U.S. 436, 478 (1966) ("To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized.").

[79] Police interrogation did not involve "legal" compulsion. *See* Seidman, *supra* note 13, at 737. Legal compulsion would seem to involve the power to impose a legal punishment, such as a conviction for contempt. *See id.* However, the Court before *Miranda* had already proscribed some punishments for the exercise of the privilege during formal adjudication that were informal, such as comment before the jury by the prosecutor or judge. *See supra* notes 47–57 and accompanying text.

[80] 168 U.S. 532 (1897).

[81] *See id.* at 542.

[82] The Court asserted that when a person in police detention, like Bram, was advised that he was accused of a crime by another suspect, "the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person." *Id.* at 562. The Court also concluded that "it cannot be conceived that the converse impression would not also have naturally arisen, that by denying[,] there was hope of removing the suspicion from himself." *Id.* The "self-evident" deduction was that "the mind

emphasized that a confession was not necessarily compelled in violation of the Fifth Amendment, and therefore inadmissible, merely because it was "made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions."[83] For the next half century, the Court also generally ignored the Fifth Amendment privilege as it applied to police interrogation,[84] turning instead to the Due Process Clause as the primary basis for regulation.[85] This trend arguably reflected doubt by the Court that it had properly applied the privilege to police interrogation in *Bram*.[86] Yet, two years before *Miranda*, in *Malloy v. Hogan*,[87] the Court seemed to reinvigorate the *Bram* notion that the Fifth Amendment privilege governed police interrogation.[88] *Miranda* confirmed this about-face,[89] but also went well beyond *Bram* by declaring that custodial police questioning posed an inherent risk of producing compelled statements.[90] This view commanded only five votes among the Justices[91] and was highly

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of one who is held in custody under suspicion of having committed a crime, would . . . be impelled to say something, when informed by one in authority" that there was this sort of evidence against him. *Id.* at 563. The *Bram* Court also noted other coercive circumstances surrounding Bram's self-incriminating statements, such as that he had been stripped naked and was questioned when alone with a detective. *See id.* at 561–62. These factors, along with the confrontational nature of the interrogation, meant that the Court could rule Bram's statements inadmissible without holding that all custodial questioning would amount to compulsion under the Fifth Amendment privilege.

[83] *Id.* at 558.

[84] *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 525 n.x (14th ed. 2015) ("Until the 1960's *Bram* had become a largely forgotten case . . . .").

[85] *See, e.g.*, Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195, 2197 (1996) (noting the "constitutional reign of thirty years" for the due process voluntariness test before *Miranda* supplanted it as "the preeminent source of confession doctrine").

[86] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 506 n.2 (1966) (Harlan, J., dissenting) (asserting that Wigmore had "disproved" the "historical premises" for applying the privilege to police interrogation in *Bram* and that some of the Court's subsequent decisions "cast further doubt" on the decision, although dicta in other decisions assumed the relevance of the privilege to police interrogation).

[87] 378 U.S. 1 (1964).

[88] The Court declared that "today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897, when, in *Bram v. United States*, the Court held that '[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by [the privilege against compelled self-incrimination in] the Fifth Amendment.'" *Id.* at 7 (first alteration in original) (citation omitted) (quoting *Bram*, 168 U.S. at 542).

[89] *See Miranda*, 384 U.S. at 510 (Harlan, J., dissenting) (calling the Court's "asserted reliance on the Fifth Amendment" a "*trompe l'oeil*" and contending that its opinion "reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station").

[90] *See id.* at 467 ("We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures . . . .").

[91] *See id.* at 499 (Clark, J., dissenting in three of the cases and concurring in the result in the fourth case); *id.* at 504 (Harlan, J., dissenting, joined by Stewart & White, JJ.); *id.* at 526 (White, J., dissenting, joined by Harlan & Stewart, JJ.).

controversial with the public.[92] However, it followed logically from the application of the Fifth Amendment privilege to police interrogation if one understood compulsion to mean what it meant during formal adjudication.[93]

Acceptance by the *Miranda* Court of this broad notion of compulsion helps explain why the majority would have wanted to turn back to the privilege to regulate interrogation. Commentators have noted that the old due process voluntariness test was too ambiguous to guide police officers or lower courts and that the Supreme Court itself seemed unable to settle on its meaning.[94] However, the more specific problem apparently was that the Court did not think that the notion of "coercion" under due process could bear the same meaning as compulsion under the privilege. Whatever the ambiguities that existed over how to articulate and apply the due process test, the *Miranda* Court apparently accepted that there was insufficient consensus for applying it other than to circumstances involving unusually vulnerable suspects and especially offensive police behavior.[95] In contrast, the majority must have believed there was a broader consensus to understand the Fifth Amendment privilege as justifying stricter regulation. The idea that the privilege required "free and rational choice"[96] reflected more concern with the pressure imposed on the mental processes of almost all detainees facing custodial police interrogation.[97] Unless the Court

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[92] *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 167 (Sanford Levinson rev. 5th ed. 2010) (asserting that *Miranda* was "[u]ndoubtedly the most controversial decision" of the Warren Court in the area of criminal justice); *see also* Leo & Koenig, *supra* note 18, at 329 ("From the day it was decided, *Miranda* was intensely controversial."); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 262 (1968) ("The case which seemed to galvanize opposition into a potent political force was the *Miranda* decision . . . ."); Seidman, *supra* note 13, at 674 (asserting that *Miranda*, along with *Brown v. Board of Education*, 347 U.S. 483 (1954), were "two of the most controversial judicial opinions of the twentieth century").

[93] *See supra* Section I.A.

[94] *See, e.g.*, Hancock, *supra* note 85, at 2237; Seidman, *supra* note 13, at 730–32; Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 102–03 (1977); *cf.* George C. Thomas III, *Stories About* Miranda, 102 MICH. L. REV. 1959, 1989 (2004) (noting that "courts are always balancing two different goals when applying the voluntariness test: protecting the suspect's free will and preventing police misconduct" and, if they wish to support the admission into evidence of a confession, can typically focus on whichever of the two goals favors that conclusion).

[95] *See, e.g.*, *Miranda*, 384 U.S. at 515 (Harlan, J., dissenting) ("[I]t must be frankly recognized . . . that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses.").

[96] *See id.* at 464–65 (majority opinion).

[97] *See id.* at 505 (Harlan, J., dissenting) (asserting that "the 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").

perceived this difference, there would have been no need to move away from due process as the foundation for *Miranda*.[98]

Professor Yale Kamisar—the "Father of *Miranda*"[99]—was an important proponent of this move to see police interrogation as generally risking compulsion under the privilege. In 1964, the Court had used the Sixth Amendment right to counsel to suppress confessions in two cases in which the defendants had counsel and, before government agents elicited their self-incriminating statements, either already had been indicted or had asked to speak to counsel.[100] In a classic article published the following year, Kamisar argued for reinterpreting the pre-indictment case, *Escobedo v. Illinois*, as a Fifth Amendment-privilege ruling that should extend to uncounseled detainees.[101] "His theme was that an incongruity existed in providing grand protections against self-incrimination at the trial . . . while largely nullifying those protections by allowing the police to use" psychological aggression "to extract incriminating statements from the accused at the police station . . . ."[102] Although Kamisar relied in part on notions of equality[103] to urge the right to appointed counsel for all suspects facing custodial interrogation,[104] he also contended that the Fifth Amendment privilege required it.[105] He argued that suspects should understand their rights and options before deciding to talk to the police and that access to counsel would serve that Fifth Amendment demand.[106] In the end, Kamisar concluded that, as in the courtroom, where authorities cannot even ask the accused any questions unless he freely chooses with the aid of counsel to testify, the suspect in custody should enjoy substantial

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[98] *See* KAMISAR ET AL., *supra* note 84, at 547 (noting that to read *Miranda* as indicating that "compulsion" under the privilege required the kind of "coercion" needed to violate the due process test would not "make[] sense").

[99] Ruth Bader Ginsburg, *Tribute to Yale Kamisar*, 102 MICH. L. REV. 1673, 1673 (2004) (quoting Terry Carter, *The Man Who Would Undo* Miranda, A.B.A. J., Mar. 2000, at 44, 46).

[100] *See* Massiah v. United States, 377 U.S. 201, 205–06 (1964) (indicted suspect); Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964) (suspect asked to have counsel present for questioning).

[101] *See* Kamisar, *supra* note 21.

[102] Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda, Furman *and Beyond*, 54 VAND. L. REV. 359, 399 (2001).

[103] *See* Kamisar, *supra* note 21, at 68–69 & 79–80. Commentators have pointed to equality as one of the key concerns driving *Miranda*. *See, e.g.*, Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1456 (1985); Howe, *supra* note 102, at 398; Seidman, *supra* note 13, at 678.

[104] *See* Howe, *supra* note 102, at 399–400.

[105] *See, e.g.*, Kamisar, *supra* note 21, at 9 ("Here the right to counsel converges with the privilege against self-incrimination . . . ."); *id.* at 62 ("Questions about the nature and scope of the right to counsel spill into questions about the nature and scope of the privilege against self-incrimination.").

[106] *See, e.g.*, *id.* at 36 ("Surely the man who, in effect, is pleading guilty in the gatehouse needs a lawyer no less than one who arrives at the same decision only after surviving the perilous journey through that structure.").

protections to ensure his free choice about whether to remain silent or talk to the police.[107]

The *Miranda* Court used forceful rhetoric to endorse Kamisar's view of the privilege as a guarantee of free and rational choice.[108] Chief Justice Warren, for the majority, declared that the privilege is not simply a protection for the custodial suspect against unusual police misconduct, but a substantive guarantee of "a "'right to a private enclave where he may lead a private life.'"[109] The privilege "require[s] the government 'to shoulder the entire load'"[110] and "to respect the inviolability of the human personality."[111] Chief Justice Warren declared that, "to permit a full opportunity to exercise the privilege . . . , the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."[112] Moreover, Chief Justice Warren seemed to endorse Kamisar's view on the importance of defense counsel in respecting the privilege. He announced a new Fifth Amendment right to "consult with counsel prior to questioning" and "to have counsel present during" the interrogation itself,[113] with indigent persons being given the right to appointed counsel.[114] Chief Justice Warren also declared that if the accused makes a statement without the presence of counsel, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[115] He concluded that "the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'"[116]

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[107] *See id.* at 14–20.

[108] The majority twice cited Kamisar's article. *See* Miranda v. Arizona, 384 U.S. 436, 440 n.2, 472 n.41 (1966). In addition, the majority relied on some of the principal authorities that Kamisar used in the article. *See, e.g.*, *id.* at 469 n.38 (citing Yale Kamisar, Betts v. Brady *Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962)); *id.* at 472 n.41 (quoting excerpts from the REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 9 (1963)); Kamisar, *supra* note 21, at 7, 56 (citing Kamisar's 1962 article); *id.* at 76, 84, 89 (citing REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE).

[109] *Miranda*, 384 U.S. at 460 (quoting United States v. Grunewald, 233 F.2d 556, 581–82 (1956) (Frank, J., dissenting)).

[110] *Id.* (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 317 (John T. McNaughton rev. ed. 1961)).

[111] *Id.*

[112] *Id.* at 467.

[113] *Id.* at 470.

[114] *Id.* at 472–73.

[115] *Id.* at 475.

[116] *Id.* at 460 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

The creation of the Fifth Amendment right regarding counsel underscored the Court's view that the privilege guaranteed both rational and free choice. The lawyer could educate the defendant who needs help in understanding his options and determining his best choice. This aspect of the right to counsel helped ensure that the suspect would not act self-destructively, including the "subnormal or woefully ignorant."[117] More importantly in the Court's view, for the suspect who decides to talk, the presence of the lawyer would reduce "the likelihood that the police will practice coercion," and if coercion occurs, enable "the lawyer [to] testify to it in court."[118]

Based on its view that the privilege guaranteed free and rational choice, the Court agreed with Kamisar that, absent the famous *Miranda* warnings and the additional protections that its opinion prescribed, suspect statements obtained through custodial interrogation were impermissibly compelled.[119] It is possible to misread *Miranda* as concerned only with aggressive interrogation tactics and as therefore equating compulsion under the privilege with coercion that would violate due process. After all, Chief Justice Warren asserted that "[a]n "understanding of the nature and setting of . . . in-custody interrogation is essential to our decisions today,"[120] and he then spent ten pages summarizing a history of police brutality in interrogation along with more modern interrogation manuals that recommended techniques involving psychological domination and deceit.[121] That discussion might suggest that incriminating statements produced by milder questioning were not compelled. However, Chief Justice Warren explicitly rejected that view: "Even without employing brutality, the 'third degree' or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[122] In fact, in both *Miranda* and the companion cases, the Court threw out confessions in which there was no evidence that interrogators had used tactics recommended in the manuals.[123]

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[117] *Id.* at 468.

[118] *Id.* at 470 ("Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process.").

[119] *See id.* at 467 ("We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime 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.").

[120] *Id.* at 445.

[121] *Id.* at 445–55. Chief Justice Warren also implied at one point that police departments across the country employed the techniques in the manuals on a regular basis. *See id.* at 449 n.9.

[122] *Id.* at 455.

[123] *See id.* at 491–93 (Miranda case); *id.* at 493–94 (Vignera case); *id.* at 494–97 (Westover case).

If one accepts the *Miranda* Court's view of compulsion, its concern about custodial police questioning was justified. Putting aside momentarily how the practice impedes *rational* choice, it impedes *free* choice. As Professor Lawrence Rosenthal has noted, "implicit in custodial interrogation is the threat that the detention and accompanying interrogation will be followed by a criminal prosecution with its attendant sanctions."[124] That is the "kind of threat" that is "the hallmark of Fifth Amendment compulsion."[125] Absent extraordinary circumstances, when a suspect succumbs by talking, there is "no plausible way to deny" that he "has been compelled to respond . . . within the meaning of the Fifth Amendment by virtue of the compulsive power of custody and the inherent threat that it will continue unless the jailer is somehow satisfied."[126]

If the capacity for "rational" choice means that the suspect must have a "real understanding" of his rights, we should say for that reason as well that police questioning, without safeguards, infringes the privilege when the suspect self-incriminates. The *Miranda* Court looked to defense counsel as the person from whom a suspect could gain advice and protection.[127] We might ask, then, what a competent criminal defense lawyer would do who, after committing a crime, has been arrested, and has the free choice whether to talk or to stand on the Fifth Amendment. Except in extraordinary circumstances, the lawyer would assert her rights and keep still,[128] because the lawyer knows that talking to the police at that point can damage one's defense, but it will rarely help.[129] Unless we implausibly assume that people are generally highly self-destructive, the *Miranda* Court was correct that interrogated persons who self-incriminate were usually not

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[124] Rosenthal, *supra* note 6, at 591.

