MANIPULATION OF SUSPECTS AND UNRECORDED QUESTIONING: AFTER FIFTY YEARS OF *MIRANDA* JURISPRUDENCE, STILL TWO (OR MAYBE THREE) BURNING ISSUES

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Fifty years after Miranda, courts still do not have clear guidance on the types of techniques police may use during interrogation. While first-generation tactics (a.k.a. the third degree) are banned, second-generation tactics such as those found in the famous Reid Manual continue to be used by interrogators. The Supreme Court has sent only vague signals as to which of these second-generation techniques, if any, are impermissible, and has made no mention of newly developed third-generation tactics that are much less reliant on manipulation. This Article divides second-generation techniques into four categories: impersonation, rationalization, fabrication, and negotiation. After concluding, based on a review of field and laboratory research, that these techniques might well have superior "diagnosticity" to third-generation techniques—and thus that police might rationally want to continue using them—

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it argues that the Court's Fifth Amendment and due process jurisprudence prohibits negotiation but permits impersonation, rationalization, and fabrication. At the same time, the Article recognizes that these techniques can produce false confessions; accordingly, it develops evidentiary principles for determining how courts might make use of expert testimony about factors that reduce the probative value of statements obtained during interrogation.

To ensure the evidence necessary for this constitutional and evidentiary analysis, interrogations must be recorded. While a recording requirement has been endorsed by commentators from all points of the political spectrum, here too the Court has been silent. This Article summarizes why recording is required under the Due Process Clause, the Fifth Amendment, and the Sixth Amendment, not just in the stationhouse but any time after custody. The Article ends with comments on how all of this should apply to interrogations of suspected terrorists. Together, these prescriptions give courts the concrete guidance the Supreme Court has failed to provide despite fifty years of case law.

INTRODUCTION

In the fifty years since *Miranda v. Arizona*[1] was decided, most of the big constitutional questions about interrogation have been resolved, at least to the Supreme Court's satisfaction. *Miranda* held that an individual's statements made during custodial interrogation are not admissible at a criminal trial unless the police first inform the individual about the right to silence and the right to counsel and unless the statements were made after a valid waiver of those rights.[2] The Court has since fleshed out the meaning of custody and interrogation, clarified the content of the warnings that must be given, decided numerous cases on the waiver issue, and limited the scope of the exclusion remedy.[3] Certainly more case law from the courts, providing even greater nuance on these issues, is forthcoming. But the parameters have been set.

Yet the Supreme Court has still not explicitly addressed two issues that are crucial to sensible regulation of the interrogation process: the constitutionality of the various types of psychological techniques police often use during interrogation and the extent to which police must keep a record of the interrogation. Neglect of these two issues is particularly aggravating because, even prior to *Miranda*, they were arguably the most important outstanding questions relating to interrogation, other than *Miranda*'s core concern about whether notification of rights is constitutionally required. Well before *Miranda* was decided there was widespread consensus against the third degree and explicit threats designed to elicit confessions, meaning that for some time the

[1] 384 U.S. 436 (1966).

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

[3] *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 371-96 (6th ed. 2015) (describing Supreme Court case law interpreting *Miranda*).

key concern about the conduct of interrogations has been the propriety of using subtler psychological techniques.[4] And any concrete rules developed on this score are likely to be toothless if accounts of the interrogation process are dependent entirely on ex post descriptions by the police and the suspect.[5] Yet the Court, whether deliberating before or after *Miranda*, has offered only scattered dicta and vague hints about its views on the use of manipulative interrogation techniques.[6] And despite the feasibility of recording interrogations for the past several decades, the Court has said nothing about the need for or even usefulness of recordings.[7]

This Symposium provides me with the opportunity to update articles I wrote addressing these two issues. The first article proposed what I called the "equivalency test," which would permit police deceit about matters that, if true, would not be considered coercive, but did not address in detail how this test would interact with concerns about false confessions.[8] The second article argued that the Due Process Clause, the Fifth Amendment, and the Confrontation Clause all require taping of a suspect's interrogation if the government later seeks to use those statements against the person in a criminal trial, but did not flesh out how this requirement would apply to statements made in the field.[9]

This Article expands upon these proposals by relating each to relatively recent developments. With respect to the use of manipulative interrogation techniques, it looks at three such developments: (1) the advent of "third-generation"

[4] Even police manuals at the time counseled against the third degree. *See* Brief for ACLU as Amicus Curiae at 4, Escobedo v. Illinois, 378 U.S. 478 (No. 615) (stating that police manuals were "not exhibits in a museum of third degree horrors" but rather sought to "carefully advise the police interrogator to avoid tactics which are clearly coercive under prevailing law").

[5] Virtually all commentators agree on this point and have done so for years. *See, e.g.*, William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 981 n.19 (2001) ("The need for video- and audio-taping is the one proposition that wins universal agreement in the *Miranda* literature."). This view is expressed by those who oppose *Miranda*, JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 116, 121 (1993); Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 487-91 (1996), as well as by those who support it, YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 129-37 (1980); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 997 (2004).

[6] *See infra* text accompanying notes 42-52, 117-26.

[7] Several cases, including *Miranda*, have noted that the presence of an attorney can assure an accurate account of the interrogation. *Miranda*, 384 U.S. at 470; *see also* Arizona v. Roberson, 486 U.S. 675, 682 n.4 (1988) (noting that the presence of counsel is a protective feature and one basis for the *Miranda* rule). But the Court has never even suggested that recording might be a good practice.

[8] Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH. L. REV. 1275, 1285-89 (2007).

[9] Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 314-21 (2003) (arguing that taping is required by various constitutional provisions).

interrogation practices that purport to avoid manipulation; (2) the explosion of research on techniques that may cause false confessions; and (3) conceptual advances regarding the admissibility of this research through expert testimony. Exploring these issues helps explicate how, under current doctrine, courts might more concretely evaluate the admissibility of self-incriminating information obtained through manipulative interrogation techniques.

With respect to the recording proposal, the update in this Article examines how the advent of police body cameras can transform regulation of pre-interrogation interrogation. Body cameras could allow courts to ensure that what transpires in the interrogation room is not a sanitized result of improper practices employed outside of it. This Article explains why, if body camera recording of suspect interviews is feasible, it is constitutionally required not only prior to criminal prosecution, but also prior to transport to the stationhouse.

Finally, this Article relates all of this to interrogations of individuals suspected of terrorism. Some have suggested that the usual restrictions on interrogation be relaxed in this context, given the public safety and national security concerns at stake.[10] This Article argues that these government objectives can be met without changing interrogation rules.

I. THREE GENERATIONS OF INTERROGATION TECHNIQUES

Modern day interrogation relies on a host of techniques. While the physical abuse and prolonged confinement associated with the infamous "third degree"[11] is no longer officially sanctioned even by the police themselves,[12] a second generation of more psychologically manipulative strategies have taken their place. The most famous compendium of these techniques, purporting to have influenced hundreds of thousands of American police officers,[13] is the manual published by John Reid and his coauthors.[14] The practices recommended by Reid and his coauthors in cases of recalcitrant subjects almost all rely on some form

[10] *See infra* note 210.

[11] Richard Leo describes the third degree to include "blatant physical abuse," "deniable physical abuse," "orchestrated physical abuse," "incommunicado interrogation," "food, sleep, and other deprivations," and "explicit threats of harm." RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN CRIMINAL JUSTICE 47-54 (2008).

[12] *Id.* at 70-74 (stating that as a result of the impact of the Wickersham Report and efforts to professionalize police, by the mid-1960s "the third degree had virtually disappeared"); *see also* FRANK E. ZIMRING & RICHARD S. FRASE, THE CRIMINAL JUSTICE SYSTEM: MATERIALS ON THE ADMINISTRATION AND REFORM OF THE CRIMINAL LAW 132 (1980) (stating that "today the third degree is almost nonexistent").

[13] *See* LEO, *supra* note 11, at 109.

[14] FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2013). While the first author is Fred Inbau, Reid (who died in 1982) was the principal developer of the tactics described in the book, and training programs using the book refer to the "Reid Technique." *Id.* at viii; *see also* John E. Reid & Associates, Inc., https://www.reid.com [https://perma.cc/WQ7Q-HWYR] (last visited Jan. 29, 2017).

of deception and can be categorized as follows: (1) "impersonation" (e.g., showing sympathy for the suspect, posing as a friend); (2) "rationalization" (e.g., suggesting that the confession will make the suspect feel better or appear honorable in the eyes of the community); (3) "evidence fabrication" (e.g., false statements that a codefendant has inculpated the suspect, that the suspect's fingerprints were found at the scene of the crime, and other means of insisting the suspect is guilty); and (4) "negotiation" (e.g., suggesting that, if the suspect confesses, more lenient punishment or release from detention is likely).[15] These categories are fluid, and specific types of interrogation practices might sometimes fit in more than one of them, but, as will be demonstrated below, they are conceptually different from one another and come close to capturing the universe of manipulative interrogation conduct.

The most avid critics of police interrogation argue that none of these techniques should be permissible, on the ground that they are immoral, corrosive of the system, coercive, and liable to produce false confessions.[16] Further, the argument is made that none of these techniques is necessary, given equally or more effective "third generation" alternatives.[17] The two most prominent alternatives are the "PEACE" method (for Preparation and Planning; Engage and Explain; Account; Closure; and Evaluation),[18] and the approach developed by the High-Value Interrogation Group Research Unit ("HIG") established by President Obama in 2010 as part of the counter-terrorism effort.[19] PEACE, purportedly in use in the United Kingdom, New Zealand, Norway and parts of

[15] INBAU ET AL., *supra* note 14, at 210-50.

[16] *See* Mariam 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, 793-94 (2006) (arguing that empirical evidence shows deception can cause false confessions); Patrick M. McMullen, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 Nw. U. L. REV. 971, 975 (2005) (finding that deception during interrogation often "effectively leaves the suspect with no rational choice but to confess"); Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817, 825, 832 (1997) (arguing that police lying during interrogation is "unjustifiable . . . because it is unnecessary and harmful as well as impossible to restrain within reasonable limits" and because it undermines government-citizen trust); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 426 (1996) (stating that police lying during interrogation "actually may decrease the valid evidence police obtain" and that "[l]ying also reduces integrity in the criminal justice system, a harm that reverberates beyond the individual case" (emphasis omitted)).

[17] *See, e.g.*, Young, *supra* note 16, at 475 ("The continued acceptance of police lying is based on the long practice of police deception and an unsubstantiated belief that such lying is necessary for successful prosecutions.").

[18] *See* Brent Snook et al., *The Next Stage in the Evolution of Interrogations: The PEACE Model*, 18 CAN. CRIM. L. REV. 219, 230-35 (2014) (describing the content of the PEACE model).

[19] *See* HIGH-VALUE INTERROGATION GRP. RES. UNIT, SCIENCE-BASED INTERROGATION: A REFERENCE GUIDE 104-05 (2016) [hereinafter HIG MANUAL].

Canada,[20] eschews all of the techniques described above, and relies on confronting the suspect with valid evidence and discrepancies in his or her story.[21] The HIG technique is very similar to PEACE but relies more explicitly on practices that produce "cognitive load," the idea that liars have a much harder time than truth-tellers at keeping their story straight.[22] Thus, the goal with HIG is to develop such rapport with suspects that they feel comfortable talking, with the result that they eventually trip over their own lies.[23]

Both of these approaches, and in particular the HIG approach, rely heavily on convincing the suspect that the interrogators are trustworthy.[24] HIG interlocutors are also taught to rely on what some might call "tricks," such as asking suspects to describe the relevant events in reverse order, maintain eye contact with the interrogator, perform several tasks at once, and answer unexpected questions, all designed to increase cognitive load.[25] A variant of the HIG approach, known as the Scharff technique after Hanna Joachim Scharff, a German World War II interrogator, also relies heavily on the "illusion of knowing it all."[26] Thus, even some third-generation approaches rely on at least a junior form of deception, and may be suspect to those who believe interrogation should not depart from Sunday School norms.[27]

More importantly, the jury is still out as to how effective these third-generation tactics are. It has been asserted that confession rates achieved using the PEACE technique are at least as high as those in the United States.[28] But that

[20] Snook et al., *supra* note 18, at 239.

[21] *Id.* at 232 ("If a discrepancy is identified, the interviewer may decide to challenge it at the end of the interview. Challenges are not conducted in an aggressive or accusatorial manner.").

[22] HIG MANUAL, *supra* note 19, at 79-81.

[23] *Id.* at 81-82 ("Methods that impose [an increased expenditure of mental energy] serve to increase the amount of cognitive load a person is experiencing. When there is an increase in the level of mental effort liars have to expend, their stories may lack detail and become less logical or coherent.").

[24] *Id.* at 51 ("A common way to start an interview is by building rapport and encouraging cooperation from the subject."); *id.* at 100-01 (discussing the importance of establishing trust and noting that "[t]here is a fine line between trust and honesty"); Snook et al., *supra* note 18, at 231 (describing the importance of rapport-building and creating a "working alliance").

