
TRANSPARENCY AND TRUTH DURING CUSTODIAL INTERROGATIONS AND BEYOND

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INTRODUCTION

My goal in this Symposium is not to disrespect the Warren Court Revolution. The Warren Court's constitutionalization of the rules of criminal procedure during the 1960s was quite clearly necessary at the time, in large part to terminate the miserably unjust treatment of African Americans living in the South,¹ and in part to foster the values of privacy, autonomy, fairness, and protection of the innocent enshrined in the Bill of Rights but ignored by many

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¹ See, e.g., JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* (2003); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) ("This Article contends that the linkage between the birth of modern criminal procedure and southern black defendants is no fortuity."); Tracey Maclin, *A Comprehensive Analysis of the History of Interrogation Law, with Some Shots Directed at Miranda v. Arizona*, 95 B.U. L. REV. 1387, 1392-97 (2015) (suggesting that the *Miranda* Court was concerned primarily with the common practice of police brutality against black suspects in the Southern states).

state criminal justice actors. The three best-known criminal procedure decisions by the Warren Court were vital to the health of the criminal justice system when they were rendered. The exclusionary remedy incorporated in *Mapp v. Ohio*² was critical in persuading peace officers to learn about and then protect Fourth Amendment values;³ the *Miranda v. Arizona*⁴ warnings seemed the only way to limit abusive police behavior at the stationhouse while still encouraging voluntary confessions;⁵ and the Sixth Amendment right to counsel offered in *Gideon v. Wainwright*⁶ was essential to separating guilty from innocent defendants.⁷ Unfortunately, and perhaps somewhat ironically, doctrine concerning these Amendments has been subsequently contorted and subjected to a constant stream of exceptions by the Burger, Rehnquist, and Roberts Courts. These once laudable decisions now contribute to—and in fact embody—the unnecessarily adversarial and deceptive nature of many encounters between citizens and police officers.

A few examples should suffice to explain my position. Let's start with the Fourth Amendment. "Consensual" seizures and searches are a bit of a joke when you try to explain them to a nonattorney—why would anyone "voluntarily" consent to stick around and have strangers rummaging through their things, especially when the person knows she possesses illegal items? The post-Warren Courts allowed these "consent searches" and called them voluntary interactions rather than "seizures" because they generate useful and accurate evidence, especially for fighting the war on drugs,⁸ without triggering the exclusionary rule.⁹ As of the *Utah v. Strieff* decision in 2016, peace officers

² 367 U.S. 643, 654 (1961).

³ See, e.g., Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 26-27 (1980) (reporting the findings of a study of police officer reactions to *Wolf v. Colorado*, 338 U.S. 25 (1949), which held that due process does not require exclusion of evidence in a state criminal trial that was taken under circumstances that would render it inadmissible in a federal criminal trial because it violated the Fourth Amendment).

⁴ 384 U.S. 436, 478-79 (1966).

⁵ See, e.g., Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 424 (1994) (observing that the *Miranda* decision is best viewed as a compromise between competing interests because it quashed the most abused forms of coercive police tactics while at the same time allowing most statements to be admitted).

⁶ 372 U.S. 335, 344-45 (1963).

⁷ REPORT OF ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 5-11 (1963) (discussing findings regarding the impact of poverty on defendants' legal representation).

⁸ I am not a proponent of the War on Drugs. While it is outside the topic of this Symposium, I believe that decriminalizing the possession of most drugs would probably be the single easiest and least detrimental way to improve citizen-officer relationships and otherwise assist race relations in this country.

⁹ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 218 (1973) (holding that respondent's consent to search by police was voluntary even though police did not inform him that he

can unlawfully detain any person without a warrant, probable cause, reasonable suspicion, or really any articulable rationale at all, in clear violation of the Court's interpretation of the Fourth Amendment, long enough to determine if such person is one of the eight million Americans with an outstanding misdemeanor warrant.¹⁰ If so, the officer can arrest and search said person, and any evidence found on her is admissible.¹¹ By assuming a Fourth Amendment violation and admitting the evidence anyway because it was "attenuated" from the violation, the majority threw the officer under the bus. The Court informs citizens that they have a Fourth Amendment right not to be detained absent at least reasonable suspicion, and places the blame for violating that right squarely on the shoulders of the officers. The *Strieff* holding is one of a long list of examples of the unintended consequences of the exclusionary rule: The Court considers the price of exclusion too high, so while ostensibly retaining citizens' Fourth Amendment rights, it refuses to enforce those rights. Officers learn the exceptions to the exclusionary rule, and then learn to ignore the unenforceable Fourth Amendment doctrine. Citizens are left with the impression that either they have no Fourth Amendment right not to be hassled by cops, or that the cop violated their right. Either way, the cop is the bad guy.

Post-Warren Courts employed similar tactics in the Fifth Amendment context. The standard for determining when a citizen is under arrest, so as to trigger the *Miranda* warnings necessary to protect the privilege against self-incrimination, is whether a defendant was "deprived of his freedom of action in any significant way."¹² However, the Court has since construed this standard in a preposterous fashion—the average person does not generally feel free to leave when questioned by an armed officer, be it at a stationhouse, at her own home, or in a vehicle pulled over for a traffic infraction.¹³ Yet the

could decline their request for his consent); *see also* *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991) (holding that the police "bus sweep," where armed officers board interstate buses at rest stop to "request" that passengers permit their baggage to be searched for drugs, does not constitute Fourth Amendment "seizures" of said passengers); *United States v. Mendenhall*, 446 U.S. 544, 545 (1980) (holding that an airline passenger transporting drugs in her underwear voluntarily consented to a strip search by Drug Enforcement Administration agents because there was no evidence of threats or force).

¹⁰ 136 S. Ct. 2056, 2063 (2016).

¹¹ *Id.* at 2064 (Sotomayor, J., dissenting).

¹² *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The Burger Court later held that this standard was to be determined from the viewpoint of a reasonable person in the defendant's position. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

¹³ *Salinas v. Texas*, 133 S. Ct. 2174, 2176 (2013) (holding that a murder suspect was not in custody); *Berkemer*, 468 U.S. at 442 (holding that "traffic stops" of motorists generally do not constitute custody); *Oregon v. Mathiason*, 429 U.S. 492, 495-96 (1977) (per curiam) (holding that mere presence in a police station does not constitute custody if voluntary, and that defendant-parolee who was "invited" to the police station and told of false evidence against him was free to leave); *Beckwith v. United States*, 425 U.S. 341, 347 (1976) (holding that a suspect questioned in his home was not in custody and thus did not have

Court has upheld each of these examples as noncustodial situations, so the protections of *Miranda* need not be employed. The exclusionary remedy that was originally employed when the *Miranda* rule was violated has been so eaten away at the corners by later Courts that the recitation by the officer is no longer an accurate description of a suspect's rights.¹⁴ Not only are the warnings subject to a public safety exception,¹⁵ but the physical and testimonial fruits of inadmissible statements are also admissible,¹⁶ and the prosecutor can use statements taken in violation of *Miranda* to rebut any contrary testimony a defendant may offer later in her criminal trial.¹⁷

The Warren Court's promise of free and competent counsel through the Sixth Amendment has fared no better. *Gideon* has become just another "unfunded mandate" that the Court refuses to enforce.¹⁸ Post-Warren Court decisions interpreting ineffective assistance of counsel claims have made it all but impossible to get a conviction reversed, no matter how subpar the defense.¹⁹ Indigent minorities seeking criminal representation are barely better

Miranda rights because the Internal Revenue Service criminal investigation into his alleged tax fraud did not "focus" on him).

¹⁴ See *infra* notes 45-70 and accompanying text.

¹⁵ See *New York v. Quarles*, 467 U.S. 649, 649-50 (1984).

¹⁶ See *Michigan v. Tucker*, 417 U.S. 433, 450 (1974).

¹⁷ See *Oregon v. Hass*, 420 U.S. 714, 714 (1975).

¹⁸ Lorelei Lard, *The Gideon Revolution*, 103 A.B.A. J., Jan. 2017, at 44, 46. See *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010), for an early example of a civil suit based in part on a Sixth Amendment claim. The case settled after this opinion, with New York agreeing to various expensive reforms in the counties involved. See *Stipulation and Order of Settlement* at 5-13, *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (No. 8866-07); see also Margaret A. Costello, *Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1953 (2014) (arguing that the "representation of indigent criminal defendants in many instances has remained inadequate" even after the *Gideon* decision).

¹⁹ See *Strickland v. Washington*, 466 U.S. 668, 669 (1984) (holding that the two-part test for defective counsel depends on (1) whether counsel's representation "fell below an objective standard of reasonableness" and (2) whether the defendant was prejudiced in that "but for counsel's unprofessional errors, the result of the proceeding would have been different"). Commentators have been uniform in their criticism of the *Strickland* standards. See YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 134-35 (14th ed. 2015) (citing the "nearly unanimous" opinion of scholars that interpretations of the *Strickland* standard has been so lax that reversals are limited to the most extreme situations). It is particularly difficult to establish prejudice, to demonstrate that the defense counsel's decision was not "tactical" or "strategic," or to overcome the Antiterrorism and Effective Death Penalty Act standard in a habeas case that the state court's interpretation of *Strickland* was "objectively unreasonable." The Court has shown some willingness to reverse on ineffectiveness grounds only in the context of capital sentencing hearings. See *Wiggins v. Smith*, 539 U.S. 510, 537-38 (2003) (finding that counsel of petitioner convicted of capital murder did not conduct a reasonable investigation leading up to the sentencing).

off now than they were in 1963.²⁰

Many of the post-Warren Court precedents that I offer above are examples of what Carol Steiker called the “Counter-Revolution;” that era where the Burger and Rehnquist Courts began to eat away at “conduct rules” directed at police officers by generating “decision rules” directed to judges that allow admission of evidence and affirmance of convictions despite violations of the conduct rules.²¹ This same phenomena was repeated by the Roberts Court.²² Conduct rules ostensibly tell law enforcement how to behave in order to comply with Fourth, Fifth, and Sixth Amendment doctrines; decisional rules are addressed to the courts and concern the practical consequences of unconstitutional conduct. Decisional rules that admit evidence taken in violation of conduct rules allow and encourage police officers, even those acting in good faith, to ignore those conduct rules that hamper their job performance.²³

²⁰ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2d ed. 2012) (arguing that America’s criminal justice system has not improved for minority citizens, but instead reflects the new Jim Crow—the mass incarceration of African Americans); AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 2 (2004) (“[O]ur study has led to the inescapable conclusion that, forty years after the Gideon decision, the promise of equal justice for the poor remains unfulfilled in this country.”); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *YALE L.J.* 2176, 1285-87 (2013) (arguing that effective counsel has not and will not improve the situation of most poor, and especially poor black Americans).

²¹ Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 *MICH. L. REV.* 2466, 2469 (1996); see also Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625, 626-30 (1984); Lisa Kern Griffin, *Silence, Confessions, and the New Accuracy Imperative*, 65 *DUKE L.J.* 698, 738-39 (2016); Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 *MICH. L. REV.* 1030, 1032-34 (2001) (describing these later Court interpretations of Warren Court rules as “prophylactic rules, safe harbor rules, and incidental rights”); Klein, *supra* note 5, at 418 (describing what later Courts did to *Miranda* as “deconstitutionalizing” the decision).

²² See, e.g., Jonathan Witmer-Rich, *Interrogation and the Roberts Court*, 63 *FLA. L. REV.* 1189, 1192-93 (2011) (praising the Roberts Court for reshaping constitutional interrogation rules according to a “fair play” principle).

²³ See CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 54 (1993) (offering hypothetical advice to police officers regarding how to avoid Fourth Amendment requirements); Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 *HARV. L. REV.* 1436, 1442-43 (1987) (offering a satirical version of a police training manual authored by Justice Holmes’s hypothetical “bad man of the law”); Andrew Guthrie Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 *FLA. L. REV.* 623, 624-28 (2014) (suggesting that the good faith exception from the “Hudson-Herring-Davis trilogy” of Fourth Amendment cases will “swallow the exclusionary rule”); Klein, *supra* note 5, at 422-34 (describing ways in which police officers can and do use *Miranda*’s exceptions and limits to obtain useful statements from suspects); Charles D. Weisselberg, *Mourning Miranda*, 96 *CALIF. L. REV.* 1519, 1521-22

Steiker predicted two ill effects of separating rules into conduct versus decisional rules and directing them to two separate audiences. First, law enforcement agents will have “incentives to violate conduct rules when no court-imposed sanction will follow.”²⁴ Second, the public’s lack of access to decision rules will cause them to overestimate court imposed restraint on law enforcement, and thereby place “more public trust and money in the institutions of law enforcement and the criminal justice system to solve our most pressing social problems.”²⁵ While the latter prediction may have been a sensible one in 1996, just the opposite has occurred. Ordinary citizens are becoming aware of the existence (if not the name) of decisional rules, and citizens are also aware that peace officers can pretty much do whatever they want without fear of sanction by the judiciary or anyone else. For a number of reasons I will detail below, we have reached a point where there is little trust in law enforcement and the criminal justice system writ large.²⁶ Rioting in Ferguson, Missouri and Charlotte, North Carolina is a serious symptom of this distrust.²⁷ In fact, only about half of Americans report confidence in the

(2008) (describing ways in which police officers have shifted their training to account for and avoid *Miranda*’s limits on interrogation).

²⁴ Steiker, *supra* note 21, at 2471.

²⁵ *Id.*

²⁶ See, e.g., John T. Cigno, Note, *Truth and Evidence: The Role of Police Officer Body Cameras in Reforming Connecticut’s Criminal Justice System*, 49 CONN. L. REV. 293, 293 (2016) (describing the public’s perception that police officers seem to be able to break the law with impunity is rooted in the “*de facto* unfairness” of the qualified-immunity and excessive-force standards).

²⁷ Mitch Weiss & Meg Kinnard, *3rd Night of Charlotte Protests Stays Largely Peaceful*, ASSOCIATED PRESS (Sept. 23, 2016, 1:37 AM), <http://bigstory.ap.org/article/3b220507d6dc4376b2477f4942babf7d/2nd-night-violent-protests-over-charlotte-police-shooting> [<https://perma.cc/5LPH-QLSB>] (“Charlotte is the latest U.S. city to be shaken by protests and recriminations over the death of a black man at the hands of police, a list that includes Baltimore, Milwaukee, Chicago, New York and Ferguson, Missouri.”). The Department of Justice (“DOJ”) has signed a consent decree with the City of Ferguson, and a decree was accepted with the City of Baltimore. Laura Wagner, *Ferguson City Council Accepts Consent Decree Worked Out with Justice Department*, NPR (Mar. 15, 2016, 9:13 PM), <http://www.npr.org/sections/thetwo-way/2016/03/15/470598733/ferguson-city-council-accepts-deal-with-justice-department> [<https://perma.cc/DNE4-CM9Q>]. A DOJ report on Baltimore’s police force concluded that officers were “routinely stopping large numbers of people in poor, black neighborhoods for dubious reasons, and unlawfully arresting residents merely for speaking out in ways police deemed disrespectful.” Juliet Linderman & Eric Tucker, *Baltimore Reaches Agreement with US to Reform Policing*, CHI. TRIBUNE (Jan. 12, 2017), <http://www.chicagotribune.com/news/nationworld/sns-bc-us—baltimore-police-death-justice-department-20170112-story.html> [<https://perma.cc/UW32-8P75>]. It remains to be seen whether President Trump’s Attorney General Jeff Sessions will enforce consent decrees crafted by former Attorney General, Loretta Lynch. See Julie Bosman & Mitch Smith, *Excessive Force Is Rife in Chicago, U.S. Review Finds*, N.Y. TIMES, Jan. 14, 2017, at

police.²⁸

Decision rules, which have the unintended consequence of encouraging police officers to lie to citizens, are part of the cause of this troubling time of national doubt in our criminal justice system. I have noticed at least five other contributors, most occurring after the Warren Court revolution: (1) Court rules concerning remedies versus rights, particularly the set of legal doctrines that leave no effective remedies against police officer misconduct. Neither civil review boards nor civil rights actions take up the slack.²⁹ In most jurisdictions, local prosecutors are unable or unwilling to indict officers who shoot unarmed fleeing suspects under questionable circumstances³⁰—unable because of the law enforcement justification defense and other special rules,³¹ and unwilling in that prosecutors' offices continue to resist sensible steps such as utilizing current conflict rules to remove themselves from making charging decisions against their friends, or from handing such decisions off to dedicated public integrity sections or prosecutors from different jurisdictions.³² (2) A shift in

A1 (describing DOJ consent decree with Chicago and mentioning the nearly two dozen other cities where the Department has pushed for wholesale changes in policing).

²⁸ Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), <http://www.gallup.com/pol/183704/confidence-police-lowers-years.aspx> [] (reporting that fifty-two percent of Americans report confidence in the police).

²⁹ See, e.g., SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 144 (2005) (commenting that civil review boards are ineffective). Civil rights lawsuits are likewise unsuitable because damages are slight, immunities abundant, and institutional change through injunctive relief unattainable. See, e.g., *Chavez v. Martinez*, 538 U.S. 760, 772 (2003); *Buckley v. Fitzsimmons*, 509 U.S. 259, 275-76 (1993) (holding that acts taken by prosecutors in preparing for trial are entitled to protection of absolute immunity, while police officers receive qualified immunity); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 914 (2015) (explaining consensus view of scholars that since the Warren Court made 42 U.S.C. § 1983 a remedy for constitutional violations in *Monroe v. Pape*, succeeding Courts have rendered a series of decisions making damages recovery costly and difficult); Klein, *supra* note 5, at 439-49 (explaining that case law bars a § 1983 violation in the *Miranda* context).