[125] *Id.*

[126] *Id.* at 591–92.

[127] *See Miranda*, 384 U.S. at 469–70.

[128] *See supra* note 26 and accompanying text; *infra* note 213 and accompanying text.

[129] To say that waiving your Fifth Amendment right and talking to interrogation authorities without first seeking legal assistance would *never* help or never be rational is to go too far. If interrogated by a prosecutor, an extremely wily suspect conceivably could first negotiate a written bargain that would be more self-serving than the bargain that he could obtain if he had first secured the assistance of a lawyer. Also, a suspect who confesses contritely to the police conceivably could receive a better concession at plea-bargaining time and at sentencing than he would receive if he had first secured a lawyer's assistance and then sincerely repented. Likewise, an arrestee could sometimes self-incriminate to save a friend or family member from arrest or prosecution. *See, e.g.*, Maryland v. Pringle, 540 U.S. 366, 368–69 (2003) (suspect with two of his friends in car in which drugs were found confessed, after officer had said all three would face arrest if nobody admitted ownership). Yet, I believe these scenarios are outlier cases. For that reason, as an attorney at the Public Defender Service for the District of Columbia in the 1980s, I tried to teach my clients that upon any future arrest, they should *always* assert the right to counsel (and silence) and otherwise keep quiet.

acting rationally (even if freely), either because they were ill informed, deceived, or mentally impaired.[130]

The argument that confessions are "good for the soul"[131] is not a worthy response to the *Miranda* Court's conclusion that confessions to the police are usually compelled. Criminal defendants generally do not confess to police officers in search of absolution. Police officers have no gift of absolution to confer, and indeed we should not conclude that persons who commit crimes and end up in police custody usually care about their souls enough to forego concern that the state can maximize their punishment if they self-incriminate. Undoubtedly, there are some arrestees who are not ignorant, mentally deficient, or mentally impaired who want to confess to the police to help alleviate their consciences no matter what negative consequences ensue, but such instances are rare.[132] As Professor Donald Dripps asks: "[C]an this be so in thousands of cases involving people who have never hitherto expressed any morality different from self-interest?"[133] In the end, if we accept the *Miranda* Court's view of the privilege as guaranteeing free and rational choice, we should also accept its conclusion: People subject to custodial police interrogation in a system without concessions generally self-incriminate not as an exercise of free will but because of compulsion.[134]

II. THE CONVENTIONAL PERSPECTIVE ON THE FAILURE OF REGULATION OF POLICE INTERROGATION

Almost everyone who accepts the *Miranda* Court's view that custodial police interrogation generally jeopardizes free and rational choice would agree that *Miranda* doctrine has failed to remedy that concern adequately.[135] The basic *Miranda* safeguards that would supposedly solve

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[130] *See* Richard H. Kuh, *Interrogation of Criminal Defendants—Some Views on* Miranda v. Arizona, 35 FORDHAM L. REV. 233, 233 (1966) (contending that "there is rarely such a thing as an intelligent, voluntary waiver" in the police interrogation context).

[131] *See* Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1842 (1987) ("All suspects in custody should have a nonwaivable right to consult with a lawyer before being interrogated by the police.").

[132] For the view of a former prosecutor that such cases are rare, see Kuh, *supra* note 130, at 233.

[133] Dripps, *supra* note 4, at 704–05.

[134] *See* Rosenthal, *supra* note 6, at 591 ("But when a public official, with a badge and a gun, deprives a suspect of his liberty, places him in custody, and then asks, 'do you have anything to say?' is it really the case that there is no compulsion to respond?"); Stuntz, *supra* note 1, at 978 (contending that suspects will rarely make such an admission if they are "rational, informed, [and] unpressured").

[135] *See, e.g.*, Ogletree, *supra* note 131, at 1842–45; Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 109–11 (1989); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 880–82 (1981); Sandra

the problem include the famous four-part warnings that police must provide to the custodial suspect before interrogation,[136] the requirement that the suspect knowingly and intelligently waive the rights to silence and to counsel,[137] and rules about how police must honor an assertion by a suspect of either of those rights.[138] Those safeguards were supposed to substantially reduce suspect self-incrimination,[139] and the remedy for violations was supposed to be suppression, which was also supposed to happen frequently.[140] After all, the *Miranda* majority claimed that the goal was not to achieve mere technical compliance with the Fifth Amendment by providing a warning that would allow an easily secured waiver as "a preliminary ritual to existing methods of interrogation."[141] Nonetheless, the prevailing consensus that the doctrine has failed rests on evidence that the vast majority of custodial suspects—roughly eighty percent[142]—still agree to talk when interrogated[143] and that courts rarely suppress any evidence under *Miranda*.[144] Conventional proposals to solve this failure focus on increasing the prevention and suppression numbers.[145] In this Part, I briefly reprise these critiques and the proposed solutions.

Guerra Thompson, *Evading* Miranda: *How* Seibert *and* Patane *Failed to "Save"* Miranda, 40 VAL. U. L. REV. 645, 645 (2006).

[136] *See* 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.").

[137] *See id.* at 475 ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.").

[138] *See id.* at 473–74 (declaring that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease," and that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present").

[139] *See, e.g.*, Stuntz, *supra* note 1, at 995 (asserting that *Miranda* requires "inviting suspects not to talk").

[140] *See Miranda*, 384 U.S. at 479 ("But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.").

[141] *See id.* at 476.

[142] *See* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 495–96 (1996); Leo, *supra* note 1, at 302.

[143] The percentage that refuse to talk may approximate the percentage that refused to talk in the pre-*Miranda* era. *See* Steven B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 557 (2007) ("Possibly as many as twenty percent of suspects in the pre-*Miranda* era invoked silence."); Leo, *supra* note 1, at 302.

[144] *See, e.g.*, Duke, *supra* note 143, at 568 (contending that today "virtually all confessions will be admissible in evidence").

[145] *See infra* Section II.B.

A. Mainstream Critiques of Miranda

The prevailing, anticonfessional perspective on *Miranda*'s failure[146] assumes that the best way to honor the privilege as it applies to police interrogation is to reduce suspect admissions and suppress evidence related to them.[147] *Miranda* doctrine does little to accomplish those goals. From the conventional perspective, there are two parts to the explanation. Perhaps the most popular is that the Burger, Rehnquist, and Roberts Courts largely destroyed the effectiveness of the original *Miranda* safeguards.[148] The other, more salient, is that the original *Miranda* safeguards were largely ineffective except in creating essentially what the *Miranda* Court said it aimed to avoid[149]—"a preliminary ritual to existing methods of interrogation."[150] In this Section, I summarize each of those conventional critiques.

1. Claims of Subsequent Destruction of Miranda *Doctrine.*—Protestations that the Burger, Rehnquist, and Roberts Courts largely eviscerated *Miranda* are accurate and play a major role in the conventional, anticonfessional narrative about its failure.[151] Indeed, for law-and-order conservatives, *Miranda* was a symbol of the Supreme Court

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[146] *See, e.g.*, Stuntz, *supra* note 1, at 978 (asserting that the definition of the problem—and, thus, the solution, "is this: Police interrogation is bad; hence any body of law that permits much police interrogation is bad . . . .").

[147] *See* Dripps, *supra* note 4, at 700–01 ("We must . . . choose between honoring the suspect's autonomy and forgoing the acquisition of significant and otherwise unobtainable evidence of crime.").

[148] *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 24 (2010) ("As numerous commentators have observed, *Miranda* has effectively been overruled."); KAMISAR ET AL., *supra* note 84, at 551 (noting that a variety of post-*Miranda* cases from the Supreme Court that limit *Miranda*'s reach "have led various commentators" to say that *Miranda* is now of little value); *see also* Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 980–1021 (2012) [hereinafter Kamisar, *Rise, Decline, and Fall*] (discussing the many ways in which the Burger, Rehnquist, and Roberts Courts limited and undermined the original *Miranda* holdings); Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. OF CRIM. L. 163, 178–84 (2007) [hereinafter Kamisar, *Fortieth Anniversary*] (focusing on the "Weakening of the 'Original *Miranda*'" as the reason for *Miranda*'s minor impact on law enforcement and its failure to eliminate the coerciveness of police interrogation); Leo & Koenig, *supra* note 18, at 329 ("Subsequent decisions of the Court—*Miranda*'s progeny—have, in effect killed the version of *Miranda* that the Warren Court . . . had laid out."); Ogletree, *supra* note 131, at 1839 ("After two decades of Supreme Court tinkering, the situations in which the *Miranda* exclusionary rule applies are now extremely limited.").

[149] *See, e.g.*, Leo & Koenig, *supra* note 18, at 336 (asserting that the "original *Miranda* was destined to fail on its own terms" because it "fail[s] to dispel interrogation compulsion prior to the warning and waiver ritual" and "also fails to dispel compulsion afterwards"); Seidman, *supra* note 13, at 744 (describing *Miranda* as "a retreat from the promise of liberal individualism brilliantly camouflaged under the cover of bold advance").

[150] *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966).

[151] *See supra* note 148 and accompanying text.

gone awry,[152] and, soon after the Warren era ended, the more conservative majorities on the Court began limiting or gutting *Miranda*'s various holdings. The Burger Court started by ruling that the government can introduce a criminal defendant's statement obtained in violation of *Miranda* to impeach his testimony at trial.[153] Likewise, the Burger Court rejected the implication in *Miranda*[154] that the doctrine applied to anyone who was the "focus" of a police investigation, ultimately holding that *Miranda* doctrine covers only those who already have been formally arrested or restrained to a degree associated with formal arrest.[155] The Court also limited the definition of "interrogation," such that *Miranda* would not apply to many provocative actions by police that cause suspects to self-incriminate, such as discussion between two officers transporting a suspect in custody about the dangers to children at a school for the handicapped from a shotgun that he had hidden nearby.[156] Criticism from the conventional perspective on *Miranda*'s failure also has focused heavily on

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[152] *See supra* note 92 and accompanying text.

[153] *See* Oregon v. Hass, 420 U.S. 714, 723–24 (1975) (failure to cease questioning after assertion of rights); Harris v. New York, 401 U.S. 222, 224 (1971) (failure to provide warnings). This limitation coincided with the Court's rulings on impeachment under the Fourth Amendment. *See, e.g.*, United States v. Havens, 446 U.S. 620, 627–28 (1980) (allowing impeachment of defendant's statements made during proper cross-examination with evidence seized in violation of the Fourth Amendment); Walder v. United States, 347 U.S. 62, 66 (1954) (holding that state could impeach defendant charged with drug distribution with evidence illegally seized from his home after he took the stand and asserted on direct examination that he had never possessed, sold, or distributed narcotics).

[154] *See Miranda*, 384 U.S. at 444 n.4 (asserting that, regarding the meaning of an interrogation that was "custodial," "[t]his is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused").

[155] *See* Berkemer v. McCarty, 468 U.S. 420, 437–42 (1984) (9–0 decision) (holding that roadside questioning of motorist detained on suspicion of drunk driving was not custodial interrogation for purposes of *Miranda*); Beckwith v. United States, 425 U.S. 341, 347 (1976) (holding that *Miranda* did not apply to interview by federal agents of Beckwith in private home although he was the focus of a federal criminal investigation). In *California v. Beheler*, 463 U.S. 1121 (1983), the Court declared that a person is "in custody" for *Miranda* purposes, if "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.* at 1125 (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). More recently, the Roberts Court held that "lawful imprisonment imposed upon conviction of a crime" does not itself constitute custody for *Miranda* purposes. Maryland v. Shatzer, 559 U.S. 98, 113 (2010). This ruling effectively overturned a post-*Miranda* decision of the Warren Court. *See* Mathis v. United States, 391 U.S. 1, 3–5 (1968) (holding that a person serving a prison sentence was in custody for *Miranda* purposes).

[156] These facts are from *Rhode Island v. Innis*, 446 U.S. 291, 294–95 (1980). There, the Court ruled that "interrogation" was "express questioning" or "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Id.* at 301. The effect was that a provocative statement by one police officer to another in front of the suspect was deemed not to constitute "interrogation." *See id.* at 294–95, 302–03. Because even an express question is not reasonably likely to elicit an incriminating response, commentators criticized the *Innis* test. *See, e.g.*, Welsh S. White, *Interrogation Without Questions:* Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1227–36 (1980).

the post-Warren Court's restriction of fruits suppression for violations. In 1974, the Court ruled that the government could use at trial a witness discovered through a *Miranda* violation.[157] The Court grounded this holding on the notion that *Miranda* only articulated "prophylactic rules" rather than true constitutional rules[158] and that compulsion under the Fifth Amendment equates with coercion under the due process "voluntariness" test.[159] Because a *Miranda* violation purportedly did not involve a true constitutional violation, the Court could properly create exceptions to the normal rules on fruits suppression.[160] This reasoning amounted to "an outright rejection of the core premises of *Miranda.*"[161] The Court later used the same reasoning to allow as evidence against a defendant a statement to the police, elicited after *Miranda* warnings, that was the fruit of a prior statement that was obtained in violation of *Miranda*.[162] While the Court subsequently declined to use the same rationale to overrule *Miranda* altogether,[163] it continued to restrict the fruits doctrine that applies in *Miranda* cases.[164] Most recently, in 2004, the Court ruled that the prosecution may introduce physical evidence discovered through a *Miranda* violation.[165]

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[157] *See* Michigan v. Tucker, 417 U.S. 433, 449–50 (1974) (unwarned statement leading to witness).