[25] HIG MANUAL, *supra* note 19, at 82-89.

[26] Simon Oleszkiewicz et al., *The Scharff-Technique: Eliciting Intelligence from Human Sources*, 38 LAW & HUM. BEHAV. 478, 479 (2014) (pointing out that this illusion leads the suspect to believe that the interrogator is "very well informed on the topic").

[27] *Cf.* Daniel W. Shuman, *The Use of Empathy in Forensic Examinations*, 3 ETHICS & BEHAV. 289, 294-97 (1993) (arguing that evincing empathy during a forensic interview is often unethical).

[28] Snook et al., *supra* note 18, at 236 (stating that the confession rate is about fifty percent whether the Reid or PEACE technique is used); *see also* GISLI H. GUDJONNSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 620-23 (2003) (stating, based on experience in the United Kingdom, that fears that abandoning the Reid technique

claim can be disputed on a number of grounds.[29] A stronger claim, based on research to date, is that third-generation interrogation techniques produce a greater amount of information than more confrontational practices that might be met with denials and clam-ups.[30] That is a decided advantage if, as the cognitive overload theory predicts, more information means a greater chance of exposing contradiction.[31] A final claim that is likely true is that, given their relatively unaggressive posture, third-generation techniques are less likely to cause false confessions.[32]

Nonetheless, yet to be proffered is solid evidence that, compared to second-generation techniques, third-generation techniques have superior "diagnosticity"—that is, a similar or higher true confession rate combined with a lower false confession rate.[33] Second-generation techniques may be significantly better than third-generation techniques at producing true confessions,[34] and if any false confessions they generate can be exposed prior to

would reduce confessions "may be overstated").

[29] First, confession rates are probably higher in the United States, where the Reid technique is prevalent, than in the United Kingdom. *See* Slobogin, *supra* note 8, at 1282-83 nn.44-45. Second, United Kingdom police still use Reid-type techniques in some cases. *Id*. Third, United Kingdom confession rates are probably enhanced by the fact that United Kingdom interrogators routinely tell suspects who refuse to answer a question that "[i]t may harm your defence if you do not mention when questioned something which you later rely on in Court," and by knowledge on the part of the interrogators that fruits of a confession will not be excluded from evidence. Jason Mazzone, *Silence, Self-Incrimination, and Hazards of Globalization*, *in* COMPARATIVE CRIMINAL PROCEDURE 308, 321 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016).

[30] *See* HIG MANUAL, *supra* note 19, at 23 (describing research finding that "[m]otivational [i]nterviewing," a variant of nonaccusatorial questioning, "increased Information Yield both directly and indirectly"); Oleszkiewicz et al., *supra* note 26, at 482 (finding that the Scharff technique "resulted in significantly more new information than the Direct Approach").

[31] HIG MANUAL, *supra* note 19, at 80.

[32] This conclusion follows from the false confession research, which indicates that, outside of interrogations involving very young children or people with intellectual disability, most false confessions come in cases using Reid-type techniques or the third degree. *See infra* notes 34 & 158 and text accompanying note 139.

[33] According to one source, "systematic study" assessing the effectiveness of the PEACE method "in the field" has yet to be completed. Snook et al., *supra* note 18, at 233. *But see* S. Soukara et al., *What Really Happens in Police Interviews with Suspects? Tactics and Confessions*, 15 PSYCHOL. CRIME & L. 493, 504 (2009).

[34] *See, e.g.*, DAVID DIXON (WITH GAIL TRAVIS), INTERROGATING IMAGES: AUDIO-VISUALLY RECORDING POLICE QUESTIONING OF SUSPECTS 228-29 (2009) (reporting survey of police, prosecutors, defense attorneys, and judges in England indicating that the first three groups were more likely to state that the PEACE technique had decreased the number of confessions, although also indicating that all four groups believed it increased guilty pleas); Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, the Bluff, and False Confessions*, 35 LAW & HUM. BEHAV. 327, 334 (2011) (reporting a laboratory study finding that while the bluff technique increased false confessions from forty-five percent to seventy percent it also

use in adjudication (in ways explained later in this Article[35]), their ultimate diagnosticity may be superior. If so, American police are justified in refusing to abandon second-generation techniques on effectiveness grounds. Then the key question is whether these techniques are legal.

II. THE LEGALITY OF SECOND-GENERATION TECHNIQUES

Until the superiority of third-generation interrogation techniques becomes clear, the primary issue surrounding interrogation will be whether there are any legal impediments to second-generation practices. Below, that inquiry is divided into an exploration of the Fifth Amendment's prohibition on coercion and an examination of the relevance of confession reliability under both the Constitution and evidence rules. The goal of this discussion is conservative: it is to make sense of current doctrine, not change it—to help courts think through the implications of the Court's cases, not propose a new framework. The discussion of coercion is an amplification of my previous work on that topic, while the discussion of reliability brings together an analysis of the Supreme Court's decision in *Colorado v. Connelly*,[36] a brief description of the new research findings from social psychologists about possible causes of false confessions, and some thoughts on how those findings can best be used by the courts.

A. *Coercion*

The Due Process Clause has long protected against "involuntary" confessions.[37] *Miranda* broadened the definition of coercion by moving the

increased true confessions from twenty-six percent to eighty-nine percent); Melissa Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 484 tbl.1 (2005) (reporting a laboratory study finding that manipulative techniques, while increasing false confessions from 6% to 18%, increased true confessions from 46% to 81%). The one laboratory study that purports to compare second- and third-generation techniques found that the two techniques produced roughly the same percentage of true confessions. Fadia M. Narchet et al., *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, 35 LAW & HUM. BEHAV. 452, 459 tbl.3 (2011). But it appears that the interrogators in this study switched to Reid techniques if they could not get a confession using "non-coercive" techniques, *see id.* at 458, which would reduce the denominator of the confession rate for the latter techniques. Relatedly, field research indicates that the use of Reid techniques increases the probability of a confession (although here it is not known whether the confession is true or false). *See, e.g.*, Lesley King & Brent Snook, *Peering Inside a Canadian Interrogation Room: An Examination of the Reid Model of Interrogation, Influence Tactics, and Coercive Strategies*, 36 CRIM. JUST. & BEHAV. 674, 690 (2007); Soukara et al., *supra* note 33, at 503.

[35] *See infra* text accompanying notes 173-76.

[36] 479 U.S. 157, 167 (1986).

[37] Rogers v. Richmond, 365 U.S. 534, 540 (1961) ("Our decisions under [the Due Process Clause] have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the *product* of coercion, either physical or

inquiry from the Due Process Clause to the Fifth Amendment's prohibition on compelled self-incrimination.[38] Relying on that language, *Miranda* reoriented the concept of coercion in the interrogation context, holding that compulsion occurs during any custodial questioning that is not preceded by the famous warnings about the rights to silence and counsel.[39] At the same time, *Miranda* held that if police provide the four-part litany and the suspect says he understands it and decides to speak anyway, then, barring coercive conduct by the police, any statements subsequently made by the defendant should be admissible under the Constitution.[40] One can argue whether the Fifth Amendment in fact requires this regime,[41] but this Article will take it as a given.

The Court's interrogation case law has always been vague about the precise meaning of coercion, understandably so given how that concept has perplexed moral philosophers.[42] Even so, some concrete guidance can be extracted from the Court's jurisprudence. The physical abuse or prolonged (multi-day) detention of suspects associated with first-generation practices is clearly coercive under the Constitution.[43] Similarly, when police threaten a suspect's

psychological, cannot stand."). For further discussion of the meaning of "involuntary" under the Due Process Clause, see *infra* text accompanying notes 112-26.

[38] Stephen J. Schulhofer, Miranda, Dickerson, *and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 950 (2001) ("*Miranda* . . . brought Fifth Amendment standards into the stationhouse under the expressly stated assumption that those standards provided more protection than the traditional Fourteenth Amendment voluntariness requirement.").

[39] Miranda v. Arizona, 384 U.S. 436, 476 ("The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.").

[40] *Id.* at 444 ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."). The Court has since downplayed the last two requirements. *See infra* text accompanying notes 89-97.

[41] *See, e.g.*, *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) ("I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules."); Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 851, 892-93 (2017).

[42] *See generally* Michael Kates, *Markets, Sweatshops and Coercion*, 13 GEO. J.L. & PUB. POL'Y 367, 368 (2015) ("Coercion is a philosophically contested concept. Indeed, the problem is even worse than that. For not only is there sharp disagreement in the philosophical literature as to what is the correct definition or meaning of coercion but the nature of that disagreement ranges over a number of different dimensions as well.").

[43] *See, e.g.*, Beecher v. Alabama, 389 U.S. 35, 36 (1967) (finding coercion where police officers held a gun to the head of a wounded confessant in a successful effort to extract a confession); Davis v. North Carolina, 384 U.S. 737, 746-51 (1966) (finding that sixteen days of incommunicado interrogation in a closed cell without windows, limited food, and coercive tactics constituted coercion); Reck v. Pate, 367 U.S. 433, 435-39 (1961) (finding coercion where a defendant was held for four days with inadequate food and medical attention until a confession was obtained); Culombe v. Connecticut, 367 U.S. 568, 570 (1961) (finding

loved one with physical force or other serious harm, then any ensuing confession is involuntary.[44] In *Miranda*'s terms, these situations impose too high a cost on remaining silent, effectively nullifying the right.[45]

The Court has not been as clear about the propriety of second-generation tactics, however. In several pre-*Miranda* cases, where the suspect was subjected to custodial interrogation and yet was not told about the right to remain silent, the Supreme Court was leery of confessions obtained through deception.[46] In contrast, in post-*Miranda* cases where the *Miranda* litany *was* given, the Court has appeared to be more willing to countenance manipulation by the police.[47] Certainly that has been true in some lower courts, which have permitted all four types of second-generation tactics described above: impersonation,[48]

coercion where a defendant held for five days of repeated questioning during which police employed coercive tactics); Payne v. Arkansas, 356 U.S. 560, 567 (1958) (finding coercion where defendant held incommunicado for three days with little food and told that Chief of Police was preparing to admit lynch mob into jail); Ashcraft v. Tennessee, 322 U.S. 143, 149 (1944) (finding coercion where defendant was questioned by relays of officers for thirty-six hours without an opportunity for sleep).

[44] Lynumn v. Illinois, 372 U.S. 528, 532 (1963) (holding invalid a confession that female suspect said she made "because the police told me they were going to send me to jail for 10 years and take my children, and I would never see them again; so I agreed to say whatever they wanted me to say"); Rogers v. Richmond, 365 U.S. 534, 536 (1961) (holding invalid a confession obtained after police threatened to arrest suspect's wife).

[45] *See Miranda*, 384 U.S. at 476 ("[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.").

[46] *See* Spano v. New York, 360 U.S. 315, 323 (1959) (involving a police officer, a friend of Spano's, falsely stating he would lose his job and that his family would suffer if a confession was not forthcoming); Leyra v. Denno, 347 U.S. 556, 559-60 (1954) (involving a psychiatrist posing as a medical doctor who repeatedly told Leyra "how much he wanted to and could help him, how bad it would be for petitioner if he did not confess, and how much better he would feel, and how much lighter and easier it would be on him if he would just unbosom himself to the doctor").

[47] *See* Oregon v. Mathiason, 429 U.S. 492, 495-96 (1977) (suggesting that lying about finding the suspect's fingerprints at the scene of the crime was not relevant to the admissibility issue); Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding admissible a confession by a suspect who was told, falsely, that his codefendant had just confessed).

[48] *See*, *e.g.*, Miller v. Fenton, 796 F.2d 598, 602 (3d Cir. 1986) (upholding confession obtained after the detective stated several times "I'm your brother.").

rationalization,[49] fabrication,[50] and negotiation.[51] The fact remains that the Supreme Court itself has been coy about these matters.[52]

Nonetheless, more specific guidance, consistent with the Court's case law such as it is, is possible. In *Lying and Confessing*, I argued that while first-generation and negotiation techniques are impermissibly coercive, impersonation, rationalization, and evidence fabrication are not.[53] Following the lead of the Court, I did not derive this conclusion from philosophical musings. Rather, I based it on the simple precept that, once the warnings are given and acknowledged as understood, police deception during interrogation amounts to Fifth Amendment coercion when, but only when, the deceptive statements would be coercive if true, a principle I called the "equivalency rule."[54] A police statement that, if true, is not unconstitutionally coercive, does not become coercive simply because it is in fact false. Conversely, of course, all coercive tactics, whether deceptive or not, should be banned. The implications of this equivalency test, and how it ties in with Supreme Court precedent governing the interrogation process, are explored below.