³⁰ Of course, the police shoulder much of the blame for these killings through their own failures in training and their unconscious biases. According to a recent study, many of the fifty largest police departments have little or no guidance for their law enforcement personnel on the use of force during arrests. See Brandon L. Garrett & Seth W. Stoughton, *A Tactical Fourth Amendment*, 102 VA. L. REV. (forthcoming 2017) (manuscript at 3) (detailing training procedures at the fifty largest police departments in the United States).

³¹ See, e.g., *Texas v. Kleinert*, 143 F. Supp. 3d 551, 556 (W.D. Tex. 2015), *aff'd*, No. 15-51077 (5th Cir., April 20, 2017) (removing and dismissing reckless manslaughter indictment against an Austin police officer who shot a fleeing unarmed black man on the grounds that this officer reasonably believed that the arrest was necessary and proper in fulfilling his federal duties); see also Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1197 (2016) (suggesting that police are not prosecuted for brutality in part because of a "special shield" known as the Law Enforcement Officers' Bill of Rights).

³² See Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1449-52 (2016) (arguing that local prosecutors are too close to police officers to be impartial and should be automatically replaced). *But see* Bruce Green & Rebecca Roiphe, *Rethinking*

police training toward militarization also contributes to widespread doubt. Officers who used to be willing to take a punch are instead trained in self-preservation using a stun gun or a firearm. The militarization of police forces gives them highly dangerous tools and creates a culture of warriors rather than helpers.³³ True community policing, a method that I believe could significantly combat this unhealthy relationship between citizens and the police, has unfortunately not always been implemented correctly, and has recently gone out-of-fashion.³⁴ (3) A federal and state legislative backlash to pro-defendant Warren Court procedural rules by broadening substantive criminal law in general,³⁵ and the decision in the 1970s to fight the “War on Drugs” in particular further contributes to doubts about police. These policy choices have resulted in an entire generation of young black men becoming prisoners rather than productive citizens.³⁶ (4) The innocence movement of the last two

Prosecutors’ Conflicts of Interest, 58 B.C. L. REV. (forthcoming Oct. 2017) (manuscript at 51-72) (proposing changes within prosecutors’ offices rather than formal conflict of interest rules).

³³ See Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officer*, 51 WAKE FOREST L. REV. 611, 612-17 (2016) (noting that the “warrior” metaphor, while adopted with the best intention, has contributed to an adversarial approach to policing that has undermined police/community relations, and suggesting that it be replaced with a “guardian” model).

³⁴ See, e.g., Evan D. Anderson & Scott Burris, *Policing and Public Health: Not Quite the Right Analogy*, J. POLICING & SOC’Y 300, 311-13 (2016) (highlighting similarities between policing and medicine and suggesting that a “culture of health” model would improve policing); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 393-94 (2016) (detailing the history and theory of community policing, and exploring how it has been replaced by the practice of “copwatching”); Philip Jankowski, *Study: Austin Police Do Not Dedicate Enough Time to Community Policing*, AUSTIN AM.-STATESMAN, Aug. 18, 2016, at B1. Perhaps this is beginning to turn around. In response to highly publicized police killings of unarmed black men around the country, President Obama created a Task Force on community policing. Exec. Order No. 13,684, 3 C.F.R. § 217 (2014). The DOJ has used its ability to sue municipalities under 42 U.S.C. § 14141 to generate consent decrees to reduce police use of excessive force and include many more community stakeholders. See *supra* note 27. Studies suggest that community-based policing may not decrease crime, but it does lead to improved citizen satisfaction. See Charlotte Gill et al., *Community-Oriented Policing to Reduce Crime, Disorder and Fear and Increase Satisfaction and Legitimacy Among Citizens: A Systematic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 399, 400 (2014).

³⁵ See BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 6 (2010) (observing that there are over 3000 offenses in the U.S. Code that carry criminal punishments); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005) (offering libertarianism as the solution to the problem of over-criminalization at both the federal and state levels); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 3-6 (suggesting that as criminal procedure tightens, legislatures respond by expanding the substantive criminal law).

³⁶ See Lance J. Rogers, *Senate Judiciary Committee Hears Conflicting Testimony on Sentencing Reform*, 98 CRIM. L. REP. 76, 76-77 (2015); Rhonda Smith, *As Job Market Tightens, More Employers Consider Hiring People with Criminal History*, 99 CRIM. L. REP.

decades, which has demonstrated and well publicized the fact that police officers arrest (and prosecutors charge and juries convict) demonstrably innocent persons.³⁷ (5) The extremely high percentage of average Americans negatively involved in the criminal justice system. Donald Dripps wrote in 1993 that legislatures could easily ignore the perspectives of crime suspects because the vast majority of their constituents correctly conclude that they are unlikely to be the target of a police investigation, much less a defendant in a criminal case.³⁸ The perspective of the average American has changed radically over the last few decades; it is now likely that a person either had an encounter with a peace officer or has a friend or family member who did. The Department of Justice estimated in 2016 that 70 to 100 million Americans adults (out of about 350 million total) have been arrested and therefore have a criminal record on file—approximately one in three adults!³⁹ According to then Deputy Attorney General Sally Yates, “one in nine African-American children has a parent in prison.”⁴⁰ Now that deceptive police behavior and misconduct affects us all, we are more likely to sit up and pay attention.

The upshot of our last fifty years of constitutional criminal procedure rules combined with the five historical events I mentioned above is that many citizens and law enforcement view each other as the enemy. This attitude is not

660, 661 (2016) (citing Bureau of Justice statistics); *infra* notes 39-40 and accompanying text.

³⁷ See, e.g., *DNA Exonerations in the United States*, INNOCENCE PROJECT, <http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [<https://perma.cc/MPT3-J65K>] (last visited Jan. 28, 2017) (providing statistics about DNA exonerations); *The Cases*, INNOCENCE PROJECT, <https://www.innocenceproject.org/all-cases/#exonerated-by-dna> [<https://perma.cc/AA5P-ZYRJ>] (last visited Feb. 13, 2017) (recording 349 cases of wrongly convicted individuals exonerated by DNA testing); *The Cases*, INNOCENCE PROJECT, <http://www.innocenceproject.org/all-cases/#involved-yes> [<https://perma.cc/B65W-4NE3>] (last visited Feb. 13, 2017) (recording an additional 189 cases exonerated through the involvement of the Innocence Project); *National Registry of Exonerations*, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> [<https://perma.cc/2GZC-LYYR>] (last visited Jan. 28, 2017) (recording 1975 exonerations nationwide since 1989); Adam Liptak, *Consensus on Counting the Innocent: We Can't*, N.Y. TIMES, Mar. 25, 2008, at A14 (estimating that about 185,000 innocent people have served hard time in the last three decades).

³⁸ Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1098 (1993).

³⁹ Smith, *supra* note 36, at 661 (citing Bureau of Justice statistics). The problem is so prevalent that President Obama established the Reentry Council in April 2011, convened by Attorney General Eric Holder, to convince employers to hire people with criminal histories. *Id.* According to a revised DOJ bulletin released in January 2016, the adult correctional systems supervised an estimated seven million people by end of 2014. *Id.* at 661.

⁴⁰ See Rogers, *supra* note 36, at 76 (quoting Yates's testimony before the Senate Judiciary Committee on October 19, 2015 at a hearing regarding Senate Bill 212, the Sentencing Reform and Corrections Act of 2015).

useful to law enforcement's primary purpose of protecting us from harm and separating the innocent from the guilty. What are we to do with such a messy and quite frankly depressing state of affairs? This unfortunate distrust we are experiencing could perhaps be harnessed to permit significant reforms that many scholars have advocated but thought impossible to achieve. At this juncture, it might be preferable to shape rules that are less adversarial and more inquisitorial. It certainly would be an improvement to announce transparent rules. Rather than having decision rules for judges and conduct rules for officers, we need one set of clear and well-publicized rules that everyone knows and follows. That set of rules need not be the same in every jurisdiction, so long as what officers tell citizens is the truth.

Confining my remaining comments to the privilege against self-incrimination, in Part II, I argue that the *Miranda* warnings, regardless of their intent and effect at the time, have become perverse. (1) They are false and deceptive. (2) They assist only guilty recidivists and the wealthy, all other suspects waive their rights. (3) They fail to achieve either of their stated goals: apprising suspects of their rights and regulating police conduct. (4) They fail to identify and exclude false confessions. (5) They are incompatible with historical practice and our current shared moral values. In Part III, I recommend that jurisdictions begin replacing the *Miranda* warnings with more effective and transparent alternatives, a move I believe is permissible under current Supreme Court doctrine.⁴¹ I propose that mid-sized to large police departments add a new "magistrate" position, appointed through the judicial branch, to their police station staff, and supplement or replace custodial interrogation by detectives with more civilized recorded questioning of felony suspects by these magistrates. Arrestees would be informed that they have no right to avoid custodial interrogation, and would be offered accurate descriptions of their options.⁴² I further suggest that the practice of producing

⁴¹ See *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (declining to allow Congress to repeal the *Miranda* warnings with the totality-of-circumstances test contained in 18 U.S.C. § 3501, but admitting that an effective alternative would be considered).

⁴² My proposal shares some features with a position championed by Judges Friendly and Schaefer shortly after the *Miranda* decision. WALTER V. SCHAEFER, *THE SUSPECT AND SOCIETY: CRIMINAL PROCEDURE AND CONVERGING CONSTITUTIONAL DOCTRINES* 76-81 (1967) (proposing that suspects be interrogated in front of a judicial officer); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 713-16 (1968) (suggesting that a suspect's refusal to answer a magistrate be disclosed at trial). It also shares features with more recent scholarly suggestions. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 70-88 (1997); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2631 (1996); Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 728 (2014) (suggesting that defendants be required to testify at trial, though not under oath). In the interest of full disclosure, I penned a critique of Akhil Amar's suggestions in Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 LAW & SOC. INQUIRY 533 (1999).

false evidence to encourage suspects to confess be strictly prohibited, and the use of deceit during custodial interrogation be debated and limited by local rules. Transparency in the interrogation process would be a civilizing influence and lead to more accurate information. Allowing local legislatures to create the rules regulating interrogations would shift blame for any deceit permitted away from police officers, fostering improved relationships between law enforcement and the citizens they serve.

Finally, in Part IV, I begin to imagine a world in which police officials used deception only when absolutely necessary. Not only would any warnings given be accurate ones, but also perhaps some of the most egregious deceptive practices during interrogations would be limited. Moreover, this idea could bleed over into undercover sting operations, as many courts are already finding ways to expand the entrapment defense. Predictive and community policing and other evidence-based law enforcement tools might be possible if the relationship between officers and citizens improves, especially in minority communities. Many practices that might be effective in ferreting out the guilty and preventing crime in the first place rely on cooperation with the community. Such cooperation is almost impossible without some transparency and trust as foundations of the relationship.

II. *MIRANDA*'S PERVERSIONS

The *Miranda* warnings have perverse results and ought to be retired and replaced for five reasons. First, the warnings are so full of omissions and inaccuracies that they actually constitute deception by police officers to arrestees. Second, *Miranda* warnings perversely assist those least in need; wealthy suspects and recidivists. Almost everyone else—upwards of eighty percent of suspects—waives their *Miranda* rights, a move that is virtually never in their self-interest, and demonstrates that the *Miranda* decision did nothing to alleviate whatever inherent compulsion is part of the custodial interrogation experience. Third, the *Miranda* warnings fail to fulfill their stated goals; to “adequately and effectively” apprise a suspect of her rights, and to regulate and guide police conduct regarding interrogation practices. Instead, suspects are deceived about their rights, often intentionally.⁴³ Though police continue to employ the same tactics they used prior to *Miranda*, the fact that the warnings were read essentially guarantees that any subsequent statements are admitted as voluntary.

Fourth, the *Miranda* warnings are ineffective at identifying false confessions; thus, they fail to protect the falsely accused and allow the perpetrator to evade responsibility. The innocence movement has

⁴³ See, e.g., Weisselberg, *supra* note 23, at 1521-33; Devallis Rutledge, *Reduce Negative Impact of Miranda*, POLICE (Mar. 11, 2014), <http://www.policemag.com/channel/careers-training/articles/2014/03/reduce-negative-impact-of-miranda.aspx> [<https://perma.cc/2PPW-48WH>]. (former policeman detailing ways for police to avoid *Miranda* requirements such as “strategic deception at arrest”).

demonstrated that the majority of these false confessions are from juveniles and those with mental disabilities. These groups of suspects are unable to comprehend the *Miranda* warnings, are incapable of providing voluntary and knowing waivers, and are particularly susceptible to people pleasing by making any statement they believe the interrogator wishes to hear. Fifth, *Miranda* is incompatible with basic morality and historical practice. The primary purpose of the self-incrimination clause was to prohibit torture and fishing expeditions, not to prevent the questioning of suspect once the government established the probable cause necessary to arrest her for a felony offense. My proposal, which allows questioning by magistrates and permits adverse inference by the factfinder for refusal to answer reasonable questions, is consistent with the historical practice at our founding. Such questioning also comports with our basic shared moral premises—an individual should explain herself if caught in a compromising situation, and factfinders might believe the worst if the suspect refuses to offer an explanation.

A. *The Warnings Are Inaccurate*

The original *Miranda* decision directed police officers to offer the following four pieces of information to arrestees, now recited from memory or read from a small white laminated flash card:

You have the right to remain silent. If you choose to give up this right, anything you can say can and will be used against you in a court of law.

You have the right to consult with an attorney, and to have the attorney present during interrogation. If you cannot afford an attorney, one will be appointed to represent you. Do you understand these rights?⁴⁴

Initially, it is critical to note how limited these protections are. The *Miranda* warnings need not be read unless a suspect is officially “in custody.” Neither street encounters nor road stop stops constitute “custody.”⁴⁵ Even police station questioning about a crime is not “custodial interrogation” if the suspect travels to the police station “voluntarily.”⁴⁶ So, officers can and do avoid having to provide the *Miranda* warnings entirely by the timing of their interrogations.⁴⁷

⁴⁴ *Miranda v. Arizona*, 384 U.S. 436, 471-73 (1966).

⁴⁵ See *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *Beckwith v. United States*, 425 U.S. 341, 347 (1976). *But see* *J.D.B. v. North Carolina*, 564 U.S. 261, 281 (2011) (holding by a five-Justice majority that age of the twelve-year-old child subjected to police questioning was relevant to analysis of whether the suspect was in custody because the child’s age was known to the officer or would have been objectively apparent to any reasonable officer).

⁴⁶ See *California v. Beheler*, 463 U.S. 1121, 1122 (1983) (per curiam); *Oregon v. Mathiason*, 429 U.S. 492, 493-95 (1977) (per curiam).

⁴⁷ See, e.g., Klein, *supra* note 5, at 422-34 (describing ways in which police officers use *Miranda*’s exceptions and limits to obtain useful statements from suspects); Weisselberg, *supra* note 23, at 1521-22; Rutledge, *supra* note 43.

Second, the single consequence to police officers who forget or refuse to read the *Miranda* warnings to suspects is the exclusion of those statements at trial in the government's case-in-chief.⁴⁸ An aggrieved suspect cannot sue the individual officer or the police department, and officers will not be fired or disciplined in any manner for disregarding *Miranda*.⁴⁹ Third, if the suspect is silent prearrest or postarrest and prior to the officer delivering *Miranda* warnings, prosecutors can use that silence as substantive evidence of guilt,⁵⁰ and to impeach a defendant if he later takes the stand.⁵¹ Finally, the warnings need not be read if the officer can invoke the public safety exception to *Miranda*.⁵²

None of this information is offered to suspects as part of their encounters with police officers, so the encounter is misleading even if the officer were not required by legal doctrine to read the *Miranda* warnings, and it is especially misleading when the officer has a suspect in custody but chooses not to offer them. Even when an officer provides the *Miranda* warnings, the warnings are not just incomplete and misleading, but false. A full and accurate statement of the law would have to include the following additional information⁵³:

⁴⁸ See *United States v. Patane*, 542 U.S. 630, 641 (2004) (plurality opinion) (holding that "police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings proscribed by *Miranda*" because *Miranda* can only be violated if the statements are used in trial).

⁴⁹ See *Chavez v. Martinez*, 538 U.S. 760, 776 (2003) (finding no Fifth Amendment violation of privilege against self-incrimination until and unless the statement taken in violation of *Miranda* is used in a criminal case).

⁵⁰ See *Salinas v. Texas*, 133 S. Ct. 2174, 2178-79, 2183-84 (2013) (holding that the government may admit suspect's silence as evidence of guilt during his double-homicide trial where a suspect was not *Mirandized* because he was not officially in custody, and he suddenly declined to continue to answer questions when asked if his shots or shells would match the ones found at the murder scene).