[158] For a refutation of this view of *Miranda*, see Rosenthal, *supra* note 6, at 586–603.

[159] *See* KAMISAR ET AL., *supra* note 84, at 547.

[160] *See Tucker*, 417 U.S. at 444–46.

[161] Stone, *supra* note 94, at 118.

[162] *See* Oregon v. Elstad, 470 U.S. 298, 305–08 (1985).

[163] In *Dickerson v. United States*, 530 U.S. 428, 444 (2000), the Court upheld *Miranda* against a claim that it had gone beyond what the Constitution requires and that Congress had properly overruled it. Rather surprisingly, Chief Justice Rehnquist wrote the opinion for the Court. *See* MCCLOSKEY, *supra* note 92, at 168. The seven-Justice majority also included Justice O'Connor. *See Dickerson*, 530 U.S. at 430. Justice Rehnquist and Justice O'Connor previously had been among those on the Court who had viewed *Miranda* doctrine negatively, declaring it nonconstitutional prophylaxis. *See, e.g.*, *Elstad*, 470 U.S. at 300, 309. Two other Justices who had taken this position, Scalia and Thomas, dissented in *Dickerson*, contending that the Court should overrule *Miranda*. *See* 530 U.S. at 465 (Scalia, J., dissenting).

[164] In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Court limited *Elstad* modestly, retaining a very restrictive fruits doctrine for *Miranda* cases. In *Seibert*, a police officer deliberately avoided providing warnings before custodial interrogation and, once the suspect incriminated herself, gave the warnings and confronted the suspect with the inadmissible prewarning statements, pressuring her to acknowledge them. *See id.* at 620–21 (Kennedy, J., concurring in the judgment). In the decisive opinion for the Court, Justice Kennedy concluded that a postwarning statement obtained through this particular two-stage approach was inadmissible unless the officer employed "curative measures" before the suspect made the post-warning statements. *Id.* at 622. However, Justice Kennedy concluded that "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances." *Id.* Alternatively, he concluded that "an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient." *Id.*

[165] *See* United States v. Patane, 542 U.S. 630, 644–45 (2004) (Kennedy, J., concurring in the judgment); Wisconsin v. Knapp, 542 U.S. 952 (2004).

The post-Warren Court also has taken other measures that contribute to what Professor Barry Friedman calls the "stealth overruling" of *Miranda*.[166] For example, the Court said that police and courts can ignore *Miranda* when justified by considerations of public safety.[167] The Court also began recognizing implicit waivers of rights,[168] rejecting the *Miranda* Court's strong suggestion that such waivers must be explicit.[169] Regarding assertions, the Court also began demanding that any assertion of rights be clear and unambiguous,[170] contrary to the suspect-oriented approach endorsed by the *Miranda* opinion.[171] Most importantly, the Court recently concluded, contrary to language in *Miranda*,[172] that police officers need not secure a waiver before commencing with interrogation and that police and courts can presume a waiver when the suspect, after receiving warnings and where there is no evidence that he did not understand them, eventually responds to a question.[173]

Anticonfessional fans of *Miranda* have taken some minor consolation from the half-hearted protections that post-Warren majorities on the Court have afforded the suspect who unambiguously invokes the Fifth Amendment.[174] The police must "scrupulously honor[]" the invocation, but this may only require that the police suspend interrogation for two hours and repeat the *Miranda* warnings before recommencing.[175] However, if the

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[166] *See* Friedman, *supra* note 148, at 1.

[167] *See* New York v. Quarles, 467 U.S. 649, 651 (1984).

[168] *See, e.g.*, North Carolina v. Butler, 441 US. 369, 375–76 (1979).

[169] *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966) (declaring that "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver" but that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained").

[170] *See, e.g.*, Salinas v. Texas, 133 S. Ct. 2174, 2181 (2013) (plurality opinion) (holding that assertion of the right to silence requires "express invocation"); Davis v. United States, 512 U.S. 452, 459 (1994) (holding that an assertion of the right to counsel must be clear and unambiguous).

[171] *See Miranda*, 384 U.S. at 473–74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.").

[172] *See id.* at 475.

[173] *See* Berghuis v. Thompkins, 560 U.S. 370, 385–87 (2010). For the view that *Thompkins* "goes a long way towards undoing *Miranda*," see Kit Kinports, *The Supreme Court's Love-Hate Relationship with* Miranda, 101 J. CRIM. L. & CRIMINOLOGY 375, 381 (2011).

[174] *See, e.g.*, Michigan v. Mosley, 423 U.S. 96, 104–05 (1975) (approving of re-interrogation of suspect who had invoked the right to silence on an earlier interrogation attempt concerning an unrelated crime).

[175] *Id.* at 104. In *Mosley*, when the suspect unambiguously asserted his right to remain silent, the detective ceased the interrogation. *Id.* More than two hours later, a different officer brought Mosley to a different location and reread the rights, which Mosley then waived. *Id.* He subsequently self-incriminated regarding a hold-up murder unrelated to the crime about which the initial detective intended to question him. *Id.* at 98. The uncertainty about *Mosley* is whether the fact that the second

suspect invokes the right to counsel, the Court has concluded that a more protective, prophylactic rule will apply: No waiver is possible unless the suspect unilaterally reinitiates communication with the police concerning the investigation.[176] This bright-line safeguard applies until fourteen days have passed since the suspect is released from presentencing custody.[177] These protections can help the suspect who asserts the right to counsel, if the assertion causes the police to cease interrogation. Some suspects may then avoid self-incrimination that otherwise would have occurred. At the same time, if the suspect ends up incriminating himself because the police flout the rules, the limitations on fruits suppression will render the protections largely meaningless.[178]

2. Claims About Miranda*'s Original Flaws.*—Despite the popularity of claims that post-Warren majorities on the Court have eviscerated *Miranda*, much commentary has correctly noted that the original opinion provided little protection for suspects. There were two main problems. The first was the deficient and erroneous advice provided by the warnings themselves.[179] The second was the absence of clear limitations[180] on tactics that the police could use before and after reading the warnings to secure a waiver and on tactics they could use after obtaining a waiver to elicit

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interrogation was by a different officer and concerned a different crime mattered to the Court's conclusion that Mosley's rights were scrupulously honored. Those facts would not seem important given that Mosley did not know what the police intended to discuss with him at either stage and that the Court has held that the police need not inform the suspect of the subject matter to be discussed before securing a valid waiver. *See* Colorado v. Spring, 479 U.S. 564, 577 (1987). For more on the meaning of *Mosley*, see KAMISAR ET AL., *supra* note 84, at 596–97.

176 *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

177 *See* Maryland v. Shatzer, 559 U.S. 98, 110 (2010).

178 *See supra* text accompanying notes 157–165; *see also* Leo & Koenig, *supra* note 18, at 335–36 (noting that *Miranda* protects only in the rare case where the suspect invokes one or the other rights and police honor the decision).

179 *See, e.g.*, Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 793 (2006) (proposing that the warning should include "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'"); *id.* at 806–07 (proposing that the warning also state "If you choose to talk, you may change your mind and remain silent at any time, even if you have already spoken"); Stuntz, *supra* note 1, at 993 (noting that the warnings leave out much information that would be helpful to suspects, such as that "their *silence* will *not* be used against them").

180 The *Miranda* Court at one point articulated a proscription against overly aggressive police behavior designed to secure a waiver, but the Court's admonition raised the same kind of subjectivity problem as the old due process test: "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." 384 U.S. 436, 476 (1966).

statements.[181] Due mostly to these aspects of the original doctrine, almost all suspects, despite receiving the warnings, still waive their rights and talk to the police.[182] What *Miranda* added, therefore, was not helpful protections for the defendant as much as "a mechanism by which the defendant could give up" any claim to protections and then self-incriminate.[183]

The mandated warnings are themselves problematic.[184] They are at best unhelpful to the suspect. They fail to tell him that his silence or invocation of rights cannot be used against him at trial and that he retains the option to invoke his rights after having waived them.[185] Also, one part of the mandated warnings is materially misleading. The second sentence advises that "anything [you] say[] can [and will] be used against [you] in a court of law."[186] This is not true, because an express invocation of the right to silence or to counsel cannot be used against the suspect.[187] The result of the omissions and the erroneous information is that not even the most astute person hearing the warnings could determine what his relevant rights actually are and certainly not the course of action that would best protect his legal interests,[188] which is to assert the right to counsel and otherwise remain silent.[189]

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[181] *See, e.g.*, Kamisar, *Fortieth Anniversary*, *supra* note 148, at 187 (noting that what the police may do after a "suspect effectively waives his rights, . . . amazingly, . . . is still unclear").

[182] *See supra* text accompanying note 143. Evidence of the failure of *Miranda* to prevent waivers and self-incrimination started to accumulate immediately after the decision. *See, e.g.*, Michael Wald et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1563 (1967) (based on an eleven-week study of police interrogations in New Haven, Connecticut, in the summer of 1966, researchers concluded that there was "[n]o support . . . for the claim that warnings reduce the amount of 'talking'").

[183] Seidman, *supra* note 13, at 744.

[184] In *Patterson v. Illinois*, 487 U.S. 285 (1988), the Court re-endorsed the *Miranda* warning and waiver procedure, holding that it generally suffices to establish a waiver of the Sixth Amendment right to counsel during interrogation when the Sixth Amendment right applies. *See id.* at 296. The Court noted that "we have permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid." *Id.* at 296 n.9. The Court also left open whether a suspect who has been indicted must be told of that fact to effectuate a valid waiver of the Sixth Amendment right, because Patterson was so advised. *See id.* at 295 n.8.

[185] *See supra* note 179 and accompanying text.

[186] Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[187] *See supra* note 12 and accompanying text.

[188] The facts in *Berghuis v. Thompkins*, 560 U.S. 370 (2010), are instructive. There, the defendant, after being given the *Miranda* warnings, remained largely silent despite continued interrogation for approximately two hours and forty-five minutes. *Id.* at 379. Finally, in response to a question about whether he prayed to God for forgiveness for shooting one of the victims, he self-incriminated by answering affirmatively. *Id.* at 376. The Supreme Court concluded that because there was no evidence that he did not understand the warnings, he could be presumed to have knowingly and intelligently waived his Fifth Amendment rights when he responded. *Id.* at 385. But, if he understood his rights, why wouldn't he have asserted them? His failure to respond to questioning for such a long period might at

The warnings are affirmatively harmful to the suspect who carefully considers them. They actually steer him toward self-incrimination. The second warning indicates that asserting either the right to silence or to counsel would be incriminating. Should the suspect then just remain silent? The warnings do not clarify whether this would incriminate him, but a failure to respond seems incriminating.[190] Should he waive and give a false story of innocence? Should he waive and confess? These latter two options sound the best. Maybe he can fool the police. Or maybe there would be some hope for leniency if he were to confess. If we want to understand the reasons that the vast majority of *Mirandized* subjects mysteriously waive their rights and talk to the police against their self-interest, we should start with the unhelpful, even harmful, content of the warnings.

Miranda also failed to adequately prevent the police from using many kinds of exploitative tactics to help induce a waiver even before providing the warnings. For example, the police could tell a suspect that he is not under arrest to avoid giving him any warnings until they have questioned him to the point of self-incrimination.[191] They could frame the warnings "as an irrelevant bureaucratic procedure" so that suspects would "not recogniz[e] the import of their actions."[192] They could "suggest to suspects that providing information to police could lead to the suspect's case being viewed more favorably" or "imply that a suspect's relationship with police

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least cause us to doubt that he understood and to look for an explanation. Instead, the Court assumed that the defendant was simply foolish, which presumably is its view of the many suspects who, when read the warnings, waive them. I submit that the starting point for a more plausible explanation is to recognize that the *Miranda* warnings on their face are too opaque—even inaccurate—to be understood in the sense required to support a knowing and intelligent waiver.

[189] *See supra* text accompanying notes 176–178. On the question of whether suspects should confess contritely and hope for a concession, the experience of Jesse Montejo warrants consideration. *See* Montejo v. Louisiana, 556 U.S. 778 (2009). Despite a full confession to murder, cooperation in locating the weapon, and a letter of apology to the victim's widow that he wrote during the excursion, *id.* at 781–82, the prosecution used his apology letter to help convict him for capital murder and to send him to death row. *Id.* This scenario exemplifies, in my view, that a suspect's waiver of *Miranda* rights and confession to the police is almost always a bad decision under current law. For more on the implications of *Montejo* for this Article's proposal, see *infra* text accompanying notes 330–332.

[190] The decision in *Doyle v. Ohio*, 426 U.S. 610 (1976), bears on this question. There, the Court concluded that due process prevents the government from impeaching a defendant with his silence in the wake of *Miranda* warnings. In support, the majority asserted: "[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." *Id.* at 618. Yet, in dissent, Justice Stevens, joined by Justices Blackmun and Rehnquist, concluded that the warnings contained no such implicit message so that the no-impeachment rule was unnecessary to prevent the warnings from being "deceptive." *See id.* at 621 (Stevens, J., dissenting).

[191] *See* Leo & Koenig, *supra* note 18, at 331.

[192] *Id.*

is nonadversarial."[193] They could imply that "the police are neutral fact finders who can help him and that opening up to these powerful friends is the only way to improve his situation."[194]

Miranda also allows the police, after securing a waiver, to use at least as much deceit and pressure as they could have employed under the old due process "voluntariness" test. A waiver is in effect a grant of permission by the suspect for the police to use compulsion to elicit a confession. All of the tactics recommended by the interrogation manuals to psychologically dominate and deceive the suspect—the very tactics criticized by the *Miranda* Court[195]—become fair game after a waiver.[196] Because few suspects, having waived their rights and begun to talk, subsequently change their minds,[197] the interrogation tactics used before *Miranda* continue to flourish.[198] As one commentator has noted:

> A common strategy is to tell the suspect that the purpose of the interrogation is not to debate whether he committed the crime, but why: "Well, let me tell you something, okay? I didn't bring you down here to ask you if you did it. Okay? I brought you down here to tell me why you did it."[199]

Today, as before, interrogation is often "a strategic, multistage, goal-directed, stress-driven exercise in persuasion and deception, one designed to produce a very specific set of psychological effects and reactions in order to move the suspect from denial to admission."[200] Many commentators even believe that judges now sometimes permit levels of police aggression that courts would have found to violate due process in the pre-*Miranda* era.[201] When the suspect has effectively consented by waiving in accordance with *Miranda* doctrine, judges rarely conclude that subsequent statements are involuntary.[202]

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[193] *Id.* at 331–32; *see also* Rosenthal, *supra* note 6, at 598 ("To be sure, many interrogators are adept at using some combination of threats and inducements to convince suspects to submit to interrogation—and even to confess—regardless of whether it was in the suspect's interest to do so.").