[49] *See id.* at 603 ("I know how you feel inside, Frank, it's eating you up, am I right? It's eating you up, Frank. You've got to come forward. You've got to do it for yourself, for your family, for your father, this is what's important, the truth, Frank."); United States v. Huggins-McLean, No. CR414-141, 2015 WL 370237, at *4 (S.D. Ga. Jan. 28, 2015) (upholding confession obtained after police told the suspect "it would be better for him to speak and provide a 'truthful and honest' statement about his criminal activities").

[50] Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 612-13 (2006) (noting that courts have permitted lies about: "witnesses against the defendant, earlier statements by a now-deceased victim, an accomplice's willingness to testify, whether the victim had survived an assault, 'scientific' evidence available, including DNA and fingerprint evidence, and the degree to which the investigating officer identified and sympathized with the defendant").

[51] *Id.* at 623 ("[T]here are many cases in which confessions are found to be voluntary based upon a variety of promises made, including vague guarantees that the defendant will receive better treatment if she confesses, offers of more lenient punishment for the suspect, assurances of lesser charges being prosecuted if the individual confesses . . . ." (footnotes omitted)).

[52] Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 6 (1995) ("The Court's few pronouncements in this area have been so enigmatic, and so highly contingent on specific facts, that they are largely ignored by interrogators and courts alike.").

[53] Slobogin, *supra* note 8, at 1285-89.

[54] *Id.* at 1287. I also argued, based on the work of moral philosopher Sissela Bok and Fourth Amendment jurisprudence, that deception should only be permissible when directed at people for whom police have probable cause. *Id.* at 1276-80; *see also* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978)). Thus, interrogation prior to arresting an individual would be impermissible. *See* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 811 (1997).

1. Manipulative Techniques That Are Coercive

The most obviously coercive deceptive practices under the equivalence test are statements that a suspect's postwarning silence will be used against him or that contact with counsel will be prevented, because even if the police mean what they say these declarations are a direct violation of *Miranda*.[55] Also clear is that false threats to impose a legal penalty if a confession is not forthcoming are coercive, as these threats would be coercive if true. The Supreme Court's Fifth Amendment jurisprudence has long prohibited imposition of legal sanctions for refusing to make self-incriminating statements.[56]

Of course, police rarely are so blatant. More likely are statements indicating either that "things will get worse" if silence or counsel rights are asserted,[57] or the converse, that lenient legal treatment is likely if the suspect confesses.[58] Often these descriptions of the suspect's legal plight might turn out to be true.[59] Nonetheless, whether true or false, such negotiation techniques tell the suspect that remaining silent will, in effect, result in a criminal penalty. Under the Fifth Amendment they should be considered coercive. Even the Reid Manual emphasizes that suspects should not be told that they face certain punishment if they do not confess or promised leniency if they do.[60]

[55] Slobogin, *supra* note 8, at 1285-86 (outlining three alternative schools of thought about coercion and asserting that all three regard such practices as violations).

[56] Examples of cases holding that the Fifth Amendment prohibits such penalties include *Lefkowitz v. Cunningham*, 431 U.S. 801, 803-04 (1977) (loss of the right to participate in political associations and to hold public office), *Lefkowitz v. Turley*, 414 U.S. 70, 73-74 (1973) (ineligibility to receive government contracts), *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 281 (1968) (termination of employment), and *Spevack v. Klein*, 385 U.S. 511, 512-13, 516 (1967) (loss of professional license). *But see* McKune v. Lile, 536 U.S. 24, 29, 48 (2002) (concluding that the Fifth Amendment is not violated by conditioning the extent to which prisoners can keep personal property, see visitors, spend money, and earn money on self-incrimination).

[57] *See* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 194-95 (1991) (stating that Baltimore detectives routinely tell a suspect that an invocation of rights will "make matters worse for him, for it would prevent his friend the detective, from writing up the case as manslaughter or perhaps even self-defense, rather than first degree murder").

[58] *See, e.g.*, Rose v. Lee, 252 F.3d 676, 686 (4th Cir. 2001) ("[W]e decline to hold that the cryptic promise that 'things would go easier' on [the suspect] if he confessed amounts to unconstitutional coercion."); LEO, *supra* note 11, at 158 (describing cases where interrogators promised lighter sentences if the suspect confessed).

[59] It is well known that sentences imposed after guilty pleas are often much shorter than those that would have been imposed after trial. *See, e.g.*, Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM L. REV. 959, 992, 1005-09 (2005) (finding increases in sentences for those who go to trial ranging "from 13% to 461% in Washington, from 58% to 349% in Maryland, and from 23% to 95% in Pennsylvania").

[60] *See* INBAU ET AL., *supra* note 14, at 344 (stating that police should not tell a suspect who is denying the crime "I will not only charge you with this offense but also with obstruction of

Again, however, sophisticated police are not likely to resort to such tactics. Instead, one technique that the Reid Manual recommends is to intimate that the suspect will have some type of defense if he or she confesses.[61] Or police might suggest that the suspect will get to go home if incriminating information is provided, or engage in extremely long interrogations that imply the same thing.[62] The inquiry here becomes more difficult, but should ultimately depend on the extent to which police condition better legal treatment on a confession. For instance, questions such as "Have you done this many times before or was this just the first time?" or "Was this whole thing your idea or did you get talked into it?"[63] are much closer to rationalization than negotiation techniques; they give the suspect a reason to feel less guilty about the offense, but do not suggest that real legal consequences will flow from a confession. In contrast, both direct and indirect indications that a confession will mean more lenient treatment by the court (e.g., "You are not to blame, but you have to tell my why") or by the police (e.g., "We can make this short or long") should lead to exclusion.[64] In such cases the police are telling the suspect that a confession is the only way to avoid significant criminal liability or physical detention.

justice"); *id.* at 345 (stating that interrogators should not tell a suspect "if this is the first time you did something like this, I'll talk to the judge and make sure that he gives you probation").

[61] *See id.* at 345 (stating that an interrogator may say to a suspect "if this is something that happened on the spur of the moment, that would be important to include in my report"); *see also id.* at 296, 299 (recommending that, at the climactic stage of the interrogation, the suspect who continues to deny the crime be given only two alternatives—e.g., "If you've done this dozens of times before, that's one thing. But if this was just the first time it happened, that would be important to establish" or "Joe, this is very critical. When you pulled that trigger were you just trying to slightly injure him or were you aiming for his heart?").

[62] *See* LEO, *supra* note 11, at 132 (providing examples).

[63] *See* INBAU ET AL., *supra* note 14, at 296 (discussing and approving these techniques).

[64] Tough cases illustrate the thin line between negotiation and rationalization. *See, e.g.*, Miller v. Fenton, 796 F.2d 598, 609 (3d Cir. 1986) (finding no coercion where officer, posing as someone who wanted to help the suspect, stated "[y]ou are not responsible" and "[y]ou are not a criminal," because detective "never stated that anyone but he thought that Miller was 'not a criminal,' nor did he state that he had any authority to affect the charges brought against Miller"); Fundaro v. Curtin, No. 4:13-cv-11868, 2015 WL 357012, at *7 (E.D. Mich. Jan. 26, 2015) (finding no coercion when police statements "were conditional: *if* Petitioner acted in self-defense, *then* he should explain his side of the story. The statements did not inform him that he in fact acted in self-defense."); People v. Holloway, 91 P.3d 164, 178 (Cal. 2004) (holding that the detective's "general assertion that the circumstances of a killing could 'make[] a lot of difference' to the punishment" did not invalidate the confession) (alteration in original). In *Fundaro* and *Holloway*, the police were only suggesting the circumstances under which lenient treatment would occur, not that lenient treatment would be forthcoming if the suspect confessed. In *Miller*, the officer, in a part of the transcript that the court does not discuss, tied the suspect's entitlement to help to a confession. *Miller*, 796 F.2d at 623, 638 (stating repeatedly, "I can't help you without the truth"). Thus, the latter officer came much closer to suggesting leniency in exchange for a confession, and coercion should have been found.

This admonition is also consistent with the Supreme Court's cases. In the late nineteenth century case of *Bram v. United States*,[65] the Court held invalid under the Fifth Amendment any confessions "extracted by any sort of threats or violence, . . . obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence."[66] Of course, the suspect in *Bram* did not have the benefit of *Miranda* warnings. However, over seventy years later, a post-*Miranda* case, *Brady v. United States*,[67] explained that in *Bram* "even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times ['alone and unrepresented by counsel'] are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess."[68] Seven years after *Brady*, in *Hutto v. Ross*,[69] the Court implied that a counsel-less plea deal conditioned on a confession violated that test.[70] While the subsequent decision of *Arizona v. Fulminante*[71] stated that "under current precedent [*Bram*] does not state the standard for determining the voluntariness of a confession,"[72] that case dealt solely with due process analysis outside of the custodial context. In contrast, direct or implied promises during custodial interrogation that condition silence on a legal penalty, whether true or false and whether pre- or postwarning, directly violate the Fifth Amendment's commands. Many lower courts, although certainly not all, are in accord.[73]

One defense of negotiation techniques—at least those that focus on promises of legal leniency—is that they are very similar to the process of plea bargaining,[74] which the Supreme Court has enthusiastically sanctioned.[75] It is

[65] 168 U.S. 532 (1897).

[66] *Id.* at 542-43.

[67] 397 U.S. 742 (1970).

[68] *Id.* at 754.

[69] 429 U.S. 28 (1976).

[70] *Id.* at 30 (admitting confession solicited *after* a bargain but reaffirming *Bram*).

[71] 499 U.S. 279 (1991).

[72] *Id.* at 285 (citing *Bram*, 168 U.S. at 542-43).

[73] *See* Marcus, *supra* note 50, at 621-22).

[74] *See* Alschuler, *supra* note 41, at 865 ("When our justice system does not balk at using promises of leniency to induce the ultimate act of self-incrimination—a plea of guilty—it need not be squeamish about using similar leverage to induce suspects to say truthfully what happened."); Lawrence Rosenthal, *Against Orthodoxy:* Miranda *Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 600-01 (2007) ("[U]nder the guilty-plea cases, even if the accused and his counsel misapprehend the strength of the prosecution's case or the availability of defenses, a guilty plea is still considered a valid waiver. A *Miranda* waiver is certainly no less valid if the suspect somehow misapprehends his own best interests.").

[75] Santobello v. New York, 404 U.S. 257, 260 (1971) (stating that plea negotiation "is an essential component of the administration of justice" and that "[p]roperly administered, it is to be encouraged").

true that the Supreme Court has held that "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation."[76] But, as this language makes clear, the legality of plea bargaining is dependent on the participation of counsel, both the defense attorney and the prosecutor, as well as the supervision of the judge at the plea colloquy. More importantly, in terms of Fifth Amendment compulsion concerns, "pre-plea bargaining" is unconstitutional because of the implicit or explicit message that if counsel is consulted, the deal is off the table; that message directly undercuts both the right to silence and the right to counsel.[77]

2. Manipulative Techniques That Are Not Coercive

While the equivalency principle bars any deception that directly undercuts the warnings, it permits many other types of manipulation, including impersonation, rationalization, and fabrication. These techniques often or always involve deceptive statements by the police. But, in line with the few hints we have from Court's cases,[78] they are not coercive because the same statements would be uncoercive if true.

Take impersonation, or what Welsh White has called the "pretended friend" technique.[79] Officers expressing sympathy for the suspect's plight or pretending to be the suspect's new best friend can be highly deceptive.[80] But they are not acting coercively, or at least no more coercively than a friend acts. Whether or not the interrogator is in fact a friend or colleague in crime, the pressure to talk in this situation is virtually nonexistent. These scenarios merely encourage the suspect to, as Bill Stuntz put it, "forget" about the existence of the right encapsulated in the warnings.[81] The friendly cop might also be joined by a

[76] Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citing Brady v. United States, 397 U.S. 742, 758 (1970)).

[77] *See* LEO, supra note 11, at 29 (using the term "pre-plea negotiation"); *id.* at 133 (stating that interrogators seek to convince the suspect that "[his] admission is, in effect, his quid pro quo for an end to the interrogation and avoidance of the worse-case scenario—harsher treatment or punishment, for example").

[78] *See supra* note 47; *infra* note 80.

[79] Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 614-15 (1979).

[80] *See, e.g.*, Illinois v. Perkins, 496 U.S. 292, 294 (1990) (holding that questioning by an undercover officer posing as a jail inmate does not violate Fifth Amendment). What if the interrogator poses as a lawyer? Although there would be no coercion, the warnings about silence and counsel would have to be given, which makes this scenario practically impossible.

[81] William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 823 (1989) ("[Deception] avoids the confession-or-perjury dilemma either by convincing the suspect that truthful statements will not have incriminating consequences, or by making him forget temporarily that they will.").

tougher one, as in the infamous Mutt and Jeff routine.[82] However, so long as Mutt does not engage in the third degree or negotiation techniques and Jeff does not offer protection from those techniques or offer leniency, Fifth Amendment coercion has not occurred. To the extent they rely on "fake" trust, this conclusion insulates the PEACE and HIG approaches as well.