⁵¹ See *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (per curiam) (holding that the defendant who took the stand could be impeached by the prosecutor as to why he did not raise his self-defense claim before he was *Mirandized* by the police). Note, however, that a defendant cannot be impeached by postarrest silence if he was *Mirandized*. *Doyle v. Ohio*, 426 U.S. 610, 619-20 (1976) (holding that where a defendant claimed that he had been "framed" by narcotics officers, the prosecutor could not ask the defendant why he had not told this story to the arresting officer after he received the *Miranda* warnings).

⁵² See *New York v. Quarles*, 467 U.S. 649, 659-60 (1984) (holding that the public safety exception to *Miranda* requirements applied where a gun was lost in a supermarket). See generally Susan R. Klein, *Miranda's Exceptions in a Post-Dickerson World*, 91 J. CRIM. L. & CRIMINOLOGY 567, 592 (2001).

⁵³ Other scholars have attempted over the years to craft an accurate set of warnings. See, e.g., Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 783-84 (2006); Klein, *supra* note 5, at 464-88; David Rossman, *Resurrecting Miranda's Right to Counsel*, 97 B.U. L. REV. [PAGE, PINCITE] (2017); Tonja Jacobi, *Miranda 2.0*, 50 U.C. DAVIS L. REV. 1, 1 (2016) (suggesting that *Miranda* "should require: warning suspects how long they can be

The right to silence I told you about does not actually mean what you think: that you have a right to end the interview, or that I will stop talking if you do attempt to end the interview. Your only enforceable constitutional rights are your due process right not to have a confession coerced from you via my use of physical or extreme psychological force,⁵⁴ and your Fifth Amendment right to exclude statements taken in violation of *Miranda* from the government's case-in-chief.⁵⁵ However, I can continue to ask you questions until you do make a statement (or fall asleep, or I get tired of asking). And unless you very clearly invoke your right to remain silent by unambiguous words (not by conduct, such as refusing to answer questions or ignoring me), I can continue to ask questions, and when you say something, I can use it in court.⁵⁶ And you probably will eventually say something so you don't look guilty, as you surely aren't aware that if you do choose silence in the face of accusation (and after you are *Mirandized*), such silence cannot be used against you at trial.⁵⁷ I don't have to tell you the subjects of questioning in advance of interrogation to obtain a waiver, even if I suddenly switch my questioning to a much more serious crime, and fail to inform you that you can now terminate your previous waiver.⁵⁸

As soon as you answer a question and make a statement, you have given up or "waived" your right to silence. Even if you make it absolutely

interrogated for; delivering the warnings via a non-police intermediary; . . . recording all interrogations; varying strength of the warnings according to the characteristics that make suspects differently susceptible; and reforming and simplifying the rules of waiver").

⁵⁴ See cases cited *infra* at note 86. It appears that a suspect may pursue a constitutional claim for liability for a substantive due process violation regardless of whether a confession is later admitted at a criminal trial where the coercive behavior of the police in obtaining the statement is "egregious" or "conscience shocking." See *Chavez v. Martinez*, 538 U.S. 760, 779-80 (2003).

⁵⁵ *United States v. Patane*, 542 U.S. 630, 635 (2004) (plurality opinion); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

⁵⁶ See *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010) (holding that a suspect's confession after a three-hour interrogation was admissible despite his refusal to sign written waiver of his *Miranda* rights because his decision to make incriminating statements constituted an implied waiver of his right to silence); *North Carolina v. Butler*, 441 U.S. 369, 375-76 (1979) (holding a suspect's statement was admissible despite his refusal to sign a written waiver form and his objection to note-taking by the officer); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 *DENV. L.J.* 1, 15 (1970) (detailing results of a study that found forty-five percent of post-*Miranda* defendants mistakenly believed that their oral statements could not be used against them at trial).

⁵⁷ Thus Mark Godsey recommends that the *Miranda* warnings be explicitly revised by a new "right to silence" warning. Godsey, *supra* note 53, at 783-84.

⁵⁸ See *Colorado v. Spring*, 479 U.S. 564, 576-77 (1987) (holding that law enforcement can obtain a written waiver of rights after questioning the suspect about stolen firearms and then question the suspect about a murder).

clear by words that you want to assert your so-called right to silence, I can continue to try to convince you to make an incriminating statement, and according to the Supreme Court, I cannot be sued. So long as the prosecutor does not use the statement (or the judge refuses to admit it, or the appeals court reverses your conviction on grounds of a compelled confession), my conduct is consistent with the Constitution.⁵⁹

I have good reason to ignore you even after you assert your right to silence, because I can use the statements you give me to discover some other physical evidence I can use against you,⁶⁰ or the name of a witness who can testify against you.⁶¹ Anything you say will probably assist my investigation into your offense and lead to other evidence I can use, as well as just assure me I am on the right track. Plus, even if I ignore your clear statement that you wish to remain silent and I continue to ask questions until you say anything at all, I can repeat that statement to the jury should you attempt later to take the stand and testify in your own defense.⁶² So if I can get you to say anything at all now, that will be useful to me later if you take the stand and say anything arguably inconsistent with the statement you make now. It will also be useful in tracking down your alleged alibi or eyewitness and asking him to testify against you. Also, if you invoke your right to silence I might wait a few hours and then try questioning you again.⁶³

The right to an attorney I mentioned earlier is not actually as clear or as useful as it sounds at first blush. Even if you manage to make a clear request for a lawyer (which most suspects cannot seem to do, as an equivocal or even a polite request is insufficient to constitute an invocation, but a statement after I read you your rights and continue to

⁵⁹ See *Chavez*, 538 U.S. at 768.

⁶⁰ See *Patane*, 542 U.S. at 635 (holding that an officer's failure to give *Miranda* warnings did not require suppression of a firearm).

⁶¹ See *Michigan v. Tucker*, 417 U.S. 433, 450 (1974) (holding that the defendant's statements were excluded at trial due to a *Miranda* violation, but could be used by the officer to obtain the name of a witness who countered the defendant's alibi for a rape).

⁶² See *Oregon v. Hass*, 420 U.S. 714, 720-24 (1975) (holding that even where police refused to honor a suspect's request for an attorney, the resulting incriminating statements could be used for impeachment purposes); *Harris v. New York*, 401 U.S. 222, 226 (1971) (holding that a prosecutor could use statement obtained in violation of *Miranda* to impeach the defendant who testified at trial in an inconsistent manner). In *Harris*, the defendant testified at trial that he sold baking powder not cocaine, but he said during custodial interrogation that he was working for the cops. *Id.* at 223.

⁶³ See *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (holding that where a defendant declined to discuss robberies during custodial interrogation and the detective promptly ceased questioning, the detective could re-*Mirandize* the suspect and question him about an "unrelated holdup murder" after two hours had passed).

hound you will constitute a waiver),⁶⁴ you will still probably not obtain access to an attorney to advise you during our interrogation. First, most people will bow to social convention and not be rude to someone like me talking directly to you. Especially when the person questioning is an authority figure like me, who is the same person preventing you from leaving the police station. After all, you know you have to satisfy me if you have any prayer of going home tonight (you do not). You don't realize this, but the fact that we read the *Miranda* warnings to you means we have probable cause to arrest, so we will at least keep you until your arraignment the next morning, or on Monday if we arrested you on Friday night (our favorite time). If you ask for an attorney, we will simply stop the interrogation, at least for now. We will not bring an attorney into the interrogation room, even though you see that sometimes on "Law and Order." We don't keep defense attorneys on hand at our house (we consider them the enemy), and if you call one we won't let him in the interrogation room. You can talk to her on the telephone from jail, she can visit you there, or more likely, you will meet her for the first time at the arraignment or bail hearing.⁶⁵ Once the interrogation has paused, then we will hope you bring up the topic of our investigation again, in which case the court says we can try questioning you again.⁶⁶ But you will not

⁶⁴ See *Davis v. United States*, 512 U.S. 452, 462 (1994) (holding that suspects must clearly and unambiguously ask for an attorney to end a custodial interrogation on grounds of denial of right to counsel, and the statement "Maybe I should talk to a lawyer" was not an unambiguous request for counsel); *Connecticut v. Barrett*, 479 U.S. 523, 529-30 (1987) (holding that where a suspect signed an acknowledgement of rights and orally admitted involvement in sexual assault, but added that he would not make a written statement outside the presence of counsel, the suspect had not invoked his right to counsel for "all purposes"); *Fare v. Michael C.*, 442 U.S. 707, 711, 719-21 (1979) (holding that a juvenile suspect who asked "Can I have my probation officer here?" did not invoke his right to counsel).

⁶⁵ See, for example, *Duckworth v. Eagan*, 492 U.S. 195 (1989), where the majority approved a *Miranda* warning that stated that "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court," *id.* at 198. Because the procedure in Indiana was for counsel to be appointed at the defendant's initial appearance in court, this instruction accurately described when the suspect would obtain counsel. As the Court noted, "*Miranda* does not require that attorneys be producible on call." *Id.* at 204. It is extremely common practice in most states and the federal system for a suspect to meet her attorney for the first time at the proceeding where she is first brought before a judge, which may be called an arraignment, a probable cause hearing, or a preliminary examination, depending upon the jurisdiction. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 107-110 (1975).

⁶⁶ See *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (holding that a suspect's statement "Well, what is going to happen to me now?" was sufficient to allow police to reinstate their interrogation of that suspect, even though he had previously asked for an attorney). *But see Arizona v. Robertson*, 486 U.S. 675, 683-85 (1988) (holding that once a suspect invokes right to counsel, renewed interrogation is impermissible unless the suspect initiates conversation).

get a lawyer then either. We will question you until you confess or we believe you will not confess or make any more useful statements, at which time we will book you and lock you up.

If you successfully and unambiguously request an attorney, we will book you and let your attorney and the prosecutor negotiate your trial or guilty plea later. We won't let your attorney in the room during our questioning, because he will certainly tell you to shut up, which is not useful to us. Since we have no legal authority to enter in plea negotiations with him, it is pointless for us to talk to him anyway. And our friend the Assistant United States Attorney or Assistant District of County Attorney is not going to come down to the stationhouse to talk to your lawyer at this early stage in the process, unless yours is a very high-profile case. It is better for the prosecutor to wait until we gather more facts and let you sweat it out a bit before entering into negotiations with your attorney (yes, you will eventually get one at the first formal proceeding against you).

By the way, if I failed to properly *Mirandize* you and you made a statement, I can fix my mistake by *Mirandizing* you after your statement and asking you to repeat that same statement. If you do that, I can use the second statement (but not the first) against you in your criminal trial.⁶⁷ Thus, I might get you to talk by failing to *Mirandize* you to begin with, and then, once you let the cat out of the bag I will uselessly *Mirandize* you and use the second statement. However, there is a good chance that if I deliberately engage in this two-step process, you might successfully exclude the resulting statements, so I am hesitant to try that.⁶⁸

Finally, you won't get any *Miranda* warning unless you are arrested and in custody. Therefore, it is in my interest to question you prior to an arrest and then any statements you make are admissible,⁶⁹ and if you refuse to talk, your silence is admissible at trial as an adverse inference of guilt.⁷⁰ You and I won't know until a later motion to suppress hearing

⁶⁷ See *Oregon v. Elstad*, 470 U.S. 298, 317-18 (1985) (holding that a suspect's second statement obtained after administering *Miranda* warnings was admissible following his initial statement obtained in violation of *Miranda*, even though the suspect might believe he had already "let the cat out of the bag").

⁶⁸ See *Missouri v. Seibert*, 542 U.S. 600, 609-10 (2004) (plurality opinion) (holding a suspect's statements inadmissible when police purposefully failed to advise her of her *Miranda* rights until after she made an incriminating statement, then offered her *Miranda* warnings after taking a twenty-minute break as part of a strategy to obtain a written waiver and an identical repeated statement).

⁶⁹ See *Berkemer v. McCarty*, 468 U.S. 442, 420 (1984); *Oregon v. Mathiason*, 429 U.S. 492, 493-95 (1977) (per curiam); *Beckwith v. United States*, 425 U.S. 341, 347 (1976).

⁷⁰ See *Salinas v. Texas*, 133 S. Ct. 2174, 2185, 2189 (2013) (affirming a conviction where the suspect's silence in face of police questioning was admissible, because the suspect agreed to allow the police to test his shotgun for ballistics and to submit to questioning in a police interview room, but suddenly declined to answer questions when an

whether you were already in custody, and thus entitled to *Miranda* warnings, or not. I'm hoping that the judge will find that you were not yet arrested when we spoke, but even if I lose that one, I still get all the aforementioned benefits of the interrogation.

Attempting to explain all of that to a suspect, or learn all of that as a law enforcement officer, is relatively futile. I have been teaching criminal procedure on and off for years and I still cannot easily recall the key holdings in the Fifth Amendment area without at least a few hours of study before class. What makes memorizing the law so difficult is the lack of any coherent principle that intertwines the holdings. The five pages of quoted material is what would be minimally necessary to accurately inform a suspect of his rights as delineated by the Court over the last fifty years, and one can notice right away how dissimilar those warnings are from the ones actually given. The current *Miranda* warnings, assuming a suspect receives them, may be worse than providing no information to the suspect at all.

B. *The Warnings Assist Only the Guilty and the Rich*

Most scholars argue that *Miranda* warnings have not reduced the rate at which suspects confess and instead suggest that the “constitutional protections intended to make prosecutions more difficult instead serve [to] make the prosecutor’s job easier.”⁷¹ Empirical studies have demonstrated that the overwhelming response to receiving *Miranda* warnings is for the suspect to waive her rights. While there is some dispute about the precise percentage of suspects who waive, the consensus view is that it is upwards of eighty percent,⁷² and even the scholars who contest those studies are arguing over just a few percentage points.⁷³ As Steven Duke has noted, “after four decades of

officer asked him whether this shotgun would “match the shells recovered at the scene of the murder”).

⁷¹ Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 CONST. COMMENT. 207, 210 (1995).

⁷² See, e.g., Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 (1996) (finding that 83.7% of the 173 suspects in his study waived their *Miranda* rights); Anthony J. Domanico, Michael D. Cicchini & Lawrence T. White, *Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations*, 49 IDAHO L. REV. 1, 13 (2012) (finding 93% of suspects waived their *Miranda* rights); Godsey, *supra* note 53, at 792 (“[M]odern studies demonstrate that roughly eighty percent of suspects waive their *Miranda* rights and talk to the police.”); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 226, 276 (1996) (reporting that of the 182 suspects observed or recorded during police interrogations in California, 78% waived their *Miranda* rights).

⁷³ See Albert W. Alschuler, 97 B.U. L. REV. [PAGE, PINCITE] (2017); Stephen J. Schulhofer, *Miranda’s Practical Effect: A Substantial Benefit and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 502 (1996) (contesting Paul Cassell’s claims of lost confessions to a few percentage points); George C. Thomas III & Richard A. Leo, *The*

living with *Miranda*, the small number of suspects who are induced to remain silent by the administration of the warnings is getting even smaller while the number encouraged to talk is at least remaining stable.”⁷⁴ Suspects who agree to talk to the police may still cut off questioning or invoke their right to have counsel, but they “almost never” do.⁷⁵

Why is the waiver rate so high? Some waivers can be attributed to police conduct. First, police officers learn how to deliver *Miranda* in a tone of voice that may incorrectly lead suspects to believe that the rights are unimportant, or correctly believe that the invocation of these rights may not be honored.⁷⁶ Second, police have learned from the Roberts Court that while they may have to recite the warnings, they can safely ignore what may look like an invocation of rights. That is, unless a suspect in custody affirmatively states that she wishes to invoke her right to remain silent or unambiguously asserts her right to consult with an attorney, the officer and later the judge can *imply* a waiver and any resulting statements will be admissible.⁷⁷ The peace officer does not tell the suspect that tidbit either, though he fully appreciates the benefits of continuing a custodial interrogation, whether it appears that the suspect has waived her right to silence or not.⁷⁸

Another explanation for this surprising and unhealthy waiver of rights may be the psychology of the suspect and her situation. There is the matter of common courtesy. It is rude to ignore someone who is addressing you directly,

Effects of Miranda v. Arizona: “Embedded” in Our National Culture, 29 CRIME & JUST. 203, 240 (2002) (finding Stephen Schulhofer’s response to be a “decisive refutation” of Cassell’s study).

⁷⁴ Steven B. Duke, *Does Miranda Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 560 (2007).

⁷⁵ William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 977 (2001).

⁷⁶ See DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 134 (2012) (“To bring the suspect to make the invariably illogical decision to confess, the interrogator must distort his perception of the situation, namely by making confessing appear to be more advantageous than refusing to confess.”); DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 210-11 (1991) (describing the ways in which the *Miranda* warning is a “psychological hurdle” for detectives to dodge during questioning); Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 383-85 (2007) (describing the way a typical interrogator questions a suspect about a crime, moving from the warnings without giving the suspect any time to reflect and reinforcing an atmosphere that the suspect has no choice but to discuss the crime); Thomas & Leo, *supra* note 73, at 250-51 (describing how the warnings are packaged like adverse health effects in pharmaceutical ads, delivered as quickly as possible and in a perfunctory manner).

⁷⁷ See *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010); *Davis v. United States*, 512 U.S. 452, 461 (1994); *North Carolina v. Butler*, 441 U.S. 369, 375-76 (1979).