[194] Leo & Koenig, *supra* note 18, at 332.

[195] *See supra* note 121 and accompanying text.

[196] *See* Guerra Thompson, *supra* note 135, at 652–53.

[197] *See, e.g.*, Stuntz, *supra* note 1, at 988.

[198] For a summary of the kinds of psychological tactics that post-*Miranda* police interrogators have legitimately employed, see LEO, *supra* note 2, at 119–64.

[199] *Id.* at 135.

[200] *Id.* at 119.

[201] *See, e.g.*, Duke, *supra* note 143, at 562–63; Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1027 (2001); Seidman, *supra* note 13, at 745–46; Weisselberg, *supra* note 38, at 1595; Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1220 (2001).

[202] *See* Duke, *supra* note 143, at 562.

B. Conventional Reform Proposals

Orthodox proposals to solve *Miranda*'s failure,[203] like the conventional accounts of the failure itself, are intended as anticonfessional. They urge reforms that purportedly would prevent and suppress more suspect admissions. The proposals include modifying existing *Miranda* rules to make them more defense oriented, electronic recording of interrogation sessions, requiring a defense lawyer's assistance to suspects prior to and during police questioning, interrogation by judges instead of by police officers, or a return to an invigorated due process test of "voluntariness" alone. All of these proposals assume that to honor the privilege we must do better at preventing or excluding admissions by custodial suspects.

1. Adjustments to Miranda *Doctrine.*—Scholarly proposals to fine-tune *Miranda* doctrine to help suspects avoid making admissions or to exclude evidence related to the ones they do make have long been prevalent. Commentators have often denounced the changes by the post-Warren majorities, contending that the protections that *Miranda* originally imposed would have better accomplished those goals. For example, scholars have urged that post-Warren majorities should not have eviscerated the fruits doctrine for *Miranda* violations,[204] should not have abandoned the presumption against waivers of *Miranda* rights,[205] and should not have required that suspects assert their rights unambiguously.[206] Other commentators who note the ineffectiveness of the original doctrine point to different adjustments. They contend, for example, that the Court should have made the warnings better for suspects so that they would understand the relative dangers of talking to the police[207] and should have

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[203] Some who accept that custodial police interrogation always risks producing a "compelled" statement may nonetheless conclude that the original *Miranda* doctrine was not a failure. *See, e.g.*, Rosenthal, *supra* note 6, at 606. If one finds that the original *Miranda* opinion provided an adequate warning-and-waiver procedure, then *Miranda* itself secured compliance with the Fifth Amendment. *See id*. However, even on that view, one can conclude that much of the evisceration of *Miranda* doctrine by post-Warren-era majorities has been unjustified.

[204] *See, e.g.*, Guerra Thompson, *supra* note 135, at 648–50; Kamisar, *Fortieth Anniversary*, *supra* note 148, at 202.

[205] *See, e.g.*, Leo & Koenig, *supra* note 18, at 333.

[206] *See, e.g.*, Marcy Strauss, *Understanding* Davis v. United States, 40 LOY. L.A. L. REV. 1011, 1062–63 (2007); Weisselberg, *supra* note 38, at 1588–89; *see also* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 320 (1993) (arguing against the unambiguous-assertion standard before the Supreme Court adopted it based on its discriminatory effect against women and certain minority groups).

[207] *See, e.g.*, Godsey, *supra* note 179, at 784 (noting that "one of the leading reasons why *Miranda* has not had its anticipated effect—why most suspects feel compulsion and waive their *Miranda* rights—is because suspects are not informed" that exercise of their right to silence cannot be used

articulated and enforced clearer protections to prevent the police from "talking the suspect out of asserting his rights before the 'waiver of rights' transaction ever takes place."[208] From the conventional, anticonfessional perspective, these kinds of reforms would better honor the privilege by ensuring that fewer suspects self-incriminate or that the government would face more obstacles to using their admissions against them.

2. Assistance by a Defense Lawyer.—Some scholars have urged that the best way for the Court to honor the privilege in the interrogation context is to require that the custodial suspect have a nonwaivable right to counsel as a precondition to any waiver of Fifth Amendment rights.[209] As a corollary, they have proposed that the government could not use against the suspect at trial any evidence obtained through a violation of this rule.[210] Professor Charles Ogletree has urged this approach, among other reasons, because of the failure of *Miranda* doctrine to adequately inform the custodial suspect of the relative benefits of speaking with the police versus invoking the Fifth Amendment and remaining silent.[211] He has urged that appointment of counsel would help ensure that the suspect understands his rights and also reigns in the likelihood of "police abuse and trickery."[212] Commentators agree that imposing such a regime would greatly reduce the number of admissions that police would elicit from custodial suspects.[213]

3. Interrogation by Magistrates.—Some commentators have argued that the Court should have required interrogation by judicial officers—or, at least, supervision by judicial officers—instead of imposing *Miranda* doctrine.[214] The basic idea is that the government could not use a suspect's

against them at trial); Stuntz, *supra* note 1, at 993 (contending that persons who know that "their silence will not be used against them" are more likely to invoke their *Miranda* rights (emphasis omitted)).

[208] Kamisar, *Fortieth Anniversary*, *supra* note 148, at 187 (emphasis omitted). Professor Kamisar concludes that the *Miranda* Court did prohibit such cajoling, at least in general terms, but that courts have not adequately enforced the prohibition. *See id.*; *see also supra* note 186 (quoting the *Miranda* Court's prohibition).

[209] *See, e.g.*, Ogletree, *supra* note 131, at 1830; *see also* Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 497 (1964) ("[I]nsistence upon the presence of counsel in all cases is simply an insistence upon the barrier to confession imposed by an effective privilege against self-incrimination . . . .").

[210] *See* Ogletree, *supra* note 131, at 1830.

[211] *See id.* at 1827.

[212] *See id.* at 1845.

[213] *See, e.g.*, Peter Arenella, Miranda *Stories*, 20 HARV. J.L. & PUB. POL'Y 375, 384 (1997); Kamisar, *supra* note 21, at 36–38; Seidman, *supra* note 13, at 741; *cf.* Caplan, *supra* note 103, at 1441 (opposing the notion that custodial suspects should have the right to consult with counsel before and during interrogation because "there may be fewer confessions and more crime").

[214] *See* Kamisar, *Rise, Decline, and Fall*, *supra* note 148, at 1032–38 (discussing the history of this proposal without endorsing it).

admission unless the suspect made it to a judge or magistrate, and that those officials would avoid some of the more aggressive interrogation tactics employed by police officers.[215] Under current law,[216] a suspect appearing before a state judicial officer would likely have the right to the assistance of a lawyer[217] and the right to warnings that any statement made could be used against him.[218] Also, the refusal of the suspect to answer questions before a judicial officer could not serve as the basis for an inference of guilt by the factfinder at trial.[219] Given those protections, employing a judicial-interrogation approach as an alternative to *Miranda* today would greatly reduce the number of suspect admissions available to the prosecution for use at trial. In this sense, the approach would better honor the Fifth Amendment privilege than *Miranda* doctrine.

4. Return to an Invigorated Due Process Standard.—Some scholars have urged that the Court would advance the goal of honoring the Fifth Amendment privilege by abandoning *Miranda* doctrine and returning to a revitalized version of the due process "voluntariness" standard.[220] This position builds on the notion that *Miranda* reduced rather than increased the protections that custodial suspects realize during the interrogation process.[221] By eliminating the effective consent that an easily secured *Miranda* waiver provides to the police to use compulsion,[222] these scholars hope that courts would scrutinize police interrogation tactics more carefully to determine whether they constitute coercion as a matter of due process.[223] Other scholars have noted that *Miranda* warnings are so helpful to the police that many would use them even if the Court did not require them.[224] This point suggests that the Court would actually have to declare *Miranda* warnings unconstitutional to stop all police departments from using them, which seems particularly unlikely. In any event, if the police would stop

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[215] *See id.* at 1033 (describing the judicial officer as "presumably more neutral" than a police officer).

[216] Proposals for judicial interrogation initially preceded *Miranda* and rulings by the Court on the right of noncapital criminal defendants in state court to counsel. *See id.* at 1032 (noting that Professor Paul Kauper first proposed this approach as an alternative to police interrogation in 1932).

[217] *See id.* at 1034.

[218] *See id.*

[219] *See supra* note 12 and accompanying text.

[220] *See, e.g.*, Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 496–502 (1998); Stuntz, *supra* note 1, at 995–96; Weisselberg, *supra* note 38, at 1595–96.

[221] *See* Seidman, *supra* note 13, at 745–46; Weisselberg, *supra* note 38, at 1595.

[222] *See supra* text accompanying notes 195–202.

[223] *See* Stuntz, *supra* note 1, at 999; Weisselberg, *supra* note 38, at 1596.

[224] *See, e.g.*, Duke, *supra* note 143, at 566.

following the *Miranda* regime, the notion is that courts would actually suppress more suspect admissions and better honor the Constitution.

III. A PRO-CONFESSIONAL ACCOUNT OF THE FAILURE OF REGULATION OF POLICE INTERROGATION

In this Part, I contend that we best understand the failure of efforts to regulate police interrogation under the Fifth Amendment from a pro-confessional perspective—one that favors rather than disfavors suspect self-incrimination. I accept the *Miranda* Court's view that the privilege protects *free and rational choice* by suspects and that unregulated police interrogation that elicits a self-incriminating statement, without any reward to the suspect, almost always denies it.[225] But I also am pleased that *Miranda* doctrine does not prevent or exclude most suspect admissions to the police.

From this perspective, I still urge *Miranda* doctrine as a failure. This position builds on the view that honoring the privilege *need not be* anticonfessional—that there are ways to incentivize suspects to self-incriminate and also to ameliorate police compulsion. Moreover, this position builds on the view that honoring the privilege *must not be* anticonfessional if is to succeed in equitable fashion. Any effort to impose doctrine that will prevent or suppress all or most custodial suspect admissions will too greatly hamper law enforcement to find general acceptance.[226] Many observers believe that the *Miranda* Court itself recognized this point when it did not impose rules that would prevent or exclude more custodial suspect admissions.[227] Yet, any effort to articulate doctrine that aims to prevent or suppress only a few of those admissions will both appear arbitrary and fail to honor the privilege. Such an effort may also perversely incentivize those who know the rules. This latter situation describes the true failure of *Miranda* doctrine. In the end, the explanation for its malfunction is not that it hasn't done enough to deter and suppress suspect admissions, but that it focuses on deterrence and suppression in the first instance.

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[225] *See supra* Section I.B.

[226] For the classic statement of the need for suspect admissions to the police in solving many criminal cases, see Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 16, 16–17 (1961).

[227] *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 424 (1986) (asserting that the *Miranda* decision was a compromise designed to strike a "balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights").

A. A Pro-Confessional Critique of Miranda *Doctrine*

Miranda was a bad compromise from the start because it did little to honor the Fifth Amendment privilege and, worse, encouraged bad conduct by custodial suspects, the police, and the courts. In this area, we should hope for law that encourages suspects to self-incriminate based on free and rational choice, ameliorates police compulsion, and enables courts to speak honestly about the application of the rules to the interrogation process. *Miranda* managed to accomplish none of those goals and, in important respects, to subvert all of them. In light of the perverse incentives that it created, I submit that the original doctrine warranted evisceration by post-Warren majorities on the Court. I do not contend that the Court's current approach to regulating police interrogation is optimal. The remnants of *Miranda* that we have today are no better than the original doctrine in terms of both honoring the privilege and incentivizing desirable behavior. However, the original *Miranda* doctrine was so bad by those measures that it is hard to describe what we have today as worse.

1. The Miranda *Opinion and Perverse Incentives.*—While orthodox critiques of the original *Miranda* opinion reveal its failure to adequately honor the Fifth Amendment privilege,[228] they typically do not underscore the wrongheaded incentives that it created. *Miranda* generally rewarded the most cunning suspects, who are the most likely to assert their rights and otherwise remain silent.[229] It invited well-trained police officers to exploit vulnerable arrestees and to treat the law as a pretense.[230] And it called on lower courts to speak dishonestly about suspect waivers and the interrogation process.[231] A legal system that aims to honor and promote honesty, human dignity, and governmental legitimacy should not encourage those behaviors.

Miranda doctrine was from the start unhelpful to the vast majority of arrestees,[232] but, oddly, it did reward a small group of the most guileful suspects—often recidivists—for obstructionist behavior.[233] Part of the

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[228] *See supra* Section II.A.2.

[229] *See* Stuntz, *supra* note 1, at 977 ("The winners in this regulatory game are likely to be the savvy suspects," and they are "likely to be defined by either wealth or experience — meaning experience dealing with the system, something that recidivists naturally possess.").

[230] *See, e.g.*, LEO, *supra* note 2, at 128 (noting that "the strategies that American interrogators use to obtain signed waivers have, in effect, turned *Miranda* on its head").

[231] *See infra* text accompanying notes 267–276.

[232] *See* Section II.A.2.