The equivalency test would also permit rationalization tactics. For instance, police might suggest that there are psychological benefits to confessing, such as alleviating feelings of guilt, showing concern for the victim's family, assuring forgiveness from God, or achieving respect in the community.[83] These sentiments would not be considered coercive if the police sincerely voiced them. That they are often voiced pretextually should not change the analysis. The important caveat is that such techniques cannot merge into negotiation tactics promising legal relief, because then they become coercive in the Fifth Amendment sense.[84]

More controversially, the equivalency test sanctions evidence fabrication ploys. Confronting a suspect with actual forensic evidence discovered at the crime scene, actual eyewitness accounts, or actual documentary evidence obviously produces pressure to confess (in the case of guilty people) or explain (in the case of innocent ones). But if such tactics were considered unconstitutionally coercive, even the PEACE approach would have to be outlawed, and confessions triggered by evidence that later turns out to be wrong (e.g., an incorrect eyewitness identification) would have to be thrown out as well. If instead the evidence is made-up, the pressure to talk is, at worst, usually no more intense and perhaps even reduced, since the suspect, whether guilty or innocent, can often smell out the ruse. For the same reason, police "bluffing" about how certain they are that the suspect is guilty should not be considered coercive.[85] Even if the police go to the trouble of fabricating evidence that can

[82] *See* Miranda v. Arizona, 384 U.S. 436, 452-53 (1966) (describing the technique).

[83] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DEN. U. L. REV. 979, 1056-60, 1077 (1997) (providing these examples and distinguishing between the moral and psychological consequences of not confessing and the legal consequences of not doing so); INBAU ET AL., supra note 14, at 289 (suggesting, inter alia, that suspects be told to tell the truth "for the sake of everyone concerned").

[84] *See supra* note 64. In one of the first studies to investigate interrogation techniques, participants perceived explicit threats and promises to be more coercive than indirect maximization and minimization techniques, which tended to be seen as no more coercive than simple questioning. Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233, 238 (1991). In a separate experiment, participants were much more likely to find that minimization techniques that were combined with the statement "If you just tell me the truth, we can get this matter straightened out" were a form of negotiation than when the latter sentence was not included. *See id.* at 240-41 (describing three scenarios—one without the statement and two with the statement).

[85] *See* ARTHUR S. AUBRY, JR. & RUDOLPH R. CAPUTO, CRIMINAL INTERROGATION 85-86

be shown to the suspect, the pressure to talk is no greater than in cases where the evidence actually exists.[86] Courts might bar such tactics on the ground that the fabricated evidence will confuse a jury if it must be presented at trial to explain how the confession was obtained.[87] But that decision would be based on concerns about prejudicing defendants, not coercing them.[88]

3. The Rights Predicate and State Action

Under the equivalency test, lies about the rights encased in the warnings constitute per se coercion under the Fifth Amendment.[89] Less clear is the result if the police neither lie nor mislead about the *Miranda* rights, but rather underplay them, or allow misimpressions on the part of the suspect to continue uncorrected. The discerning reader may have noted that, in my earlier description of *Miranda*'s holding,[90] I said that *Miranda* prevents the police from *telling* suspects they do not have a right to silence and counsel or that their statements will not be used against them, and that *Miranda* requires that police make sure the suspect *says* he understands these rights. I described the holding this way because, since *Miranda*, the Supreme Court has held admissible a number of confessions obtained after the police accurately give the warnings to a suspect who indicates he understands them and then gives incriminating statements, all while apparently confused about what the warnings really mean.

(1965) (recommending "bluffing" the suspect by telling him, e.g., that he was seen at the scene of the crime or that the co-defendant has confessed).

[86] *See, e.g.*, State v. Cayward, 552 So. 2d 971, 972 (Fla. Dist. Ct. App. 1989) (excluding confession produced after police showed suspect fabricated report showing that the semen stains on the victim's underwear belonged to the suspect); Washoe Cty. v. Bessey, 914 P.2d 618, 619, 622 (Nev. 1996) (refusing to exclude confession on similar facts); State v. Patton, 826 A.2d 783, 784 (N.J. Super. Ct. App. Div. 2003) (prohibiting use of a manufactured recording in which police presented a fictitious eyewitness).

[87] *Cayward*, 552 So. 2d at 974 ("A report falsified for interrogation purposes might well be retained and filed in police paperwork. Such reports have the potential of finding their way into the courtroom.").

[88] *See* George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEXAS TECH. L. REV. 1293, 1308-12, 1316-19 (2007) (describing *Cayward*, *Bessey*, and *Payton* and concluding that the confessions should have been admitted).

[89] *See, e.g.*, Hart v. Attorney Gen. of Fla., 323 F.3d 884, 894-95 (11th Cir. 2003) (excluding a statement from the suspect who was told "honesty will not hurt you"); *Ex parte* Johnson, 522 So. 2d 234, 235-36 (Ala. 1988) (excluding a statement after the suspect was told it could not be used in a criminal case); Commonwealth v. Peters, 373 A.2d 1055, 1058-63 (Pa. 1977) (excluding statements made after the suspect was told they would only be used against other suspects); State v. Stanga, 617 N.W.2d 486, 490-91 (S.D. 2000) (excluding a statement from a suspect who was told the statements would just be "between the two of them").

[90] *See supra* text accompanying note 40.

For instance, in *North Carolina v. Butler*[91] and *Connecticut v. Barrett*,[92] the defendant appeared to believe that statements not reduced to writing and signed are inadmissible; in *Berghuis v. Thompkins*[93] the defendant might have believed that merely remaining silent meant he had asserted his right to silence;[94] in *Davis v. United States*[95] the defendant probably thought that stating "Maybe I should talk to a lawyer" was an assertion of the right to counsel;[96] and in *Colorado v. Spring*[97] the defendant may have believed that he could not refuse to answer a question about a murder after talking volubly about a firearms violation.[98] In all of these cases, the Court found no violation of *Miranda*.

Assuming that during the interrogation the suspects had the beliefs just ascribed to them, were their statements coerced under the Fifth Amendment? The dissenters in some of these cases and many commentators believe so, on the ground that any confusion about the *Miranda* rights means that subsequent statements are compelled.[99] But this commentary has given insufficient

[91] 441 U.S. 369, 371 (1979) (involving a suspect who, after receiving the warnings, stated "I will talk to you but I am not signing any form").

[92] 479 U.S. 523, 525 (1987) (involving a suspect who said he understood his rights and then said he would not give a written statement without a lawyer being present but had "no problem" talking).

[93] 560 U.S. 370 (2010).

[94] *Id.* at 375-76 (involving a suspect who was given warnings and said very little for the first two hours and forty-five minutes of the interrogation, at which point, in answer to the question "Do you pray to God to forgive you for shooting that boy down?" he answered "Yes").

[95] 512 U.S. 452, 455 (1994) (holding that police may continue questioning a suspect who states "Maybe I should talk to a lawyer" without stopping to clarify if the suspect wants counsel).

[96] *Id.* at 455 (holding that police may continue questioning a suspect who states "Maybe I should talk to a lawyer" without stopping to clarify if the suspect wants counsel).

[97] 479 U.S. 564 (1987).

[98] *Id.* at 567 (where suspect waived his rights on the understanding police would question him about a firearms charge, and at some later point during the ninety-minute interview answered affirmatively when asked if he had ever shot someone).

[99] *See, e.g.*, *Berghuis*, 560 U.S. at 404 (Sotomayor, J., dissenting) ("Today's decision bodes poorly for the fundamental principles that *Miranda* protects."); *Davis*, 512 U.S. at 472 (Souter, J., concurring) ("When a suspect understands his (expressed) wishes to have been ignored (and by hypothesis, he has said something that an objective listener could 'reasonably,' although not necessarily, take to be a request), in contravention of the 'rights' just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation."); *Spring*, 479 U.S. at 579 (Marshall, J., dissenting) ("[R]equiring the officers to articulate at a minimum the crime or crimes for which the suspect has been arrested could contribute significantly toward ensuring that the arrest was in fact lawful and the suspect's statement not compelled because of an error at this stage alone."); Yale Kamisar, *The Rise, Decline and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 1008-20 (2012) (criticizing *Butler*, *Berghuis*, and *Davis*).

consideration to the implications of *Colorado v. Connelly*, which (correctly) held that neither the Fifth Amendment nor the Due Process Clause is violated unless the police engage in "overreaching" that leads to the statement.[100] All of the cases under consideration involved inaction, not action; the pressure to talk, if there was any (unlikely in *Butler* and *Barrett*, possible in the other three), came not from the police but from the defendant's confusion about rights that had been read to him and that he said he understood. The police did not "overreach," they merely took advantage of a suspect's befuddlement.[101] The one possible exception is *Spring*, where the police affirmatively lied about the full scope of the interrogation, probably in an effort to surprise Spring with their question about the murder midway through the interview.[102] But that lie was not about the rights to silence or to counsel. While its timing might have taken advantage of Spring's erroneous belief that once he started talking he had to keep going, that belief was Spring's "fault," not the fault of the police.

A second nondoctrinal, but perhaps equally important, reason to accept the results in these cases is the heavily documented fact that a large proportion of suspects have trouble understanding the warnings.[103] Imposition of a duty to clarify would place substantial burdens on the police. Further, when a suspect claims the rights should have been clarified, courts must also determine whether any claimed misunderstanding was real. It was assumed above that the defendants in *Butler*, *Barrett*, *Berghuis*, *Davis*, and *Spring* thought either that nothing they said could be used against them (in *Butler* and *Barrett*) or that they did not have a right to silence or counsel (in *Berghuis*, *Davis*, and perhaps *Spring*). But in many such cases there will be evidence to the contrary.[104] If so,

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[100] Colorado v. Connelly, 479 U.S. 157, 170 (1986).

[101] *See* Robert P. Mosteller, *Police Deception Before* Miranda *Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239, 1270 (2007) (arguing that "passive deception" at the time of the warnings is permissible, but that "affirmative, false statements" should not be).

[102] *See supra* note 97.

[103] *See* Richard Rogers et al., *An Analysis of* Miranda *Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177, 188-91 (2007) (finding that understanding the warnings requires a reading capability somewhere between sixth and tenth grade, which many defendants lack); Richard Rogers et al., *"Everyone Knows Their* Miranda *Rights": Implicit Assumptions and Countervailing Evidence*, 16 PSYCHOL. PUB. POL'Y & L. 300, 307-11 (2010) (finding, among a sample of adult defendant and college students given the warnings, that 30.2% believed that once counsel is requested questioning may continue until counsel arrives, 30% believed that silence could be used as evidence, 25.9% believed that a waiver must be signed to be valid, and 12.8% believed that statements could be retracted).

[104] In *Davis*, for instance, the defendant later unequivocally stated he did not want counsel. *Davis*, 512 U.S. at 455. In *Spring*, the suspect not only was given the usual warnings but was also told he had the right to cut off questioning at any time. *Spring*, 479 U.S. at 564. In *Berghuis*, the suspect never said he wanted to remain silent and in fact responded to a number of the interrogators' questions. *Thompkins*, 560 U.S. at 375.

the ensuing suppression hearing would require ascertaining not only whether the police should have been on notice that the defendant might need clarification, but also whether the defendant actually needed the clarification; the temptation to malinger confusion is very high in such situations.

In short, despite their underhanded treatment of the *Miranda* warnings, these cases make sense both as a matter of doctrine and as a practical matter. Closer cases occur when police immediately proceed to questioning after giving the warnings and eliciting an indication of understanding without asking the suspect whether he or she wants to invoke the rights, or when they downplay the rights as mere bureaucratic boilerplate.[105] In these situations more is involved than a failure to clarify, and a court might find that police affirmatively led the suspect to believe he was supposed to talk. But even in these situations the conclusion that silence is not permissible is the suspect's; the police are not stating or implying there will be a legal penalty for remaining silent.

More easily distinguishable from the Court's cases are those situations where psychological characteristics of the suspect make the warnings irrelevant. This situation is most likely to arise with very young children (below thirteen) or individuals with intellectual disability. Because of their susceptibility to authority figures and their difficulty understanding abstract concepts, they are very likely to believe that they should talk to police regardless of how carefully the *Miranda* warnings are delivered.[106] In other words, the mere act of questioning these sorts of people "compels" them to talk despite being told about the right to silence. Further, in contrast to intellectually intact adults, whose actual understanding of the rights can be difficult to discern, the cognitive

[105] *See* LEO, *supra* note 11, at 125, 127 (describing such ruses).