⁷⁸ See Charles Weisselberg & Stephanos Bibas, Debate, *The Right to Remain Silent*, 159 U. PA. L. REV. PENNUMBRA 69 (2010) (debating how “affirmatively” a suspect must state her intent to remain silent).

especially when that someone is an authority figure who holds power over you. Next, suspects erroneously believe that they can talk their way out of trouble. Finally, a suspect may not believe that she has the right to remain silent, despite the warning. The warnings appear to be boilerplate language like that found in a telephone or internet contract that you must agree to before service, or sound like that annoying droning language in pharmaceutical ads describing worst-case scenario adverse health effects that don't apply to you.

The suspects who do not waive their rights but rather invoke them fall into two categories. The first tend to be wealthy and well-educated suspects, who immediately call their lawyers. As the late William Stuntz noted, affluent suspects are more likely "to know that talking to the police is a tactical error."⁷⁹ The second category includes recidivists, who have already tried unsuccessfully to outsmart the cops, and have since learned their lesson and their rights. For example, in one well-regarded study, 95% of suspects who invoke one of their *Miranda* rights had previously been convicted of a crime, and 82% had previously been convicted of a felony.⁸⁰ The same is true for juvenile recidivists, who have learned the hard way that waiving is not in their self-interest.⁸¹

I find these results morally troubling. The rich already have every advantage in our ostensibly adversarial system,⁸² as they can afford a dream team of

⁷⁹ Stuntz, *supra* note 75, at 993.

⁸⁰ See Leo, *supra* note 72, at 287 tbl.9 (finding that suspects with felony records are almost four times more likely to invoke their *Miranda* rights than suspects without criminal records); Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 469 (1999) (finding that suspects who assert their *Miranda* rights have been "hardened by exposure to the criminal justice system").

⁸¹ See Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 255-56 (2006) (finding that juveniles with prior felony arrests waived their *Miranda* rights 68% of the time, while juveniles without prior police contacts waived their *Miranda* rights 89% of the time).

⁸² I call our criminal justice system "ostensibly" adversarial because, as Judge and Professor Gerard Lynch noted almost twenty years ago, it has evolved into a "de facto administrative system" where prosecutors interpret the laws and adjudicate cases without written standards or hearings. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2142 (1998). Even the Supreme Court has admitted that we no longer have a system of adversarial criminal trials, but that instead plea bargains have replaced trials. *Lafler v. Cooper*, 566 U.S. 156, 169-70 (2012). As I have previously noted, this change favors the few individuals who can still afford to challenge the government's case. See Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 579 (2013) (arguing that the only defendants who can afford Justice Scalia's "gold standard" of justice—one of those rare criminal trials—are wealthy and sophisticated defendants, defendants who are championed by cause groups such as the ACLU, corporate criminal defendants who have their attorneys paid for by their employers, and those charged with regulatory offenses who are unlikely to see prison time). The fact that we are moving as a

powerful attorneys and private investigators. This group of suspects simply does not need even more advantages over the indigent suspects who waive their *Miranda* rights, confess, and plead guilty. Similarly, the *Miranda* warnings were certainly not designed to benefit recidivists. Recidivists have proven unable to conform their conduct to the law, and are thus the most culpable and most difficult to rehabilitate of all suspects. Like the wealthy, they are not my first choice of people who need a boost. Since the *Miranda* warnings benefit only two small and undeserving categories of offenders, they should be replaced with procedures, such as those I offer in Part III, that benefit guilty suspects equally, and weed out the actually innocent ones.

C. *The Warnings Fail to Apprise Suspects of Their Rights or Guide Police Conduct*

The *Miranda* warnings utterly fail to fulfill their two stated goals: (1) to “adequately and effectively” apprise a suspect of her rights; and (2) to regulate and guide police conduct regarding interrogation practices (rather than relying on case-by case totality-of-circumstances test under Due Process Clause). Instead, suspects are confused and deceived, often intentionally, and the mere fact that the *Miranda* warnings were read essentially guarantees that any subsequent statements are admissible, regardless of whether they are the “voluntary” product of “free will.”⁸³ Police continue to employ the same, sometimes offensive, tactics they used prior to *Miranda* as soon as they receive their waivers.

That *Miranda*’s first goal, to ensure that suspects understood their rights before undergoing custodial interrogation, has failed should be obvious from the first two perversions: the facts that the warnings are misleading and that over eighty percent of suspects waive all of the useful rights that they are offered.⁸⁴ Suspects subject to arrest do not have the full right to remain silent described in the *Miranda* warnings. Rather, they have the much more limited rights fleshed out by the Burger, Rehnquist, and Roberts Courts. That recidivists who have heard the warnings at least twice (and suffered the result of ignoring their rights) and well-educated individuals who understand the dynamics of the relationship frequently invoke their rights indicates that the other eighty percent of the suspects did not sufficiently understand their rights as described. If a rational individual understood her rights, she would remain silent, speaking only to demand counsel. That is what I tell all my students, and what police officers tell their own children. In fact, it appears that the *Miranda* Court expected that the number of custodial interrogations would dwindle, as most suspects would request counsel, and no attorney worth his

society towards a more inquisitorial system provides additional rationale for my proposals.

⁸³ Klein, *supra* note 5, at 449-54.

⁸⁴ See *supra* Sections II.A-B.

salt would allow her client to speak in his absence.⁸⁵

The *Miranda* majority's second goal was to regulate and guide police conduct regarding interrogation practices, so judges wouldn't later have to employ the "totality of circumstances" test to determine whether, in each custodial interrogation, the suspects' "will was overborne." Pre-*Miranda*, the Court employed the Due Process Clause to prohibit the admission of involuntary confessions, considering the actions of police, the characteristics of defendant, and the circumstances surrounding her confession.⁸⁶ This required a lot of time and effort for every criminal case before every court, and it provided no guidance to law enforcement as to what behavior overbore a suspect's will and made a confession involuntary, and what behavior was acceptable. Cases with similar facts would have different results, and no officer could predict when a judge might later reject a statement.

Unfortunately, this is still true. By the time the *Miranda* decision was rendered officers had already stopped using "the third degree" or any form of physical beatings or torture.⁸⁷ After the Wickersham Commission Report was published in 1931, professional police departments began to turn instead to

⁸⁵ See *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring) ("[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.").

⁸⁶ *Townsend v. Sain*, 372 U.S. 293, 307 (1963) (holding the due process voluntariness test applies where a confession was obtained by administering a truth serum to defendant); *Spano v. New York*, 360 U.S. 315, 322-23 (1959) (finding a defendant's will was overborne when fifteen officers questioned the defendant for "virtually eight straight hours before he confessed," ignoring his repeated requests for silence and a lawyer and using a "false friend" to trick defendant into believing his "friend's" job was at risk if he did not confess); *Ashcraft v. Tennessee*, 322 U.S. 143, 153-54 (1944) (finding a confession to be involuntary when obtained after thirty-six hours of continuous questioning); *Brown v. Mississippi*, 297 U.S. 278, 283 (1936) (applying the due process voluntariness test to suppress a confession obtained through whipping and mock lynching). Some element of "coercive police conduct" that is "causally related to the confession" is necessary to make any confession "involuntary" within the meaning of the Due Process Clause. *Colorado v. Connelly*, 479 U.S. 157, 164, 170-71 (1986) (holding a suspect's *Mirandized* confession was voluntary where "voice of God" commanded his confession because there was no government coercion).

This test is also used post-*Miranda*, as confessions obtained after proper warnings must still be voluntary within the meaning of due process, and some confessions are obtained in circumstances not requiring the *Miranda* warnings. However, in part because, as argued *infra* note 93 and accompanying text, compliance with *Miranda* generates a strong presumption in favor of admission, the Supreme Court has reversed only two convictions on due process voluntariness grounds since 1966. See *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) (finding suspect's confession was coerced when made under "credible threat of physical violence"); *Mincey v. Arizona*, 437 U.S. 385, 399-402 (1978) (finding confession involuntary where suspect interrogated while in "debilitated and helpless condition" in hospital).

⁸⁷ See RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 45 (2008).

prolonged incommunicado questioning during which they employed isolation, manipulation, and psychological pressure.⁸⁸ By 1966, most officers employed a number of these techniques from the still famous Inbau manual. These techniques included:

- 1) Isolate the suspect in unfamiliar surroundings;
- 2) Minimize the moral seriousness of his crime;
- 3) Offer excuses to suspect (bad childhood, problems with alcohol or drugs, the victim provoked him);
- 4) Assume confidently that the suspect is guilty throughout questioning (and never ask her if she did it);
- 5) Engage in good cop/bad cop routine;
- 6) Exhibit patience and persistence throughout long questioning period;
- 7) Tell the suspect that silence does not look good, and will just make things worse for him;
- 8) Induce a confessions by trickery (fake line-up, falsely inform the suspect that a witness or co-defendant has identified him, create and show the suspect false documents or evidence implicating him).

The *Miranda* Court spoke to none of these methods.⁸⁹ Therefore we do not know which, if any, of these methods might overbear a suspect's will. It appears that the *Miranda* majority believed that properly warned suspects would request an attorney, and the attorney would immediately terminate the interrogation.⁹⁰ Compulsion would be dispelled because interrogations would not occur. In those few instances that the Court anticipated a suspect would waive his rights after being warned, this waiver would indicate that the mere reading of the *Miranda* warnings magically did, in fact, dispel the inherently coercive nature of the custodial interrogation, and the resulting statement would be voluntary.⁹¹ Instead, completely unanticipated by the Warren Court,

⁸⁸ See, e.g., FRED INBAU & JOHN REID, LIE DETECTION AND CRIMINAL INTERROGATION 142 (3d ed. 1953). When Fred Inbau and John Reid published the new edition of the manual shortly after *Miranda*, they noted that "all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used after the recently prescribed warnings have been given to the suspect under interrogation." FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (2d ed. 1967).

⁸⁹ While the "Mutt and Jeff" routine, fake sympathy, and deception appeared to offend Chief Justice Warren, *Miranda* "did not condemn any specific techniques as such or hold that evidence obtained by use of them would be inadmissible. Reliance was placed on warning and counsel to protect the suspect." Sheldon H. Elson & Arthur Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645, 667 (1967).

⁹⁰ *Miranda v. Arizona*, 384 U.S. 436, 474 (1966) ("If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.").

⁹¹ *Id.* at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be

over eighty percent of suspects waive all *Miranda* rights, future Courts riddled *Miranda* with exceptions, and police officers learned to work around it.

Post-*Miranda* judges generally no longer bother employing the Due Process test to attempt to determine if the custodial interrogation overbore a suspect's free will. The *Miranda* warnings replaced this important inquiry. If the *Miranda* warnings are given to the suspect before custodial interrogation begins, that is good enough for government work. A waiver is implied,⁹² and judges have created an informal but extremely strong presumption that any statements given are voluntary.⁹³ Perhaps judges recognize that a guilty suspect is a great place to obtain information about the crime he committed, that there are no ethical problems surrounding questioning an individual once the government has established probable cause to believe him guilty, and that, beyond prohibiting physical and psychological force, there is no method for determining when a suspect's "will was overborne in such a way as to render his confession the product of coercion."⁹⁴

Regardless of the reasons judges refuse to review statements for voluntariness, *Miranda* has failed. The high waiver rate coupled with the presumption that the warnings make all resulting statement admissible result in the regular employment of those interrogation techniques that we considered offensive in 1966. Local legislatures and law enforcement personnel must determine which methods of official persuasion are acceptable, and which are unduly coercive.

the product of his free choice.").

⁹² See *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010) ("Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's statement establishes an implied waiver . . .").

⁹³ See, e.g., *Duke*, *supra* note 74, at 632 ("One who receives warnings but nonetheless 'waives' his rights to silence and to have a lawyer present thereby makes his incriminating statements appear more clearly voluntary and reliable than if he made them without any warnings or waivers."); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 60-62 (2010) ("The failure to discuss the underlying merits of police conduct is particularly disappointing given that *Miranda* now seems to supplant any meaningful examination in decided cases of the voluntariness of confessions."); Klein, *supra* note 5, at 419 ("The *Miranda* decision offered the indispensable advantage[] . . . by presuming confessions to be valid when the prescribed warnings are given . . ."); Weisselberg, *supra* note 23, at 1523 ("But it turns out that following *Miranda*'s hollow ritual often forecloses a searching inquiry into the voluntariness of a statement."). As *Duke* noted, "[i]n the three decades prior to *Miranda*, the Supreme Court held that confessions were involuntary in at least twenty-three cases. In the four decades since *Miranda* . . . the Court has decided only three voluntariness cases, and has only held two confessions involuntary." *Duke*, *supra* note 74, at 652-64.

⁹⁴ *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991) (reversing a conviction where FBI informant offered to protect the suspect's life if he confessed to sexually assaulting and murdering his stepdaughter).

D. *The Warnings Fail to Identify False Confessions*

The *Miranda* doctrine, in addition to benefitting recidivist and well-educated suspects, harms uneducated, mentally ill, cognitively challenged, and juvenile suspects. Those latter categories of suspects are more likely to confess, and their confessions are more likely to be false.⁹⁵ Youthful and mentally challenged suspects are more likely to wish to please the interrogator, and are less likely to comprehend the process in which they are involved.⁹⁶ Juveniles, for example, confess at rates higher than adults do. Two studies conducted by Barry Feld in 2006 and 2013 found that 80% to 93% of the juveniles questioned waived their *Miranda* rights, and either confessed or provided some inculpatory statement.⁹⁷ Other scholars made similar findings.⁹⁸ Juveniles waive their right at a higher rate than adults and are more likely to confess because children are raised to respond to adult authority figures.⁹⁹

That fact alone might appear unfair, though perhaps we could live with it in

⁹⁵ See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 919 (2004) (“Notwithstanding the role of psychological coercion as the primary cause of interrogation-induced false confession, some individuals—particularly the mentally retarded and juveniles—are more vulnerable to the pressures of interrogation and therefore less likely to possess or be able to muster the psychological resources or perspective necessary to withstand accusatorial police questioning.”).

⁹⁶ *Id.* at 1005 (“[J]uvenile suspects share many of the same characteristics as the developmentally disabled, notably their eagerness to comply with adult authority figures, impulsivity, immature judgment, and inability to recognize and weigh risks in decision-making, and appear to be at greater risk of falsely confessing when subjected to psychological interrogation techniques . . .”).

⁹⁷ Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL’Y 395, 431 (2013) (reviewing 307 video-recordings of juvenile interrogations and finding 92.8% of juveniles waived their *Miranda* rights); Feld, *supra* note 81, 255, 303 (reviewing fifty-three video-recordings of juvenile interrogations and finding “80% of the juveniles waived their *Miranda* rights”).

⁹⁸ See, e.g., Hayley M.D. Cleary, *Police Interviewing and Interrogation of Juvenile Suspects: A Descriptive Examination of Actual Cases*, 38 LAW & HUM. BEHAV. 271, 276 (2014) (finding that of fifty-eight juveniles, 36.2% fully confessed and 31% made incriminating statements, for an overall success rate of 68%); Sharon L. Davies, *The Reality of False Confession—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 215-16 (2006) (describing false confessions given by suspects who ranged in age from fourteen to sixteen); Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communications with Attorneys, and Appeals*, 29 LAW & HUM. BEHAV. 253, 261 (2005) (finding a juvenile confession rate of 55.3%).

⁹⁹ See Feld, *supra* note 81, at 230 (“Social expectations of obedience to authority and children’s lower social status make them more vulnerable than adults during interrogation.”); A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 53 (1970) (finding that over ninety percent of juveniles interrogated freely and voluntarily waived their *Miranda* rights in part due to lack of understanding).

order to combat crime. Unfortunately, these same categories of suspects tend to confess falsely. In a study conducted by Steven Drizin and Richard Leo, of 125 proven false confessions obtained in the post-*Miranda* era, forty were from suspects under the age of eighteen at the time they confessed, and twenty-eight involved mentally retarded defendants.¹⁰⁰ According to Brandon Garrett, of the 250 convicted persons proven innocent by DNA testing during the first twenty-one years of the innocence movement, from 1989 to 2010, forty, or sixteen percent, had falsely confessed.¹⁰¹ Of the exonerations in the last five years, another twenty-six false confessions were revealed.¹⁰² At least half of these false confessions involved juveniles, the intellectually disabled, or the mentally ill.¹⁰³ None of these false confessions was obtained in violation of *Miranda*, and every one of them was ruled voluntary and admissible by the court.¹⁰⁴

Youthful and mentally ill suspects comprise a significant percentage of all suspects. By some estimates, fifteen to twenty-five percent of prisoners suffer from mental illness.¹⁰⁵ Youth account for a similarly significant proportion of individuals charged with a crime. The FBI reported in 2011 that youth under

¹⁰⁰ Drizin & Leo, *supra* note 95, at 968, 971; *see also* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 551 (2005) (“False confessions . . . played a large role in the murder convictions that led to exonerations, primarily among two particularly vulnerable groups of innocent defendants: juveniles, and those who are mentally retarded or mentally ill. Almost all the juvenile exonerees who falsely confessed are African American.”). *See generally* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002).

¹⁰¹ *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 5-21 (2011); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1052, 1052 (2010); *see also* Jacobi, *supra* note 53, at 9 (“Of wrongful conviction cases tracked by the Innocence Projects, approximately 28% involved false confessions or self-incriminating statements.”).

¹⁰² *See* Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 395-96 (2015).

¹⁰³ *Id.* at 399-400 (“Of these twenty-six new false confessions among the DNA exonerees, ten were juveniles, at least two more had an intellectual disability, and one more was mentally ill.”).