[233] In one of the most important empirical studies of police interrogation, Richard Leo concluded that "[t]he more experience a suspect has with the criminal justice system, the more likely he is to take advantage of his *Miranda* rights to terminate questioning and seek counsel." Leo, *supra* note 1, at 286.

reason was the opaque, four-part warnings that *Miranda* mandated.[234] They would befuddle not only persons of low intelligence or impaired mental abilities but even the most high-functioning individuals. They provide little, if any, useful guidance about how to deal with police interrogators.[235] Indeed, they mislead about how to serve one's interests.[236] Consequently, both waivers and assertions of Fifth Amendment rights by suspects who receive the warnings are generally only random acts among the confused.

The exception is assertions of these rights by suspects who already know of *Miranda*'s substantive protections for those who assert their rights.[237] Those suspects act rationally by asserting. Thus, the primary beneficiaries of *Miranda* are an indiscriminate lucky few who randomly assert their rights and a substantial group of persons schooled in Fifth Amendment law—mostly hardened criminals.[238] Do we want interrogation law to help only these individuals but not the first-time arrestees who are least informed about their rights and the most easily coerced by the police?[239]

The original *Miranda* doctrine also encouraged police officers to act at least as deceitfully and aggressively as when they were governed by the due process "voluntariness" test alone. As we have seen, once having obtained a *Miranda* waiver, officers have always been free to use the very same exploitative tactics that they used in the pre-*Miranda* era.[240] After *Miranda*, as before, "[p]olice elicit the decision to confess from the guilty by leading them to believe that the evidence against them is overwhelming, that their fate is certain (whether or not they confess), and that there are advantages that follow if they confess."[241] Of course, this is generally

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Other prior empirical studies had reached the same conclusions. *See, e.g.*, David W. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103, 106–07 (1974); Wald et al., *supra* note 182, at 1562–77.

[234] For the warnings, see *supra* note 9.

[235] *See supra* notes 184–190.

[236] *See supra* text accompanying notes 189–191.

[237] For a discussion of the "second-level" *Miranda* protections that apply when a suspect invokes the right to silence or to counsel, see *supra* text accompanying notes 174–178.

[238] *See* Leo, *supra* note 1, at 286 (concluding from empirical study that "a suspect with a felony record . . . was almost four times as likely to invoke his *Miranda* rights as a suspect with no prior record and almost three times as likely to invoke as a suspect with a misdemeanor record"); Stuntz, *supra* note 1, at 977 (noting that "recidivists naturally possess" the "experience dealing with the system" to best understand "their situation").

[239] *See* Stuntz, *supra* note 1, at 994 (criticizing *Miranda* because it "protects the least vulnerable suspects and fails to protect the most vulnerable").

[240] *See supra* text accompanying notes 195–202.

[241] Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENVER U. L. REV. 979, 985–86 (1997).

duplicity, for there is rarely a significant advantage for the suspect in self-incriminating to the police.[242]

Moreover, there seems little disagreement among commentators that *Miranda* actually shielded the police from the level of scrutiny that they faced in the pre-*Miranda* era[243] because the courts have viewed the waiver as effectively a consent by the suspect for the police to use even tactics that verge into coercion.[244] This concern can become overblown, as empirical evidence suggests that police only rarely use strategies that would actually violate due process.[245] Yet, the evidence does suggest that police interrogation in general is no more respectful than it was immediately before *Miranda*.[246] And, did we want *Miranda* law actually to *invite* the police to act as dishonestly and aggressively as before?

Miranda doctrine also invited police officers to disrespect the law because it purported to give them conflicting duties but did not require them to honor their duty to suspects zealously.[247] The job of the interrogating officer is to try to get the accused to confess.[248] *Miranda* implicitly purported to require the officer to help the accused not to confess.[249] Yet, the doctrine seemed almost a pretext given the lack of clarity about just what comments and behaviors the officer could employ to

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[242] Part of the reason that talking will rarely help the suspect resolve his case favorably derives from evidence law. A suspect statement that the prosecution wants to introduce will fall within a hearsay exclusion or exception as a statement by the opposing party. *See, e.g.*, FED. R. EVID. 801(d)(2). However, when the defendant makes a favorable statement to the police and would like to offer it into evidence for its truth, the statement typically will constitute inadmissible hearsay. *See, e.g.*, *id.*

[243] *See supra* note 85 and accompanying text.

[244] *See supra* text accompanying notes 195–202.

[245] *See, e.g.*, Leo, *supra* note 1, at 282–83 (finding incidence of coercion during about two percent of interrogations).

[246] The *Miranda* Court claimed to eschew this outcome: "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." 384 U.S. 436, 476 (1966).

[247] *See* Kamisar, *supra* note 21, at 35–36 (noting that "when we expect the police dutifully to notify a suspect of the very means he may utilize to frustrate them—when we rely on them to advise a suspect unbegrudgingly and unequivocally of the very rights he is being counted on *not* to assert—we demand too much of even our best officers"); Kuh, *supra* note 130, at 236 ("The first and most marked absurdity of *Miranda* is to expect police to give advice that will strip them of their ability to collect evidence.").

[248] *See, e.g.*, Wald et al., *supra* note 182, at 1554 (analyzing empirical study and suggesting that interrogators generally saw their job as "obtaining some kind of statement to present to the prosecutor").

[249] *See* Caplan, *supra* note 103, at 1451 (noting that "[a] police warning" that is "delivered faithfully" will "encourage the suspect to withhold information").

downplay the warnings and the waiver.[250] Predictably, police officers have often viewed the warning and waiver requirements with scorn and minimized their importance to suspects.[251] Interrogators often try to "create the illusion" that the suspect and the interrogators "share the same interest" and that waiver and "continued compliance" is "to the suspect[']s] advantage."[252] From the typical interrogator's perspective, the *Miranda* warnings and waiver rules understandably are mere inconveniences to be disparaged rather than serious protections for the accused that deserve their veneration.[253] Do we want to impose rules that are so easy for officers to compromise and that we all but explicitly invite them to undermine?

The *Miranda* opinion also encouraged lower courts to speak mendaciously.[254] It summoned them to declare the misguided, irrational, or inveigled decisions of arrestees to waive their rights and talk as sensible.[255] As long as the interrogator repeated the *Miranda* warnings, it did not matter that the advice they contained was befogging.[256] The *Miranda* opinion implied that the warning made the decision to waive and talk well considered and rational.[257] Thus, a subsequent statement by a suspect that he was willing to talk without a lawyer's help, except in the most extreme

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[250] *See* Kamisar, *supra* note 21, at 36. ("[I]s it the duty of the police to persuade the suspect to talk or persuade him not to talk? They cannot be expected to do both." (quoting Brief of Edward L. Barrett, Jr. as Amicus Curiae at 9, People v. Dorado, 398 P.2d 361 (1965) (on rehearing))).

[251] *See, e.g.*, LEO, *supra* note 2, at 128 (noting that "the strategies that American interrogators use to obtain signed waivers have, in effect, turned *Miranda* on its head"); Rosenthal, *supra* note 6, at 598 ("[M]any interrogators are adept at using some combination of threats and inducements to convince suspects to submit to interrogation."); Wald et al., *supra* note 182, at 1552 (empirical study after *Miranda* noting that interrogators often tried to convey that the warnings were a mere bureaucratic formality and that the suspect should tell them what happened).

[252] LEO, *supra* note 2, at 128.

[253] *Id.* at 124 ("*Miranda* has become a 'manageable annoyance'—the anti-climax of custodial questioning—to American police . . . .").

[254] *See* Kuh, *supra* note 130, at 235 (contending that, although "there is just no sound way of ordinarily finding an intelligent waiver by a defendant of his [F]ifth [A]mendment rights[,] . . . *Miranda* would have us believe there is such a thing").

[255] *See id.*

[256] *See supra* notes 184–190 and accompanying text.

[257] The Court lacked any basis in existing Fifth Amendment doctrine to create a Fifth Amendment right to counsel during interrogation and to require that warnings apprise the suspect of that right. If one can accept that construction of the privilege, it is not a big step to accept that the Court could have required the actual appointment of counsel to assist the suspect in reaching a decision on waiver. It is also not a big additional step to accept that the Court could have even imposed a nonwaivable requirement that counsel be present to assist the defendant during any questioning. Given that the Court took the first step, its failure to take either or both of the latter two raises the question whether it was aiming for a practical compromise rather than conforming to a notion of what it thought the Constitution demanded.

circumstances, was a valid waiver.[258] The fact that such a decision was "stupid" on its face[259] was no basis to deny its validity.[260] Further, the fact that such a huge proportion of suspects facing interrogation—roughly eighty percent[261]—were acting stupidly by waiving[262] was no basis for lower courts to worry that the warnings might be confounding or that the police were acting begrudgingly in administering and commenting to suspects on them. Because the vast majority of waivers were highly stupid, there was little reason to try to categorize some as more stupid than others. *Miranda*, thus, functioned to promote and legitimize compelled *waivers*[263] by having lower courts participate in the subterfuge of calling them "knowing[] and intelligent[]."[264] Do we want the courts to so blind themselves to the meaning of words in justifying their decisions?

2. Undermining Miranda *Without Honoring the Privilege.*—In largely eviscerating *Miranda*, the post-Warren Court at least modestly reduced some of the perverse consequences of the doctrine. By making waivers easier and assertions harder,[265] the post-Warren Court reduced the ability of random suspects among the vast array of confused ones to gain the benefits associated with an invocation of rights. Likewise, by allowing impeachment with evidence from *Miranda* violations, restricting the definitions of "custody" and "interrogation," limiting the fruits doctrine,

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[258] *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966). The exceptional circumstances in which the Court has declared a purported waiver invalid involve efforts by the police to continue interrogation after the defendant had clearly and unambiguously asserted his right to counsel. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477, 479–80 (1981).

[259] Kuh, *supra* note 130, at 234–35 (concluding that a suspect's "act in talking intentionally is a stupid, non-intelligent act").

[260] In his dissent in *Miranda*, Justice White suggested that any decision to waive after *Miranda* would seem as irrational as any decision to answer an unwarned statement had been in the pre-*Miranda* era: "But if the defendant may not answer without a warning a question . . . without having his answer be a compelled one," he asked, "how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?" 384 U.S. at 536 (White, J., dissenting). These comments—ironic ones, given that Justice White dissented—suggested that the warnings the majority required, at least when administered by police officers in the context of custodial interrogation, could not produce the kind of waiver that should count as voluntary, knowing, and intelligent.

[261] *See* Rosenthal, *supra* note 6, at 603–04.

[262] *See, e.g.*, LEO, *supra* note 2, at 124 ("[T]he *Miranda* ritual makes almost no practical difference in American police interrogation."); Wald et al., *supra* note 182, at 1563 (in an empirical study conducted shortly after the *Miranda* decision: "No support was found for the claim that warnings reduce the amount of "talking.").

[263] *See supra* text accompanying notes 184–194.

[264] 384 U.S. at 444.

[265] *See supra* notes 168–173 and accompanying text.

and imposing the public safety exception,[266] the Court reduced the ability of cunning recidivists to avoid aggressive police interrogation that might cause them to self-incriminate. If we accept that the original *Miranda* doctrine dished out benefits to a few suspects who were no more entitled to them than many others, we should commend the post-Warren Court for at least modestly reducing the unfairness.[267]

The post-Warren Court also has helped slightly reduce the need for mendacity by lower courts confronting *Miranda* claims, even if it has not done much to reduce dishonorable behavior by police interrogators. The Court's rulings narrowing the application of *Miranda*[268] reduce the need for lower courts to disingenuously declare compelled suspect waivers as "knowing and intelligent," allowing the lower courts to rule for the government on alternative grounds. Decisions of the post-Warren Court that allow impeachments and restrict fruits exclusions after even conceded *Miranda* violations[269] provide a similar benefit.

The problem with the rulings of the post-Warren Court on *Miranda* is that they do not honor the Fifth Amendment privilege. Should we criticize the general demolition of *Miranda* on this basis? Given the benefits of what the post-Warren Court has accomplished in modestly reducing perverse consequences, there is little reason to say that *Miranda* doctrine today is worse than it was originally. However, if the goal is to find a way to both honor the privilege and encourage suspect admissions, current *Miranda* doctrine, like the original, fails miserably.

B. A Pro-Confessional Critique of Reform Proposals

Conventional proposals for reform also would achieve poor results because they, like *Miranda*, accept that the dilemma must concern which arrestees should benefit from doctrines that aim to prevent or suppress

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[266] *See supra* notes 153–165, 167 and accompanying text.

[267] The post-Warren Court has fortified *Miranda* doctrine in one respect, however, that empowers the most cunning suspects. As we have seen, the Court has given the strongest *Miranda* protection to the suspect who, after receiving the warnings, clearly invokes the right to counsel. *See supra* notes 176–177 and accompanying text. If that person can keep asking unambiguously for a lawyer in the face of police efforts to elicit an admission, he may benefit. The suspect may cause the police to cease the interrogation, which may allow him to avoid making an admission that he otherwise would have made and that could then have been used for impeachment purposes at trial or to find other admissible evidence. *See supra* text accompanying notes 153, 157–165. The Court has not effectively explained why an unequivocal invocation of the right to counsel—as opposed to a clear or even equivocal assertion of the right to silence—should confer the added shelter. The protection given those who clearly invoke the right to counsel arguably operates as a semi-secret doctrine that the most well-versed and emotionally sturdy suspects can use to shield themselves.

[268] *See supra* notes 154–156 and accompanying text.

[269] *See supra* notes 153, 157–165 and accompanying text.

admissions elicited through custodial interrogation.[270] Yet, if virtually every such admission is "compelled" under the privilege, we cannot achieve a good compromise by focusing on prevention and suppression. Any effort to prevent or suppress all or even most of those admissions will be unpalatable because of the perception that they are generally too important in securing convictions of the guilty. At the same time, any attempt to use doctrine to filter out only a few of them to prevent or suppress will seem arbitrary and will likely produce perverse incentives.