[106] Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 513, 576 (2002) (finding extremely low understanding of the *Miranda* warnings among people with an IQ below eighty and noting that "[n]umerous participants involved in our study [of interrogation] answered yes to questions that they neither understood nor were able to answer"); Carol K. Sigelman et al., *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53, 53-57 (1981) (discussing studies that show individuals with intellectual disability are more likely to comply with unreasonable instructions); Susan Harter, *Mental Age, IQ, and Motivational Factors in the Discrimination Learning Set Performance of Normal and Retarded Children*, 5 J. EXPERIMENTAL CHILD PSYCHOL. 123, 137-38 (1967) (finding that individuals with intellectual disability seek approval from authority figures even when it requires giving an answer they know to be incorrect); Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 VILL. L. REV. 629, 657 (2003) (summarizing psychological research reporting that "children are more compliant and suggestible than adults"); Amye R. Warren & Dorothy F. Marsil, *Why Children's Suggestibility Remains a Serious Concern*, 65 LAW & CONTEMP. PROBS. 127, 128-31 (2002) (summarizing research indicating that children under twelve are significantly more suggestible than older children and adults).

deficits of young children and people with intellectual disability are consistent and relatively reliably ascertained by appropriately trained individuals.[107]

4. Summary

One way of deciding whether manipulative interrogation techniques are permissible is to analyze whether they would be coercive if police were in fact acting in good faith. Under this equivalency test, third degree interrogation and negotiation tactics involving threats or promises about a suspect's legal situation should be banned under the Fifth Amendment. Impersonation, rationalization, and fabrication should not be. The legal effect of a failure to clear up confusion about rights once they have been recited and the suspect claims to understand them is less clear but can be justified on the ground that the failure does not amount to state action.

Of course, most interrogations, at least those that are contested, usually involve a mishmash of techniques, not just a single tactic, often over a several-hour period.[108] Figuring out which technique, if any, "caused" an incriminating statement is virtually impossible. Probably the best approach is to presume that any interrogation in which negotiation tactics or first-generation techniques are used is coercive for Fifth Amendment purposes. The prosecution bears the burden of disproving coercion by a preponderance of the evidence.[109] Unless the prosecution can proffer solid evidence that coercive tactics, once shown to have occurred, did not influence the suspect, the confession should be excluded on Fifth Amendment grounds.

B. *Reliability*

The conclusion that confessions that are coerced should be excluded follows even if the prosecution can convincingly show the confession is reliable. The Fifth Amendment prohibits compelled testimony, not just compelled, unreliable testimony.[110] The converse of that statement is not true, however. As its language makes clear, and as the Supreme Court has confirmed, the Fifth

[107] *See generally* THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 149-92 (2003) (describing methods for evaluating waivers of rights by, inter alia, juveniles and people with intellectual disability).

[108] *See, e.g.*, State v. Turner, 847 N.W.2d 69, 73-74 (Neb. 2014) (refusing to exclude confession despite use of negotiation tactic—misrepresenting that a lesser sentence would be imposed for felony murder—because the confession was immediately preceded by rationalization techniques—telling suspect he was not an evil person, exhorting him to "do the right thing," and discussing the fate of his soul).

[109] Lego v. Twomey, 404 U.S. 477, 489 (1972).

[110] Michigan v. Harvey, 494 U.S. 344, 351 (1990) ("We have mandated the exclusion of reliable and probative evidence for *all* purposes . . . when it is derived from involuntary statements." (citing New Jersey v. Portash, 440 U.S. 450, 459 (1979))).

Amendment has nothing to say about false confessions unrelated to compulsion.[111]

Nor, as a practical matter, does the Due Process Clause. Some Supreme Court cases prior to *Miranda* did refer to the potential role of the Clause in excluding false confessions independently of whether they were coerced.[112] But in *Colorado v. Connelly* the Court not only emphasized the state action requirement, it also rejected this earlier view of the process due during interrogation.[113] After noting that the lower court in that case had found the confession resulted from the defendant's mental conflicts rather than from police interrogation,[114] the majority in *Connelly* declared that "[a] statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, . . . not by the Due Process Clause of the Fourteenth Amendment."[115] Thus, the Court dismissed the lower court's holding that the Clause requires "inquiries . . . divorced from any coercion brought to bear on the defendant by the State."[116]

This language also strongly suggests that, whatever may have been true decades ago,[117] due process analysis in interrogation cases is no longer concerned with "offensiveness" other than that associated with coercion. Pre-*Miranda* cases, where warnings were not required, excluded confessions on the ground that the techniques used were "revolting to the sense of justice,"[118]

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[111] Colorado v. Connelly, 479 U.S. 157, 170 (1986) ("The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion.").

[112] The strongest such statement came in *Lisenba v. California*, 314 U.S. 219, 236 (1941) ("The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence."). But most of the Court's due process cases during the pre-*Miranda* era simply emphasized that the focus should be coercion, not reliability. *See* Rogers v. Richmond, 365 U.S. 534, 540-41 (1961) ("Our decisions . . . have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand . . . not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.").

[113] *Connelly*, 497 U.S. at 163-67 (holding that introducing respondent's statements into evidence did not constitute a violation of the Due Process Clause).

[114] *Id.* at 162.

[115] *Id.* at 167.

[116] *Id.*

[117] The Court summarized the relevant sentiment in *Miller v. Fenton*, 474 U.S. 104, 109 (1985) ("This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.").

[118] Brown v. Mississippi, 267 U.S. 278, 286 (1936).

"tyrannical,"[119] or "shock[ing to] the conscience."[120] But this type of language—which is extremely amorphous,[121] and partly for that reason has generally been avoided in other contexts[122]—rarely finds its way into post-*Miranda* cases.[123] It is possible that particularly egregious police interrogation conduct offends the Due Process Clause even if it is not coercive.[124] But such cases are virtually an extinct breed after the *Connelly* decision and the Court's repeated description of the due process test as one focused on interrogation practices "calculated to break the suspect's will."[125] In short, for all practical purposes, the protection afforded by the Due Process Clause and the protection guaranteed by the Fifth Amendment after the warnings are given and putatively understood are co-extensive.[126]

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[119] Chambers v. Florida, 309 U.S. 227, 236 (1940).

[120] Chavez v. Martinez, 538 U.S. 760, 774 (2003) (quoting Rochin v. California, 342 U.S. 165, 172, 174 (1952)).

[121] This point has been made even by commentators who generally want to restrict interrogation practices. *See* Yale Kamisar, *On the Fortieth Anniversary of* the Miranda *Case*: *Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 168 (2007) (calling the due process involuntariness test "too amorphous, too perplexing, too subjective and too time-consuming to administer effectively").

[122] Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 335 (2015) ("In short, conscience-shocking behavior happens, but courts only rarely call it unconstitutional.").

[123] *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 285-88 (1991) (where the Court's due process analysis focused solely on "coercion," and did not mention offensiveness); Mincey v. Arizona, 437 U.S. 385, 398-402 (1978) (where the Court's due process analysis focused on whether police conduct, which included denying multiple requests for an attorney from a hospitalized individual, undermined the suspect's "free and rational choice"). In *Chavez v. Martinez*, the Court explained its holding that questioning of a hospitalized individual did not "shock the conscience" on the ground that the questioning was not "intended to injure in some way unjustifiable by any government interest." *Chavez*, 538 U.S. at 774-75. Assuming first-generation tactics are not at issue, interrogation is rarely intended to injure a suspect unjustified by a legitimate government interest.

[124] *E.g.*, Bambauer & Massaro, *supra* note 122, at 347-48 (arguing that *Missouri v. Seibert*, 542 U.S. 600 (2004)—where police knowingly took advantage of Supreme Court case law finding admissible postwarning statements made after prewarning statements—should have been decided on due process "outrageousness" grounds rather than on the assumption that the second confession was heavily influenced by the first (an assumption that Court had been unwilling to make in previous cases)). The fact that the Court chose the path it did suggests its antipathy toward using substantive due process in this context.

[125] This phrase first appeared in *Oregon v. Elstad*, 470 U.S. 298, 312 (1985), as a way of distinguishing coercion that renders a confession involuntary under the Due Process Clause and coercion associated with failing to give the warnings. *See* Colorado v. Spring, 479 U.S. 564, 574 (1987).

[126] Of course, if a person is not in custody at the time of questioning, *see Fulminante*, 499 U.S. at 283-84, or if the person is in custody but an exception to *Miranda* applies, *see* New York v. Quarles, 467 U.S. 649, 650 (1984), then the Due Process Clause alone protects

If so, proof that a confession is false does not change the constitutional analysis in interrogation cases.[127] That does not mean that defendants cannot obtain exclusion of false confessions, of course. As *Connelly* indicates, local evidentiary rules are another basis for exclusion.[128] Every jurisdiction provides that evidence lacking in probative value or whose probative value is outweighed by its prejudicial impact is inadmissible.[129] Certainly, false confessions, which are almost always completely inaccurate at the same time they are extremely influential,[130] fall in that category.[131] Commentators have also noted that false confessions might be excluded under the rule that a witness may only testify based on personal observation,[132] under variations of the *corpus delecti* rule,[133]

individuals from coercion during interrogation.

[127] Eve Primus has argued that, in context, *Connelly* was merely stating that reliability, standing alone, is not guaranteed by the Due Process Clause, and that unreliability caused by state action is still a matter of concern under the Clause. Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 32-34 (2015). But the Court's statement in *Connelly* that the Clause is only triggered by "coercion brought to bear on the defendant by the State" forecloses that argument, as does its declaration that "the voluntariness determination has nothing to do with the reliability of jury verdicts; rather, it is designed to determine the presence of police coercion." Colorado v. Connelly, 479 U.S. 157, 167-68 (1986); *see also* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 37 (2011) ("The U.S. Supreme Court has held that unreliability is irrelevant to the question whether a confession statement is sufficiently voluntary to be admitted at trial.").

[128] *Connelly*, 479 U.S. at 167. *Connelly* specifically referenced Federal Rule of Evidence 601, which states that the competency of witnesses is presumed. *Id.* That rule, at best, is tangential to the central inquiry, for reasons developed in the rest of this Section.

[129] *See, e.g.*, FED. R. EVID. 401 (defining as relevant any evidence that tends to make the existence of any material fact "more or less probable than it would be without the evidence"); FED. R. EVID. 403 (excluding relevant evidence when its probative value is "substantially outweighed by a danger of . . . unfair prejudice . . . [or] misleading the jury").

[130] *See Fulminante*, 499 U.S. at 292 ("A defendant's confession is 'probably the most probative and damaging evidence that can be admitted against him . . . .'" (quoting Cruz v. New York, 481 U.S. 186, 195 (1987))). Certainly, confessions have a profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind "even if told to do so." *Id.*; Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 479, 481 (1997) (finding that confessions are more prejudicial to the defendant's case than eyewitness identification and character testimony).

[131] *See* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 531-33 ("Because juries often see confession evidence as dispositive of guilt, even when it is false, its prejudicial effect can be devastating to an innocent defendant.").

[132] Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 232-33 (2006).

[133] Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 41-47 (2008) (criticizing the *corpus*

or pursuant to a special rule of evidence focused solely on confessions.[134] Procedurally, these claims would be raised via a motion *in limine*, akin to a suppression hearing.[135]

While an evidentiary hook is necessary,[136] the more important question is the quantity and quality of evidence defendants must present to meet the burden of production. On the assumption that the Due Process Clause protects against false confessions even in the absence of coercion, Eve Primus proposes that the defense should be required to show that the police used techniques they knew or should have known were likely to cause a false confession, at which point the state must show by a preponderance that the confession was reliable.[137] Because, as just explained, proof of state action is not necessary in the evidentiary setting, neither is proof of police mens rea of the type required by Primus.[138] But otherwise this division of responsibility between the defense and the prosecution is a sensible proposal, which the following discussion fleshes out in more detail.

1. The Defendant's Burden of Production

In meeting its burden of production under evidence law, the defense must provide plausible evidence that the defendant's confession is false. In the absence of significant physical or eyewitness proof of innocence (which is likely if the case continues forward), this showing can be difficult. Fortunately, because of the huge increase in relevant social science research, defense attorneys have been able to rely on more than conjecture for this purpose. In the past two decades, social scientists have conducted studies purporting to find a large number of "risk factors" for police-induced false confessions, including: (1) bargaining techniques involving legal consequences; (2) minimization of guilt that falls short of promising legal leniency; (3) interrogations lasting over four to six hours; (4) sleep deprivation; (5) false evidence ploys, especially when combined with lengthy interrogations; and (6) "bluffing" to the suspect that untested forensic evidence exists, which can induce a belief that exoneration will

delicti rule—requiring independent evidence that a crime has occurred—as tangential to the goal of assuring reliable confessions, and the "trustworthiness" rule—requiring corroboration from virtually any source—as too "permissive" toward the prosecution).

[134] *Id.* at 47-54 (proposing and elaborating on a new rule of evidence governing admissibility of confessions).

[135] *See* Leo et al., *supra* note 131, at 531.

[136] I prefer Rule 401/403 analysis because it uses existing law to confront directly the balance between the State's interest in introducing relevant evidence and the defendant's interest in keeping tainted, highly influential evidence from getting to the factfinder.

[137] Primus, *supra* note 127, at 41.