¹⁰⁴ At least for the confessions in the first wave. *See* Garrett, *supra* note 101, at 1057.

¹⁰⁵ *See* REBECCA VALLES, CTR. FOR AM. PROGRESS, DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA’S JAILS AND PRISONS 2 (2017), <https://cdn.americanprogress.org/wp-content/uploads/2016/07/15103130/CriminalJusticeDisability-report.pdf> [<https://perma.cc/74BE-LDW7>] (referencing Bureau of Justice statistics that “fully 1 in 5 prison inmates have a serious mental illness”). The Human Rights Watch reported similar statistics.; *see also* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 17-18 (2003), <https://www.hrw.org/sites/default/files/reports/usa1003.pdf> [<https://perma.cc/E8MK-FRXY>].

age eighteen accounted for fourteen percent of all arrests.¹⁰⁶ Justice demands some method for identifying these suspects before custodial interrogation begins. In order not to be perverse (for surely no one on any Court or of any political stripes desires false confessions), *Miranda* must be modified by delivering special warnings that might be effective on those groups, using specially trained magistrates to interrogate them using modified questions and methods. Alternatively, law enforcement could decide not to interrogate them at all.

E. *The Warnings Are Incompatible with History and Morality*

Though there is some debate over the origins of the Fifth Amendment,¹⁰⁷ it was not designed to protect some indefinable notion of autonomy nor allow suspects a sporting chance at trial.¹⁰⁸ Most likely, the English as well as American colonists enacted the clause preventing any person from being “compelled in any criminal case to be a witness against himself”¹⁰⁹ in order to bar confessions extracted by torture or compelled by swearing an oath, as had been done by the Spanish Inquisition and the Star Chamber.¹¹⁰ The ban on

¹⁰⁶ CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM 1 (2012), <https://www.campaignforyouthjustice.org/documents/KeyYouthCrimeFacts.pdf> [<https://perma.cc/ND9G-CHK6>]. However, some statistics suggest that the number of youth arrests is steadily declining. See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, STATISTICAL BRIEFING BOOK: LAW ENFORCEMENT & JUVENILE CRIME (2015), <https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qa> [<https://perma.cc/6CW3-XEGH>].

¹⁰⁷ Leonard Levy and John Wigmore believed the foundations of the Self-Incrimination Clause were established at common law as a result of the downfall of the Star Chamber and Court of High Commission. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968); JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2250, at 278-84. The English High Commission required the accused to swear an *ex officio* oath and answer questions truthfully. Alschuler, *supra* note 42, at 2641. More recent scholars believe that the origins began before English common law in the *ius commune*. M. R. T. Macnair, *The Early Development of the Privilege Against Self-Incrimination*, 10 OXFORD J. LEGAL STUD. 66, 78-79 (1990). One of the principle maxims of *ius commune* was *nemo tenetur prodere seipsum* (“no-one is bound to betray himself”). *Id.* at 67.

¹⁰⁸ 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 238-39 (London, C. H. Reynell 1827) (describing the “fox-hunter’s reason” for the rule against self-incrimination); see also Ronald J. Allen, *Miranda’s Hollow Core*, 100 NW. U. L. REV. 71, 72 (2006) (arguing that *Miranda* is gibberish on its own terms).

¹⁰⁹ U.S. CONST. amend. V.

¹¹⁰ Alschuler, *supra* note 42, at 2630-31 (“[T]he privilege against self-incrimination was not intended to afford defendants a right to remain silent or to refuse to respond to incriminating questions. Its purpose was to outlaw torture and other improper methods of interrogation.”); Marvin E. Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U.

confessions obtained by torture excludes unreliable confessions and prevents inhumane government methods of extracting confessions.¹¹¹ The ban on compelled statements under oath prevents moral and psychological torture—the cruel trilemma between self-accusation, perjury, or contempt.¹¹² Contempt and conviction both lead to jail, which violates the natural duty of self-preservation.¹¹³ Perjury leads straight to hell, as it was believed that God punished those who lied under oath.¹¹⁴ Moreover, these oaths were required without what we would now identify as probable cause to believe a crime had been committed; suspects were not informed of the charges against them, and private and religious matters were raised.¹¹⁵

Thus, most scholars and jurists generally agree that the Framers' intended the privilege to protect people from abuse of process, intrusion of private matters, religious persecution, and mental and physical torture. The purposes thus include both preventing false confessions and preventing true ones gathered by abusive means. There is also general agreement on common law and colonial American practice at the time of the Fifth Amendment's enactment. Criminal defendants were not permitted to testify on their own

L. REV. 516, 530 (1976) ("A state taking more responsibility upon itself to pursue the truth by fair and civilized means . . . would, as do most countries, claim the common sense right to question the defendant—the best witness to his own guilt or innocence—exerting the unquestionably severe pressure of adverse inferences from silence, but otherwise ensuring courtesy, safety, and an entire absence of trickery."). See also Ronald J. Allen, *The Misguided Defenses of Miranda v. Arizona*, 5 OHIO ST. J. CRIM. L. 205, 206-11 (2007) (suggesting there is nothing in the history of the Fifth Amendment that should have led the Court to the decision it came to in *Miranda*).

¹¹¹ Alschuler, *supra* note 42, at 2648 ("The Law of *England* . . . does not use the Rack or Torture to compel Criminals to accuse themselves.").

¹¹² *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 79 (1964); see also *Brogan v. United States*, 522 U.S. 398, 400-04 (1998) (stating an innocent person does not suffer from even a "lemma," and rejecting a self-incrimination defense raised by a defendant charged with lying to the FBI, in violation of 18 U.S.C. § 1001, by denying his guilt).

¹¹³ Macnair, *supra* note 107, at 71-72 (arguing "the natural duty of self-preservation . . . is not overridden by the mere fact of commission of a crime").

¹¹⁴ Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1486-87 (1997) (writing that one interest the privilege against compelled self-incrimination was designed to serve was "sparing a guilty defendant from the enormous temptation to lie under oath and, consequently, suffer eternal damnation in the fires of hell").

¹¹⁵ R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 984 (1990) (the privilege is "a protection against the exercise of overly intrusive powers by public officials seeking to pry into the private lives of ordinary men and women"); Macnair, *supra* note 107, at 72 (describing how the Court of High Commission would require the accused to swear to the oath before she was informed of the charges).

behalf.¹¹⁶ Evidentiary rules banned testimony forced by compulsory oath or physical torture; such rules did not ban voluntary, unsworn testimony.¹¹⁷ Therefore, the practice at common law and in America was for a justice of the peace to examine an arrested person *not* under oath, and to record her response. “The justice of the peace [then] testified at trial as to the content of the defendant’s statement.”¹¹⁸ Juries were permitted to draw adverse inferences from a defendant’s failure to give unsworn testimony.¹¹⁹

Given this historical context of the self-incrimination clause, and the shared moral values we now hold regarding truthfulness toward law enforcement, *Miranda* is a dismal failure. Let us start with the Framers’ intent. If we are trying to avoid physical or psychological force, whatever was causing confessions to be involuntary prior to *Miranda* continues to exist for the eighty percent of suspects who waive their rights. If we find some of those police techniques objectionable, we need to combat such compulsion by regulating the police methods of obtaining statements. Likewise, nothing about refusing to allow a jury to draw an adverse inference from a defendant’s refusal to testify comports with historical practice. Magistrates routinely interrogated suspects pretrial at our founding, though such questioning was not done under oath. In addition, juries regularly drew adverse inferences from a suspect’s refusal to submit to such questioning. Perhaps a refusal to allow a jury to draw an adverse inference made sense when defendants were not permitted to take the stand in their own defense.¹²⁰ However, it makes little sense today, when defendants can testify if they so choose. Moreover, my proposal, disallowing

¹¹⁶ See *Ferguson v. Georgia*, 365 U.S. 570, 573-74, 596 (1961) (asserting that by the seventeenth century, criminal defendants were permitted to call witnesses on their behalf, but were not permitted to testify themselves because they were “an interested witness,” and holding that Georgia’s statute preventing defendants from testifying on their own behalf unconstitutional). Georgia was the last state to bar defendant testimony. See *Rock v. Arkansas*, 483 U.S. 44, 50-53 (1987) (holding that the constitutional right to testify in one’s own behalf stems from the Fourteenth Amendment’s guarantee of due process, the Sixth Amendment Compulsory Process Clause, and the Fifth Amendment’s self-incrimination guarantee).

¹¹⁷ *Mitchell v. United States*, 526 U.S. 314, 332-33 (1999) (Scalia, J., dissenting) (“The longstanding common-law principle, *nemo tenetur seipsum prodere*, was thought to ban only testimony forced by compulsory oath or physical torture, not voluntary, unsworn testimony.”).

¹¹⁸ *Id.* at 333 (finding pretrial procedures in colonial America were governed by the Marian Committal Statute).

¹¹⁹ *Id.* (dissenting from the majority holding that declined to allow a sentencing judge to draw an adverse inference from the defendant’s silence at sentencing, and criticizing the *Griffin* rule disallowing the jury to draw an adverse inference from a defendant’s refusal to take the stand in his own defense).

¹²⁰ *Griffin v. California*, 380 U.S. 609, 614-25 (1965) (holding that jury may not draw an adverse inference from a defendant’s refusal to take the stand, as that would violate his privilege against self-incrimination).

an adverse inference from a defendant refusing to take stand at trial but allowing the jury to draw an adverse inference from her refusal to answer official questions at the earlier time of arrest, comports with current Court precedent.¹²¹

My proposal is also consistent with the deeply ingrained notion that society is entitled to every person's evidence in general, not only at grand jury stage.¹²² A witness at the grand jury is compelled to testify under oath (though she can claim the privilege against self-incrimination to refuse to answer particular questions where testimony may "tend to show that [the witness] himself had committed a crime"¹²³). Many decisions reaffirm "the historically grounded obligation of every person to appear and give his evidence before the grand jury. 'The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.'"¹²⁴ A prosecutor at the grand jury is not required to advise the witness, even where she is the target of the investigation, that she has a right to exercise her privilege against self-incrimination.¹²⁵ No more should be granted to suspects outside of the grand jury.

Moving to our shared moral intuitions, I submit that there is nothing abusive about expecting someone to at least listen to questions from a government official about a particular chargeable crime when there is probable cause to believe the suspect committed that crime. In fact, it defies common sense not to do so. One so naturally expects a suspect to provide an explanation under such circumstances that it is illogical to expect a jury to draw no adverse

¹²¹ See *id.* My proposal also protects innocent defendants from convicting themselves by a bad performance on the witness stand. See *Quinn v. United States*, 49 U.S. 155, 163-64 (1955) ("[T]he fact that a witness expresses his intention in vague terms is immaterial so long as the claim is sufficiently definite to apprise the [court] of his intention."). Under my proposal, a defendant's answer to the police officer or magistrate, if she chooses to answer, is not heard by the jury.

¹²² A subpoena duces tecum compels production of tangible evidence and a subpoena ad testificandum compels persons to appear before the grand jury and give testimony. See FED. R. CRIM. P. 17. Both are enforced by contempt and neither require showing of probable cause.

¹²³ *Counselman v. Hitchcock*, 142 U.S. 547, 562, 586 (1892) (holding that privilege against self-incrimination is available to a grand jury witness); see also *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

¹²⁴ *United States v. Dionisio*, 410 U.S. 1, 9-10 (1973) (quoting *Blair v. United States*, 250 U.S. 273, 281 (1919)). The *Blair* Court noted that the grand jury's inquisitorial function was well established at the time of the Constitution's adoption, and this function was as revered for its service as a buffer between the government and the individual. See *Blair*, 250 U.S. at 279-81.

¹²⁵ *United States v. Washington*, 431 U.S. 181, 189 (1977) (holding that a witness need not be warned that he is a target of the grand jury investigation); *United States v. Mandujano*, 425 U.S. 564, 581-82 (1976) (holding that *Miranda* did not apply to grand jury witnesses).

inferences from a suspect's refusal to explain herself to law enforcement.¹²⁶ As Justice Thomas wrote in a 1999 dissent, "[I]f I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear."¹²⁷ Likewise, employers consider it proper to question an employee accused of stealing from the company and a fireable offense if they refuse to answer.¹²⁸ Congress, through the Federal Sentencing Guidelines, encourages judges to award discounted sentences to defendants who waive their privilege and provide substantial assistance to federal prosecutors regarding additional criminal offenses¹²⁹ and to offer hugely discounted criminal fines (or even dismissals) to corporations that institute compliance programs to identify and turn over employees who may have violated federal law.¹³⁰

In any criminal matter, the person in the best position to explain whether he has an alibi or motive to commit an offense is the person charged with committing it. Thus, as Al Alschuler and other scholars have argued, a sensible legal and moral system would allow questioning where there are reasonable grounds to suspect a person,¹³¹ and would reward voluntary confessions. While

¹²⁶ I believe juries try their best not to draw an adverse inference from a defendant's failure to testify when so instructed by the judge, but even those who understand that the defendant has a Fifth Amendment right to remain silent must find it curious. I know I would.

¹²⁷ *Mitchell v. United States*, 526 U.S. 314, 332 (1999) (Thomas, J., dissenting). In *Mitchell*, four Justices dissented in the application of *Griffin* to sentencing and suggested that it be reexamined. *Id.* at 331 (Scalia, J., dissenting).

¹²⁸ Many employers have such a policy. This is constitutional, of course, unless the employer is the government. *See Lefkowitz v. Turley*, 413 U.S. 70, 81 (1973) (holding that state may not disqualify individuals as public contractors if they refuse to testify and waive immunity).

¹²⁹ U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2016) ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.").

¹³⁰ *See id.* §§ 8C2.5(f)-(g) (reducing culpability score where an organization had an "effective compliance and ethics program" and demonstrated "self-reporting, cooperation, and acceptance of responsibility"); U.S. ATTORNEY'S MANUAL § 9-28.300(4), (6) (2017) (providing that one of the bases for determining whether to charge a corporation is "the corporation's timely and voluntary disclosure of wrongdoing" and its "willingness to cooperate in the investigation of its agents"); Susan Klein & Crystal Flinn, *Social Media Compliance Programs and the War Against Terrorism*, 8 HARV. NAT'L SECURITY J. 53, 83-84 (2017), available at <http://harvardnsj/volum-8/> (comparing proffered antiterrorism legislation with other legally required self-reporting programs such as corporate compliance programs rewarded under the U.S. Sentencing Guidelines).

¹³¹ SCHAEFER, *supra* note 42, at 59 ("[T]he Fifth Amendment privilege against self-incrimination . . . runs counter to our ordinary standards of morality."); Alschuler, *supra* note 42, at 2637; Alschuler, *supra* note 73, at [PINCITE] ("No legal system has failed to seek evidence from the accused, and no sensible legal system ever would."); R. Kent

the text of the Fifth Amendment disallows a criminal penalty for a defendant's refusal to answer questions about her own criminal conduct on the stand, nothing in the text of the Self-Incrimination Clause or in basic morality should prevent juries from drawing an adverse inference from such failure. Nor, certainly, does the text prevent pretrial questioning of a suspect, so long as his answers are excluded at his criminal trial. The text of the clause demands only that defendant not be forced to take the stand at his own criminal trial; any other meaning of word "compelled" is nonsense.

III. PROPOSED *MIRANDA* REFORMS

To begin with, I propose that every jurisdiction that wishes to increase the odds of affirming a conviction where a confession was admitted after a change in *Miranda* procedures first video and audiotape all custodial interrogations, so at the very least the reviewing court can more easily exclude involuntary confessions using the Due Process "totality of circumstances" test. Virtually every scholar agrees that taping is necessary,¹³² as does the Department of Justice, at least outside of terrorism and public safety cases.¹³³ We should start immediately by recording custodial interrogations that occur at police stations. I suggest that a system be devised whereby the recording begins automatically when the officer turns on the interrogation room light; that the recording be time and date stamped; and that it cease only once the suspect has been moved to a holding cell. Eventually, as the technology improves, recording should be extended to every place where a conversation may occur between suspect and officer. Many of the larger police departments are already moving to body cameras as well as cruiser cameras.¹³⁴ There is absolutely no plausible excuse

Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 22-32 (1981) (arguing that it is moral to question a person suspected of wrongdoing when the person is questioned on "solidly grounded suspicion"); Charles T. McCormick, *Law and the Future: Evidence*, 51 NW. U. L. REV. 218, 222 (1956) ("[O]rdinary morality . . . sees nothing wrong in asking a man, for adequate reason, about particular misdeeds of which he has been suspected and charged.").

¹³² See, e.g., Drizin & Leo, *supra* note 945, at 997 ("The risk of harm caused by false confessions could be greatly reduced if police were required to electronically record the entirety of all custodial interrogations of suspects."); Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387, 425 (2001) ("[A] system of audiotaping and videotaping police questioning and a modified set of warnings . . . would and should pass constitutional muster.").

¹³³ Memorandum from the Off. of the Deputy Att'y Gen. to the Associate Att'y Gen. et al., James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just. (May 12, 2014) (on file with author) (establishing a presumption that federal law enforcement agencies will covertly or overtly electronically record statements made by suspects in their custody subject to certain exceptions). The primary exception concerns questioning done for the purpose of gathering public safety information under *Quarles* and or to gather national security-related intelligence. *Id.*

¹³⁴ Katie Delong, *One-Third of United States Police Departments Using Body Cameras:*

not to do this, whether a jurisdiction wishes to innovate with new *Miranda* rules or not.