1. Adjustments to Miranda *Doctrine.*—Proposals that focus on tinkering with *Miranda* doctrine cannot escape this conundrum. Consider, for example, claims that the Court should improve the *Miranda* warnings so that they actually help custodial suspects with their decision whether to waive and talk.[271] How helpful should the revised warnings be? Do we want all suspects to understand that speaking with the police is virtually never their best option? Or do we want the ill-informed suspects to be only slightly less confused than they are with the current warnings so that they will mostly still agree to talk? There is no good choice between these options. One honors the privilege but at the expense of almost entirely eliminating custodial admissions as a tool for helping obtain criminal convictions. The other generally fails to honor the privilege and does so according to arbitrary rules that will still encourage police to downplay the warnings and the lower courts to classify many compelled and confused waivers as knowing and intelligent.

2. Electronic Recording of Interrogations.—Requiring electronic recording is also not a good solution to the dilemma, because that approach will greatly underenforce the privilege. Electronic recording may produce modest benefits for criminal suspects in terms of limiting extreme police coercion and ensuring accurate information about what procedures the police followed and what verbal statements the suspect actually made.[272] Yet, the most fundamental problem with regulation under the Fifth Amendment privilege is not the absence of information about precisely what happened during the interrogation process[273] but our willingness to ignore the obvious: a well-informed, nondisabled, nonbefuddled criminal

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[270] *See supra* Section II.B.

[271] *See supra* text accompanying notes 207–208.

[272] *See* Stuntz, *supra* note 1, at 995–96. *But see* Rosenthal, *supra* note 6, at 606–07 (questioning whether videotaping would yield any significant benefits from the perspective of those in the "*Miranda*-is-a-failure camp").

[273] *See* Rosenthal, *supra* note 6, at 606–07 (noting that "there is little empirical evidence" that "coercion during interrogation is common" or that "credibility disputes are common in litigation about custodial interrogation").

suspect in police custody would rarely agree to talk.[274] Only by obscuring that reality can the law purport to protect vulnerable suspects while also making their statements to the police generally admissible against them.[275] Electronic recording would probably have, at best, modest impact in preventing or excluding suspect statements because it would tell us little about the fear, anxiety, confusion, and irrationality in the suspect's mind.[276] It is not a bad idea from the prosecution's perspective,[277] and I am not against it. However, electronic recording does little to address the central conundrum raised by *Miranda.* While it will not greatly increase the proportion of statements that courts suppress, it will also not do much to honor the privilege.

3. Reforms Involving Defense Counsel or Magistrates.—Reforms that would require the presence of defense counsel prior to and during police interrogation or demand that a judicial officer conduct or supervise any custodial interrogation also cannot escape the problem.[278] To the extent that these approaches would honor the privilege by virtually eliminating suspect admissions and their fruits, they could carry a high price in terms of lost convictions.[279] In a significant number of cases, the government would need a custodial admission from the defendant, or, at least the fruits of the statement, to meet its difficult burden at trial.[280] For this reason, the cost of

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[274] *See* Kuh, *supra* note 130, at 234–35.

[275] As we have seen, concluding that police interrogation that produces an admission generally involves such "compulsion" requires little information about the details of the particular interrogation session. *See supra* text accompanying notes 124–134.

[276] The idea that the privilege required "free and rational choice" reflected concern with the pressure imposed on the mental processes of almost all detainees facing custodial police interrogation, rather than with unusual police misconduct or unusual vulnerability by a particular suspect. *See supra* text accompanying notes 96–97.

[277] *See* Duke, *supra* note 143, at 569–72 (discussing the benefits to the prosecution of video-recording of interrogation sessions).

[278] *See supra* text accompanying notes 209–219.

[279] Before the Court decided *Miranda*, there was debate about the extent to which suspect admissions mattered, but some commentators concluded that in a large majority of cases, they were unimportant. *See* LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS, 156–57 (1983) (noting a study in the Brooklyn prosecutor's office that prosecutors had given notice that they planned to use confessions as evidence in only 8.6% of their cases). In the modern era, commentators still vigorously contest the extent to which suspect admissions (and, thus, *Miranda* rules) matter. *Compare, e.g.*, 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, 1132 (1998) ("*Miranda* may be the single most damaging blow inflicted on the nation's ability to fight crime in the last half century."), *with* Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 547 (1996) ("For all practical purposes, *Miranda*'s empirically detectable net damage to law enforcement is zero.").

[280] *See, e.g.*, Inbau, *supra* note 226, at 16–17; Kuh, *supra* note 130, at 239–40.

such reforms in hampering law enforcement seems exorbitant. Perhaps even the Warren Court agreed. Commentators had suggested these approaches before *Miranda*,[281] and the *Miranda* majority could have required the presence of defense counsel as a condition for any Fifth Amendment waiver by a custodial suspect.[282] That it did not do so raises the question whether it thought the price too high.[283]

4. Reliance on a Reinvigorated Due Process Standard.—Returning to a fortified due process test of voluntariness alone also cannot solve the *Miranda* predicament. Perhaps such an approach[284] could do more to honor the privilege than current *Miranda* doctrine does. Yet, under any conceivable circumstances, the number of suspect admissions that this reform would prevent or suppress would still pale compared to the large number of suspect admissions produced through custodial interrogation. The reform proposals do not call for the Court to radically change the due process test.[285] Instead, they propose essentially that, without the consent to coercion provided by a *Miranda* waiver, lower courts would more carefully scrutinize police behavior to determine whether it appears unduly coercive.[286] It is not clear how to define what courts should do better.[287] But, this approach would, at best, do only marginally more than current interrogation doctrine to prevent and suppress suspect admissions. Thus, while not extremely anticonfessional, it does not honor *Miranda*'s view that custodial police interrogation involves inherent compulsion under the privilege.[288]

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[281] *See supra* note 216.

[282] At oral argument in *Miranda*, the Court questioned counsel about whether the suspect should have a nonwaivable right to the assistance of counsel in deciding whether to waive his right against compelled self-incrimination. *See* KAMISAR ET AL., *supra* note 84, at 528–29 (quoting transcript of oral argument). Moreover, the Court was not feeling bound by traditional views of the Fifth Amendment and waiver doctrine and, in that sense, could have imposed such a requirement or, at least, imposed a requirement that consultation with counsel occur before any waiver of Fifth Amendment rights. What the Court actually did in *Miranda* was itself a novelty—create a Fifth Amendment right to counsel as a purported prophylactic protection for the privilege and require a warning as to that newly invented prophylactic.

[283] *See* Arenella, *supra* note 213, at 384 ("To avoid this law enforcement nightmare, the Court compromised by permitting waivers of *Miranda* rights before consultation with counsel.").

[284] *See supra* notes 220–224 and accompanying text.

[285] *See, e.g.*, Garcia, *supra* note 220, at 504; Weisselberg, *supra* note 38, at 1596.

[286] *See, e.g.*, Weisselberg, *supra* note 38, at 1596.

[287] *See* Rosenthal, *supra* note 6, at 608–11.

[288] *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

IV. A PRO-CONFESSIONAL PROPOSAL: USING CONCESSIONS TO REWARD SUSPECT ADMISSIONS TO THE POLICE

This Part proposes an alternative approach to regulating police interrogation that accepts the *Miranda* Court's view of "compulsion"[289] but does not assume that we must honor the privilege by preventing or suppressing suspect admissions. I propose instead legislated sentencing concessions, meaning reductions in sentence severity,[290] applied broadly to the group of suspects who self-incriminate to the police. I also propose that police advise suspects of the concessions. I contend that the concessions along with the advice would help incentivize suspects to waive their rights and talk, reduce the need for the police to employ deceitful or abusive interrogation tactics, and enable courts to speak more openly and candidly than current law permits about the problem of compulsion in the interrogation process.

A. The Basis for Broadly-Applied Legislated Concessions

Sentencing concessions can help states achieve a stable and sensible compromise between respecting the Fifth Amendment privilege and administering the criminal law. As Part III demonstrated, regulation that involves prevention and suppression of suspect admissions can never achieve such a compromise. The cost of preventing or suppressing compelled suspect admissions across the board is too high, and yet there are severe problems with trying to limit a remedy to only a few of the many compelled admissions. The cost to states of sentencing concessions is much less than that of prevention or suppression of suspect admissions. Sentencing concessions also provide a benefit that prevention or suppression does not because advice about them can encourage suspects to self-incriminate without the need for police aggression. These factors make applying sentencing concessions broadly across the group of persons who self-incriminate to the police more acceptable than the conventional remedies.

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[289] *See supra* Section I.B.

[290] The nature of the concession I propose would depend on the nature of criminal sentencing in the jurisdiction and on the sentence that would otherwise apply in the particular case. In cases in which the judge would prescribe a fixed period of incarceration, the concession would reduce the period. In cases involving the death penalty, life imprisonment without parole, or life imprisonment, the concession would, respectively, protect the defendant from the death penalty, make the defendant parole eligible, or at least advance the defendant's parole eligibility date. In a jurisdiction in which the judge prescribed an incarceration range, the concession would reduce both numbers, making the defendant parole eligible sooner and limiting his maximum potential period of incarceration. *See infra* Section IV.C.

This approach is not cost-free to states, but the cost need not be exorbitant. Sentencing concessions would result in some reductions in criminal sentences on a widespread basis. Those reductions would constitute a sacrifice in the efforts of a state to achieve its otherwise optimal level of law enforcement. However, the Fifth Amendment privilege necessarily conflicts with the goal of achieving maximum law enforcement at the lowest cost to the state. Honoring the privilege requires the state to sacrifice something in its efforts.[291] At the same time, we will see that the concessions that I propose would only modestly reduce the sentence imposed.[292]

The proposal also involves sacrificing something in the way of honoring the Fifth Amendment. The privilege forbids the use against the defendant in a criminal case of his compelled statements.[293] Given the *Miranda* view of compulsion,[294] providing a sentencing concession would not fully honor this proscription, at least in cases in which, in addition to or in lieu of advice about the concession, the police have employed deceit or other psychological pressure.[295] In such cases, suppression often should occur but will not under existing *Miranda* doctrine.[296] A sentencing concession will only partially compensate a suspect in such a case because it is less of a reward than prevention or suppression of the admission. Nonetheless, it is substantially more reward than a suspect currently receives for self-incriminating.

B. Why Not a Supreme Court Pronouncement?

A system of concessions and advice would not only help honor the Constitution but also reduce the perverse consequences of existing doctrine on police interrogation. It would help offset the advantage that current law confers on experienced suspects who decline to cooperate. Suspects who cooperate would usually receive the concession, something those who refuse to talk would forego. A system of concessions could also ameliorate the tendency of police officers to employ deceit and psychological aggression to elicit admissions from suspects. Police officers could instead employ truthful advice about the availability of the concession to help elicit

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[291] There may be alternative methods through which a state could achieve a compromise. I advocate sentencing concessions because they are already accepted as part of the plea-bargaining process throughout the country. *See infra* note 320 and accompanying text.

[292] *See infra* Section IV.C.3.

[293] *See, e.g.*, Bram v. United States, 168 U.S. 532, 542 (1897).

[294] *See supra* Section I.B.

[295] *See supra* Section I.B.

[296] *See supra* Section II.A.

waivers and admissions. Finally, a system of concessions would enable courts to speak more forthrightly than current law permits about the interrogation process. Courts at least would have some basis to justify a decision of a suspect to waive his rights and self-incriminate as rational and intelligent if the police truthfully advised him in advance of the sentencing concession.

The compromise of constitutional rights that the proposal embodies helps explain why I propose its promulgation through legislation rather than Supreme Court pronouncement. The fact that the proposal would not completely vindicate the privilege would not necessarily bar its implementation by the Court as a constitutional mandate. After all, *Miranda* itself implemented a compromise in enforcing the privilege, and one with greater flaws than the plan I propose.[297] However, my proposal is a transparent tradeoff, while *Miranda* was not generally understood at the outset—even by those who accepted its view of compulsion—as having seriously cheated the privilege.[298] The later characterization of *Miranda* by liberals as a balancing of competing interests frequently was not a compliment,[299] and acknowledgement of the compromise nature of the decision has not stopped its unraveling as constitutional doctrine.[300] Among conservatives on the Court, any recognition that the opinion had implemented some form of tradeoff[301] was not seen as a reason to avoid undermining it further, but rather as grounds to conclude that it had not

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[297] For the view that the original opinion represented a compromise, see Arenella, *supra* note 213, at 384; Kinports, *supra* note 173, at 376–77; George C. Thomas, III, *"Truth Machines" and Confessions Law in the Year 2046*, 5 OHIO ST. J. CRIM. L. 215, 218 (2007). For the view that the changes imposed by post-Warren-era majorities on the Court represent a different compromise, see *supra* Section III.A.

[298] Originally, "[m]any thought that *Miranda* made lawful interrogation almost impossible." Duke, *supra* note 143, at 555. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting) ("[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 536 (White, J., dissenting) (asserting that the Court "expects . . . that the accused will not often waive the right [to counsel]; and if it is claimed that he has, the State faces a severe, if not impossible burden of proof."). For one of the articles that contributed to the later understanding, see Seidman, *supra* note 13, at 744 (describing *Miranda* as "a retreat from the promise of liberal individualism brilliantly camouflaged under the cover of bold advance"). For an early article that noted the seeming tension between what the *Miranda* Court said the privilege guaranteed and the protections the Court seemed to provide, see Kuh, *supra* note 130, at 234 (contending that "there can be no truly 'intelligent' waiver" of the privilege).

[299] *See, e.g.*, Seidman, *supra* note 13, at 747 (asserting that "the Court ended up contributing to the smugness and self-satisfaction that are the main enemies of growth and reform").

[300] *See supra* Section II.A.

[301] *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 424 (1986) (contending that the *Miranda* decision struck a "balance between society's legitimate law enforcement interest and the protection of the defendant's Fifth Amendment rights").

hewn to any firm constitutional principle.[302] This history suggests that the Court should not declare the existence of a constitutional principle but institute a safeguard that obviously short-changes it.