[138] Nor is such proof needed with respect to decisions about the coercion issue, even though state action is required in that setting. Nowhere does *Connelly* require knowledge of wrongdoing; it merely requires coercion. State action doesn't have to be intentional, it just has to exist.

occur despite a confession.[139] Then there are a number of other risk factors related to the suspect rather than to specific conduct by the police: (7) the belief that the criminal justice system is fair and thus exoneration is forthcoming; (8) immaturity; (9) intellectual disability; and (10) mental illness, including antisocial personality disorder, psychosis, and depression.[140] The basic research underlying these last four findings, particularly the latter three, documents well-known psychological mechanisms, including difficulty in delaying gratification, susceptibility to suggestion, and vulnerabilities in memory.[141]

Some of these risk factors (most obviously, (1) and, depending on the circumstances, (3), (8), and (9) as well) overlap with techniques or dispositions that would require a finding of coercion under the Fifth Amendment.[142] But many would not. If an interrogation was not coercive under the Fifth Amendment and the defense instead wants to exclude the confession on the ground it is false, how might this evidence be presented? Answering this question requires resort to the rules of evidence regarding expert testimony, which today center on *Daubert v. Merrell Dow Pharmaceutical Co*.[143] Although these rules are often relaxed in pretrial hearings,[144] they need to be discussed in this setting because they clearly have affected appellate court decisions about the admissibility of expert evidence pertaining to false confessions, which often sustain exclusion of this type of testimony whether presented prior to or during trial.[145]

Primus notes that such testimony can be "generalized" or "particularized" but does not discuss the evidentiary implications of this distinction.[146] In a recent article entitled *Group to Individual (G2i) Inference in Scientific Expert Testimony*, David Faigman, John Monahan, and I argued that *Daubert* analysis should differ depending upon whether the testimony is about general

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[139] The research findings bolstering these claims about false confessions are summarized in Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 16-22 (2010).

[140] *Id.*

[141] *See id.* at 15-16.

[142] *See supra* text accompanying notes 56-77, 106-07.

[143] 509 U.S. 579, 585-97 (1993).

[144] *See, e.g.*, FED. R. EVID. 104(a) (stating that in deciding the "preliminary question" about whether evidence is admissible, the "court is not bound by evidence rules").

[145] *See, e.g.*, United States, v. Belyea, 159 F. App'x 525, 529-30 (4th Cir. 2005) (requiring a particularized *Daubert* inquiry with regards to the admission of expert testimony on false confessions); People v. Kowalski, 821 N.W.2d 14, 24-26 (Mich. 2012) (applying *Daubert* to expert testimony on false confessions). *See generally*, Brian Cutler, Keith A. Findley & Danielle Loney, *Expert Testimony on Interrogation and False Confession*, 82 UMKC L. REV. 589, 590 (2014) ("The courts' response to expert testimony on false confessions . . . has not been uniformly welcoming. Some courts have permitted such evidence, but a significant number have rejected it for various reasons.").

[146] Primus, *supra* note 127, at 43.

phenomenon (i.e., "framework" evidence) or individual characteristics (i.e., "diagnostic evidence").[147] While the difference in analysis between framework and diagnostic evidence can vary along five axes (relevance, qualifications, internal validity, helpfulness, and prejudicial impact),[148] the relevance and validity components are most pertinent here.

In the confession context, framework evidence would report general research findings of the type described above and let the factfinder draw conclusions about whether it applies to the case at hand. One advantage of framework evidence is that because it is generally applicable, reaching beyond the facts of a particular case, it can be presented in briefs, the same way generally applicable legal principles are proffered;[149] in this way, litigants who cannot afford an expert witness might still be able to take advantage of false confession research. A possible disadvantage of framework evidence is that its general nature can sometimes undermine its relevance to a particular case, an issue that we referred to as "empirical fit"[150] (borrowing from *Daubert*'s use of the latter word[151]) and that social scientists call external validity or generalizability.[152] Whatever the label, the concept refers to the extent to which research findings apply to groups or individuals that were not the subject of study.[153]

For much of the research on false confessions, empirical fit may be unclear because it relies on "interrogations" of college students and similar populations who are accused of minor infractions that at most will lead to some type of academic penalty, and who are not given *Miranda*-style warnings.[154] Not surprisingly, the generalizability of these findings to warned criminal defendants

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[147] David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 421 (2014) (defining framework and diagnostic evidence).

[148] *Id.* at 440.

[149] *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 495-97 (1986).

[150] Faigman, Monahan & Slobogin, *supra* note 147, at 441.

[151] Daubert v. Merrell Dow Pharm. Co., 509 U.S. 579, 591 (1993) (citing United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)).

[152] *See* SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 63-64 (John Monahan & Laurens Walker eds., 8th ed. 2014).

[153] *Id.* at 67 ("External validity refers to the extent to which the findings of the study can be generalized.").

[154] *See, e.g.*, Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 126 (1996) (describing a study where the consequence of the infraction was a phone call from the principal investigator); Perillo & Kassin, *supra* note 34, at 333-34 (describing a study where the consequence of the infraction was loss of one credit hour); Russano et al., *supra* note 34, at 483 (describing a study where the consequence of the infraction was either to return for another session without receiving credit or to tell the participant that the professor would be informed of the failure to confess). In none of these studies were the subjects given warnings or anything equivalent.

charged with serious crimes and potentially subject to imprisonment has been called into question.[155] Further, because they take place in the "lab" and must abide by research ethics standards, the studies have a hard time replicating the incentives of real criminal defendants. In the popular "computer-crash" paradigm, subjects are falsely informed they have caused a computer to crash by pressing a button they were told not to press.[156] While a large number of these innocent subjects "confess," they could easily be doing so because they believe they are in fact guilty, given the vagaries of typing (as indicated by the finding in the most famous such study that the researchers obtained confessions from 65% to 100% of those in the "fast-paced" condition but from only 35% to 89% of those under the "slow-paced" condition).[157] The better constructed "cheating" paradigm, where researchers obtained confessions from students who in fact did not cheat and presumably knew they did not, largely avoids that problem, and research using it tends to corroborate that minimization, false evidence, and bluffing techniques increase false confessions.[158] But the findings in these studies that even those not subject to any manipulative questioning sometimes falsely confess (at a rate ranging from 6%[159] to 26.7%[160]) indicates that students

[155] *See* Gisli H. Gudjonsson, *The Psychology of False Confessions: A Review of the Current Evidence*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 31, 43 (G. D. Lassiter & C. A. Meissner eds., 2010) ("Experimental research is particularly helpful in studying the conditions under which people make false confessions and allow the researcher to control for ground truth, but this kind of research has little ecological validity in terms of applying it to real-life individual cases.").

[156] *See* Kassin & Kiechel, *supra* note 154, at 126. This study has been replicated by other researchers. *See* Robert Horselenberg, Harald Merckelbach & Sarah Josephs, *Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel (1996)*, 9 J. PSYCHOL. CRIME & L. 1, 3-5 (2003) (investigating the influence of confession consequences); Jessica R. Klaver, Zina Lee & V. Gordon Rose, *Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIM. PSYCHOL. 71, 75-76 (2008) (investigating the effect of minimization and maximization techniques).

[157] Kassin & Kiechel, *supra* note 154, at 127 tbl.1; *see also* Tim Cole et al., *Trying to Obtain False Confessions Through the Use of False Evidence: A Replication of Kassin and Kiechel's Study* (May 25, 2009), http://www.allacademic.com/meta/p13137_index.html [http://perma.cc/Z5X9-RM4V] (obtaining *no* false confessions when subjects knew they had not caused the crash); Klaver et al., *supra* note 156, at 81-82 (finding that when the "crash key" was farther away from the other keys participants were sixteen times less likely to falsely confess).

[158] *See, e.g.*, Perillo & Kassin, *supra* note 34, at 334 tbl.2 (using the cheating paradigm and finding a significant increase in false confessions from use of bluffing technique); Russano et al., *supra* note 34, at 482, 484 tbl.1 (stating that "the participants clearly knew whether they committed the act" yet finding a significant increase in false confessions).

[159] Russano et al., *supra* note 34, at 484 tbl.1.

[160] Perillo & Kassin, *supra* note 34, at 334.

may not consider the consequences of cheating during an experiment that significant.

Research on interrogations involving actual criminal defendants has greater empirical fit or relevance. But it can suffer from suspect internal validity, because the "ground truth" of whether a confession is in fact false can only be known in a small subset of cases.[161] Some researchers have avoided this problem by focusing on proven cases of wrongful conviction in which confessions were obtained, and they have produced work that suggests a correlation between false confessions and techniques such as negotiation, evidence ploys, and lengthy interrogation.[162] However, because these latter techniques occur in a large number of interrogations, most of which produce true confessions or at least confessions not known to be false, this research is still ambiguous about whether the techniques studied are likely to lead people to confess to crimes they did not commit.[163] The fact that ninety percent of false confessions came after interrogations lasting more than three hours, reported by Brandon Garrett,[164] does not mean that most such interrogations, or even a sizeable minority of them, produce false confessions.

Despite these external and internal validity problems, where the laboratory and field research is convergent—say, with respect to the impact of minimization techniques or the combined impact of the false evidence ploy and lengthy interrogation[165]—this type of evidence should probably be admissible,

[161] *See* Gudjonsson, *supra* note 155, at 43 ("In many anecdotal case studies, ground truth is difficult to ascertain. Similarly, in studies of false confessions among prisoners and community samples, the genuineness of the [self-reported] false confession is nearly impossible to corroborate.").

[162] *See, e.g.*, Drizin & Leo, *supra* note 5, at 929-30 (reporting 125 cases purportedly involving confessions proven false through DNA analysis or other methods); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1052-54 (2010) (reporting forty cases purporting to involve confessions that were proven false by DNA analysis).

[163] *See* Rosenthal, *supra* note 74, at 617-18 ("[I]t would not surprise me if the vast majority of custodial interrogations involve the features condemned by critics. If so, the fact that a study of false confessions will frequently disclose the use of [manipulative] interrogation tactics . . . provides no basis to conclude that these features increase the likelihood that a confession is false.").

[164] GARRETT, *supra* note 127, at 38.

[165] Based on his comprehensive study, Leo concludes that these are the two most likely causes of false confessions. He asserts that negotiation is a primary cause of what the literature calls "compliant false confessions," where the suspect confesses and subsequently recants. LEO, *supra* note 11, at 201 (describing a compliant false confession as given "to achieve some instrumental benefit—typically either to terminate and thus escape from aversive interrogation process, to take advantage of a perceived suggestion or promise of leniency, or to avoid an anticipated harsh punishment"). He concludes that the false evidence ploy, combined with prolonged interrogation, is the most common cause of "persuaded false confessions," the second most significant category of false confessions, in which the suspect

especially since it will usually also be very helpful (another evidentiary factor), in the sense that it challenges preconceptions about the likelihood that an innocent person would confess.[166] However, the court must still decide whether, in light of the expert evidence, the defendant's burden of production is met. For instance, one laboratory study suggests that some techniques increase the risk of a false confession three-fold, from six percent to eighteen percent.[167] But even ignoring external validity concerns, if in the real world the base rate for false confessions in unmanipulated interrogations is infinitesimal, a three-fold increase due to police manipulation might not be considered significant.[168]

This is where diagnostic expert testimony about a particular defendant's mental condition and reaction to police conduct at the time of the interrogation could play a role. This testimony too must satisfy evidentiary requirements. In contrast to framework testimony about confessions, diagnostic testimony is most likely to be vulnerable on validity rather than relevance grounds. In *Group to Individual Inference*, we pointed out that the ideal method of determining the validity of diagnostic testimony is through feedback loops that provide data about the accuracy of a particular expert's conclusions.[169] Unfortunately, such feedback is unlikely in the false confession context. Alternatively, we argued, the validity of diagnostic evidence can be improved through ensuring the expert's assessment is based on an empirically derived, structured evaluation

comes to believe he or she committed the crime. *Id.* at 224-25 (noting the connection between persuaded false confessions and use of the "false-evidence ploy" together with "lengthy and intense interrogation").

[166] Danielle E. Chojnacki, Michael D. Cicchini & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 39 (2008) ("[O]ur survey findings indicate that the false confession phenomenon itself, even its broadest sense, is in fact *outside* the common knowledge of potential jurors.").

[167] Russano et al., *supra* note 34, at 484 tbl.1.

[168] Estimates of the incidence of false confessions vary widely. *Compare* Miller W. Shealy, Jr., *The Hunting of Man: Lies, Damn Lies, and Police Interrogations*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 21, 65 (2014) ("[T]he number is most likely infinitesimally small."), *with* Kassin et al., *supra* note 139, at 5 (describing studies that found rates up to twelve percent based on self-report methods). In evaluating whether the burden of production has been met, much may depend on how courts define that threshold. *See, e.g.*, United States v. Branch, 91 F.3d 699, 712 (5th Cir. 1996) ("[T]he 'merest scintilla of evidence' in the defendant's favor does not warrant a jury instruction regarding an affirmative defense for which the defendant bears the initial burden of production. . . . [T]here must be 'evidence sufficient for a reasonable jury to find in [the defendant's] favor.'" (quoting United States v. Jackson, 726 F.2d 1466, 1468 (9th Cir. 1984); then quoting Mathews v. United States, 485 U.S. 58, 63 (1988))).