The Court can give local jurisdictions space to do this by selecting an appropriate case for review and re-emphasizing the prophylactic nature of the *Miranda* rule.¹³⁵ After all, *Miranda* was not intended to be a “constitutional straitjacket,” and the Court invited states and Congress to create adequate alternatives.¹³⁶ When the Court gets its first test case, it could encourage such experimentation by giving the state a safe harbor: a rebuttable presumption that the self-incrimination clause is not violated so long as the confession is recorded and lasts no longer than four hours¹³⁷ with a peace officer or one day (eight hours with a lunch break) if performed by a magistrate. Such a presumption should apply only where officers have followed their jurisdiction’s local rules prohibiting physical or psychological coercion by detectives, and have avoided those specific practices already condemned by the Court as resulting in an involuntary confession under the due process rule.

That presumption of admissibility can be rebutted if the police department fails to properly tape the interrogation or otherwise fails to comply with local rules, such as the rules discussed *infra* in Section III.B regarding the use of lies and trickery as an interrogation technique. The presumption can also be rebutted by defense allegations of coercion that point to specific moments of the taped interrogation. Legislatures will want to avoid requiring judicial review of each recording, as one primary benefit of *Miranda* is routinely admitting voluntary confessions without having to engage in the cumbersome totality-of-the-circumstances test under the Due Process Clause.

Finally, detectives would be required to photocopy a suspect’s identification

They’re Expensive, so Are They Worth It?, Fox6Now (Mar. 2, 2015, 9:28 PM), <http://fox6now.com/2015/03/02/one-third-of-united-states-police-departments-using-body-cameras-theyre-expensive-so-are-they-worth-it/> [<https://perma.cc/442X-DXFE>] (“About one-third of the 18,000 police departments in the United States are using body cameras.”).

¹³⁵ See *Dickerson v. United States*, 530 U.S. 428, 437-40 (2000). As Alschuler so accurately stated, “[c]reating a procedure ‘at least as effective’ as *Miranda*’s would not take much. For example, a legislature could require a police officer to wave a wet noodle in the direction of Mecca.” Alschuler, *supra* note 73, at [PINCITE]; see also Kamisar, *supra* note 132, at 425 (“*Miranda* left the door open for Congress to replace the warnings with other safeguards that perform the same function. Unfortunately, Congress did not walk in the door. But the door remains open.”).

¹³⁶ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

¹³⁷ Drizin & Leo, *supra* note 94, at 948 (noting more than eighty percent of false confessors were interrogated for more than six hours). Thus, Leo recommends strict time limits for police interrogations. RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 245, 311 (2008) (“[C]ourts and legislatures may wish to specify time limits for interrogations. Lengthy incommunicado interrogation is not only inherently unfair, but, as recent research has documented, far more common in false confession cases than other ones. Routine interrogations last less than two hours on average, but interrogations leading to false confessions often last longer than six hours.”).

or otherwise prove the suspect's age, and where suspects show signs of mental incapacity officers would have to administer a test to determine the suspect's ability to understand and waive her rights. Juveniles and mentally challenged suspects would then be shunted for questioning automatically into the "official magistrate," rather than the "detective track" described below. These magistrates would be trained as to how to question juvenile and mentally challenged suspects to obtain accurate information, rather than what the questioner wants to hear. Juveniles and mentally challenged suspects unable to converse with the magistrate or be tested by an alternative government official would be provided a lawyer to negotiate charging, release, or some other suitable arrangement. Magistrates who are able to converse with juveniles or mentally challenged suspects would have the authority to offer the same deal that adults of average abilities receive from choosing the detective track.

I suggest that local legislatures or administrative agencies debate or have notice and review periods, and adopt something similar to the following for a mid-sized to large police department. Officers should read the entire sheet, showing the suspect all the available options, before obtaining written waiver or shunting the suspect to the official magistrate. These warning must be offered to each suspect before questioning, judges cannot craft any exceptions to the requirement that they be read, and suspects would not be permitted to forgive any intentional or inadvertent mistakes in providing these warnings in a later-drafted plea agreement.¹³⁸

A. *The New Warnings - Magistrates*

(1) You have been arrested for ——[insert crime] (Note that this warning is nonwaivable). We want to talk to you about [insert general description of crime (e.g., killing of John Smith, robbery of stereo)].

(2) You have the right to an attorney, a right not be called as a witness in your own criminal trial, and a right to exclude any statements you make today at any future criminal trial for the crime of arrest. If you cannot afford an attorney, one will be provided to you. However, you do NOT have the right to avoid questioning by either a detective or an official magistrate. One or the other will question you.

(3) You get to select either informal questioning by a detective or formal questioning by an official magistrate. Listen to me describe both before you decide which you will select.

¹³⁸ I have noted in prior work that if any constitutional or statutory right can be waived in a plea negotiations, it is only a matter of time before prosecutors add such waivers to standard plea deals. *See generally* Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015) (observing that federal prosecutors now demand waivers of not just those rights necessary to avoid trial, but non-trial rights, such as the right to direct appeal and collateral attack, the right to immigration advice, and the right to discovery material).

(4) First, I am going to describe questioning by the detective. There are two different rights involved here and two different rewards for giving up those rights, so please listen carefully.

(a) You can give up, or “waive,” your right to have an attorney present during the questioning and your right to exclude any statement you will make at this questioning session at any potential future criminal trial concerning — [insert crime]. If you sign written waivers of your right to exclude these statements at a future criminal trial and your right to have an attorney present now during questioning, we promise to question you for no longer than four hours, to video and audiotape your session, and give you a fifty percent discount on the average sentence if you are eventually convicted or plead guilty to [insert crime].¹³⁹ If you convince us that you are not guilty during questioning, you may go home immediately.

Notice that this essentially allows suspects to choose, as they do anyway during plea negotiations, whether to admit guilt in exchange for a discount or go to trial and risk a much heavier penalty if convicted. In the federal system, this would be done during plea negotiations, reduced to written form, and offered to the court during the plea hearing.¹⁴⁰ Under my proposal, the suspect obtains the benefit of a good deal if she confesses. This is preferable to the current system, where suspects confess to police not because they are rewarded with better plea deals but because they did not understand their rights or they are novices to system. Suspects should not receive miserly plea deals based upon fortuity. The warnings continue:

(b) If you do not wish to give up your right to an attorney, you may talk to an attorney and then decide whether to give up your right to exclude any statement you will make at this questioning session at any potential future criminal trial involving — [insert crime]. It may take

¹³⁹ One advantage is that such a process would require jurisdictions to calculate what the “average” sentence is for each crime and to equalize sentencing even without guidelines. I have suggested this as part of an amendment to Federal Rules of Criminal Procedure 11 and 16. See generally Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L.R. 559 (2013). This, in essence, moves the plea negotiation, which resolves ninety-seven percent of criminal felony charges anyway, to a slightly earlier time in some cases. Erica Goode, *Stronger Hand for Judges in the “Bazaar” of Plea Deals*, N.Y. TIMES, Mar. 23, 2012, at A12 (“97 percent of federal cases and 94 percent of state cases end in plea bargains, with defendants pleading guilty in exchange for a lesser sentence.”). It also creates the potential for moving some decision-making from prosecutors to officers. This process will not work if the suspect is arrested for a capital offense, unless the suspect is clearly not death-eligible or the prosecutor is willing to take death off the table. The detective should obtain permission from the prosecutor before deciding to question under such terms, and the prosecutor would have to decide what kind of sentence reduction might be appropriate.

¹⁴⁰ See FED. R. CRIM. P. 11(b)(3) (“Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.”).

a few hours or even a full day for you to find your own attorney or, if you are indigent, for us to provide one to you. You will be held in an interrogation room or in jail until an attorney can be located. If, after consultation with your attorney, you sign a written waiver of your right to exclude any statements you make today at any future criminal trial, we will question you for no longer than four hours, video and audio tape your session, and give you a twenty-five percent discount on the average sentence if you are eventually convicted or plead guilty to — —[insert crime]. If you and your counsel convince us that you are not guilty, you may go home immediately.

Note that if the suspect selects this option, first providing an attorney and second proceeding with interrogation, this may require a wait, especially in a smaller office. Of course there is always the chance that the defense attorney will advise the suspect not to sign the waiver of her privilege against self-incrimination. If that happens, the officer will proceed to the final warning, number 5 below.

(5) “If you refuse to sign a written waiver of your right to an attorney and/or your right to exclude any statement you make to me at your later criminal trial, and talk to a me about [insert general description of crime], a government official will question you anyway. This questioning will not be done by me, the investigating officer. Instead, you will be questioned under oath by our “magistrate official” for no longer than one full eight-hour day (with a lunch break) sometime within the next forty-eight hours. You may refuse to answer the magistrate’s questions. However, if you do so, and you are tried for a crime involving — —[insert general elements of crime], the jury at your criminal trial will be told that you refused to answer the magistrate’s questions.¹⁴¹ If you knowingly lie to

¹⁴¹ This piece of my proposal is similar to English practice, which allows the prosecutor to comment to the jury on a suspect’s refusal to answer questions asked by the police (though they provide solicitors for suspects during custodial interrogation). The English Act goes much further than my proposal, as once an accused has been properly warned of the consequences of failure to testify, the jury “may draw such inferences . . . as appear proper.” Criminal Justice and Public Order Act 1994, c. 33, § 34(2)(d) (Eng.); Chris Blair, *Miranda and the Right to Silence in England*, 11 TULSA J. COMP. & INT’L L. 1, 3 (2003) (“Although [the United States and England] had historically disallowed the drawing of adverse inferences from the exercise of the right to remain silent, England reversed itself on that point with the adoption of the Criminal Justice and Public Order Act in 1994.”). Suspects in Wales are advised that “it may harm your defence if you do not mention when questioned something which you later rely on in court.” Blair, *supra*, at 3. In Norway, a defendant need not respond to the charges read against him at the outset of trial, but if he refuses to “answer, the president of the court may inform him that this may be considered to tell against him.” William T. Pizzi, *Punishment and Procedure: A Different View of the American Justice System*, 13 CONST. COMMENT. 55, 61 (1996). Scholars advocating for changing *Miranda* along these lines include Craig Bradley. See Craig M. Bradley, *Interrogation and Silence: A Comparative Study*, 27 WIS. INT’L L.J. 271, 271 (2009).

the magistrate official, that lie will be prosecuted as perjury,¹⁴² with a potential one-year sentence per lie. Statements you make at this session will not be used against you at your criminal trial for ——[insert crime], though they may be used against you in a perjury trial if you lie. Any leads we develop from your answer to the magistrate’s questions, including but not limited to physical evidence or witness testimony, will be used against you if you are eventually tried for the crime involving ——[insert general description of crime], or any other crime.”

I propose that the “magistrate official” be technically an official employed by the local court system. I model this after the United States Probation Office, an office supervised by the federal judicial branch.¹⁴³ These federal probation officials question every federal criminal defendant who agrees to the interview before her bail and sentencing hearings, in order to prepare the bail and Presentencing Reports submitted to federal judges.¹⁴⁴ Any player in the federal criminal justice system will report that these well-trained Probation officers are extremely effective at pulling information from suspects and defendants, and then conducting full and independent investigations of the information provided to determine its accuracy.

Some scholars recommend a double-blind process whereby the questioner does not know the details of the crime so she cannot inadvertently reveal

¹⁴² See, e.g., 18 U.S.C. §§ 1001, 1621, 1623 (2016) (defining false statements within the jurisdiction of federal agencies). The government must prove that the defendant knew his statement was untrue, that the lie was material, and that the defendant intended to lie. See, e.g., *Brogan v. United States*, 522 U.S. 398, 408 (1998) (holding that there is no exception to 18 U.S.C. § 1001 for a false statement consisting of an “exculpatory no”); *United States v. Dunningan*, 507 U.S. 87, 94 (1993) (permitting perjury enhancement at sentencing); *United States v. Yermian*, 468 U.S. 63, 75 (1984) (holding that government must prove that the defendant knew his statement was false and that he either knew or should have known that the information would be submitted to a government agency); *Bronston v. United States*, 409 U.S. 352, 362 (1973) (reversing the appeals court based on a literal truth defense). While those federal offenses are five-year felonies, I suggest that perjury in this context be a misdemeanor, with perhaps escalating penalties as the number of lies increase.

¹⁴³ 18 U.S.C. § 3552 (providing for the preparation of presentence investigation reports by United States probation officers).

¹⁴⁴ This is an inexact analogy, as defendants at the time of sentencing have either been found guilty or pled guilty, and thus have no privilege to waive regarding information concerning that offense. A probation officer talks to the defendant and to law enforcement, to ensure that all the facts in her report regarding the offense are accurate. Further, the probation officer gives her own opinion in the report as to each aggravating and mitigating factor contained in the Federal Sentencing Guidelines. Though some defense attorneys consider the Probation Department an arm of the prosecution, the majority believes that probation officers are relatively impartial. Most federal defendants willingly talk to probation officers when they still retain their privilege, to help prepare a pretrial services report for their Bail Reform Act hearings, but those questions generally concern family and character, not the facts of the offense.

nonpublic information to the suspect.¹⁴⁵ Here, that would mean the magistrate would not be given the detective's file, or a second detective with no knowledge of the case would conduct the interrogation. I believe this would be ineffective and result in decreased information gathering and true confessions. Many police techniques for obtaining additional information require that the detective know as much about the suspect and the offense as possible.

Suspects who refuse to waive their privilege against self-incrimination at the questioning session with the police in exchange for the possibility of future sentence reductions will be sworn in answer questions posed by the magistrate. Innocent adult suspects of average intellectual and mental ability will not be assisted by the sentence reduction but also will not have any incriminating information to reveal, so they should be able to safely select questioning by either the detective or the magistrate.¹⁴⁶ Guilty adult average suspects who refuse to waive the privilege and choose questioning by the magistrate must answer truthfully, if they answer at all, on pain of prosecution for perjury (a misdemeanor offense consisting of a knowing lie made while under oath, proven beyond a reasonable doubt). Such answers might provide good leads to law enforcement. A suspect who lies to the magistrate about her alibi, the location of evidence or other witnesses, or any other objective fact can be prosecuted for perjury even if she escapes liability on the original crime. A suspect who refuses to answer questions posed by the magistrate officials thereby tips off law enforcement officials that they should be scrutinized more closely, and juries can take that lack of cooperation into account as an adverse interest at a criminal trial.

In those cases where an innocent suspect does not want to appear before a petit jury because he makes a bad witness, he still need not testify at his criminal trial and the prosecutor cannot ask the petit jury to draw an adverse inference from that refusal. However, the jury will be instructed that it can draw an adverse inference from his refusal to talk to the detective or the magistrate when he was arrested. Such a witness should have no good reason to refuse to speak to the magistrate, as the magistrate, unlike a later jury, is not judging his demeanor to determine credibility, but is just on a fact-finding mission. However, if an innocent suspect refuses to talk to the magistrate, his defense counsel may explain to the petit jury that silence at the earlier magistrate questioning was for a reason other than guilt (again, perhaps because thought he would be other than convincing to law enforcement, or because his attorney advised him to be quiet).

One might argue that my proposed warnings are too complicated for the average suspect to comprehend.¹⁴⁷ A colleague of mine ran these warnings

¹⁴⁵ See Garrett, *supra* note 101, at 1116.

¹⁴⁶ Which track a suspect should choose depends upon which interrogation techniques the jurisdiction and the courts allow. Some of the pre-*Miranda* techniques may have been more likely to elicit false confessions.

¹⁴⁷ My colleague Henry Hu suggested this during a drawing board lunch in October 2016

through an internet program that stated that it would take at least a high school education to understand all of my warnings.¹⁴⁸ I have simplified them since then, and hope that the Court would allow experimentation with even simpler warnings. However, even if that critique is true, a slightly more complicated set of warnings seems preferable to lies. Moreover, I ran my more current versions of the warnings through the program again and this time discovered that one needs only an eighth-grade education to understand them. If most Americans are not up to this grade level, perhaps the answer is to give no warning at all, and simply forge ahead with questioning by the detective or magistrate. In my opinion, that still beats giving inaccurate and deceptive warnings.

One last but serious criticism of my proposal is that it would be inconsistent with the Court's holding in *Griffin v. California* that a prosecutor cannot ask a jury to draw an adverse inference from a defendant's refusal to testify to facts within her knowledge at her criminal trial.¹⁴⁹ While I am not convinced that *Griffin* is a correct interpretation of the amendment, I do agree that the present Court is unlikely to reverse another seminal Warren Court decision. Luckily, my proposal does not violate its holding. Under my proposal, a defendant is not required to take the stand at her own criminal trial, and the jury is not instructed to draw an adverse inference from her failure to take the stand. However, critics might argue further that the underlying rationale for *Griffin* would be violated by my proposal. This argument is that allowing the jury to draw a logical inference from a defendant's failure to take the stand at trial is a punishment for exercising the right not to be a witness against oneself, and allowing the jury to draw a logical inference for a suspect's failure to talk to a magistrate during custodial interrogation likewise punishes her for failure to be a witness against herself. My response is that in neither case, but certainly not in the latter, is a person "compelled" to be a witness against herself. If having to explain to a jury your refusal to follow the common law practice of speaking to a magistrate upon arrest constitutes "compulsion," then the Court "stretches the concept of compulsion beyond all reasonable bounds."¹⁵⁰

The words of the Fifth Amendment require only that a person shall not be "compelled in any criminal case to be a witness against himself,"¹⁵¹ not that

at the University of Texas at Austin School of Law.