The Court also has gone too far with *Miranda* at this point—especially after purporting to reaffirm it in the *Dickerson* decision in 2000[303]—to now mandate a substantially different approach under the privilege. Pursuit of the *Miranda* path for so long has undermined the ability of the Court to credibly claim that the Fifth Amendment privilege commands a different course. In this sense, *Miranda* doctrine has not been merely a failure on its own terms but destructive of any opportunity for the Court to do something more constructive to regulate police interrogation under the Constitution.[304]

A state legislature has much more flexibility than the Court to institute a plan that supplements existing doctrine on police interrogation. The legislature can act in service of its state constitutional equivalent to the Fifth Amendment privilege. It can act to fulfill its notion of what constitutes good policy in regulating police interrogation. And, it can act on the view that the Supreme Court has underenforced the federal privilege and that there is a way for state legislation to help fill the gap. This latter position would merely acknowledge that the Supreme Court sometimes cannot fully enforce the Constitution due to its institutional limitations but that these inhibitions do not reflect the substantive boundaries of the document.[305] Consistent with this view, the conclusion of the Court that the privilege demands little from government to protect suspects does not foreclose a state legislature from concluding that it demands more.[306] A state legislature would be affording the privilege "heightened protection," and "the same justifications for searching judicial review do not apply" in that circumstance as when a legislature affords "less protection . . . than the courts deem warranted."[307] The legislature has the authority to "provide

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[302] *See* New York v. Quarles, 467 U.S. 649, 654–56 (1984) (creating a public safety exception to *Miranda*); Michigan v. Tucker, 417 U.S. 433, 444, 451–52 (1974) (declining to exclude the testimony of a witness discovered by eliciting statement from defendant in violation of *Miranda*).

[303] *See* Dickerson v. United States, 530 U.S. 428 (2000); *supra* note 163.

[304] *See, e.g.*, Stuntz, *supra* note 1, at 978 ("That is the real cost of *Miranda*—a bad regulatory scheme removed all possibility of developing a good one, a state of affairs that *Dickerson* ensures will continue.").

[305] *See* Sager, *supra* note 35, at 1214–15.

[306] The *Miranda* Court asserted that the decision "in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect." 384 U.S. 436, 467 (1966). The Court "encourage[d] 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." *Id.*

[307] *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROBS. 105, 129 (2004).

stronger protections," particularly when, as here, there would be no "competing claims to constitutional protection" that would conflict with the legislation.[308]

While a state legislature that accepts the *Miranda* Court's view of compulsion[309] arguably is bound to enact a system such as sentencing concessions to honor the privilege, the obligation is best understood as moral rather than legal.[310] There is no enforceable duty by a legislature to act in these circumstances, unless a state court determined that the absence of such concessions violated state law.[311] Nonetheless, for legislators who believe that *Miranda* properly declared the privilege to protect free and rational choice,[312] the moral obligation is clear.[313] They should try to help redress the Supreme Court's underenforcement of the privilege. They can do so in an effective way by creating a system of sentencing concessions, with advice to suspects, to reward those who self-incriminate.

C. Implementing the Concessions

There are three central questions that a legislature would confront in creating a system of concessions. The first concerns which suspects should qualify based on their circumstances. The second concerns what kinds of statements should qualify. The third concerns how to define the amount of the concession. On the first question, I recommend that concessions go only to those suspects who have been seized under Fourth Amendment standards and who reasonably conclude that they are speaking with a government agent. On the second question, I urge that, within this group, concessions go to everyone who makes a statement to the police that the state would use against them at trial. Use of the fruits would amount to use of the statement for these purposes. Regarding the third question, I

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[308] *See id.* at 129 n.98.

[309] *See supra* Section I.B.

[310] There would be no duty to act if legislators conclude that *Miranda* was materially wrong about the meaning of "compulsion" and that it actually equates with "coercion" for due process purposes. However, as Professor Kamisar has urged, this view is not sensible. *See* KAMISAR ET AL., *supra* note 84, at 547 (noting that "compulsion" and "coercion" have "different connotations when one takes into account their different bases, legal history and legal meaning").

[311] *See, e.g.*, Commonwealth v. Upton, 476 N.E. 2d 548, 550 (Mass. 1985) (mandating under state constitution a test of probable cause for searches that was more favorable to criminal defendant than the test mandated by the U.S. Supreme Court under the federal Constitution).

[312] *See supra* Section I.B.

[313] A state legislature that agrees with the *Miranda* view of compulsion arguably could conclude that the Supreme Court erred in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), in incorporating the privilege against the states. Professor Dripps has argued that the Court's ruling in *Malloy* was wrong. *See* Dripps, *supra* note 4, at 728–30. Nonetheless, such a legislature could still conclude that good policy reasons remain to implement a system of concessions for confessions.

recommend a percentage reduction from the sentence that the defendant otherwise would have received, but acknowledge that legislatures would have to decide how much the proportional concession should be. In the following Sections, I elaborate on my answers to these questions.

1. Concessions in What Circumstances?—The issue of who should receive concessions embodies the problem of what circumstances surrounding a statement should matter. A state could conclude that concessions should apply only where *Miranda* protection currently would apply. On that view, only a statement made by a person in *Miranda* "custody"[314] who faces *Miranda* "interrogation"[315] would qualify. A state could justify this limited application of concessions on grounds that these aspects of *Miranda* doctrine appropriately define when concerns about compulsion under the privilege become significant.

Alternatively, a state could expand the use of concessions to cover some persons who do not fall within *Miranda*'s coverage but whom the state wants to encourage to waive their rights and talk. This group could include some not in *Miranda* custody—for example, persons who are temporarily detained or persons who are talking to the police but who could on their own choice terminate the encounter. A state could also expand coverage to include arrested suspects who make statements not in response to interrogation but still in response to elicitation efforts by government agents—such as to inquiries by undercover officers posing as cellmates or by cellmates working as government agents.

Although my proposal could prompt reasonable disagreement, I urge coverage somewhat broader than *Miranda* doctrine would confer. I propose that the concessions apply to all persons who have been seized under Fourth Amendment standards, which would include persons whom the police have either arrested or, unlike under *Miranda*, temporarily detained.[316] I also would not require interrogation under *Miranda* doctrine to trigger eligibility for the concessions. However, I would require that one in the detainee's position reasonably have concluded that he was speaking to a government agent. There also would be no exception to the application of concessions in "public safety" situations, unlike for *Miranda*.[317] I believe this approach would reward the suspect who self-incriminates in most situations in which we could conclude that compulsion would operate. This

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[314] *See supra* note 155 and accompanying text.

[315] *See supra* note 156 and accompanying text.

[316] *See* Terry v. Ohio, 392 U.S. 1, 16 (1968) (holding that a temporary, investigatory stop constituted a "seizure" within the meaning of the Fourth Amendment).

[317] *See supra* note 167 and accompanying text.

approach would also encourage suspects in detention to talk before the police employed "interrogation," which the *Miranda* Court found to risk compulsion.[318]

2. Concessions for Which Statements?—To implement concessions, a state must also confront questions about which statements warrant them. Should a state only reward a remorseful and complete confession to the most serious charge ultimately leveled against the suspect? Sometimes, suspects admit only to lesser crimes than those they actually have committed or to only some of the crimes for which they are factually guilty. Likewise, suspects sometimes claim innocence but give a statement that tends to incriminate them because the government can easily disprove it and thereby show consciousness of guilt. Which kinds of statements warrant a sentencing concession?

I advocate a simple rule that aims primarily to honor the rights of suspects under the Fifth Amendment privilege by compensating them for statements they have made in response to police compulsion. I contend that the concessions can sometimes serve further valuable ends when the police inform suspects of them. In such cases, the concessions would sometimes incentivize suspects to waive their rights and self-incriminate, and, in a smaller number of cases, even encourage suspects to confess. However, the principal goal is to honor the Fifth Amendment. Consequently, I propose that concessions adhere for any statement (or the fruits of any statement) that the prosecution would use against the suspect at his trial.

This standard would often mean that defendants who waive their rights and speak to the police would have some leverage to claim a concession. Almost all criminal convictions result from a plea bargain.[319] A defendant who talks to the police could frequently assert during plea negotiations with the prosecutor that his statement to the police would be used against him if the case were to proceed to trial. The prosecution could deny this, but the problem would usually resolve itself without extended litigation. The trial judge could render a ruling on the question at the plea bargain hearing, and the defendant's acceptance of the bargain could be deemed to foreclose any further challenge. After all, the defendant could make the prosecutor's promise to represent to the court that defendant had made a self-incriminating statement to the police and that the government

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[318] *See supra* note 119 and accompanying text.

[319] *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

would have used it at trial a condition of the bargain.[320] Even if the prosecutor would not make such a promise as part of the bargain,[321] the court should ask the prosecutor about it on the record at the plea bargain hearing when the government presents its factual basis for the guilty or no-contest plea.[322] The defendant could reject the plea bargain and go to trial if he did not believe the prosecutor. Under those circumstances, the judge could, except in unusual circumstances,[323] properly rely on the prosecutor's representations in deciding whether the concession should apply.[324]

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[320] One might plausibly contend that prosecutors would sometimes strong-arm defendants who deserve the concession to forego it: "If you insist on claiming a concession, we are going to trial and I'm going to prove you guilty of a more serious offense, and you will go to prison for a lot more time." I concede that this would happen sometimes. Yet several forces would generally operate to limit these tactics. For example, discretion remaining with the judge on sentencing after a conviction at trial could deter such behavior. *Cf.* Richard S. Frase, *Sentencing Guidelines in Minnesota*, *1978–2003*, 32 CRIME & JUST. 131, 206 (2005) (noting that, under the Minnesota sentencing guidelines, trial judges retain substantial sentencing discretion, which limits overcharging of crimes by prosecutors); Joseph S. Hall, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1355–56 (1999) (noting that, before federal sentencing guidelines reduced their sentencing discretion, federal judges, after a conviction at trial, "could act to remedy the prosecutor's overcharging by recognizing the overcharging and correcting for it"). To the extent that the defendant who has been convicted after trial could show that he was browbeaten unjustly not to claim the concession during plea bargaining, the defendant could ask for, and might well receive, leniency over and above the concession from a judge who retained substantial sentencing discretion. In that scenario, the prosecutor's tactics would backfire. Moreover, if the size of the concession given after a trial versus after a guilty plea were greater (and I contend that they should be engineered to be different), a prosecutor would generally be less inclined to refuse to acknowledge the propriety of the concession in the plea bargaining process, because the disparity in sentences between the two outcomes would be smaller.

[321] The prosecutor understandably would sometimes be unable to say with certainty what would happen at trial regarding reliance on a statement or its fruits. Yet, the legislature, or the courts through adjudication, could require the prosecutor to predict what would occur according to a lower standard than certainty—such as by a fair probability.

[322] Should we worry that prosecutors would respond deceitfully, delusively, or at least nonobjectively to the judge's inquiry? I concede that this would happen sometimes. Nonetheless, I contend that, in a large proportion of cases involving defendants qualifying for the concession, the prosecutors would realize that they would have to use the statement or its fruits at trial and that they could not credibly deny the defendant's claim. In other cases in which the defendant should qualify but in which it would be less obvious to the court, I believe that prosecutors would still often recognize the truth and report it accurately. The likelihood that inaccuracy on their part could later be revealed at a trial would provide some incentive to act with honesty and foresight.

[323] If the proffer presented by the government to support the factual basis for the guilty or no-contest plea relied heavily on the suspect's qualifying statement or the obvious fruits, the judge could still rule that the defendant deserved the concession despite the prosecutor's assertions to the contrary.

[324] In a jurisdiction that allows bargaining for a specific sentence in addition to charge bargaining, a court could, in theory, leave it up to the parties to resolve through the bargaining process whether the defendant deserved the concession. However, the better course, for reasons discussed in a preceding note, would be for the judge to question prosecutors about whether they had granted a defendant the concession. The answers would help the judge determine whether to honor the plea bargain and, in unusual cases, determine whether the government had unjustifiably denied the concession. *See supra*

Likewise, if the case proceeded to trial, the prosecution would show its hand on whether it would admit the statement, which usually would resolve whether the concession applied.

Under my proposed standard, there is only one situation in which a conviction based on a plea or trial usually would not resolve issues over whether a concession should apply. That is if the defendant made a statement and claims that the government introduced evidence at trial that was the fruit although it did not introduce the statement itself. The parties would usually have plea bargained to avoid the uncertainties over the outcome.[325] But, in the case where bargaining failed and a trial conviction resulted, the judge would have to resolve the fruits issue.

3. How Much of a Concession?—Defining the sentencing benefit that each qualifying defendant should receive might seem like an insoluble conundrum for legislators trying to implement a system of concessions. How much of a concession should a defendant charged with first-degree murder receive for an admission to the police? What if the conviction occurred after a guilty plea rather than after a trial? What if the plea were to a lesser offense instead of to the original charge? What if there were multiple charges but most were dropped as part of the bargain? One need not contemplate these kinds of questions long to realize that an approach focused on articulating specific reductions that would apply to each kind of conviction in every possible context would become complicated. Unless the legislator could articulate a relatively simple approach that would sensibly apply across the run of cases, the task of promulgating a workable concession system could seem too daunting.

I contend that there are workable approaches that could apply broadly, although they require some inconsistency in the concessions granted to different defendants. Imagine an approach that focused on identifying a "one-size-fits-all" fixed-term reduction in incarceration periods. Assume a jurisdiction in which the judge sentences to a fixed term of incarceration rather than a minimum and maximum term. Assume further that a legislature specified that any defendant who qualified for a concession would receive a five-year reduction from the sentence that he otherwise would have received. This approach is simple, but it fails to acknowledge that a five-year reduction from a sentence of fifty years would carry far

note 322. On the forms of plea bargaining employed in the United States, see LAFAVE ET AL., *supra* note 44, at 1000.

[325] *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1935 (1992) ("[P]arties bargain over the allocation of criminal punishment in order to reassign and thereby reduce the risks of an uncertain future . . . .").

different implications than the same reduction from a sentence of five years. The same fixed reduction would seriously thwart the penological goals of the criminal justice system in the latter case although not in the former.