[169] Faigman, Monahan & Slobogin, *supra* note 147, at 451 ("While a diagnostic opinion can certainly be informed by research and the confidence level associated with it can sometimes even be quantified, ultimately whether it is reliable . . . can be tested only through some sort of feedback loop that indicates whether the expert was right or wrong.").

process.[170] Social scientists have developed psychometrically sound instruments that can help measure a defendant's understanding of *Miranda* and his or her suggestibility.[171] Although the extent to which such instruments assess confession reliability is not clear, evaluations based on these or similar protocols can suggest that, due to youth, mental disorder, or other personality traits, the defendant exhibits significant cognitive impairment, suggestibility, or impulsivity. Those types of results, combined with the relevant framework evidence, could easily lead a court to decide that the probative value of a given confession is so low it is outweighed by the potential the confession will blind the jury to evidence of innocence. If the court so finds, the confession should be declared inadmissible unless the prosecution can burnish its probative value.

2. The Prosecution's Burden of Proof

Assuming the prosecution does not have overwhelming evidence independent of the confession (in which case the confession is unnecessary), how can it rebut a finding that a confession is presumptively false? Richard Leo and Richard Ofshe have suggested three factors must be considered: (1) whether the confession contains nonpublic information that can be independently verified, would be known only to the true perpetrator or an accomplice, and cannot likely be guessed by chance; (2) whether the confession led the police to new evidence about the crime; and (3) whether the suspect's postadmission narrative fits the crime facts and other objective evidence.[172] Proof of any of these factors will go a long way toward showing the confession is reliable, with the important caveat that the prosecution must also show that interrogators did not feed the suspect the relevant information or simply fraudulently assert that he or she knew it.[173]

If a suspect confesses without any detail, or the crime is mundane enough that there are no special facts, the prosecution's burden on this score is more difficult.[174] But if Leo and Ofshe's proposal becomes the rule, police should be

[170] *Id.* at 452, 456, 464-66 (discussing how the "process of accumulating and analyzing the relevant information" can address validity concerns about diagnostic testimony).

[171] *See, e.g.*, NAOMI E.S. GOLDSTEIN, HEATHER ZELLE & THOMAS GRISSO, *MIRANDA* RIGHTS COMPREHENSION INSTRUMENTS (2012); GISLI GUDJONSSON, GUDJONSSON SUGGESTIBILITY SCALES (1997); RICHARD ROGERS ET AL., STANDARDIZED ASSESSMENT OF *MIRANDA* ABILITIES (2011).

[172] Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 438-39 (1998). Welsh White disagreed with this proposal on several grounds. Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2024-28 (1998). But his concerns were ably rebutted by Leo and his coauthors. Leo et al., *supra* note 131, at 522-25.

[173] Garrett, *supra* note 162, at 1066 (noting that in thirty-six of thirty-eight false confession cases suspects' confessions were "contaminated" by information fed by the police or media accounts).

[174] *Compare* Rosenthal, *supra* note 74, at 610 ("In my experience, it was difficult to get

required to act accordingly. A confessor who remains otherwise mute should be cajoled into providing detail that can be corroborated with nonpublic information, used in discovering new evidence, or compared to known facts.[175] Police should make sure they do not contaminate a confession by providing the suspect with information only the perpetrator would know or, if their confrontation tactics make that impossible, at least withhold one such piece of information until a confession is forthcoming so as to provide a double-check.[176] These procedures are simple enough that, without a very good explanation for why they were not followed, the prosecution should not be able to meet its burden on the reliability issue as a matter of law.

III. RECORDING

None of the foregoing determinations about coercion and reliability can be made with any confidence without a recording of the interrogation, preferably on video. Unencumbered by real-time depiction of their conduct, police may be very reticent about admitting to engaging in negotiation and other manipulative techniques, and anything suspects say on that score will look self-serving and thus often lack credibility.[177] Even if both parties agree about what happened

even highly motivated cooperating defendants to remember the details of crimes they had committed."), *with* Garrett, *supra* note 162, at 1111 (noting that in most exoneree case studies "there was a lack of fit and non-volunteered details were inconsistent with crime scene evidence").

[175] Garrett, *supra* note 162, at 1116 (stating that police can not only examine "whether the suspect volunteers key crime scene facts, but also [ask] leading questions regarding facts inconsistent with how the crime occurred"). Paul Cassell has rightly pointed out that many guilty suspects often provide statements, intentionally or not, that do not fit the known facts. Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 594-96 (1999). Such a discrepancy should not be grounds for finding the confession unreliable. Rather, as indicated in (3) above, if there is no such discrepancy or only a minor one, the prosecution's burden will probably be met; if discrepancies are significant, then the court might require that (1) or (2) also be met.

[176] Michael R. Napier & Susan H. Adams, *Criminal Confessions: Overcoming the Challenges*, 72 FBI L. ENFORCEMENT BULL. 9, 12 (2002) (noting that police routinely designate "holdback evidence" involving unique crime facts or details not publicly known or easily guessed, to see if the confessor knows about it and thereby corroborate the confession's reliability).

[177] Lawrence Rosenthal points to George Thomas's review of custodial interrogation cases, *see* George C. Thomas III, *Stories About* Miranda, 102 MICH. L. REV. 1959, 1982-83 (2004), as evidence that admissibility decisions rarely turn on the credibility of the participants. Rosenthal, *supra* note 74, at 607. But, in fact, credibility assessments permeated Thomas's cases. *See* Thomas, *supra*, at 1975 ("[M]y data contain a potential reporting bias. If the defendant and the police tell a different story about whether warnings were given, one would expect judges to believe the police—and this is exactly what I found."); *see also* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 898

and give accurate accounts to the best of their ability, subtleties about impersonation, rationalization, evidence fabrication, and negotiation will be missed; confession contamination may also be hard to discern without a record.[178] In civil cases, face-to-face questioning of one party by the opposing party, conducted with the goal of producing evidence for trial, virtually always takes place at a deposition, and a deposition that is not recorded in some fashion is always inadmissible evidence.[179] This is in stark contrast to interrogations conducted in the criminal justice system. As I stated in *Toward Taping*, "it is stunning that we do not require verbatim transcripts of criminal interrogations, where the stakes are so much higher, access to information about psychological pressures so much more important, and legal representation (of either party) so much less likely."[180]

Motivated as much by a desire to deter defendants from making up stories as by the objective of providing the courts with evidence, many police departments are moving toward recording interrogations.[181] But many have not done so, and the effort is often half-hearted; interrogations at the stationhouse may not be recorded in full, and any softening up of the suspect prior to arrival at the

n.192 (1979) ("In most confession cases that have reached the Supreme Court, the actual events in the interrogation room have been disputed.").

[178] The account below captures the point:

> [R]ecording will greatly facilitate the Miranda and voluntariness analyses, and a recording details factors relevant to credibility and the ultimate issue—the substance of the defendant's statements; was the defendant informed of his Miranda rights; did he understand them; were they waived; was the waiver voluntary; was the statement voluntary; was either the statement or waiver coerced; the substantive questions asked; how they were asked; and conversely the answers given and how the responses were made; the interrogator's demeanor (and appearance) contrasted with the suspect's behavior (and appearance); the fit between what the tape reveals and the testimony of the people on the tape; as the Eighth Circuit recognized, a tape will display if the defendant "is hesitant, uncertain, or faltering, . . . [if] he has been worn out by interrogation, physically abused, or in other respects is acting involuntarily, the tape will corroborate him in ways a typewritten statement would not.

Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223, 228 (2000).

[179] FED. R. CIV. P. 30(c).

[180] Slobogin, *supra* note 9, at 317.

[181] *False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT (Aug. 12, 2015), www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/false-confessions-recording-of-custodial-interrogations [https://perma.cc/3LMF-9X8C] (reporting that approximately one thousand jurisdictions in the United States use interrogation room recording equipment); Carrie Johnson, *New DOJ Policy Urges Agents to Videotape Interrogations*, NAT'L PUB. RADIO (May 21, 2014, 5:04 PM), http://www.npr.org/blogs/thetwo-way/2014/05/21/314616254/new-doj-policy-calls-for-videotaping-the-questioning-of-suspect [https://perma.cc/8EMJ-Q4VU] (noting a reversal of federal policy against recording interrogations).

stationhouse is virtually never subject to recording.[182] A constitutional argument is needed to ensure recording takes place. In *Toward Taping*, I provided three.[183] After canvassing those arguments, which were aimed at stationhouse recording, I extend the analysis to pre-interrogation interrogation.

A. *The Constitutional Arguments*

The first constitutional argument that interrogations must be recorded is based on the Due Process Clause and straightforwardly asserts that procedural fairness requires a recording.[184] This argument must clear the hurdle created by the Supreme Court's decisions in *California v. Trombetta*[185] and *Arizona v. Youngblood*,[186] which held that failure to preserve forensic evidence after it has been tested does not violate due process unless the defendant is denied access to the test results or bad faith is otherwise proven.[187] Relying on these cases, a number of lower courts have held that a failure to record an interrogation is not a violation of due process because it is not designed to hide exculpatory information and the defendant can reconstruct the interrogation through testimony from the suspect and the police.[188] But these courts misconceive the

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[182] Brandon L. Garrett, *Interrogation Policies*, 49 U. RICH. L. REV. 895, 898 (2014) (finding that only eight percent of 116 Virginia departments required recording); Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J.L. & SOC. POL'Y 400, 409 (2012) ("[T]he vast majority of police departments still do not record. There are wide variations among the voluntarily adopted programs. Departments vary in what crimes are recorded, whether recording is only audio or also visual, and at what locations recording must be made."); Tracy Lamar Wright, *Let's Take Another Look at That: False Confession, Interrogation, and the Case for Electronic Recording*, 44 IDAHO L. REV. 251, 279, 281 (2007) ("[M]any of the nation's largest police departments that do record interrogations only record the latter part where the suspect confesses" and many record only interrogations in homicide or serious felony cases.").

[183] *See* Slobogin, *supra* note 9, at 317-21.

[184] At least one court has accepted this argument. Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985). Other courts have more or less followed suit, albeit bottoming their conclusion on their supervisory power rather than the Constitution. *See, e.g.*, Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533 (Mass. 2004) ("[A] defendant whose interrogation has not been reliably preserved by means of a complete electronic recording should be entitled, on request, to a cautionary instruction concerning the use of such evidence."); State v. Barnett, 789 A.2d 629, 632 (N.H. 2001) ("[A] tape recorded interrogation will not be admitted into evidence unless the statement is recorded in its entirety.").

[185] 467 U.S. 479 (1984).

[186] 488 U.S. 51 (1988).

[187] *Id.* at 58; *Trombetta*, 467 U.S. at 490-91.

[188] *See, e.g.*, Holloway v. Horn, 161 F. Supp. 2d 452, 530 (E.D. Pa. 2001) (stating that a recording of an interrogation is only "potentially useful"); Tennessee v. Godsey, 60 S.W.3d 759, 771 (Tenn. 2001) ("Lack of an electronic recording did not preclude the defendant from challenging the accuracy of the officers' recollection of the interrogation.").

problem. Failing to tape is much worse than destroying physical evidence that has been tested because, in the interrogation setting, until a court looks at the interrogation transcript, the evidence has yet to be "tested;" just as is true of untested forensic evidence, the defendant's only evidence in this instance is his or her say so. Further, as already noted, neither defendants nor courts can accurately reconstruct the interrogation based solely on the testimony of the interrogators and the suspect.

The second argument is an originalist one based on the Fifth Amendment. At the time the Amendment was drafted and well afterward, all interrogations were conducted by a judge in open court.[189] Neither police departments nor their interrogation rooms existed.[190] Assuming we are not going to move back to the colonial model, the closest modern equivalent to such questioning is a recording that allows judges to witness the interrogation as it happened.[191]

The third argument in support of recording is grounded in the Sixth Amendment decision in *United States v. Wade*,[192] which held that defendants subjected to lineups are entitled to counsel or "substitute counsel."[193] Although *Wade* is usually described as a case about the right to counsel, a more accurate reading of the case is that it rests on a separate Sixth Amendment right, the right of confrontation. Worried about the "vagaries" of eyewitness identifications,[194] the Court emphasized that without some third-party mechanism for recounting how the lineup occurs the accused is "deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him."[195] Most lower courts have interpreted *Wade* to require, at the least, a visual

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[189] John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1059-60 (1994).