¹⁴⁸ This was done using a function of Microsoft Word called *Test Your Document's Readability*. The function provides readability scores according to both the Flesch Reading Ease Test and the Flesch-Kincaid Grade Level Test.

¹⁴⁹ *Griffin v. California*, 380 U.S. 609, 614-15 (1965) ("We . . . hold that the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."); *see also* *Carter v. Kentucky*, 450 U.S. 286, 300 (1981) (holding a judge must instruct a jury not to draw an adverse inference from a defendant's refusal to testify if he requests it).

¹⁵⁰ *Griffin*, 380 U.S. at 620 (Stewart, J., dissenting).

¹⁵¹ U.S. CONST. amend. V.

she not be encouraged to cooperate with the investigation. Nothing in the Fifth Amendment or *Griffin* prevents a court or prosecutor from commenting on a suspect's earlier refusal to talk to either the police or a magistrate official at the time of the incident. The actual statements taken from the magistrate official, if any, will *not* be relayed to the petit jury. In fact, the magistrate won't testify at the criminal trial at all, unless it is to state that the suspect refused to answer questions.¹⁵² Defense counsel can then argue to the jury about what inferences, if any, can be drawn from this failure to cooperate.

If, on the other hand, the rationale underlying *Griffin* is that the Self-Incrimination Clause protects a suspect "entirely innocent of the charge against him" but for whom "excessive timidity, nervousness" and association with others may be confused and embarrassed on the stand,¹⁵³ then again my proposal is consistent with *Griffin* and fully protects the witness. The suspect who will make a bad presentation to the jury is protected by the fact that the magistrate official will not testify as to the suspect's demeanor in answering questions.¹⁵⁴ The magistrate can only testify that a suspect refused to cooperate and answer questions. It may be that innocent suspects who make bad witnesses are better off under my proposal, as they can tell their true stories to the impartial magistrate for review, without the threat of impeachment with their prior criminal records, which is what actually keeps most criminal defendants from testifying on their own behalf.¹⁵⁵

B. *Law Enforcement Deceit During Investigation*

There will be no deceit employed under my proposal if magistrates conduct the questioning of criminal suspects. However, if a suspect chooses the detective track in order to reap the largest fifty percent sentencing discount, she might encounter deception during the interview. If legislative and

¹⁵² The magistrate may also testify if the suspect lies to the magistrate and the suspect is later prosecuted for perjury. The Court has already crafted a perjury exception to the privilege. *See* *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) (holding that defendant who lies in the grand jury after an immunity grant may subsequently be prosecuted for perjury).

¹⁵³ *Griffin*, 380 U.S. at 615.

¹⁵⁴ *Id.* at 614-25.

¹⁵⁵ *See* FED. R. EVID. 609 (providing for impeachment of criminal defendant's character for truthfulness by evidence of prior felony conviction or by evidence of any crime involving dishonesty or false statements). A significant proportion of criminal defendants have prior convictions, though statistics vary. *See* Ronald J. Allen & Larry Laudan, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. OF CRIM. L. & CRIMINOLOGY 493, 494 ("[M]ore than half of defendants who go to trial have prior convictions . . ."); THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 2 (2010) (reporting that the percentage of felony defendants with a prior felony conviction rose from 36% in 1990 to 43% in 2006).

administrative bodies at various levels of state, local, and federal governments begin experimenting with revised *Miranda* warnings, they might be more inclined to consider and debate the propriety of police techniques during custodial interrogation by officers. As I mentioned in Section II.C, the Court has not directly blessed or rejected any of the pre-*Miranda* techniques that the Warren Court found troublesome. Cops routinely lie to suspects about the evidence, the seriousness of the crime, and the ability of a lawyer to get them out of trouble, and, for the most part, the Court has accepted this.¹⁵⁶ Neither the Supreme Court nor lower courts have opined on the police techniques contained in the latest 1986 edition of the Inbau manual.¹⁵⁷

In the analogous context of undercover sting operations, the Court has long held that the Constitution does not forbid officers from lying to suspects. “Artifice and stratagem may be employed to catch those engaged in criminal enterprises.”¹⁵⁸ Undercover police work is an increasingly common method of federal law enforcement, particularly in combating drug trafficking, money laundering, terrorism, child pornography, and even white-collar crime.¹⁵⁹ So long as the government does not “implant in the mind of an innocent person the disposition to commit the alleged offense,”¹⁶⁰ government agents can

¹⁵⁶ See, e.g., *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (per curiam) (upholding a conviction where police obtained confession after falsely informing the suspect that his fingerprints had been found at the scene of the crime); *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (upholding a conviction where police obtained confession after falsely informing suspect that another suspect identified him as the gunman); *Frazier v. Cupp*, 394 U.S. 731, 737-38 (1969) (holding that a confession was admissible though the police had falsely told the suspect that another person had confessed to the crime, and had offered the suspect the excuse that the victim’s homosexual advances started the fight).

¹⁵⁷ FRED E. INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, *CRIMINAL INTERROGATION AND CONFESSIONS* 216 (3d ed. 1986) (maintaining that while the Court did not explicitly address the trickery issue involved in *Frazier v. Cupp*, that case “‘implicitly recognized’ the essentiality of interrogation practices involving trickery or deceit, and approved of them, [and that] there are many appellate court cases holding that a confession is admissible even when it was obtained by trickery and deceit [so long as the police conduct did not] shock the conscience [or was not] apt to induce a false confession”).

¹⁵⁸ *Jacobson v. United States*, 503 U.S. 540, 548 (1992) (quoting *Sorrells v. United States*, 287 U.S. 435, 441 (1932)).

¹⁵⁹ See NORMAN ABRAMS ET AL., *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 490-504 (6th ed. 2015); DEAN A. DABNEY & RICHARD TEWKSBURY, *SPEAKING TRUTH TO POWER: CONFIDENTIAL INFORMANTS AND POLICE INVESTIGATIONS* 1, 66 (2016) (finding reliance on informants among homicide, narcotics, prostitution, fraud, firearms, robbery, white-collar crime, and burglary investigations).

¹⁶⁰ *Sorrells*, 287 U.S. at 442. Most courts determine whether a defendant was predisposed to commit an offense despite the government deceit and inducement by considering “(1) the character or reputation of the defendant, including any prior criminal record; (2) whether the government initially made the suggestion of criminal activity; (3) whether the defendant engaged in the criminal activity for profit; (4) whether the defendant evidenced reluctance to commit the offense that was overcome by repeated government

pretend to be part of a fictitious “American Hedonist Society” and repeatedly attempt to convince an individual to pursue his First Amendment right to sexual freedom by purchasing magazines with lewd pictures of underage boys,¹⁶¹ provide the ingredients for manufacturing controlled substances,¹⁶² pretend to be an addict desperately needing a fix,¹⁶³ and sell an unemployed Muslim fake bomb parts as part of a conspiracy to earn money by blowing up a synagogue.¹⁶⁴

Similarly, police officers can plant undercover operatives who secretly work for the government into a suspect’s social or business circle, without informing the unindicted suspect that his “friend” is actually a government agent.¹⁶⁵ Even worse is the jailhouse informant, an individual who offers information to law enforcement regarding the admissions he allegedly overheard from a fellow inmate in exchange for a reduced sentence.¹⁶⁶ While perhaps not quite as invasive of privacy as fake friends, jailhouse snitches produce wildly inaccurate testimony.

Many scholars, members of the public, and jurists find these tactics distasteful. I have noticed a trend over the last few decades in some jurisdictions to limit government stings by enlarging the entrapment defense, such as the Seventh Circuit holding that there is entrapment as a matter of law

inducements or persuasion; and (5) the nature of the inducement or persuasion supplied by the government.” *United States v. Williams*, 547 F.3d 1187, 1198 (9th Cir. 2008).

¹⁶¹ See, for example, *Jacobson v. United States*, 503 U.S. 540, 552 (1992), although the Court reversed the defendant’s conviction.

¹⁶² *United States v. Russell*, 411 U.S. 423, 425 (1973) (upholding a conviction where the federal officer supplied the defendants with the chemicals to be used in the manufacture of methamphetamine, in return for half of the product).

¹⁶³ *Sherman v. United States*, 356 U.S. 369, 372 (1958) (overturning a drug conviction for entrapment, but finding “the fact that government agents ‘merely afford opportunities or facilities for the commission of the offense does not’ constitute entrapment”).

¹⁶⁴ *United States v. Cromitie*, 727 F.3d 194, 203 (2d Cir. 2013) (upholding a conviction where FBI Muslim plant befriended another worshiper and sold him three fake bombs and two fake Stinger missiles for use in attack).

¹⁶⁵ *Illinois v. Perkins*, 496 U.S. 292, 300 (1990) (holding that so long as the Sixth Amendment right to counsel has not yet attached, an undercover officer masquerading as a burglar in a jail cell need not blow his cover by *Mirandizing* a suspect before eliciting information from him). See generally Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT. RPT. 292, 294 (1995); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 774-777 (2016).

¹⁶⁶ See, e.g., Susan Clampet-Lundquist et al., *The Sliding Scale of Snitching: A Qualitative Examination of Snitching in Three Philadelphia Communities*, 30 SOC. F. 265, 265 (2015); Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1375 (2014); Daniel Richman, *Informants and Cooperators* (unpublished manuscript) (on file with Sandra Day O’Connor School of Law, Conference on Scholarship and Criminal Justice).

unless the defendant is “in a position without the government’s help to become involved in illegal activity”;¹⁶⁷ the First Circuit mandate that the government offer more than the “*ordinary* opportunity to commit [a] crime”;¹⁶⁸ and a holding by the Fifth Circuit that the government establish the defendant would “likely” have committed the crime absent the government’s involvement.¹⁶⁹ I have also seen some courts encourage similar new defenses, such as “outrageous governmental misconduct”¹⁷⁰ and “sentencing entrapment,”¹⁷¹ that focus on the propriety of police conduct rather than the defendant’s predisposition to commit the offense.

While federal circuits are bound by Supreme Court precedent on the entrapment defense and the Federal Rules of Criminal Procedure, state courts can develop their own tests for criminal law defenses and develop their own criminal procedural rules, depending upon how comfortable they are with police deceit. How much deceit does each local jurisdiction wish to allow in the competitive enterprise to ferret out crime? Each state may answer differently. For example, some states reject the federal approach to entrapment and adopt instead the Model Penal Code rule, which focuses on police behavior rather than the defendant’s criminal record and predisposition.¹⁷² This subject requires serious debate, and there is no objectively correct answer. The important points are that, first, each jurisdiction should decide for itself how much deception is too much, and what

¹⁶⁷ *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc) (reversing a conviction based upon lack of “positional” predisposition where defendant did not have the “training, contacts, aptitude, or experience” necessary to commit the offense).

¹⁶⁸ *United States v. Gendron*, 18 F.3d 955, 962-63 (1st Cir. 1994).

¹⁶⁹ *United States v. Knox*, 112 F.3d 802, 808 (5th Cir. 1997) (“[I]n determining predisposition we are to ask what the defendant would have done absent government involvement.”).

¹⁷⁰ *Hampton v. United States*, 425 U.S. 484, 489 (1976) (holding out possibility that even where a defendant is predisposed to commit an offense, outrageous government conduct could invalidate a conviction); *United States v. Chin*, 934 F.2d 393, 398 (2d Cir. 1991) (en banc) (holding due process limits are violated where government misconduct includes coercion, violence, or brutality to the person).

¹⁷¹ *United States v. Sed*, 601 F.3d 224, 229-30 (3d Cir. 2010) (“We have neither adopted nor rejected the doctrines of sentencing entrapment and sentencing factor manipulation. Almost all of our sister courts of appeals have opined about both doctrines, reaching varied conclusions.”); *United States v. Knox*, 573 F.3d 441, 451-52 (7th Cir. 2009) (holding there was no sentencing factor manipulation in violation of due process where the defendant had sold crack to the government informant on several occasions prior to the fifty-gram crack sale which triggered the mandatory minimum sentence).

¹⁷² MODEL PENAL CODE § 2.13 (AM. LAW INST., Official Draft 1985) (providing that the defendant must establish to a judge, by a preponderance of the evidence, that the government’s inducement would cause an ordinary law-abiding citizen to engage in the crime); *State v. Vallejos*, 945 P.2d 957, 958 (N.M. 1997) (adopting both subjective and objective entrapment defenses).

police techniques are unacceptable no matter how successful. Second, each jurisdiction should decide how best to regulate this aspect police behavior—internal police department or prosecutorial guidelines, legislation, or judicial exclusion of evidence.¹⁷³ By allowing “equally effective” alternatives to *Miranda*, we can generate discussion and choice in the context of police deceit during interrogation, and perhaps apply the same reasoning to deceit during ordinary noncustodial encounters and undercover operations as well.

Scholars have suggested various rules governing police officer and undercover operative deceit. In an earlier piece, I suggested the strong need for a theory that identifies when it is acceptable for the government to lie to its citizens, and at the same time justifies the law that criminalizes lying by citizens to the federal government and often requires affirmative disclosure of unfavorable facts by private citizens and government employees.¹⁷⁴ More particularly, I support a rule disallowing any technique that involves creating false physical evidence, real or documentary, or creating written reports purported to test physical evidence that contain lies. There is too high a risk that such a document might find its way into a criminal case file or the public realm, or cause an innocent person to confess.¹⁷⁵ Welsh White argues that certain types of lies should make the resulting confession automatically inadmissible: (1) any lies which distort the seriousness of the crime under investigation (for example false telling a murder suspect that the victim is still

¹⁷³ For example, the Attorney General has guidelines that require that DOJ agencies conduct suitability inquiries before signing up informants, and that any illegal activity engaged in by such informants be authorized. U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS (2002). Likewise, the International Association of Chiefs of Police have guidelines regarding best practices, though police departments around the country do not always follow them. See JON SHANE, CONFIDENTIAL INFORMANT: A CLOSER LOOK AT POLICE POLICY 30 (2016). Some scholars have suggested judicial gatekeeping before allowing informant testimony. See Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. LAW & CRIMINOLOGY 329, 364 (2012). And some scholars suggest legislation barring such testimony, at least from jailhouse snitches. See Covey, *supra* note 166.

¹⁷⁴ See generally Susan R. Klein, *Lies, Omissions, and Concealment: The Golden Rule in Law Enforcement and the Federal Criminal Code*, 39 TEX. TECH L. REV. 1321 (2007) (contrasting federal government’s expectations of honest conduct by citizens on pain of criminal sanctions with the government’s sanctioning of lies by law enforcement personnel during sting operations). For example, if an individual knowingly lies to the federal government or conceals a material fact, that is a five-year felony. 18 U.S.C. § 1001 (2012). If an individual knowingly fails to report that he is carrying in excess of \$10,000 across an international border, that is a five-year felony. 31 U.S.C. §§ 5316, 5323 (2012).

¹⁷⁵ See, e.g., Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 833 (2006) (arguing that any confession based upon any fake document or officer’s oral report of a failed polygraph should be excluded). Some courts will follow this rule only for a written report, not oral lies.

alive); and (2) lies about the assumption of a nonadversarial role (for example assuming a father figure or religious counselor role).¹⁷⁶ Phillip Johnson proposed that the police be barred from making “any statement which . . . may reasonably be understood as implying that the suspect will not be prosecuted or punished.”¹⁷⁷ In my opinion, the key is not which limits each jurisdiction places on custodial interrogations, but that the rules are available to the public and enforced.

Finally, in crafting rules underlying interrogation practices, I suggest that local bodies notice the stark difference between the deceptive conduct we permit from police officers and the high ethical standards we demand from prosecutors—both are law enforcement officials, but the latter must be scrupulously honest in all her dealings with criminal and civil defendants. Rather than viewing the prosecutor as one of the players in the game to ferret out crime at essentially all cost, the prosecutor is “not . . . an ordinary party to a controversy,” and her interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done.”¹⁷⁸ Special state bar rules regarding ethical conduct prevent a prosecutor from even speaking to a represented party,¹⁷⁹ and prosecutors have special constitutional duties to disclose any evidence that tends to negate guilt or punishment.¹⁸⁰ Likewise, defense

¹⁷⁶ Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 584, 611, 614 (1979).

¹⁷⁷ Phillip E. Johnson, *A Statutory Replacement for the Miranda Doctrine*, 24 AM. CRIM. L. REV. 303, 305 (1987). See also Chris Slobogin’s proposed test for when to permit falsehoods during custodial interrogation, in this Symposium issue, Chris Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of Miranda Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. [PAGE, PINCITE] (2017). Though it appeared briefly that the Court would disallow promises of leniency by officers, *Bram v. United States*, 168 U.S. 532, 565 (1897) (“A confession can never be received in evidence where the prisoner has been influenced by any threat or promises.”), this has since become simply one more factor to consider in the totality of circumstances test, see Paul Marcus, *It’s Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 606 (2006).

¹⁷⁸ *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹⁷⁹ MODEL RULES OF PROF’L CONDUCT r. 4.2 (AM. BAR ASS’N 2016) (“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”).