Specifying various categories of crimes and corresponding fixed-term reductions could improve our hypothetical system but would still pose major challenges. To demonstrate, suppose the legislature required different fixed-term reductions for different tiers of crimes involving similar levels of seriousness. For example, the legislature could require a ten-year reduction for certain major felonies, a five-year reduction for medium-grade felonies, and a six-month reduction for the least serious felonies.[326] The legislature could also impose adjustments to the size of the fixed-term concessions for convictions based on trials rather than on guilty pleas, to address the disparity in sentences that a court would otherwise impose in those differing situations. A workable system of this sort is not impossible to imagine. Yet, it would become complicated if the legislature tried to include more than a few of the distinctions that might seem warranted.

I urge that a better approach would involve specifying a proportional reduction that a qualified defendant would receive from the sentence that the court otherwise would have imposed. This approach would be relatively simple and could help avoid seriously thwarting the penological goals of criminal sentencing. If the reduction were, for example, twenty percent, a fifty-year sentence would reduce to forty years while a five-year sentence would reduce to four years. If the jurisdiction were one that required the judge to articulate both minimum and maximum incarceration periods, both would be reduced by the proportional figure. A legislature might introduce some minor adjustments, such as for the proportional reduction that would apply after a conviction at trial versus after a conviction on a plea. However, the focus on proportional reductions already solves many of the problems that would adhere in a system with fixed-term concessions.

A legislature implementing a concessions system should clarify that a qualifying defendant earns these reductions on top of any sentencing benefits that come to him from pleading guilty, accepting responsibility, or expressing contrition or remorse. Under current sentencing practices, a defendant will often receive some leniency for having timely pursued a guilty plea and perhaps, usually in connection with the plea, for showing

[326] I put aside the problem of crimes carrying the death penalty or life imprisonment for now but address it later. *See infra* paragraph following note 331.

remorse.[327] However, defendants do not receive sentencing credit simply for having yielded to police compulsion and self-incriminated[328]: "I was the one who shot him, but it was in self-defense!" My proposal aims to compensate suspects who have yielded to police compulsion in any way that the government uses to its advantage. The concessions I propose do not reward full confessions topped off with an apology any more than false alibis that the government can easily destroy before a jury to show that the suspect is a liar and conscious of his own guilt. Thus, the concessions I urge do not "double count" for any conduct that current sentencing practices sometimes reward.

At the same time, I reject the view that suspects typically can count on receiving a significant benefit (that they could not later have earned) even for a full-blown and tearful confession. The uncertainty that *any* benefit will accrue is surely part of the reason that one high-ranking former prosecutor conceded that the decision of a suspect to talk to the police is "rarely . . . intelligent."[329] The facts in *Montejo v. Louisiana*[330] underscore the point. Jesse Montejo confessed to a murder in response to police compulsion, acceded to the police pressure that he lead detectives to the weapon, and, during the ride, wrote a letter of apology to the victim's widow.[331] Did this cooperation and remorse earn Montejo a concession? The prosecution used Montejo's letter of apology to help secure his conviction for capital murder and his death sentence.[332] The case underscores the very need for a concession system. Whether or not we also reward Montejo's acceptance of responsibility and apology, we should compensate him, if we accept the *Miranda* Court's view of the privilege, simply because the government compelled him to be a witness against himself.

The *Montejo* case also raises another issue: What to offer in the way of concessions in capital cases or those where the defendant faces life

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[327] Current federal Sentencing Guidelines, for example, provide for level reductions for a defendant who demonstrates "acceptance of responsibility." *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2015) [hereinafter USSG]. Yet, these reductions do not adhere simply for having yielded to compulsion during police interrogation. For more on the application of USSG § 3E1.1, see Alexa Chu Clinton, Comment, *Taming the Hydra: Prosecutorial Discretion Under the Acceptance of Responsibility Provision of the U.S. Sentencing Guidelines*, 79 U. CHI. L. REV. 1467, 1474–83 (2012), and Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1510–42 (1997).

[328] *See, e.g.*, USSG § 3E1.1.

[329] Kuh, *supra* note 130, at 233.

[330] 556 U.S. 778 (2009).

[331] *See id.* at 781–82.

[332] *Id.* at 782.

imprisonment without parole or life imprisonment with parole? Reasonable people could disagree, but I urge some simple solutions. I recommend that the law state that the death penalty will not remain an option for the defendant who warrants the concession. If the next most serious penalty available is life imprisonment without parole, the defendant will receive that sanction. Likewise, if the defendant qualifies for a concession and would otherwise receive a sentence of life imprisonment without parole, he should receive a life sentence with the possibility of parole. Finally, if the defendant warrants a concession and would otherwise receive a sentence of life imprisonment with the possibility of parole, at least his parole eligibility date should advance by the proportional reduction.

In jurisdictions with sentencing guidelines,[333] concessions could, in theory, be made part of the guidelines. The federal Sentencing Guidelines, for example, appear in the form of a matrix system expressed in "levels."[334] A particular kind of crime falls into a "base offense level."[335] From that point, the level for the defendant's crime increases and decreases based on various articulated factors.[336] In such a system, legislation could authorize the concession as part of the level-adjustment process. As for state sentencing guidelines, they all differ from the federal guidelines in their scoring approach or the level of granularity with which they articulate sentencing ranges.[337] In these jurisdictions as well, adjustments in the guidelines could incorporate the concessions.

To be mandatory, however, I contend that the concessions should generally appear as legislated rules that stand apart from sentencing guidelines. The federal Guidelines are advisory after *United States v. Booker*,[338] even if federal district judges typically follow them. Most state sentencing guidelines are also not mandatory for sentencing judges.[339] If the concessions are required in the case of a qualifying defendant, they should not appear as part of a mere advisory system.

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[333] For a summary of various sentencing-guideline systems used in federal court and in some states, see MD. DEP'T OF LEGISLATIVE SERVS. OFFICE OF POLICY ANALYSIS, SENTENCING GUIDELINES – MARYLAND AND NATIONWIDE 9–21 (2014) [hereinafter SENTENCING GUIDELINES – MARYLAND AND NATIONWIDE].

[334] *See* U.S SENTENCING COMMISSION, SENTENCING TABLE (2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/Sentencing_Table.pdf [http://perma.cc/N8AC-FZFN].

[335] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 11–12 (1988).

[336] *See, e.g.*, USSG § 3E1.1.

[337] *See* SENTENCING GUIDELINES – MARYLAND AND NATIONWIDE, *supra* note 333, at 9–21.

[338] 543 U.S. 220, 245 (2005).

[339] *See* SENTENCING GUIDELINES – MARYLAND AND NATIONWIDE, *supra* note 333, at 21.

In the end, legislatures in different jurisdictions would surely vary over how to define the concessions.[340] I have urged an approach focusing on proportional reductions but do not contend that it is the only plausible methodology or that there is an optimal amount. A legislature could easily obtain advice on the problem from a wide array of experts, including those familiar with plea bargaining and sentencing practices in the particular jurisdiction. A legislature could also adjust the reductions as it deems appropriate over time. Defining the nature of workable concessions need not be a serious impediment to implementing the reform.

D. Advising Suspects About the Concession

A system of concessions would also allow police interrogators to truthfully tell suspects that waiving their Fifth Amendment rights and talking could benefit them. Concessions would have value even without this advice. Concessions would properly compensate a suspect for the violation of his rights although he did not know of their existence when speaking to the police. This conclusion builds on the proposition that the Supreme Court has underenforced the privilege as it applies to police interrogation.[341] Nonetheless, states could also provide the concessions to help *ameliorate* the problem of psychological abuse in police interrogation. By advising suspects in advance that waiving their rights and talking would carry a possible benefit, the police could legitimately encourage suspects to talk. Police could place less reliance on deceptive and intimidating tactics than they currently employ.[342]

The interrogator should not mislead the suspect to his detriment, which means that she should not overstate the concession. The interrogator should speak in general terms to avoid making a false promise. Immediately following the *Miranda* warning, the interrogator could provide the following statement:

> *While you have the right to remain silent and the right to an attorney, there may be an advantage to you in waiving those rights and speaking to the police. Should you make a statement that reveals your involvement in a crime, the law provides that you may receive a lower sentence than you would if you are found guilty of the crime and have not admitted your participation to us.*

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[340] Detailed discussion about how a legislature in a particular jurisdiction should implement such a concession system in conjunction with the jurisdiction's approach to plea bargaining and to criminal sentencing is a fruitful topic for further commentary.

[341] *See supra* Section II.A.

[342] For a description of common current police interrogation tactics, see *supra* text accompanying notes 198–200, 252.

This advice does not promise more than the plan proposes, and it would likely cause some defendants to think rationally about talking to the police and confessing.[343] Under current law, they generally have no rational basis to waive their rights and talk.[344]

In some cases, suspects would ask the officer follow-up questions, but these inquiries need not cause significant problems. Generally, the officer would do best not to add additional statements about the assurance or size of the concessions. The officer could appropriately respond that she is not able to give further advice about the concession or that she is unsure how to answer a question accurately.

Provision of the concession and the advice would not constitute improper compulsion in violation of the privilege, nor would it constitute coercion under due process, according to Supreme Court decisions on plea bargaining.[345] In the plea negotiating context, a prosecutor may offer sentencing concessions designed to induce the defendant to waive the privilege and plead guilty.[346] There are limits, particularly when the concessions come through legislation. In a decision that has never been overruled, the Court ruled that a legislature may not in a death penalty case provide that a guilty plea will avoid any possibility of the death sentence.[347] The Court has also suggested that, even in non-death penalty cases, legislation may not *guarantee* a defendant a lesser sentence after a *non vult* or *nolo contendere* plea—in a case where the specific statute barred guilty pleas—as opposed to after a trial.[348] Nonetheless, the Court has found that legislation can at least make the defendant who pleads guilty *eligible* for a lesser sentence for which he would not be eligible after conviction at trial.[349] The concessions plan that I propose conforms to this approach. The

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[343] Should the warning more clearly articulate that something less than a full confession could entitle the suspect to receive a concession? A police officer could try to clarify more fully with examples and explanations just when the offender would or would not qualify for the concessions. However, the warning could quickly become complicated, and the officer could easily err. Also, the officer probably would want to encourage the full, truthful confession rather than, for example, saying, "Even if you just give us a false alibi that we can disprove, you may qualify for a lower sentence."

[344] *See supra* text accompanying notes 127–134, 213.

[345] For discussion of these decisions, see WHITEBREAD & SLOBOGIN, *supra* note 72, at 726–32.

[346] *Cf.* Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978) (finding due process not violated when prosecutor carries out threat to re-indict accused on more serious charges if he does not plead guilty to original charge).

[347] *See* United States v. Jackson, 390 U.S. 570, 571–72 (1968).

[348] *See* Corbitt v. New Jersey, 439 U.S. 212, 217–18 (1978) (upholding statute that permitted a judge to sentence a defendant to either life imprisonment or thirty years' imprisonment after a *non vult* or *nolo contendere* plea but required a sentence of life imprisonment after a conviction at trial, and noting that the risk of life imprisonment was "not completely avoided" by a *non vult* plea).

[349] *See id.* at 218.

defendant is not *guaranteed* a lesser sentence for self-incriminating to the police. The proposed warning only tells him that he "may" receive a lower sentence. Moreover, in some cases involving self-incrimination, the prosecution would not introduce the statement or its fruits at trial, which would mean that the concession rule would not apply. Although the defendant in such a case would suffer no detrimental consequences from talking to the police, he would also gain nothing in the way of a sentencing reduction.

CONCLUSION

This Article began by asking why the *Miranda* doctrine invites terrible behavior by criminal suspects, the police, and the courts. The explanation traces in some sense to the Fifth Amendment privilege against compelled self-incrimination. However, I have argued that the perverse consequences also stem from the conventional view that prevention and suppression of suspect statements are the only ways that the legal system can honor the privilege. Based on that view, the *Miranda* Court felt the need to pursue a bad compromise. While acknowledging that almost all admissions elicited through custodial police interrogation are "compelled," the Court promulgated doctrine that prevents or excludes only a few of them. Post-Warren-era majorities on the Court have further eviscerated the doctrine to prevent or suppress even fewer suspect admissions. The arbitrary rules created not only underenforce the privilege but reward disproportionately recidivist criminals and invite dishonesty by police officers and artifice by courts.

I have urged a supplemental system of sentencing concessions for custodial admissions, accompanied by advice to suspects. The concessions approach, like *Miranda*, represents a compromise between fully honoring the Fifth Amendment privilege and pursuing an optimal level of law enforcement. However, it would provide a better compromise than the one embodied in *Miranda* doctrine. It would reorient the remedy away from providing a major benefit for only a few suspects toward providing a modest sentencing concession broadly across the group of detainees who self-incriminate. Suspects would still face conviction and often a substantial sentence when their statements to the police tend to demonstrate their guilt.

I have argued that states should implement this system through legislation. The Supreme Court has gone too far with *Miranda* doctrine to now abandon it in favor of an alternative approach to regulating confessions. State courts also have no authority to implement the system as a better interpretation of the Fifth Amendment privilege, although they

could adopt it to enforce their state constitutions. State legislatures can promulgate the system as an adjunct to constitutional doctrine, but the question is whether they have good reason given the price in reduced criminal sentences.

I contend that the benefits of a concessions system would outweigh the costs, which I have urged as modest. First, there is the gain of honoring an underenforced Fifth Amendment privilege. This benefit may seem abstract, but it is important. And other benefits are more concrete. Do we want to encourage suspects—and mostly recidivists—to cover up their crimes? Or do we want to encourage them to admit them? Do we want to incentivize police officers to deceive suspects, or even lie about the strength of the government's evidence (when the suspect often commits a crime by lying to the police)?[350] Or do we want to give them a means to elicit suspect admissions through honest statements about concessions? Do we want to impel judges in case after case to call waivers "knowing" and "intelligent" that are patently irrational and stupid? Or do we want to give them a basis to speak more forthrightly about whether the decisions of suspects to talk are the kinds of choices they plausibly would make even with the assistance of counsel? For any legislature that aspires for a legal system that promotes dignity, integrity, and governmental legitimacy, the answers are reason enough to look for an alternative to *Miranda.*

[350] *See, e.g.*, 18 U.S.C. § 1001 (2012) (making it a felony carrying up to five years of imprisonment for lying or covering up "a material fact" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States").