[190] Roger Lane, *Urban Police and Crime in Nineteenth Century American*, *in* 15 MODERN POLICING 1, 5 (Michael Tonry & Norval Morris eds., 1992) (explaining that in the nineteenth century, law enforcement was "largely the responsibility either of the community as a whole or of the individual victim of some offense, rather than something delegated to specialized agents of the state").

[191] In *Toward Taping*, I also argued, based on the holding in *Connelly*, that taping is required given the prosecution's burden of showing by a preponderance of the evidence that the Fifth Amendment was not violated:

> If one assumes that voluntariness cannot be assessed without taping, the tapeless prosecutor cannot meet [the preponderance of the evidence] burden, at least where the defendant plausibly asserts he did not receive or understand warnings, was misled about them, or received improper threats, promises and the like. In such cases, at best the parties are in equipoise, and the party with the burden of proof—the government—should lose.

Slobogin, *supra* note 9, at 319.

[192] 388 U.S. 218 (1967).

[193] *Id.* at 237.

[194] *Id.* at 228.

[195] *Id.* at 235.

depiction of the lineup.[196] Because the vagaries of interrogation are even more pronounced, the same holding is imperative in that context.

In *Toward Taping*, I also argued that the constitutional right to a recording is nonwaivable.[197] If it could be waived one can predict that, just as defendants routinely forego their *Miranda* rights, they would often be persuaded to give up their right to a recording.[198] The nonwaivability argument rests on the assumption that recording is vital to determining the reliability (as well as the coerciveness) of interrogations. Consider the fact that a defendant may not waive the right to be tried while competent because society, not just the defendant, has a strong interest in ensuring the integrity of the trial process and a meaningful confrontation between the accused and his or her accusers.[199] The same reasoning supports a nonwaivable right to recording.[200]

B. *Extending the Recording Right Beyond the Stationhouse*

One of the more revolutionary developments of modern policing has been the introduction of the police body camera.[201] While it has been touted primarily as a way of recording and deterring police brutality,[202] it could also serve as a

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[196] *See, e.g.*, United States v. LaPierre, 998 F.2d 1460, 1464 (9th Cir. 1993) (finding insufficient a videotape that showed only the lineup and not what occurred in the witness room); People v. Fowler, 461 P.2d 643, 654 (Cal. 1969) (finding still photographs inadequate); Bruce v. Indiana, 375 N.E.2d 1042, 1086 (Ind. 1978) (requiring videotaping lineups).

[197] Slobogin, *supra* note 9, at 321.

[198] *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996) (finding a seventy-eight percent waiver rate).

[199] Pate v. Robinson, 383 U.S. 375, 384-85 (1966) (requiring inquiry into competence to stand trial upon any "bona fide doubt").

[200] *See* Nancy J. King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 117 (1999) ("[R]ules of constitutional stature protecting interests that may differ from those of the parties should not be subject to evasion by the consent of the parties unless effective enforcement mechanisms exist to protect such interests.").

[201] Some predict such cameras will become as common as dashboard cameras within the very near future. *See* Chuck Humes, *Body Worn Cameras*, LAW OFFICER (Feb. 14, 2013), www.lawofficer.com/article/technology-and-communications/body-worn-cameras [https://perma.cc/P4Q3-JJHR]. Even expense might not be a major limitation. *See Justice Department Awards over $23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States*, DEP'T JUST. (Sept. 21, 2015), https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law [https://perma.cc/V6W4-B85Q] (describing the Department of Justice initiative "to assist local jurisdictions that are interested in exploring and expanding the use of body-worn cameras").

[202] *See generally* Barak Ariel et al., *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 525-26 (2015) (finding that use-of-force complaints against the police who used body cameras was roughly half the number lodged against police

means of ensuring that any encounter before entering the stationhouse, precustody or postcustody, is accurately depicted at later proceedings. Especially in light of the Supreme Court's holdings that postwarning statements which repeat pre-warning statements are not admissible if the prewarning statement was coerced or the police acted in bad faith,[203] a verbatim accounting of police-suspect interaction from custody onward is crucial.

Accordingly, at least in those jurisdictions that have already required police to wear body cameras,[204] the constitutional arguments just canvassed should require that the cameras be turned on during all police-suspect confrontations. While the Sixth Amendment applies only to "criminal prosecutions,"[205] in *Toward Taping* I argued that, because the Amendment's relevance to the recording issue stems from the right of confrontation rather than the right to counsel, it extends backward to any action that the government describes at trial, just as the admissibility of all hearsay, whether uttered pre- or postcharging, is governed by confrontation analysis.[206] The Fifth Amendment, which applies to any "criminal case,"[207] also extends back at least to the time of custody, as *Miranda* held.[208] And the Due Process Clause applies whether or not a person is a suspect, and thus is not limited by the criminal prosecution or custody thresholds.[209]

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without cameras, perhaps because both police and citizens were more circumspect).

[203] Oregon v. Elstad, 470 U.S. 298, 314 (1985) (holding that although a postwarning statement that repeats a prewarning statement is usually admissible, it is inadmissible if the police use "deliberately coercive or improper tactics in obtaining the initial statement"); *see also*, Missouri v. Seibert, 542 U.S. 600, 621 (2004) (Kennedy, J., concurring) (while affirming *Elstad*, stating that when an interrogator deliberately uses the "two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps"); United States v. Patane, 542 U.S. 630, 632 (2004) (where five justices indicated bad faith might require exclusion even of tangible fruits).

[204] There may be good reasons to be careful about adopting such a system. *See* Elizabeth Atkins, *#BlackLivesRecorded: Will the Darling Savior of Police Brutality Be the Downfall of Modern Privacy*? 13-14 (2016), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2803588 [https://perma.cc/CX8Q-Y57Q] (delineating privacy and other harms that can arise from body camera use). While the argument in the text does not require adoption of such a system, it would prohibit police questioning without it.

[205] U.S. CONST. amend. VI.

[206] *See, e.g.*, Lilly v. Virginia, 427 U.S. 116, 117-18 (1999) (holding a codefendant's confession made before the defendant was inadmissible under the Confrontation Clause).

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

[208] Miranda v. Arizona, 384 U.S. 436, 444 (1966) (stating that the Fifth Amendment applies to "custodial interrogation," defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way").

[209] Arizona v. Fulminante, 499 U.S. 279, 286-87 (1991) (applying due process analysis to interaction that did not involve custody).

IV. A WORD ON INTERROGATION OF SUSPECTED TERRORISTS

In the wake of 9/11, several commentators suggested that the rules restricting interrogation be relaxed when the person interrogated is suspected of engaging in or conspiring to commit a terrorist act.[210] Of course, if any statements obtained during such interrogations are sought solely for investigatory or intelligence purposes rather than as trial evidence, the Fifth Amendment, which is focused on excluding compelled testimony, is irrelevant.[211] Even if the government wants to obtain admissible statements, however, relaxation of the usual Fifth Amendment rules is not called for in the counter-terrorism context. This is especially so if the HIG technique turns out to be as effective as its progenitors predict.[212] Even if more aggressive interrogation tactics are thought to be crucial, however, this Article has made clear that interrogators have plenty of second-generation tools at their disposal that fall short of coercion.

If negotiation or first-generation techniques are nonetheless deployed in a terrorism interrogation, the Fifth Amendment or Due Process Clause should require exclusion. Some have argued that the public safety exception to *Miranda*, adopted in *New York v. Quarles*,[213] would authorize such tactics.[214] But the *Quarles* exception only applies in cases of imminent danger.[215] And even when it applies, its impact is limited; *Quarles* strongly suggested that statements

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[210] *See, e.g.*, Norman Abrams, *The Case for a Cabined Exception to Coerced Confession Doctrine in Civilian Terrorism Prosecutions*, *in* PATRIOTS DEBATE: CONTEMPORARY ISSUES IN NATIONAL SECURITY LAW 42, 51 (Harvey Rishikof, Stewart Baker & Bernard Horowitz eds., 2012) (arguing that some interrogation techniques that are considered coercive under current doctrine should be permissible in the national security context under an "exigent circumstance exception").

[211] *See* Chavez v. Martinez, 538 U.S. 760, 776 (2003).

[212] *See supra* text accompanying notes 23; *see also* Bobby Ghosh, *After Waterboarding: How to Make Terrorists Talk?*, TIME (June 8, 2009), www.time.cm/tme/magazine/article/0,9171,1901491,00.html [https://perma.cc/QM5U-E9WM] (stating that, according to government interrogators, "the best way to get intelligence from even the most recalcitrant subject is to apply the subtle arts of interrogation," including treating the individual with respect and then using "sleight of hand" to get the relevant information).

[213] 467 U.S. 64, 655-56 (1984) (announcing a "'public safety' exception" to *Miranda*).

[214] Abrams, *supra* note 210, at 49-50; *see also F.B.I. Memorandum*, N.Y. TIMES (Mar. 25, 2011), www.nytimes.com/2011/03/25/us/25miranda-text.html?_r=1 [https://perma.cc/QR9B-4W8G] (providing the text of an internal Justice Department memorandum that permits agents to decide whether "continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat").

[215] *Quarles*, 467 U.S. at 658 (emphasizing that the officers in the case "were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket").

resulting from coercion beyond a failure to give *Miranda* warnings are still inadmissible against criminal defendants.[216]

Note, however, that the Fifth Amendment only applies in criminal cases. Preventive detention regimes, such as those associated with military commissions, are considered civil in nature.[217] Thus, the Fifth Amendment would not require exclusion in proceedings designed to preventively detain enemy combatants. Of course, the Due Process Clause might still require exclusion, but a plausible argument can be made that it does not.[218] At the same time, if exclusion is not required, any unjustifiable coercion, whether aimed at obtaining evidence admissible in such a proceeding or simply at getting information necessary to prevent an attack, should meet with some other sanction.[219]

CONCLUSION

Miranda was an attempt at giving police clear guidelines about interrogation. Other than its warnings requirement, however, it has not done so. While Court decisions since *Miranda* have clarified a number of peripheral issues, they continue to be vague about the types of interrogation tactics police may use to obtain a confession. Further, the Court has been mum about whether interrogation tactics must be memorialized so that courts have a complete and accurate record of their effect.

This Article has suggested a number of rules to fill these gaps, all of them consistent with the Court's jurisprudence to date. The Fifth Amendment's prohibition on compulsion should bar third degree tactics and explicit and implicit negotiation about legal consequences, and any confession resulting

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[216] *Id.* at 655 n.5 ("[R]espondent is certainly free on remand to argue that his statement was coerced under traditional due process standards.").

[217] Hamdi v. Rumsfeld, 542 U.S. 507, 533-35 (2004) (holding that the "exigencies" of a military trial allow departure from normal procedures other than the "core elements" of "notice . . . and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

[218] *See* Arnold H. Loewy, *Police Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 939 (1989) ("[W]hen obtaining evidence is the constitutional wrong [as opposed to when the wrong is using it in a criminal proceeding], exclusion should be subjected to a cost-benefit analysis.").

[219] *Id*. at 938-39 (arguing that deterrence is the main goal of the Due Process Clause and concluding that, given that goal, third party standing might be granted "to deter the most flagrant forms of obtaining coerced confessions"). However, a defense might be available in such situations. In Israel, interrogators can resort to any means needed to procure information that might avert a threat, subject to the stipulation that they will escape subsequent prosecution or suit only if they can prove a necessity defense. Judgment of the Interrogation Methods Employed by the General Security Service, Israeli Supreme Court ¶¶ 35-36 (1999), https://www.derechos.org/human-rights/mena/doc/torture.html [https://perma.cc/9SAY-VWDC].

from such tactics should be excluded, even if it is shown to be reliable. However, manipulative techniques that would not be considered coercive if true—including expressions of sympathy or friendship, suggestions of how one might rationalize a confession, and false evidence ploys—violate neither the Fifth Amendment nor the Due Process Clause, and a failure to clear up confusion about rights can be excused on lack-of-state-action grounds, even if the result is an unreliable confession. Confessions should nonetheless be excluded on unreliability grounds under the rules of evidence, if testimony describing laboratory and field research and the results of structured individual evaluations can show that a technique or combination of techniques significantly increased the chances of a false confession, and the prosecution is unable to show the confession includes information that only the perpetrator of the crime is likely to know. To ensure accurate information about the interrogation process is available, recording of all phases of the process should be required under the Due Process Clause, the Fifth Amendment, or the Sixth Amendment's Confrontation Clause. These rules should not be relaxed in national security investigations, although coerced statements might be admissible in noncriminal detention proceedings, as long as some other sanction for unjustifiable coercion is available.

Perhaps research comparing third-generation interrogation techniques to second-generation techniques will convince police departments to move toward interrogation processes that do not require aggressive manipulation. Similarly, perhaps more police departments will, on their own, come to realize the many benefits of recording all interrogations. If not, hopefully the Court will adopt more concrete rules about interrogation tactics and recording well before we reach *Miranda*'s 100th anniversary.