¹⁸⁰ *Id.* r. 3.8(d) (“The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor . . .”); see also *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (holding that a *Brady* violation warrants reversal of conviction only where there is a “reasonable probability” that such evidence would have led to a different result); *Brady v. Maryland*,

attorneys are bound by state bar associations to be strictly loyal to their clients, and to inform them of important consequences of any trial or plea related decisions.¹⁸¹ Similarly, when judges interact with defendants in court they must inform defendants on the record and obtain a knowing, voluntary, and intelligent waiver of their trial rights before accepting guilty pleas.¹⁸²

Perhaps the practical necessity for police officers to lie to suspects does not exist for prosecutors or judges. However, we must recognize that these lies breed distrust of police.¹⁸³ Judges and prosecutors have better reputations among the public than do officers precisely because they do not tell lies. As I have argued elsewhere, though many of our constitutional criminal procedural guarantees were drafted to ensure the accuracy of trials, some were placed there to foster equality and prevent governmental harassment. Limits on deceit by law enforcement officers might lead to (1) an increase in law-abiding behavior by community-members stemming from a perception of a fair

373 U.S. 83, 87-88 (1963) (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . .”). There is now some dispute in the courts regarding whether prosecutors can be disciplined for failing to follow the more demanding Model Rules, even where such evidence was not material under the due process standard. See *In re Kline*, 113 A.3d 202, 213 (D.C. 2015) (holding in an attorney disciplinary hearing brought against former federal prosecutor that Model Rule 3.8 requires a prosecutor to disclose all potentially exculpatory information in his possession regardless of whether that information would meet the materiality requirements of *Brady*’s progeny, but reversing sanctions given confusion regarding rule).

¹⁸¹ See, e.g., *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012) (holding that it is a Sixth Amendment violation of defendant’s right to effective assistance of counsel for defense attorney to fail to inform her client of a plea offer); *Padilla v. Kentucky*, 559 U.S. 356, 368-69 (2010) (holding that it is a Sixth Amendment violation of a defendant’s right to effective assistance of counsel for a defense attorney to fail to inform her client of the immigration consequences of her plea).

¹⁸² FED. R. CRIM. P. 11(b)(1) (providing a list of disclosure of defendant’s rights that judges must personally make to the defendant on the record before accepting a guilty plea); *Faretta v. California*, 422 U.S. 806, 835-36 (1975) (holding that a judge must have full and frank discussion with the defendant regarding the wisdom of waiving his right to counsel in favor of self-representation); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (discussing the requirements for finding an intelligent waiver).

¹⁸³ Police perjury is not a new phenomenon. Indeed, it has become so pervasive that it has developed a name: “testilying.” Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 272 (2017); see also Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041-42 (1996) (describing the practice of police perjury as “systemic,” “routine,” “commonplace,” and “prevalent”). Testilying has systemic consequences that include the loss of trust in government. *Id.* at 1039 (“Presumably . . . the loss of police credibility on the stand diminishes law enforcement’s effectiveness in the streets. . . . [Moreover], the loss of public trust may extend beyond law enforcement to the criminal justice system generally.”).

system,¹⁸⁴ (2) the greater likelihood that minority members will opt-in to the criminal justice system,¹⁸⁵ and (3) an increased ability of law enforcement to combat crime because of new cooperation between citizens and their government.¹⁸⁶

C. *Impact of Proposal on Law Enforcement Goals*

Critics have suggested that the drawback of offering any sort of *Miranda*-type warnings is that this could harm law enforcement interests: first, in decreasing the number of accurate confessions; and second, in decreasing clearance rates for felony offenses. We know the first critique, at least as to the current *Miranda* warnings, is not true, as upwards of eighty percent of suspects waive all of the rights they are offered and make a statement. However, while the *Miranda* warnings probably do not decrease the total rate of confessions, they may increase the number of false confessions, as it is juveniles and mentally challenged individuals who are most likely to waive their rights, and these same individuals give the greatest percent of false confessions received.¹⁸⁷ In light of post-*Miranda* evidence of the reaction to the warnings, the necessary reform would be to strengthen the warnings for juvenile and mentally challenged suspects, or replace them with the magistrate questioning I have suggested. It is not a law enforcement win to convict the wrong perpetrator, whether or not she confessed.

As to the second critique, there is little evidence that the *Miranda* warnings directly or indirectly decreased crime clearance rates, though one set of researchers have set out to prove that in a series of articles.¹⁸⁸ While that

¹⁸⁴ See ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 5 (2009) (arguing that police cultivation and reliance upon informants have pathological effects on vulnerable communities).

¹⁸⁵ See Rachel A. Woldoff & Karen G. Weiss, *Stop Snitchin': Exploring Definitions of the Snitch and Implications for Urban Black Communities*, 17 J. CRIM. JUST. & POPULAR CULTURE 184, 184 (2010) (suggesting that the perceived concentration of informant activity in inner-city minority communities "weakens informal social control by stigmatizing residents who witness and report neighborhood crime, and simultaneously interferes with the system of formal social control that is necessary for crime prevention and community safety and justice for victims").

¹⁸⁶ See Klein, *supra* note 174, at 1324; Scott E. Sundby, *Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1777 (1994) (discussing "trust as a constitutional value"). One study suggested that "the significantly lower clearance rates in Black census tracts and integrated census tracts are a function of less trust and less cooperation and information from citizens." Janice L. Puckett & Richard J. Lundman, *Factors Affecting Homicide Clearances: Multivariate Analysis of a Complete Conceptual Framework*, 40 J. RES. CRIME & DELINQ. 171, 185 (2003).

¹⁸⁷ See *supra* notes 95-106 and accompanying text.

¹⁸⁸ See, 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, 1063-67 (1998) (suggesting that the best available metric for whether *Miranda* is hurting

position has been championed by former federal judge and now professor Paul Cassell, the great majority of scholars have found Cassell's argument unconvincing.¹⁸⁹ I tend to agree with the scholarly consensus—there are too many variables involved in clearance rates for us to determine whether the *Miranda* warnings have any causal effect on their movement. Clearance rates might increase or decrease based upon socioeconomic variables, law enforcement expenditures, population age and gender, demographics, or abortion rate. In any given regression study many variables are completely unaccounted for and many others that are included are assigned too much or too little importance. We simply cannot pin any movement in clearance rates on *Miranda*.

Of equal importance, my proposal does not give suspects the option of remaining quiet at no cost. My hope is that more average adult suspects will waive their rights in exchange for the sentencing discount. The ones who refuse to talk to either officers or magistrates know that they will have to explain that decision to a jury later, and this should strongly encourage their willingness to answer questions. Our federalism ought to allow local jurisdictions to experiment so that they can determine if my or an alternative proposal is better or worse than *Miranda* for law enforcement, and whether the benefits to the community as a whole outweigh the costs.

IV. REFORM THROUGH GREATER TRANSPARENCY BY LAW ENFORCEMENT

Even if we were not trying to reform the criminal justice system for the better, we cannot limp along maintaining the status quo unless each community believes that the criminal justice system is fair and transparent, or at least that law enforcement personnel are not outright lying to the public. When the government loses that level of trust, we end up unable to convince juries that officers are testifying truthfully on the stand, or even worse with rioting by justifiable distraught citizens.¹⁹⁰ Lies told with the best of intentions to calm unrest simply mask serious problems, which fester and become worse.

Permit me to offer one recent example close to home. The forensic lab in Austin, Texas, where I live, closed in December 2016 because of inaccurate

law enforcement is clearance rates—the ratio of cases the police solve to those that it does not); Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects of Law Enforcement*, 97 B.U. L. REV. [PAGE, PINCITE] (2017) (purporting to show that *Miranda* harms law enforcement by negatively effecting clearance rates).

¹⁸⁹ See, e.g., John J. Donahue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1155 (1998) (noting that discovering a “*Miranda* effect” on clearance rates depends upon which variables that a researcher includes or excludes from the model); Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of Miranda on the Police*, 32 RUTGERS L.J. 1, 3-6 (2000) (suggesting that any post-*Miranda* decline in crime clearance rates is a statistical artifact caused by record keeping issues and other similar problems).

¹⁹⁰ See *supra* note 27.

DNA testing.¹⁹¹ The gross incompetency in this lab went undiscovered for years, in part because the Austin police department, who ran the lab, refused to admit how bad things had gotten and to request help. They used shoddy science, outdated standards, and occasionally intentionally faked results.¹⁹² Instead of admitting that the lab ought to be supervised by an impartial party rather than by the officers relying on the results, the interim Chief of Police tried to revive the failing lab by hiring a new Chief Forensics Officer.¹⁹³ No one was surprised when that plan was abandoned after the new chief forensics officer was terminated because he was academically unqualified for the job.¹⁹⁴ Due to this debacle, the city of Austin will have to pay over \$14 million to retest evidence from prior convictions, and must send evidence for use in those future trials requiring DNA results to expensive private labs. The public has lost faith in the police department's ability to correctly conduct scientific testing on evidence.¹⁹⁵ This is not, unfortunately, a problem limited to the Austin area; in recent years labs in New York, Boston, Florida, and Houston have suffered a string of scandals.¹⁹⁶

This first lie probably stemmed from embarrassment—the Interim Police Chief did not want to appear incompetent to run his department's own labs. As Sandra Guerra Thompson has noted in her book about the topic, “there has been a fair amount of fraud, but mostly it's incompetence.”¹⁹⁷ Had those running the police department admitted the problem to the public when they first discovered it, the academic and legal community, the scientific community (such as the American Society of Crime Laboratory Directors Lab

¹⁹¹ Tony Plohetski & Philip Jankowski, *Forensic Lab Leader's Hiring Exposed Flaws*, AUSTIN AM.-STATESMAN, Jan. 8, 2017, at A1 (discussing the closure of Austin's forensic lab after “a state audit said scientists were improperly analyzing samples”).

¹⁹² Eric Dexheimer, *Imploding Crime Lab Got Passing Grades*, AUSTIN AM.-STATESMAN, Jan. 15, 2017, at A1. (“During the past decade, a surprising number of forensic facilities in Texas and across the country have endured high-profile failures, ranging from stolen or missing evidence, to shoddy science and even faked results.”).

¹⁹³ The Supreme Court has recognized that there may be a law enforcement tilt by supposedly unbiased lab analysts. What police labs term “neutral scientific testing” may not be so neutral. “Forensic evidence is not uniquely immune from the risk of manipulation.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).

¹⁹⁴ See generally Plohetski & Jankowski, *supra* note 191.

¹⁹⁵ See generally Dexheimer, *supra* note 192.

¹⁹⁶ *Id.*

¹⁹⁷ Eric Dexheimer, *Austin Crime Lab Bucked DNA Standard for Years, yet Got Passing Grades*, MY STATESMAN (Jan. 12, 2017, 12:45 PM), <http://www.mystatesman.com/news/crime—law/austin-crime-lab-bucked-dna-standard-for-years-yet-got-passing-grades/MZBboOfzXWWgqlem6867TO/> [https://perma.cc/9KKM-BHPR]; see also SANDRA GUERRA THOMPSON, *COPS IN LAB COATS: CURBING WRONGFUL CONVICTIONS THROUGH INDEPENDENT FORENSIC LABORATORIES* 45 (2015) (“[I]ncompetence and fraud may be the most widespread cause of large-scale case reviews and crime laboratory audits.”).

Accreditation Board and the Texas Forensic Science Commission), and more professionally run law enforcement agencies (like the DPS), might have pushed them towards what is now recognized as the best practice—an independent lab.¹⁹⁸ Instead of admitting misconduct, as they expect suspects to do during custodial interrogation, law enforcement practiced deceit and stuck with it. Such behavior can only lead those of us being policed to believe that law enforcement cannot be trusted in its most basic functions.

Such thinking can infect each side and become a viscous cycle, causing further deterioration of the relationship. For example, according to the nonpartisan Pew Research Center, some police officers suffer from the “Ferguson effect” since the highly publicized police use of force in cities such as Baltimore, Ferguson, Baton Rouge, Milwaukee, Chicago, and New York. That is, over three quarters say they are hesitant to use force, even when appropriate, are less willing to stop and question suspicious people, and that interactions between police and blacks have become more tense.¹⁹⁹ If the public has no trust in the officers who police their neighborhood, and the officers have no trust in the residents they are bound to serve, the prospects for improved relations are slim.

In addition to the level of trust necessary for daily operations, many new ideas for reform, especially in the areas of crime prevention, reducing mass incarceration, and eliminating unwarranted racial disparity, require heightened trust between law enforcement and the community. One example is “evidence-based policing,” a new method designed to prevent criminal incidents from occurring. Law enforcement officers are encouraged to use computer models and social media to track and monitor known individuals within their communities who are responsible for much of the violence in particular areas.²⁰⁰ Part of evidence-based policing relies on predicting who will commit violent crime, and where it will be committed. Such “predictive policing” may subject officers to charges of profiling racial minorities who live in poor inner-city neighborhoods.²⁰¹ This new method has no chance for success without cooperation from law-abiding members of these same communities.

Similarly, evidence-based sentencing, drug courts, and rehabilitation programs (both in and out of prison) will help reduce prison overcrowding and dampen the cycle of poverty to prison we see in some cities. Individuals will not participate in such programs unless they believe they are going to be

¹⁹⁸ THOMPSON, *supra* note 197, at 181 (discussing the National Academy of Sciences’ call for independent forensic laboratories unaffiliated with police agencies).

¹⁹⁹ Lisa Marie Pane, *Survey: Officers More Reluctant to Use Force*, AUSTIN AMERICAN-STATESMAN, Jan. 12, 2017, at A2 (discussing the “Ferguson effect”).

²⁰⁰ See, e.g., John Eligon & Timothy Williams, *On Police Radar for Crimes They Might Commit*, N.Y. TIMES, Sept. 25, 2015, at A1, A17 (describing predictive policing programs in Kansas City, Missouri and dozens of other police departments across the country).

²⁰¹ See generally ACLU, CRIMINAL LAW REFORM PROJECT (2017), <https://www.aclu.org/issues/criminal-law-reform> [<https://perma.cc/J57Q-XFNY>].

rewarded by revealing the necessary information, rather than slammed with additional sanctions.²⁰² An addict might willingly admit his problem if his sanction is drug treatment, but not if he believes police and prosecutors will use that admission to obtain a prison sentence. Like evidence-based and predictive policing, these programs are subject to the criticism that the factors used to lower sentences or allow entry into these programs are proxies for race and poverty.²⁰³ Such programs will not be enacted unless the public believes that the peace and probation officers and judges who determine risk when considering sentences and entry into rehabilitation programs are considering and revealing all the pertinent facts that go into such determinations. They have to believe that race will not be a negative factor before they buy in to the program.

An even more radical program recently started in Washington, D.C. and Richmond, California, that hires ex-convicts to mentor violent offenders, gang members, and other individuals at high-risk for engaging in violent offenses.²⁰⁴ This innovative and controversial program that pays ex-convicts not to reoffend and pays at-risk community members not to become criminals cannot succeed unless law enforcement personnel are able to convince the former felons to join, and unless the ex-cons are then able to convince high-risk individuals in the community to participate. Without a successful pilot program, policymakers cannot assess whether the costs of these programs outweigh the benefits, nor can society discuss the morality of such a program. There will be no successful trial program without some level of trust between

²⁰² Several states have begun to incorporate evidence-based sentencing into their guidelines. Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 805 (2016) (finding that courts in at least twenty states have implemented some form of evidence-based sentencing). There are currently two bills before Congress that would adopt evidence-based sentencing at the federal level. See Sensenbrenner-Scott Over-Criminalization Task Force Safe, Accountable, Fair, Effective Justice Reinvestment Act of 2015, H.R. 2944, 114th Cong. (2015) (providing for the establishment of “evidence-based sentencing alternatives for lower-level offenders”); Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015) (calling for the National Institute of Corrections to “evaluate all recidivism reduction programming or productive activities that are made available to eligible prisoners and determine whether such programming or activities may be certified as evidence-based and effective at reducing or mitigating offender risk and recidivism”).

²⁰³ See, e.g., Bernard E. Harcourt, *Risk as a Proxy for Race*, 27 FED. SENT’G REP. 237, 237 (2015) (suggesting that risk assessment collapses into prior criminal history, which is itself a proxy for race).

²⁰⁴ See, e.g., Aaron C. Davis, *Cities Begin to Challenge a Bedrock of Justice: They’re Paying Criminals Not to Kill*, WASH. POST (Mar. 26, 2016), https://www.washingtonpost.com/local/dc-politics/cities-have-begun-to-challenge-a-bedrock-of-american-justice-theyre-paying-criminals-not-to-kill/2016/03/26/f25a6b9c-e9fc-11e5-a6f3-21ccdbc5f74e_story.html?utm_term=.782a8963c10d [https://perma.cc/3LNY-BEFQ].

law enforcement officials and the people they are sworn to protect.

Regardless of whether one is in favor of such new reforms or whether we are satisfied with the current regime, no criminal justice system (or any social program) can be effective without buy-in from all stakeholders. The public, which at present consists of persons who are much more likely than at any other time in our history to be “criminals” or potential criminals, should have some confidence that the criminal justice system is at least sufficiently transparent to evaluate. Offering accurate legal warnings to suspects during custodial interrogations is one place to start.